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Protection of Children Bill

Bill 12 of 1998-99

The Bill, a Private Member's Bill that has Government backing was introduced by Debra Shipley MP and is due for its Second Reading on 26 February. Its provisions are designed to help strengthen procedures for vetting people who work with children. It is backed by MPs drawn from the three major parties.

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Summary of the Bill

The Bill is a Private Member's Bill introduced by Debra Shipley MP that has Government backing and cross-party support. It is one of a series of Government measures designed to strengthen the law and practice in relation to protecting children from abuse. Its main purpose is to tighten up procedures for vetting people working with children, in particular to prevent people who have been found unsuitable to work with children in one job from moving to another one where they will still be working with children.

The Government's long term aim have is to set up a one stop shop where employers would obtain details about a candidate's criminal record and other factors that might render them unsuitable for working with children. This one stop shop would be provided by the Criminal Records Bureau, which has yet to be established under Part V of the *Police Act 1997*. Part of the purpose of the Bill is therefore to amend the *Police Act* so that the Bureau will be able to provide information from the Department of Health' s Consultancy Service Index and the Department for Education and Employment's List 99, which provide information additional to criminal records.

The Bill is mainly concerned with reforms to the two lists as these are major sources of such information. Most of the reforms are concerned with the Department of Health list, which, unlike List 99, has no statutory basis. The Bill will require the Secretary of State for Health to keep a list of individuals who are considered unsuitable to work with children. There is provision for an individual to appeal against inclusion on the list but, once on, there is no provision for removal unless it can be shown that he or she was mistakenly placed on it.

The reforms to the lists are separate from the amendments relating to the introduction of the Criminal Records Bureau and the Bill makes provision for information from the lists to be obtained by applying to the Secretary of State before the Bureau comes into effect. Applications for information will for the time being continue to be free whereas the Police Act 1997 makes provision for charging.

The Bill requires child care organisations (as defined in the Bill) employing someone in a child care position to find out whether the individual is on either list. At the moment there is no general requirement for child care organisations to do this. For the purposes of the Bill, a child care organisation may be in either the public, private or voluntary sector but must in some way be regulated by a statutory provision. Child care organisations will also have to satisfy themselves that anyone supplied to them by an employment agency or a nursing agency has been checked against the lists.

The Bill will ban a child care organisation from offering an individual employment in a child care position if the individual is on the Department of Health's list or on the relevant part of List 99. This is also new as the Department of Health’s list is currently advisory only. Inclusion on the DfEE's List 99 does lead to a ban or restricts teaching and certain other types of employment, but the ban does not extend to child care organisations. Currently, the two

government departments supply information to each so that a check against one list will lead to a check against the other but this does not alter the force of each list so that an employer from a child care organisation who knew that someone was on List 99, for example, could choose to employ that person anyway.

The Bill provides for an appeal against inclusion on either list to be made to a Tribunal and specifies some details of the Tribunal, leaving others to be made by regulations. This is new in relation to both lists. There has until now been no independent appeal system in either case. Apart from that, the main effect of the Bill is on child care organisations although there will be some incidental effects relating to teachers. Changes to the DfEE's list are intended to make part of List 99 available to the child care organisations by distinguishing on the list individuals who are not suitable to work with children. The Bill will also ensure that a teacher who is on the Department of Health's list will be banned from teaching.

In relation to the new, statutory Department of Health list the Bill will:

- place new requirements on child care organisations to refer people's names to the Secretary of State for Health for inclusion on the list subject to certain conditions, for example, where they have been dismissed on grounds of misconduct or incompetence which harmed a child or placed a child at risk of harm.
- enable, but not require, other organisations to make such referrals.
- establish the procedures according to which the Secretary of State will include someone on the list and provide for someone to be included on the list on a provisional basis while the referral is being determined
- establish the procedure for transferring people from the existing Department of Health's Consultancy Service Index

The Bill does not cover nannies or child minders employed by private individuals.

The Bill also makes provision for Regulations to make similar arrangements in relation to individuals working with people who have a mental impairment.

Except for the provision relating to the Criminal Records Bureau, the Bill applies to England and Wales only.

Jo Roll

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I Introduction (Jo Roll)

The provisions of the Bill are part of a series of measures designed to prevent unsuitable people from working with children. Examples of existing measures and of the present Government's policy in this area were given in a Written Answer in June 1998, when the Government announced that it would be setting up an interdepartmental group on preventing unsuitable people from working with children:

> **Helen Jones:** To ask the Secretary of State for the Home Department what action he is taking to prevent sex offenders from being employed in occupations with access to children and to prevent children being abused by people who are in a position of trust over them. [44827]
>
> **Mr. Michael:** There are a number of statutory safeguards already in place. Criminal record checks are available on people working in the statutory sector where they have substantial unsupervised access to children. They are also available on teachers in the private and voluntary sectors.
>
> The Police Act 1997 contains provisions which will widen access to criminal record checks when they are implemented. The Sex Offenders Act 1997 imposes a requirement on those convicted or cautioned for sex offences against children and other serious sex offences to notify the police of their name and address and any changes to these. This allows the police to monitor sex offenders in the community and to take action where appropriate to warn potential employers of any risk they might present.
>
> The Government have made it clear that such information must not just sit on a computer or gather dust on a file and the police and probation services have responded positively and responsibly using this information for the protection of children and vulnerable adults, as intended. The Government are also introducing sex offender orders in the Crime and Disorder Bill [Lords] which will apply to sex offenders if their behaviour indicates a possible threat to the public. The courts will be able to make an order to impose prohibitions necessary to protect the community.
>
> There are also a number of other measures in place to prevent those considered unsuitable to work with children from gaining employment with them. The Department for Education and Employment maintains "List 99" which contains information about people whom the Secretary of State has barred from working in schools; the Department of Health operates a Consultancy Service Index which enables local authorities and private and voluntary childcare organisations in England and Wales to check on suitability of those they propose to employ; and many professional bodies have codes of conduct which set out members' responsibilities in this area and provide for disciplinary action to be taken when these codes are breached.
>
> We are concerned that these safeguards are not fully integrated and that there is a need for a more streamlined approached to ensure that there are no loopholes. For

> this reason, the Government are setting up an inter- departmental working group of officials to consider additional safeguards to prevent those who are unsuitable from working with children, including the possibility of a central register backed up by a new criminal offence to prevent those on the register applying for work with children.
>
> In looking at this subject, the group will draw upon the consultation exercise "Sex Offenders: A Ban on Working with Children"; and on recommendations made in the report of Sir William Utting's review of safeguards for children living away from home (particularly those recommendations dealing with choosing the right staff) and the Government's response to this review which is expected to be published by the Ministerial Task Force on the Children's Safeguards Review in the summer. The group will also consider whether further measures are necessary to protect 16 and 17 years olds who may be vulnerable to abuse by those in a position of trust, such as carers, teachers and leaders of organised residential activities. It is expected that the group will make its final recommendations to Ministers by the end of the year.[1]

In November 1998 the Government responded to Sir William Utting's report on safeguards for children living away from home. The Utting review had been set up by the Conservative Government in 1996 as a result of a series of scandals in children's homes but it looked more generally at the problems of children in public care.[2] The Utting report had contained a chapter on sources of background information that described the patchwork of existing measures and made a range of recommendations. In relation to proposals relating to police and other checks, the Government's Response said:

The Government's Response to the Children's Safeguards Review

> **Police and other checks**
> **Existing Arrangements**
>
> 8.5 As a supplement to the taking up of references within the recruitment process, employers seeking to engage persons to work with children are able to check the names of those they wish to employ against a number of centrally held records. Not all employers have access to all records:
>
> criminal record checks - these checks are, in the main, only available to statutory bodies and a number of major voluntary childcare organisations via their membership of the Voluntary Organisations Consultancy Service (VOCS). The great majority of non-statutory childcare organisations - voluntary and private - are unable to check the criminal background of people they propose to engage. Provisions to widen access to checks were included in Part V of the Police Act 1997. This has not yet been implemented.

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1 HC Deb 4 June 1998 c 304-5W

2 Sir William Utting, *People Like Us: the report of the review of the safeguards for children living away from home*, The Department of Health and the Welsh Office, 1997

DfEE List 99 and DHConsultancy - checks against these are not presently readily accessible to all those organisations employing staff working with children. The need for all employers to make several applications to check the various sources of information is a disincentive for them to seek all the checks available.

Planned Changes

8.6 Improving access to checks The aim of the inter-departmental working group is to establish a single access point or "one stop shop" for information. It will draw on measures and information sources already in existence across the public, private and voluntary sectors. The working group will produce recommendations by the end of the year. Detailed work will then be taken forward as a mater of priority. The scheme will need primary legislation.

8.7 Criminal Records Agency In the meantime, the Government will take the following action before a comprehensive scheme is introduced:

- implement Part V of the Police Act 1997 and start to set up a CRA. The Government will make an announcement shortly about arrangements for the operation and management of the Agency

Once established, the Agency will make checks available to any employer regardless of whether they are in the statutory, voluntary or private sector. The decision as to whether a criminal record check is necessary will be a matter for the employer or employing body concerned and a check will only be carried out with the consent of the person on whom the check is sought. The certification provided for by the Police Act 1997 will be phased in by the Agency. Priority will be given to carrying out police checks on those applying for positions which involve caring for, training, supervising or being in sole charge of persons aged under the age of eighteen.

- improve the working of the DH Consultancy Index:

    - ensure that maintained boarding schools and employing LEAs, as appropriate, have the same access as independent boarding schools to the Consultancy Index
    - introduce legislation when Parliamentary time allows to place the Consultancy Index on a statutory basis so that inclusion on it is a bar to employment in the relevant fields (thus bringing it more in line with the operation of List 99), make arrangements for representations against the unfair or unjustified inclusion of individuals on it, and provisions for the future expansion to the scope of the Index
    - permit NHS employers to check those staff who are likely to work closely with children against the Consultancy Index, and to contribute names for inclusion on the Index
    - permit employers to check those who work closely with people with learning disabilities against the Consultancy Index, and to contribute names for inclusion on it.

> 8.8 The Prison Service currently carries out criminal record checks for all staff. It is planning to carry out additional checks for all prison officers working with young people under 18. The new Youth Justice Board for England and Wales came into operation on 30 September 1998. Its role will include advising on standards for secure facilities for sentenced and remanded juveniles, including Prison Service accommodation. More details will be announced in 1999.
>
> 8.9 In the NHS, the processes for selecting and appointing staff who have substantial unsupervised access to children have been strengthened and reviewed over recent years. The NHS Executive issued fresh guidelines on pre-employment checks earlier this year.
>
> 8.10 An "alert letter" system was established in 1997. This is sent to warn NHS employers about doctors and dentists whose performance has caused serious concern - including those dismissed or under suspension by their employer - and where there are sufficient, reasonable grounds to consider them a potential danger to the safety of patients, or staff, or themselves, and where there is reason to believe they may seek work elsewhere. A similar alert letter system for nurses, midwives, health visitors and Professions Allied to Medicine (PAMs) is being developed. More information on this will be available in 1999.
>
> 8.11 The Government will build further on these arrangements by requiring NHS employers to review, by April 1999, their recruitment processes for those who work with children admitted to hospitals. This will include incorporating the principles of Choosing with Care, as well as the use of police checks to ensure that prospective employers have a complete picture of potential recruits.[3]

An Annex to the Response briefly described List 99 and the Department of Health's Consultancy Index (Details of these lists and the reforms that are the subject of the present Bill are described in the following sections of this Research Paper):

> 1. **DfEE's List 99** records people who have been statutorily barred, either wholly or in part, from teaching and other employment in the education service involving regular contact with children and young people under the age of 19. Barring is made automatically where the person is convicted of a sexual offence involving a child and may be made in other cases of misconduct or on medical grounds. Where a person is barred, it is illegal for a maintained or independent school, or a LEA or FE institution, to employ them in any way which contravenes the terms of the barring order.
>
> 2. Independent boarding schools have employees vetted against police checks, List 99 and the Consultancy Index. They are also required to report to DfEE (and the Welsh Office in Wales) cases where employees are dismissed or resign on grounds of misconduct (whether or not convicted of a criminal offence), so that barring action may be considered. Welfare inspections under Section 87, and

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3 *The Government's Response to the Children's Safeguards Review*, Cm 4105, November 1998

inspections by OFSTED (and by OHMCI in Wales), check that these responsibilities are being discharged. DfEE (and Welsh Office in Wales) take action with schools found not to be doing so. Maintained boarding schools and employing LEAs as appropriate must undertake comparable vetting and reporting of employees, but they do not currently have the same access as independent boarding schools to the Consultancy Index or welfare inspections under Section 87 of the Children Act 1989.

3. The **Department of Health Consultancy Service Index** enables local authorities and private and voluntary child care organisations in England and Wales to check on the suitability of those they propose to employ. It is a list of child care workers or former child care workers about whom concerns exist around their suitability to work in the child care field.

4. It is used by child care employers when considering the employment of people to posts involving substantial, unsupervised access to children. Although there is no requirement for employers to check names against it, checks have doubled over the last 18 months and are now in the order of 140,000 a year.

5. Information is supplied by employers when staff are dismissed or resign in certain circumstances, or when they have been moved within the organisation to work away from children. Inclusion on the Index does not automatically prohibit the person from working with children, that decision rests with the potential employer after considering references and other information.

6. The service also maintains a list of child care workers whose names have been notified to the Department by the Police following certain convictions and cautions. A check against the consultancy service triggers a check against this list, and the DfEE's List 99.[4]

The interdepartmental group that had been set up in June produced a final report at the end of 1998, which contained the following recommendations. Some of these recommendations are reflected in the current Bill. Others would have to be implemented separately:

Summary of Recommendations of the Interdeparmtnetal Working Froup on Preventing Unsuitable People from Working with Children and Abuse of Trust

1 The new system recommended should be seen as only one part of a network of measures and good practice to protect children from those who might harm them. The measures are no substitute for essential steps in assessing whether someone should be given access to children such as taking up references etc. Guidance should be issued on the new system to set it in context and set out good practice guidelines.

2 The central access point should be the Criminal Records Bureau.

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[4] Government's Response, as above

3 Access to the sensitive information to be available under the new scheme should automatically follow an application in respect of working with children under sections 113 and 115 of the Police Act 1997.

4 Consideration should be given to the introduction of the second level for child care checks at as early a stage as possible for the new Bureau together with the new integrated scheme.

5 The discretionary use of criminal records information contained in Criminal Records or Enhanced Criminal Records Certificates should remain as a crucial underpinning of the new integrated system providing a range of information on which an employer could make an informed decision.

6 The new system should be voluntary; there should be no requirements on employers to make the checks or submit information to the lists outside those imposed in respect of List 99 and the Consultancy Index by the Departments for Education and Employment and of Health respectively.

7 There should be a new criminal offence on working with children attached to certain specified criminal offences and to placement on List 99 or the Consultancy Index following implementation of the new scheme, including an offence of applying for, or accepting an offer of, work with children when banned.

8 The offence should be arrestable. It should be triable either way, with a maximum penalty of five years imprisonment, or unlimited fine, or both. The offence should be added to the list of offences carrying the requirement to register under the Sex Offenders Act 1997 since an individual committing it carries a clear risk to children.

9 There should be a list of offences carrying a criminal offence on working with children, but further work is needed on the list itself; whether cautions should attract the ban; and whether it should be discretionary.

10 As a pre-requisite to being part of the new scheme, safeguards achieving a similar level of proper process for the information should be in place for both the Consultancy Index and List 99.

11 The police should have in place processes which allow early identification of local information suitable for release so that there can be a quick return on any subsequent check under Part V of the Police Act 1997; it may also be necessary for the police to look at locally held information in advance of implementation of Part V with a view to subsequent disclosure under the Act.

12 A general definition of ‘working’ with children should be provided, on the lines of that in the Exceptions Order it may also possible to provide an illustrative list of occupations and activities which come within the definition but it would be impractical to attempt to produce a fully comprehensive list.

13 Both those organisations qualifying for the enhanced check i.e. where a position involves regularly caring for, training, supervising or being in sole charge of persons aged under 18 (Police Act 1977 section 115(3)) should have access to the information in the new integrated system; and those qualifying for the second level of check, the criminal record certificate, under section 113, which includes those who can receive information on spent convictions under orders made under

the Rehabilitation of Offenders Act 1974. This second group should be confined to those exempted from the Act because of work with children. Those outside the registration provisions of the 1997 Act should not have access to the new integrated system.

14 Anyone subject to the criminal offence should also be disqualified from acting as a trustee of a charity which has activities falling within the definition of working with children or which regularly benefits children. This could be achieved by adding an "unsuitable person" disqualification to Section 72 of the Charities Act.

15 All such charities and the Charity Commission itself should have access to the integrated information through the central access point in respect of any such appointments.

16 In principle, checks should be made on an individual every time he started new work with children but this should be operated on a common sense basis.

17 Checks should be run on the preferred applicant only.

18 Consideration should be given to guidance for parents.

19 Good practice guidelines should be issued on how to ensure the correct and full identification of any applicant

20 Good practice guidelines should also be issued on the security and handling of information released to organisations under the new scheme

21 Consideration should be given to a help line for the Criminal Records Bureau at least for an initial period.

22 It cannot be recommended that information at present on List 99 and the Consultancy Index and convictions (and perhaps cautions) for offences which will in the future attract the new criminal offence but do not at present do so should attract the new criminal offence.

23 As regards List 99 and the Consultancy Index:

- the existing lists should be "frozen";
- where an application for work with children is made, the applicant and employer should be informed as part of the criminal record certificate or enhanced certificate that the individual is on the list; and that the relevant Secretary of State is looking into the case to see if it justifies a criminal offence or should be removed;
- action should then be taken within the relevant department to follow this up urgently by re-assessing the information with the full process required. This would mean that such a ‘virtual’ ban would be time limited;
- where there are entries on either list which would clearly not merit conversion to the new list, they should be expunged.

24 The group recommends organisations should only make retrospective checks on existing workers after careful consideration as to whether this is justified.

25 The area of repeat checks needs to be looked at further as part of the scoping work to be done in respect of the Criminal Records Bureau; and guidance should be given to organisations on good practice in this respect once the Bureau was fully up and running and able to take on the extra burden this would represent.

26 Where an initial decision has been taken on the information received , in the case of the police to prosecute, and in the case of the lists, to commence the formal assessment process, the information should be revealed as part of the disclosure of information through the central access point.

27 There should be an enabling provision, similar to section 115 of the Crime and Disorder Act 1998, to allow such disclosure where necessary for the purposes of the new integrated system in the circumstances specified.

28 The Ministry of Defence should consider putting into place procedures to enable this information to be input on the PNC or passed to DH (to consider placement on the Consultancy Index) where it might be of relevance to protecting children.

An indication of yet other measures relating to child protection that are likely to be taken in the near future was given by Margaret Hodge, Minister at the DfEE in a recent press statement, which is reproduced below:

DfEE Press Notice 12.1.99 Hodge Strengthen Safeguards for the Care of Children

> Equal Opportunities and Employment Minister Margaret Hodge today responded to the concerns of parents and childcare workers by announcing a four point plan to strengthen the care and protection of children, including new guidance on regulating childminders and raising the standards of nanny agencies new proposals for toughening up the regulation of nanny agencies.
>
> Mrs Hodge said:
>
> "The safety of our children is paramount. Our four point plan will help reassure parents that their children are being well looked after whilst they are at work or in education or training.
>
> "We recently consulted widely on the regulation and inspection of early education and day care. Most people support the Government's intention to have a single regulatory system for early education and for day care. But however good the regulation is, no-one can give a cast-iron guarantee that children will come to no harm. So we must all continue to be vigilant, including parents who are in a good position to pick up any warning signals. After all, they take and fetch their children every day.
>
> "We have listened carefully to the calls for action, including the concerns raised over the last two years about nannies. That is why we are attracted to the idea of establishing through a voluntary register for nanny agencies and we will be putting this to the industry. This would, at least in the first instance, be on a

voluntary basis and would involve agencies being recognised if they agree to meet new even higher standards.

We will also bring measures before Parliament this session to strengthen the regulatory framework for setting and enforcing standards. In addition to these steps, my Department will be exploring with nanny agencies other measures to raise quality. improving the standards of nanny agencies, and giving parents sound advice about how to recruit anyone to work in their home.

We will build on the minimum standards established by the Employment Agencies Act 1973. In addition, anyone who has a problem with an agency can contact the Department of Trade and Industry's helpline on 0645 555105. For the future, I want to explore developing these standards into a statutory code, taking into account the costs, risks and benefits. This would involve a register of those agencies which have agreed to meet the new, higher standards."

The Government will also:

• issue further advice to local authorities on the registration and inspection of childminders and others providing day care. The circular will respond to recent court cases involving childminders and will include information on:

• procedures to establish identity and check fitness to care for children;

•steps which local authorities can take to ensure childminders are properly briefed on the demands and rewards of childminding;

•the need for sound training and development for registration and inspection staff; and,

•the importance of valuing feedback from parents on the quality of care provided:

•draw up guidance to help parents who want to employ someone in their own home to look after their children, covering recruitment and monitoring;

•establish a Criminal Records Bureau to make it easier to carry out police checks on people who want to work with young children. The Government also welcomes Debra Shipley's Private Member's Bill to make law the existing Department of Health list of people deemed unsuitable for work with young children.

The Government will now work on the other areas identified in the consultation document and will bring forward firm proposals later.

II The Department of Health's List (Jo Roll)

A. Background

A brief description of the Department of Health's Consultancy Index, as set out in the Government's Response to the Utting Report on safeguards for children living away from home, is included in the Introduction of this Paper. It was described in more detail in the Utting Report itself and that description is reproduced below. (Department of Health guidance to local authorities is contained in an Annex to a Circular about disclosure of criminal background of those with access to children issued in 1993.)[5]

> 14.21 This has no statutory basis. In 1961, the Home Office – then responsible for maintaining the Index – when challenged about its existence said that, as the Secretary of State had a general responsibility for children in care, if employers consulted him about applicants for posts in a child care service he considered it desirable to draw to their attention any information in his possession which suggested an applicant might be unsuitable to work with children. It operates on the basis that inclusion on the Index does not automatically prohibit the person from working with children. The decision whether to employ someone rests with the potential employer. The main criterion for inclusion is that the *employer* referring a name considers the person unsuitable to work with children. The evidence to support this might be: the person has been dismissed after formal disciplinary proceedings; has admitted unacceptable conduct; there has been an adverse decision by an Industrial Tribunal. Employers have to give the Department of Health a positive assurance that they will provide a reference with a full explanation of the circumstances leading to their referral, even if a subsequent check against the Index is sought years after the person left their employment.
>
> 14.22 There are around 750 names referred by employers on the Index. In addition the Department maintains a list of names – currently 4,800 – referred by the police of child care workers or ex-child care workers who have received convictions and police cautions. Anyone asking whether a name is on the Index will also have it checked against the names referred by the police and against List 99. Access to the Index is not restricted to particular types of organisation, so it provides a route for checking someone's background for agencies not able to access criminal record checks. Not all police forces send caution/conviction information to the Department and some of those that do send details about relatively trivial offences – eg shoplifting – as well as the more serious.
>
> 14.23 The Index is well used. There are about 7,000 requests for checks against the Index made each month. The number of positive checks per month runs at about 6 or 7. The Department of Health does not routinely monitor the organisations requesting checks, so cannot say whether all relevant organisations

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[5] Department of Health, LAC (93) 17, *Protection of Children: Disclosure of Criminal Background of those with Access to Children*, 18 October 1993.

– eg all local authorities – use the Index. The Review's study of some inspection reports of community and registered children's homes suggests that checking against the Index is now part of routine personnel practice when appointing staff. It is important that this is included in the inspection standards and covered on every inspection.

14.24 The Department receives around 10-12 referrals from employers per month with the majority being put on the Index. It takes less than 4 weeks for a name to be put on the Index provided the employer supplies complete information about the individual. The individual is notified at the same time as his name is put on the Index, even though the letter gives him the opportunity to object to this. The Department maintains the Index in this way because the duty to ensure that children are protected from harm is paramount.

14.25 The value of the Index is wholly dependent on employers and local authorities as regulators passing on information about an employee, or service provider or foster carer who is considered on the balance of probabilities to present a risk to children. There is not much evidence that employers or regulators routinely consider the question of referral when disciplining and/or dismissing staff. It is listed in *Inspecting for Quality* as a measure of performance. Many local authority inspection units use these standards, so this should be checked during inspections of children's homes. Schools can ask for names to be put on the Index, but this is not well known. Of more concern to the Review is the fact that local authorities do not routinely refer foster parents who have been removed from their lists.

14.26 At the request of the Review the Department checked its records to test whether the range of authorities referring names was what might be expected or not. They found that one or two quite large authorities very rarely made referrals, though it seemed reasonable to postulate that there would have been cases which should have been referred. The Review suggests that the Department of Health and local authorities should take steps to monitor this more closely.

14.27 The number of requests for checks would suggest that the existence of the Index is well known and the Review would expect this to be reflected both in the number of names on the Index referred by employers and in the rate of referrals. It is therefore surprising to discover that employer referrals number only 750 and the referral rate is quite low. While it is understandable that some employers will be relieved when a troublesome employee leaves or they manage to dismiss him and will thankfully close the file, it does children no service for the employer to fail to take all possible steps to prevent that person getting another job working with children. In the case of foster parents the Review cannot understand why consideration of referral is not standard practice.

14.28 The main strength of the Index is that it enables organisations providing or regulating children's services to refer people who on the balance of probabilities standard of proof present a risk to children. It is the only system available for dealing with soft information cases, which is valuable. The Department told the Review that it is to re-examine the operation of the Index. We agree that this is necessary and hope that one of the guiding principles for its future operation will

preserve the balance of probabilities standard of proof. The Review is convinced that using this standard helps to ensure that people with a propensity to abuse or harm children are identified at an earlier stage in their careers and thus children in general are better protected.

14.29 A more difficult issue for the re-examination is the role of the Secretary of State and his Department and how the information in the Index is used. At the moment the Department's role is confined to giving the enquirer the name of the previous employer who referred the case. It is left to the enquirer to approach the referring agency and to decide in the light of the information provided whether to employ someone, who in very rare cases is found to be on the Index. Operating in this way can create practical problems where it is learnt that the referring agency or company no longer exists or where the relevant personnel records have been destroyed, although this might be overcome by requiring referring employers or authorities to provide a full reference at the time of referral. It is also thought that discovering that the person is on the Index is enough to make the enquirer decide not to offer the job.

14.30 It would be open to the Secretary of State to adopt a more interventionist approach and pass on the information supplied by the referring employer to the enquirer, together with his opinion that the person is considered on the balance of probabilities standard of proof to present a risk to children. The Review does not take a position on this, but considers that the proposed review must address the issue.

14.31 The Review recommends that more is done to publicise the Index, so that all employers working with children in any setting use it to check names against it and refer appropriate people. Guidance on the Index is currently contained in annexes to circulars on criminal records issued jointly by the Department, the Home Office, Department for Education and Employment and the Welsh Office and is difficult to track down.

14.32 The Review is pleased that Scotland is to have a similar list to the Consultancy Index. This means that, as Northern Ireland now has its Pre-employment Consultancy Service, the whole of the United Kingdom is covered. The Review suggests that the Department of Health, the Northern Ireland Office and the Scottish Office arrange to share these sources of information with a view to making a check against one Index cover all three.

14.33 These sources of background information on people are by no means perfect, but there are ways in which each can be made to work better. Criminal record checks can be processed more quickly. Cases referred to the Secretary of State for Education and not barred or restricted can at least be referred on to the Department of Health. The Consultancy Index can be made better known.

14.34 The Review thinks that the arrangements for monitoring that independent schools and providers of children's homes use these sources to check the backgrounds of prospective staff are reasonably satisfactory, as they are covered during the inspection process. The position is far less satisfactory in the case of foster parents. We recommend in Chapter 3 that the Department of Health

> develops a Code of Practice for Foster Carers and the question of checking foster parents should be considered as part of that.
>
> 14.35 It is difficult to establish whether employers and regulators are rigorous in referring names to the Department for Education and Employment or the Department of Health. In the case of schools employers are under a duty to notify names and the same applies to children's homes. This could be strengthened in the case of children's homes by making it an offence not to notify someone who was dismissed on grounds of misconduct or resigned in suspicious circumstances. In the case of foster parents this should be looked at as part of the work on developing a Code of Practice.[6]

B. The Bill (Clauses 1-4 and 14)

The Bill requires the Secretary of State to keep a list of individuals who are considered unsuitable to work with children and provides for two ways onto the list, one through new procedures and one by transfer from the old Consultancy Index. The Secretaryof State is given power to remove an individual from the list if he is satisfied that the individual should not have been included on it.

A child care organisation,as defined in the Bill, must refer an individual who has been employed in a child care position to the Secretary of State, and other organisations may do so, if certain conditions are fulfilled. A child care organisation is defined in clause 14. The definition is focused on those in the statutory sector and those which are the subject of statutory regulation.The conditions include, for example, that the organisation has dismissed the individual on the grounds of misconduct or incompetence (whether or not in the course of the individual's employment) which harmed a child or placed a child at risk of harm. They also include the situation where the individual has resigned or retired in circumstances such that the organisation would have dismissed him, or would have considered dismissing him, in such ground if he had not resigned or retired.

The Bill sets out the procedure to be followed by the Secretary of State. This includes placing someone on the list on a provisional basis while the outcome of the referral is determined. The procedure also requires the Secretary of State to obtain observations from the relevant parties. He then has to confirm the person on the list or remove him from it. The criterion for including someone is that the Secretary of State is of the opinion:

> a) that the organisation reasonably considered the individual to be guilty of misconduct or incompetence (whehther or not in the course of his employment) which harmed a child or placed a child at risk of harm and
> b) that the individual is unsuitable to work with children.

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6 Sir William Utting, *People Like Us: The Report of the Review of the Safeguards for Children Living Away from Home*, the Department of Health and the Welsh Office, 1997

The procedures relating to the transfer of people on the Consultancy Index require them to be subject to similar procedures.

Individuals may appeal against inclusion on the list (unless they are on it on a provisional basis) and against a Secretary of State's decision not to remove on the grounds that he should not have been on it in the first place.

III Department for Education and Employment List (Christine Gillie)

A. Background

The Department for Education and Employment (DfEE) list, known as List 99, contains the details of people who are barred or restricted, either on grounds of misconduct or on medical grounds, from employment as teachers or in other work that brings them into regular contact with pupils or students under 19 years of age. In England and Wales, the power to bar from employment or to impose restrictions rests with the Secretary of State for Education and Employment. The Secretary of State's powers apply in relation to "relevant employment".[7] Essentially, this means employment by a LEA or a governing body, or by any other body, as a teacher at a school or further education institution, or as a worker with children or young persons. It also covers employment at an independent school as a teacher or worker with children or young persons.

People barred on misconduct grounds are listed separately from those banned on medical grounds, but no details of misconduct are given. Teachers who are barred from teaching in Scotland and Northern Ireland are included in Annexes to the List. Decisions about Scotland and Northern Ireland are not a matter for the Secretary of State for Education and Employment, but action under the regulations could be taken by the Secretary of State if any of those persons listed in the Annexes to the List apply for a post in England and Wales.

The statutory basis for List 99 is section 218[8] of the *Education Reform Act 1988* and regulations made under it. Section 218 subsection (6) states[9]:

> (6) The Secretary of State may by regulations make provision for prohibiting or restricting the employment or further employment of persons-
> (a) as teachers at schools and institutions falling within subsection (10) or (11) below;
> (b)by local education authorities as teachers otherwise than at schools or such institutions;
> (c) by local education authorities or by the governing bodies of schools or such institutions in such work as is mentioned in subsection (5) (c) above;[or
> (d) by the proprietors of independent schools or at such schools as teachers or in any such work]
> on medical grounds, in cases of misconduct and, as respects employment or further employment as a teacher, on educational grounds.

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7 *Education (Teachers) Regulations* SI 1993/543 regulation 7

8 as amended; section 49 of the *Education Act 1997* extended the scope of the provisions

9 extracts taken from Butterworths, *The Law of Education*, ninth edition

Subsection 5(c) referred to above states:

> (5) (c) persons employed:
> (i) by local education authorities; or
> (ii) by the governing bodies of schools or such institutions;
> in work otherwise than as teachers which brings them regularly into contact with persons who have not attained the age of nineteen years.

The other relevant provisions in section 218 are subsections (6A) and (6B), reproduced below:

> (6A) The Secretary of State may by regulations impose requirements on-
> (a)local education authorities,
> (b)the governing bodies of schools or institutions falling with subsection (10) below,
> (c) the proprietors of independent schools,
> for the purpose of prohibiting or restricting, on medical grounds or in cases of misconduct, access to persons who have not attained the age of nineteen years by persons (not falling within subsection (6) above) who provide services falling within subsection (6B).
>
> (6B) Those services are services provided in relation to the school or institution or persons attending it which-
> (a)are provided by whatever means and whether under contract or otherwise, and
> (b)bring the persons providing them regularly into contact with persons who have not attained the age of nineteen years.

(The institutions referred to in subsection (10) are those maintained by LEAs or within the further education sector.)

Under the *Education (Teachers) Regulations 1993*,[10] as amended, the Secretary of State may make a direction to:

- require an employer, in the case of a person in relevant employment, to suspend or terminate a person's employment; or
- make continued employment subject to specified conditions;
- prohibit subsequent appointment or employment in relevant employment, or impose specified conditions on a person's appointment or employment.[11]

"Relevant employment" is defined as follows:

> 7.(1) Any reference in this Part to relevant employment is [subject to paragraphs (2) and (3)], a reference to employment-

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[10] SI 1993/543
[11] Regulation 10 (2)

> (a) by a local education authority, as teachers (whether or not at a school or further education institution) or as workers with children or young persons;
> (b) by any other body, as teachers at a school or further education institution; or
> (c) by the governing body of a school or further education institution as workers with children or young persons.
>
> (2) In [regulations 10 and 10A], any reference to relevant employment also includes employment-
> (a) by the proprietor of an independent school, as teachers or workers with children or young persons; and
> (b) at an independent school, as teachers or as workers with children or young persons.]
>
> [(3)For the purposes of this Part, employment includes the engagement of a person to provide his services as a teacher otherwise than under a contract of employment and references to employment or relevant employment shall be construed accordingly.]
>
> Amendment Regulation 7 was substituted by the Education (Teachers) (Amendment) Regulations 1994, SI 1994/222, with effect from 1 March 1994. The words within square brackets in paras (1) and (2) were substituted, and para (3) was added, by S1 1998/1584 with effect from 1 August 1998. [12]

Employers of persons in relevant employment must comply with any direction prohibiting or restricting a person's employment or further employment.[13]

Governing bodies of schools or further education institutions and the proprietors of independent schools must take such steps as are reasonably practicable to prevent a person who is not employed by them but who has been barred by the Secretary of State, from providing services in relation to the school or institution. The restriction applies to services provided under contract or otherwise.[14]

Misconduct is not defined but the Regulations state that a direction will be made automatically in the case of any person who is found guilty or pleads guilty to a sexual offence which involves a child under 16 years of age. The specific offences are listed in the Regulations.[15] DfEE Circular 11/95[16] provides guidance on the Secretary of State's powers to bar people from teaching and other employment. The offences that lead to automatic barring include:

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[12] Regulation 7
[13] Regulation 10 (11)
[14] Regulation 10A
[15] Regulation 10 (9) and Schedule 4
[16] DfEE Circular 11/95, *Misconduct of Teachers and Workers with Children and Young Persons*, October 1995

- rape
- buggery
- incest
- unlawful sexual intercourse
- indecent assault
- gross indecency
- taking or distributing indecent photographs[17]

In other cases, the power is discretionary, and is not limited to misconduct relating to children and young people. Not all those on List 99 are perceived to be a danger to children. DfEE Circular 11/95 lists the kinds of misconduct which are likely to lead to a bar or restriction, including fraud and dishonesty:

- Violent behaviour towards children or young people;
- A sexual, or otherwise inappropriate, relationship with a pupil (regardless of whether the pupil is over the legal age of consent);
- a sexual offence against someone over the age of 16;
- any offence involving serious violence;
- drug trafficking and other drug related offences;
- stealing school property or monies;
- deception in relation to employment as a teacher or at a school, for example false claims about qualifications, or failure to disclose past convictions;
- any conviction which results in a sentence of more than 12 months imprisonment;
- repeated misconduct or multiple convictions unless of a very minor nature.[18]

The Circular emphasises that it is not possible to specify in detail everything that might constitute misconduct for the purpose of the Regulations. Some behaviour that an employer might legitimately regard as misconduct for disciplinary purposes might not be regarded as misconduct requiring consideration by the Secretary of State. The Circular identified in very broad terms the kind of behaviour that is regarded as misconduct requiring consideration by the Secretary of State:

- committing a criminal offence resulting in conviction;
- behaviour which could lead to prosecution for a criminal offence;
- behaviour which involves an abuse of a teacher's position of trust or a breach of the standards of propriety expected of the profession.[19] The Circular stated that a sexual relationship with a pupil over the age of consent would be behaviour that would be likely to be regarded as coming within this category.[20]

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17 paragraph 7
18 paragraph 9
19 paragraph 13
20 paragraph 15

The *Sexual Offences (Amendment) Bill*, Bill 47 1998-99, seeks to create a new criminal offence of abuse of position of trust where a person 18 or over has sexual intercourse, or engages in other sexual activity, with a person under that age, if the person aged 18 or over is in a position of trust in relation to the younger person in circumstances specified in the Bill.[21] It is not yet clear whether barring would be automatic where a person was found guilty of such an offence.

There are around 2,000 names on List 99-about 80% in the automatic category and 20% in the discretionary one.[22]

Provision is made to enable an individual to make representations where the Secretary of State is considering using his barring powers.[23] There is no provision at present for an appeal against the Secretary of State's decision and inclusion on list 99. However, the Secretary of State has power to withdraw, or vary the terms of, a direction if he is satisfied that it would be appropriate to do so because new information is available or there is evidence of a material change in circumstances.[24]

Employers are required to report to the Secretary of State cases where a person has been dismissed from relevant employment on grounds of misconduct, or where someone resigns in circumstances where he or she would have been dismissed or considered for dismissal on those grounds.[25]

In September 1998, the DfEE issued guidance on the recruitment and selection procedures for teachers and other staff who have contact with children and young people. The guidance, which lists the checks that should be made on candidates, including the List 99 check, was issued to LEAs, heads and governors of LEA maintained schools, grant maintained schools, City Technology Colleges, non-maintained special schools, independent schools, further education institutions, and teacher employment agencies.[26]

DfEE Circular 10/95 provides guidance to the education service on its role in helping to protect children from abuse. It includes guidance on the procedures that schools should have in place for handling allegations of abuse.[27]

The *Report of the Interdepartmental Working Group on Preventing Unsuitable People from Working with Children and Abuse of Trust* noted that List 99 is already well

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21 Bill 47 1998-99

22 *People Like Us, Report of the Review of the Safeguards for Children Living Away from Home*, Department of Health, 1997, Chapter 14, para.14.18

23 Regulation 10 (4) (5)

24 Regulation 10 (11)

25 Regulation 11

26 *Recruitment and Selection Procedures: Vetting Teachers and Other Staff who will have Contact with Children*, DfEE, 1998

27 DfEE Circular 10/95, *Protecting Children from Abuse: The Role of the Education Service*, October 1995

constructed as a building block for an integrated system of identifying people deemed unsuitable to work with children. However, it observed that some changes may be needed to enable it to form part of an integrated scheme, including making it clear that any person on it who was banned from working with children in the educational sector would also be banned in the care sector. The report also pointed out that List 99 may need to be reconstructed, so that a distinction could be made between individuals banned from working in education because of misconduct relating to children, and those banned for other reasons. The report noted that a major weakness of List 99 as currently constructed is that it only contains the names of those who have previously been brought to the attention of the Secretary of State. Also there is no appeal process.

The *Teaching and Higher Education Act 1998* gives the new General Teaching Councils (GTCs) for England and Wales the power to take disciplinary action against teachers on grounds of unacceptable professional conduct or serious professional incompetence, but cases involving misconduct continue to be decided by the Secretary of State. Provision is made for the GTC to issue a code of practice for teachers, laying down standards of professional conduct and practice expected of teachers. Section 15 makes provision for regulations to be made requiring employers of persons falling within section 218 (6) of the *Education Reform Act 1988* to provide information to the Secretary of State and to the GTCs on teachers who have been dismissed on grounds of misconduct, incompetence, or on medical grounds, or who have resigned in circumstances where it is likely that they would have been dismissed on these grounds.

B. The Bill (Clauses 5 and 6)

The Explanatory Notes and the Regulatory Impact Assessment to the Bill state that a necessary step towards an integrated vetting system-the "one stop shop"- would require, among other things, changes to List 99. (List 99 has wider purposes than the current Department of Health Consultancy Index and the statutory list proposed under clause 1 of the Bill.) It is proposed that a distinction should be drawn between people who are on List 99 because they are unsuitable to work with children and people who are on the list for other reasons. It is also proposed to extend the grounds for inclusion on List 99 to persons who are included (otherwise than provisionally) on the list kept under the section 1 of the Protection of Children Act 1999. This would enable the identification of people in both education and child-care settings who should not be allowed to work with children in the education service. In order to make these changes the statutory provision that is the basis for List 99-the *Education Reform Act 1988*, section 218 (6)-needs to be amended.

Clause 5 amends section 218 (6) the *Education Reform Act 1988 Act* by substituting a new subsection (6ZA) listing the grounds for prohibiting or restricting employment by the Secretary of State. The present grounds for prohibiting or restricting employment (namely, medical grounds, misconduct grounds, and (for teachers) educational grounds) are restated, and two new grounds are added.

The first new ground is that the persons concerned are not "fit and proper persons" to be employed as teachers or in other work mentioned in section 218 (5) (c). (Section 218 (5)

(c) covers persons employed by LEAs or schools in work otherwise than as teachers that brings them regularly into contact with persons who have not reached the age of 19.) The Bill does not define persons who are "not fit and proper" in this context. The effect of the provision is to distinguish between those who are barred or restricted because they are not fit and proper persons to work with children, and those who are banned or restricted because of other misconduct. The latter would be barred or restricted from working as teachers or in other work with pupils and students under the age of 19 years, but would not be barred from working with children generally as they have not been found to be a danger to children.

The second new ground is where the persons concerned are included (otherwise than provisionally) in the proposed new statutory list under section 1 of the Protection of Children Act 1999. A List 99 check carried out by the DfEE includes a check against the Department of Health's Consultancy Index but bodies[28] holding copies of List 99 do not automatically check the Index. At present the Secretary of State's barring powers do not extend to a person who is on the Department of Health's Consultancy Index. The new ground therefore tightens up the existing provisions. The effect would be that a person who is on the statutory list under section 1 (i.e. has been found to be unsuitable to work with children) would not be able to be employed as a teacher, or in other employment by LEAs or schools that brings them regularly into contact with persons who have not reached the age of 19.

Clause 5 (3) and (4) incorporates the new grounds into section 218 (6A) and section 15 of the *Teaching and Higher Education Act 1998* (which relates to the supply of information to the Secretary of State and the General Teaching Councils about the dismissal of teachers).

Clause 6 extends the power of Secretary of State to make regulations under section 218 (6) of the 1988 Act to provide for appeals to the Tribunal (established under the Bill). Clause 6 (1) and (2) specify that an appeal may be made against a decision by the Secretary of State to prohibit or restrict employment, or a decision not to revoke or vary such a decision. The circumstances in which the Tribunal shall allow an appeal and the powers available to it on allowing such an appeal will be set out in regulations. Clause 6 (3) provides that where a person has been convicted of an offence involving misconduct, no finding of fact in the case may be challenged before the Tribunal.

[28] e.g. LEAs and associations representing independent schools

IV The Tribunal (Mary Baber)

(Clause 9 and Schedule of the Bill)

Clause 4 of the Bill is intended to permit people who are included (otherwise than provisionally) in the Department of Health list created under Clause 1 to appeal to a Tribunal against the decision to include them in the list. The Clause is also designed to permit appeals to the Tribunal against decisions by the Secretary of State not to exercise his powers under Clause 1(3) to remove people from the list. In the latter case an appeal will only be possible where leave has been obtained from the Tribunal and the circumstances come within those prescribed in regulations made by the Secretary of State[29].

Clause 4(2) provides that the Tribunal must allow the appeal and direct that the individual be removed from the list if it is not satisfied that the individual was guilty of misconduct or incompetence as claimed, or that the individual is unsuitable to work with children. If it is so satisfied, it must confirm the Secretary of State's decision.

Where a person has been convicted of an offence involving conduct of a type mentioned in Clause 4(2)(a), Clause 4 (3) seeks to prevent any finding of fact on which his convictions must be taken to have been based from being challenged on an appeal to the Tribunal.

As far as the Department for Education and Employment list is concerned, Clause 6 is intended to enable the Secretary of State's power to make regulations under section 218(6) of the *Education Reform Act 1988* to be extended to include a power for a person to appeal to the Tribunal against a decision of the Secretary of State prohibiting or restricting their employment on the grounds listed in the new subsection 6ZA of section 218 of the 1988 Act, (which is to be inserted by Clause 5(2) of the current Bill) or against the Secretary of State's refusal to revoke or vary that decision.

The circumstances in which the Tribunal will be able to allow an appeal and the powers available to it on allowing such an appeal are to be set out in regulations made under section 218(6) of the 1988 Act. Clause 6(3) is designed to enable the regulations to make provisions analogous to those under Clause 4(3), which seek to prevent challenges to findings of fact made in criminal proceedings being made on appeals to the Tribunal.

Regulations made under section 218 of the *Education Reform Act 1988* are subject to annulment under the negative procedure.

Provisions governing the creation and management of the Tribunal are set out in Clause 9 and Schedule 1 of the Bill. Schedule 1 provides for the appointment of a President of the

[29] Clause 12(4) provides for such regulations to be subject to annulment under the negative procedure

Tribunal, a chairmen's panel and a lay panel. As with a number of other statutory tribunals, it is intended that each Tribunal should consist of a chairman nominated by the President of the Tribunal from the chairmen's panel and two lay members nominated by the President from the lay panel .The President of the Tribunal and the members of the chairmen's panel will be appointed by the Lord Chancellor. They will have to be barristers or solicitors of at least seven years' standing. The members of the lay panel will be appointed by the Lord Chancellor after consultation with the Secretary of State. Paragraph 8 of Schedule 1 is designed to add the Tribunal to the tribunals (listed in Schedule 1 to the *Tribunals and Inquiries Act 1992*) which are under the general supervision of the Council on Tribunals. The Council, which was set up under the *Tribunals and Inquiries Act 1958* and now operates under the *Tribunals and Inquiries Act 1992*, is particularly concerned with the administrative procedures employed by tribunals It keeps the constitution and working of the tribunals listed in Schedule 1 of the 1992 Act under review and reports on them from time to time. It has 15 members, including the Parliamentary Ombudsman, who is a member by virtue of his office. The current chairman of the Council on Tribunals is Lord Archer of Sandwell.

Clause 9 of the Bill includes a power for the Secretary of State to make regulations (which, like other regulations under the Bill will be subject to annulment under the negative procedure) concerning the proceedings of the Tribunal on appeals under the measures set out in Clauses 4 and 6. Clause 9(3) seeks to specify a number of matters which the regulations may cover, including:

- The persons who may appear on behalf of the parties;
- The holding of hearings in private in prescribed circumstances;
- The imposition of reporting restrictions in prescribed circumstances;
- The granting to any person of such discovery or inspection of documents or right to further particulars as might be granted by a county court;
- Provisions requiring people to attend to give evidence and produce documents;
- Provisions authorising the administration of oaths to witnesses;
- Provisions for determining appeals without a hearing in prescribed circumstances;
- Provisions concerning the withdrawal of appeals;
- Provisions enabling the Tribunal to review its decisions, or revoke or vary its orders, in certain circumstances which may be determined in accordance with the regulations

Clause 9(5) is intended to enable a fine of up to £1,000 to be imposed on any person who, without reasonable excuse, fails to comply with any requirement imposed by regulations made under Clause 9 in respect of reporting restrictions, the discovery or inspection of documents or a requirement to attend the tribunal and give evidence or produce documents.

Clause 9(6) is designed to enable appeals to be to made to the High Court on points of law from decisions of the Tribunal.

V One Stop Shop (Mary Baber)

The provisions in the Bill relating to Part V the Police Act 1997 are a preliminary to the Government's plans for setting up a one-stop- shop for obtaining information from the two departmental lists and criminal records through the same access point.

A. Background: Police Act 1997 Part V

Part V of the *Police Act 1997,* which the Government is seeking to implement within the next two years[30], is intended to enable the Secretary of State to issue three types of document containing information on a person's criminal record:

- A ***criminal conviction certificate***, issued under section 112 of the 1997 Act, which will be available to individual applicants who will be able to choose whether or not to show it to their employers. The certificate will give details of every conviction the applicant has which is recorded in national records, other than records of convictions which are "spent" under the *Rehabilitation of Offenders Act 1974.* It will not show "spent convictions" or cautions.

- A ***criminal record certificate***, issued under section 113 of the 1997 Act, which will be available to individual applicants working in areas exempted under the *Rehabilitation of Offenders Act 1974* (that is, those professions, occupations etc. which are excluded, under an exceptions order made by the Secretary of State, from benefiting from the provisions of section 4(2) (a) or (b) of the *Rehabilitation of Offenders 1974* concerning the effect of "spent" convictions. This type of certificate will thus be available to people who have regular contact with people under the age of 18, the elderly, sick or handicapped people, those involved in the administration of the law (such as police officers) and others employed in other sensitive areas and professions. The certificate will include details of convictions, including convictions which are "spent" under the *Rehabilitation of Offenders Act 1974.* It will also include cautions held at the national level.

- An ***enhanced criminal record certificate***, issued under section 115 of the 1997 Act, which will be available for those applying for paid or unpaid positions involving regular caring for, training, supervising or being in sole charge of under-18s or, in certain specified cases, over-18s, or for various other purposes, including the registration of child minders, the placing of children with foster parents or the approval of any person as a foster carer, for certain statutory licensing purposes (eg gaming and lotteries licences) and for those being considered for judicial appointments. Like the criminal record certificate, this certificate will

[30] "Criminal Records Bureau to strengthen child protection safeguards" - Home Office Press Notice 14.12.1998

> contain information on 'spent' and 'unspent' convictions and cautions held at national level. In addition, it will include information from local police records including relevant non-conviction information, which will not be included in the certificate but will be disclosed to the "registered person".

An application for a criminal record certificate or an enhanced criminal record certificate will have to be countersigned by a "registered person", that is, a person listed in a register maintained by the Secretary of State under section 120 of the 1997 Act. The register will include any person who applies to the Secretary of State in writing to be registered and satisfies the following conditions, set out in section 120(4)-(6) of the 1997 Act:

(4) A person applying for registration under this section must be-

(a) a body corporate or incorporate
(b) a person appointed to an office by virtue of an enactment
(c) an individual who employs others in the course of a business

(5) A body applying for registration under this section must satisfy the Secretary of State that it-
(a) is likely to ask exempted questions[31]
(b) is likely to countersign applications under section 113 or 115 at the request of bodies or individuals asking exempted questions
(6) A person, other than a body, applying for registration under this section must satisfy the Secretary of State that he is likely to ask exempted questions.

An application for a criminal record certificate or for an enhanced criminal record certificate will have to be accompanied by a statement from the registered person who has countersigned it, stating that it is required for the purposes of an exempted question[32] and, in the case of an enhanced criminal record certificate, that the question is being asked in the course of considering the applicant's suitability for a purpose or position in respect of which such certificates are available.

Where employment by the Crown is concerned, an application for a criminal record certificate will have to be accompanied by a statement by a Minister of the Crown that the certificate is required for the purposes of an exempted question asked in the course of considering the applicant's suitability for an appointment by or under the Crown. An application for an enhanced criminal record certificate in the context of Crown employment will similarly have to be accompanied by a statement by a Minister of the Crown, or a person nominated by a Minister of the Crown, confirming that the certificate is required for the purposes of an exempted question asked in the course of considering a person's suitability for a judicial appointment or an appointment by or under the Crown to a position in respect of which enhanced criminal record certificates are available.

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[31] that is, questions in relation to which the benefit to the respondent of the provisions of section 4(2) (a) or (b) of the *Rehabilitation of Offenders 1974* concerning the effect of "spent" convictions has been excluded by an Exceptions Order made by the Secretary of State under the 1974 Act

[32] for an explanation of this term see the previous footnote

A criminal conviction certificate will be issued to the person who applied for it, who will be able to choose whether or not to show it to an employer. A criminal record certificate will be issued to the person who applied for it and a copy will be sent to the registered person who countersigned the application for it. An enhanced criminal record certificate will be issued to the person who applied for it and a copy will be sent to the registered person who countersigned the application. In the case of an enhanced criminal record certificate, the registered person (but not the applicant) will also be given information which, in the opinion of the police:

a) might be relevant for the purpose for which the certificate is required;
b) ought not to be included in the certificate, for reasons of the prevention or detection of crime, but
c) can, without harming those interests, be disclosed to the registered person.

Sections 112-116 of the *Police Act 1997* require individuals who apply for the various types of certificate to make their applications in a prescribed form and pay a fee. The Government estimates that each applicant for a certificate (the individual, not employer) will pay between £5 and £10, depending on the level of check,[33].

Where an applicant believes that the information contained in the certificate issued to him under sections 112-116 is inaccurate he will be able to make a written application to the Secretary of State for a new certificate. Where the Secretary of State agrees that the information in the certificate is inaccurate he will be required to issue a new certificate. He may require the applicant to provide evidence of identity, such as fingerprints and to pay a prescribed fee, which will be refunded if a new certificate is issued. Regulations may provide for the subsequent destruction of the fingerprints in specified circumstances. Section 119(5) of the 1997 Act provides that no proceedings shall lie against the Secretary of State by reason of any inaccuracy in information made available or provided to him by police officers or any other person holding records of cautions, convictions or fingerprints for the use of police forces generally.

Under section 123 of the 1997 Act it will be an offence punishable by up to 6 months' imprisonment and a £5,000 fine for a person to make a false certificate, alter a certificate, use a certificate which relates to another person in a way which suggests that it relates to himself, or allow a certificate which relates to him to be used by another person in a way which suggests that it relates to that other person. It will also be an offence punishable in the same way for a person knowingly to make a false statement for the purpose of obtaining, or enabling another person to obtain a certificate.

[33] ibid

It will also be an offence punishable by up to 6 months' imprisonment and a £1,000 fine for a person to disclose information provided following an application for a criminal record certificate or an enhanced criminal record certificate, except in certain circumstances specified in Section 124 of the 1997 Act.

A Home Office Press Notice of 14 December 1998 announced that a self-financing Criminal Records Bureau under the management of the Passport Agency would be set up to carry out the criminal record checks and issue certificates for employment purposes under the provisions of the 1997 Act[34]. It added that:

> It is estimated that it will take 2 years to establish the Bureau during which time there will be wide consultation with user groups, such as the voluntary sector and trade unions, to ensure that its operation will meet the needs of the community it serves.

The Press Notice went on to say that:

> The three certificates will be phased in over a period of years to ensure a smooth transition from the current arrangements.
>
> However, top priority will be given to the issue of certificates for those seeking positions which involve regularly caring for, training, supervising or being in sole charge of under-18s.

The Scottish Office minister, Henry McLeish, set out the Government's plans for implementing Part V of the *Police Act 1997* in Scotland in the following Written Answer of 14 December 1998[35]:

> **Mr. David Stewart**: To ask the Secretary of State for Scotland what plans he has for implementing Part V of the Police Act 1997 in Scotland providing for extended access to criminal record checks for employment vetting and other purposes.
>
> **Mr. McLeish**: My right hon. Friend the Home Secretary is announcing today that in order to implement Part V of the Police Act 1997 in England and Wales the Home Office will set up a Criminal Records Bureau. In Scotland the work of disclosing criminal record information will be carried out by the Scottish Criminal Record Office (SCRO), which is already well established as a central vetting authority.
>
> The Government's main objective in introducing these arrangements is to strengthen the safeguards for the protection of children. In line with this and to ensure a smooth transition from the current arrangements for employment vetting checks, the SCRO will phase in the issue of three new types of certificates provided for under the Act. Top priority will be given to the issue of certificates for those seeking positions that will involve regular unsupervised access to children. The scheme is to be self-financing with all applicants for certificates being charged a fee which, depending on the level of certificate sought, is currently estimated at being between £5 and £10.

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[34] "Criminal Records Bureau to strengthen child protection safeguards" - Home Office Press Notice 14.12.1998

[35] HC Deb Vol 322 c335-6W, 14.12.1998

We expect that it will take some two years to equip the SCRO for the new much expanded system of checks. In this time we intend to consult widely in order to ensure that the system will meet the needs of the community it serves.

B. The Bill (Clause 8)

Clause 8 of the *Protection of Children Bill* seeks to insert new subsections in two sections within Part V of the *Police Act 1997*, namely section 113 (the section dealing with criminal record certificates) and section 115 (the section dealing with enhanced criminal record certificates). The Bill's *Explanatory Notes* state that Clause 8 is necessary in order to establish the onestopshop" which the Bill is designed to create, enabling or requiring employers to access a single point for checking the names of people they propose to employ in posts involving the care of children.

The subsections 3A and 3B which are intended to be inserted in section 113 of the Police Act 1997 are designed to make the Department of Health list referred to in Clauses 1-4 of the Bill and the Department for Education and Employment list referred to in Clauses 5-6 of the Bill available, via the Criminal Records Bureau, in any case where an application for a criminal record certificate is accompanied by a statement by the registered person that the certificate is required for the purpose of considering the applicant's suitability for any of the following positions (whether paid or unpaid):

- a child care position within the meaning of the *Protection of Children Bill* i.e. a position concerned with the provision of accommodation, social services or health care services to children or the supervision of children which is such as to enable the holder to have regular contact with children in the course of his duties; or
- a position employment or further employment in which may be prohibited or restricted by regulations made under subsection (6) of section 218 of the *Education Reform Act 1988*;or
- a position such that the holder's access to persons aged under 19 may be prohibited or restricted by regulations under subsection (6A) of that section; or
- a position of such other description as may be prescribed by regulations (which, like other regulations made under the Bill, will be subject to annulment by either House of Parliament under the negative procedure)

The subsection which is to be inserted into section 115 of the 1997 Act (subsection 6A) by Clause 8 is designed to make similar provision in the case of enhanced criminal record certificates.

VI Effect of the Bill (Jo Roll)

A. Employment Ban

Under Clause 7 of the Bill, child care organisations must check whether an individual is included on the Department of Health's list or on the relevant part of the DfEE lists before offering him or her employment in a child care position If the individual is included on either list, the organisation must not offer that individual employment. If the individual is being supplied by an employment agency or a nursing agency, the child care organisation must satisfy itself that the checks have been made and not offer that individual employment in a child care position if he or she is on the Department of health's list or the relevant part of the DfEE's list.

B. Responses

The Bill was printed one week before the date set for Second Reading and there have been few responses to the details of the Bill itself although many organisations, including many of the children's organisations and the Local Government Association had been campaigning for change similar to those in the Bill (among others).

There is some concern that provisions for which organisations had been campaigning are not included in the Bill. For example, the NSPCC, while welcoming the Bill and urging MPs to support it, would like to see the scope of the compulsory aspects of the Bill widened to include staff and volunteers in non-statutory organisations who will be working with children. NSPCC is also concerned that private individuals employing nannies are not covered by the Bill

Other concerns relate to civil liberties. In particular, Liberty, the National Council for Civil Liberties, while welcoming the overall aim of the Bill and accepting that people working with children should be subject to greater scrutiiny and more stringent checks on their suitability than those in other professions, has some concern that provisions in the Bill could increase the risk of employees being treated unjustly. In summary its five main concerns are, that:

- the process for initial inclusion on the list is administrative rather than by a court
- the threshold for an individual's initial inclusion on the list is too low
- the basis for inclusion is not confined to sexual or other intentional abuse
- the onus is on individuals who are wrongly included to ensure that their names are removed from the list
- the proposals violate the right to privacy

C. Financial Effect and Regulatory Impact

Clause 11 of the Bill makes provision for money to be provided by Parliament for expenditure arising by virtue of the Act or attributable to it.

Further details about the impact of the Bill, including the costs to government, are contained in the *Regulatory Impact Assessment* from the Department of Health. Since August 1998 such Regulatory Impact Assessments have replaced the previous compliance cost assessments. They cover benefits as well as costs and examine the impact on charities and the voluntary sector as well as on business. A series is kept in the Library.

In relation to costs falling on government, the Bill's Regulatory Impact Assessment says that there will be additional costs for the Department of Health due to the increased volume of work although it is not possible to estimate with any degree of certainty how large an increase in the volume of work there will be. The additional manpower costs associated with the increased activity within the Department will be absorbed within current provision. The cost of the Tribunal, which is estimated to be around £500,000, will be shared between the Department of Health and the Department for Education and Employment.