

PROTECTION OF CHILDREN ACT 1999

EXPLANATORY NOTES

INTRODUCTION

1. These explanatory notes relate to the Protection of Children Act 1999. They have been prepared in the Department of Health in order to assist the reader of the Act. They do not form part of the Act and have not been endorsed by Parliament.
2. The notes need to be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or part of a section does not seem to require any explanation or comment, none is given.

SUMMARY

3. This Act makes four principal changes to the law with the object of both creating the framework of a coherent cross-sector system for identifying people unsuitable to work with children and achieving a “one stop shop” to compel or allow employers to access a single point for checking the names of people they propose to employ in a post involving the care of children. This will involve permitting checks against criminal records and two lists of similar kind of people considered unsuitable for work with children maintained respectively by the Department of Health and the Department for Education and Employment to be made via the Criminal Records Bureau - which is due to come into operation under Part V of the Police Act 1997 in the near future.
4. First, the Act places the existing “Consultancy Index List” (a list wholly confined to people considered unsuitable to work with children) of the Department of Health on a statutory basis, provides for the referral of names, creates a right of appeal to a new tribunal against inclusion on the list, and – with the leave of the tribunal, and to protect individuals from remaining provisionally listed for unreasonably long periods – allows individuals listed provisionally for at least nine months to request the tribunal rather than the Secretary of State to determine the question of permanent inclusion.
5. Secondly, the Act amends section 218 of the Education Reform Act 1988, which provides, essentially, for prohibiting or restricting the employment of teachers. Under those powers, the Department for Education and Employment maintains for analogous but wider purposes a list (“List 99”) similar to the Department of Health list. To enable the “one stop shop” to operate, it is necessary to permit access to List 99. To this end, the Act provides a power permitting inclusion on List 99 on grounds that individuals are not considered fit and proper persons to work as teachers or in work involving regular contact with children. This will enable a distinction to be drawn between people who, on the one hand, are included on List 99 because they are unsuitable to work with children and, on the other hand, teachers who are included on the list for other reasons e.g. for fraud and dishonesty. In this way people will be identified who should not be allowed to work with children in both education and childcare settings. The Act will also provide for a right of appeal to the new tribunal mentioned above against inclusion on List 99.
6. Thirdly, the Act amends Part V of the Police Act 1997 to enable the Criminal Records Bureau established under that Act to disclose information about people who are included on either list along with their criminal records. In this way the Act provides a

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“one stop shop” system of checking applicants for child care positions against similar criteria through the gateway of the Criminal Records Bureau.

7. Fourthly, to complete the circle, the Act requires child care organisations proposing to employ someone in a child care position to ensure that individuals are checked through the Bureau against the Department of Health list and the relevant category of “List 99” and not employ anyone identified on either list.

BACKGROUND

Department of Health “Consultancy Index List”

8. This list has been in operation in one form or another on an administrative basis for a number of years as a resource for identifying people unsuitable for employment with children in child care roles. With the exception of local authorities, in respect of whom guidance is currently in place requiring them to refer names and carry out checks before making an offer of employment, there has been no compulsion on employers to refer cases to it for inclusion, to consult it when making appointments, or to take any specific action in respect of job applicants found to be listed. Equally, there has been no formal recourse for appeal against inclusion by persons listed.

Department for Education and Employment “List 99”

9. This list has also been in use for a number of years, but with two differences: it has wider criteria (e.g. to include medical reasons or forms of misconduct other than ones which reflect on suitability for employment in child care positions); and it has always been on a statutory basis (though without any formal rights of appeal against inclusion). Hitherto, the various reasons for inclusion on the list have not been prescribed to the degree set out in the Act because it has not been necessary to do so. Further, the Protection of Children Act provides a statutory avenue of appeal against inclusion on the list, and thus provides for both lists a common regime of appeal simultaneously.

Interdepartmental Working Group on Preventing Unsuitable People from Working with Children

10. The Working Group’s consideration took place in the context amongst other things of the formulation of the Government’s response to the Report of the Review of Safeguards for Children Living Away from Home (entitled “People Like Us” and known as the Utting Report) published in November 1997. The Utting Report made a number of recommendations in its Chapter 13 for improving recruitment and selection procedures in the child care field. In its published, formal response to the Utting Report in November 1998 (“The Government’s Response to the Children’s Safeguards Review”), the Government said (paragraph 8.6) that it looked forward to the Working Group recommending how a “one stop shop” for single access to the relevant information might be set up. In turn the Working Group recommended (Report, December 1998, placed in the Parliamentary Libraries 25 January 1999) how advantage might best be taken of the creation of the Criminal Records Bureau established by Part V of the Police Act 1997. It was always envisaged that primary legislation would be necessary, and this Act will allow the goal to be approached by setting up the “one stop shop” where all employers may, and those employers specifically designated under the Act must, ensure that all the necessary checks to prevent the employment of unsuitable people in positions involving regular contact with children are carried out and through the facility of one operation on their part.

COMMENTARY ON SECTIONS

Sections 1- 4: Department of Health List

11. *Section 1* imposes a duty on the Secretary of State to establish a list of people who are considered unsuitable to work with children; provides that the new list should comprise fresh names and names taken from the existing, administrative list (the Consultancy Service Index); and confers a power to remove names.
12. *Section 2* specifies the procedure and the criteria for inclusion on the new statutory list. Whilst child care organisations (as defined in section 12) *must* refer eligible names, it will be *permissible* for other organisations also to make references. All references fall to be treated in the same way regardless of whether they are compulsory or permissive. Thus:

Subsection (1) requires “child care organisations”, and permits any other organisation, to refer to the Secretary of State for possible inclusion on the list certain individuals who are or have been employed in child care positions, provided the conditions in *subsections (2) or (3)* are fulfilled.

- “**child care organisation**” is defined in *section 12(1)* to mean an organisation –
 - (a) which is concerned with the provision of accommodation, social service or health care services to children or the supervision of children;
 - (b) whose activities are regulated by or by virtue of any prescribed enactment; and
 - (c) which fulfils such other conditions as may be prescribed.

(It should be noted that this definition includes organisations which may be licensed or controlled under a prescribed enactment.)

- “**child care position**” is defined to mean a position which –
 - (a) is concerned with the provision of accommodation, social services or health care services to children or the supervision of children; and
 - (b) is such as to enable the holder to have regular contact with children in the course of his duties; and
 - (c) is not in a position within *subsection (3)* below.....

As defined in *subsection (2)*, the first of the alternative conditions which have to be satisfied for individuals to be eligible for referral for listing are that they have been dismissed, transferred or suspended on the grounds of misconduct (whether or not in the course of their employment) which harmed a child or placed a child at risk of harm, or who would have been dismissed, or who would have been considered for dismissal, on such grounds had they not resigned or retired.

Subsection (3) provides a further set of criteria which may trigger a referral. Pursuant to the subsection a referral should or may be made where the organisation has dismissed the individual, he has resigned or retired, or the organisation has transferred him to a position within the organisation which is not a child care position; that information not available to the organisation at the time of the dismissal, resignation, retirement or transfer has since become available; and that the organisation has formed the opinion that, if the information had been available at the time and if (where applicable) the individual had not resigned or retired, the organisation would have dismissed him, or would have considered dismissing him, on the grounds of misconduct (whether or not in the course of his employment) which harmed a child or placed a child at risk of harm.

Subsections (4) – (8) set out how references are to be received and determined, including provisionally. The Secretary of State, after inviting observations

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from appellants and relevant employers, and after considering all the relevant information before him, must confirm an individual's inclusion on the list if he is of the opinion both that the referring organisation reasonably considered the individual to be guilty of misconduct (whether or not in the course of employment) and that the individual is unsuitable to work with children.

Subsection (9) applies the effect of *section 2* with appropriate modifications in the case of references from employment agencies and agencies for the supply of nurses.

Subsection (10) provides that child care organisations will not be under a duty to refer cases where the dismissal, resignation, retirement or suspension took place prior to the commencement of *section 2*. It also provides that the obligation will not arise in relation to referrals made under *subsection 2(3)* where the opinion which triggers a referral was formed before the commencement of *section 2*.

13. *Section 3* provides for the transfer of names from the existing Consultancy Service Index to the new statutory list created by *section 1*. Essentially, it applies the effect of *section 2* to persons listed in the Consultancy Service Index.

14. *Section 4* provides for appeals against inclusion on the list

Subsection (1) provides that, except for those included provisionally, appeal from decisions of the Secretary of State should lie to the Tribunal and, with the leave of the Tribunal, against decisions made under *section 1(3)* not to remove a name from the list;

Subsection (2) provides that, where an individual has been provisionally included on the list under *section 1* for more than nine months, they may – with the leave of the Tribunal and subject to *subsection (5)* – have the issue of their permanent inclusion determined by the Tribunal rather than by the Secretary of State under *section 2*;

Subsection (3) provides that the Tribunal must either allow appeals against inclusion on the list, or determine the matter in the individual's favour if it is not satisfied that the individual is guilty of the misconduct as alleged, or that the individual is unsuitable to work with children, or confirm the Secretary of State's decision or direct that the individual should be included in the list if they are;

Subsection (4) provides that no finding of fact in a criminal court in the case of a relevant conviction may be challenged before the Tribunal. The reason for this is to prevent both attempts to revisit criminal trials at an inappropriate hearing and the expense and delay that could be caused by allowing such attempts;

Subsections (5) and (6) specify that, for the purposes of applications for leave under *subsection (2)*, no application may be made where the alleged misconduct is subject to any civil or criminal proceedings until six months after the determination of those proceedings. This is to allow reasonable time for the Secretary of State to consider whether, in the light of the proceedings, the name should be included in the list under *section 2*.

Sections 5 and 6 – Department for Education and Employment List

15. *Section 5* amends the Education Reform Act 1988 (the existing provision for “List 99”) by substituting a new list of grounds for prohibiting or restricting employment by the Secretary of State:

Subsections (1) and (2) insert a new subsection (6ZA) into *section 218* of the 1988 Act which covers at (a), (b) and (e) all the present grounds for prohibiting or restricting employment and, for the first time, distinguishes at (c) “fit and proper” grounds and provides at (d) that the grounds should also include the individuals who are in the Department of Health list so that the list under the amended 1988 Act may be operated together with the Department of Health list for determining employment;

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Subsection (3) is a consequential amendment to section 218 (6A) of the 1988 Act reflecting the various grounds there are to be for prohibiting or restricting employment;

Subsection (4) incorporates all the grounds as specified in subsection (6AZ) into section 15 of the Teaching and Higher Education Act 1998 (which relates to the supply of information relating to the dismissal or resignation of teachers) so that common grounds apply to both the 1988 and the 1998 Acts.

16. *Section 6* establishes a statutory appeal against decisions by the Secretary of State to prohibit or restrict employment, or refuse to revoke or vary such decisions, on medical grounds or on grounds of misconduct or that the individual is not a fit and proper person. It achieves this effect by extending the power to make regulations under subsection (6) of section 218 of the 1988 Act to allow appeals to the Tribunal mentioned at *section 4* above.

Subsection (1) specifies what decisions may be appealed;

Subsection (2) provides that regulations may lay down the ambit of the Tribunal's decisions and powers;

Subsection (3) repeats as appropriate for this context the effect of *section 4(3)* above.

Section 7 – General (Effect of inclusion on either list)

17. *Section 7* concerns the duties of child care organisations in relation to the two lists where they propose to employ someone in a child care position (defined in *section 12* and referred to at paragraph 11 above), including if that person has been supplied by an employment agency or an agency for the supply of nurses:

Subsection (1) provides that the organisation proposing to offer the post must check whether the individual is included in either of the two lists and, if so, must not offer employment;

Subsection (2) specifies what degree and frequency of checking is required when the individual has been supplied by an agency, and the circumstances in which employment falls to be refused. Separate arrangements are necessary because the individuals the agencies supply may not be engaged continuously or for more than short periods (for example, as care attendants) and it would be unreasonable to require applications for certificates on each occasion that they happen to be supplied for child care positions;

Subsection (3) explains that it will be irrelevant for the purposes of action under the section if the individual is already employed by a child care organisation. This deals with situations where, for example, an individual moves within an organisation to a new post that would attract a check;

Subsection (4) provides that for the purpose of this section the only relevant grounds from List 99 are the fit and proper grounds of subsection (6ZA)(c) inserted into section 218 of the 1988 Act by *section 5(2)* above.

Section 8 – Searches under Part V of the Police Act 1997

18. *Section 8* is necessary to the establishment of the one stop shop by making available the vehicle of the Criminal Record Bureau established under Part V of the Police Act 1997. Thus:

Subsection (1) inserts in section 113 of the Police Act 1997 (which deals with criminal record certificates) two new subsections. Their effect is to make the Bureau's services accessible to employers in child care or specified educational organisations in respect of child care positions or educational posts as a teacher, or which otherwise bring the holder into regular contact with persons aged under 19, or a position of such other description as may be prescribed. In these cases, criminal record certificates have also

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to state whether the applicant (i.e. the proposed employee) is included in either of the two lists and, if so, such details of his inclusion as may be prescribed by regulations including, in the case of List 99, the grounds on which he is included;

Subsection (2) makes similar provision in the case of enhanced criminal record certificates by inserting a new subsection (6A) in section 115 of the 1997 Act.

Section 9 – The Tribunal

19. *Section 9* establishes the Tribunal already mentioned variously above:

Subsection (1) confirms that it is to deal with appeals and determinations in respect of the Department of Health list under *section 4*, and appeals in respect of List 99 in consequence of regulations made under *section 6*;

Subsection (2) confers a power to make regulations for the Tribunal's proceedings;

Subsection (3) specifies, though not exclusively, what the regulations may cover;

Subsection (4) disapplies Part 1 of the Arbitration Act 1996 since it would not be appropriate for these proceedings, though it is left open that the regulations may nonetheless draw on the Act's provisions;

Subsection (5) establishes offences triable only in the magistrates' court confined to three specific areas of the regulation making power and for the purpose of supporting the integrity of the Tribunal's procedure, specifying also the level of penalty available to the courts on conviction;

Subsection (6) provides that appeal from the Tribunal will lie to the High Court on a point of law only;

Subsection (7) gives effect to the Schedule to the Act which concerns the constitution and management of the Tribunal.

Section 10 – Supplemental

20. This section enables the Secretary of State, by means of an Order subject to affirmative procedure, to apply the Protection of Children Act arrangements to adults who are suffering from mental impairment as defined in *section 12(1)*. Since the situation of such adults is in practice indistinguishable from that of the children the Act desires to protect, it follows that they should receive the same protection in due course.

Section 11 – Financial provisions

21. This section authorises the direct and indirect expenditure that will be incurred in implementing the Act.

Section 12 – Interpretation

22. *Section 12* clarifies important features as follows:

Subsection (1) defines the meaning of the principal terms used in the Act ;

Subsection (2) provides that, where an organisation only partly falls to be regarded as coming within the definition of a child care organisation, then only that part should in effect be treated as having to comply with the relevant provisions of the Act;

Subsection (3) forms part of the definition of "child care position" in *subsection (2)*;

Subsection (4) provides that regulations under the Act (e.g. under *section 4(1)(b)*, *section 9(2)* or *(3)*, and *section 12(1)*) must be made under the negative procedure.

Section 13 – Transitory

23. *Section 13* makes further provision for dovetailing present and future arrangements:

Subsections 13(1) and (2) provide that cases referred for inclusion on the Consultancy Service Index satisfying any of the conditions specified in *section 2(2) or 2(3)* but undetermined by the time *section 2* is brought into effect must be treated as if they were fresh references under *section 2(1)*, thus engaging the full procedural protections afforded by those provisions;

Subsection 13(3) preserves the ability of organisations to access the Consultancy Service Index and List 99 without first going through the Criminal Records Bureau until such time as the one stop shop set up by *section 8* comes into operation;

Subsection 13(4) makes it clear that it will remain possible to access List 99 without having to go through the Criminal Records Bureau.

Section 14 – Short title, commencement and extent

24. *Section 14* gives the Protection of Children Act its title (*subsection (1)*); empowers the Secretary of State to make orders bringing it into force in whole or in part and at different times (*subsection (2)*); and provides that, apart from the extension of *section 8* to the whole of the United Kingdom including Northern Ireland, the Act should otherwise apply to England and Wales only (*subsections (3) and (4)*).

The Schedule

25. *The Schedule* details the appointment, composition, tenure and management of the Tribunal.

26. *Paragraph 1* deals with the composition of the Tribunal:

Paragraph 1(1) provides for the appointment of a President and two panels – a panel from whom legally qualified chairman of individual tribunals may be appointed, and the second panel from whom the other two, lay members may be chosen;

Paragraph 1(2) provides that the tribunal in any particular case will consist of three persons – a chairman and two other members.

27. *Paragraph 2* provides for the appointment of the President and panel members:

Paragraph 2(1) lays down that the President and the Tribunal chairmen are to be appointed by the Lord Chancellor;

Paragraph 2(2) specifies that the minimum legal qualification for those appointed under *paragraph 2(1)* is to be a solicitor or barrister of at least seven years' standing;

Paragraphs 2(3) and (4) requires that the Lord Chancellor also appoints the lay panel members but in their case after consultation with the Secretary of State, and only if they satisfy any appointment criteria that may be specified in regulations.

28. *Paragraph 3* deals with the tenure of appointees:

Paragraph 3(1) provides that the President and panel members are to hold and vacate office under the terms of their instruments of appointment;

Paragraph 3(2) permits all appointees to resign by notice in writing but in all cases to remain eligible for reappointment if they cease to hold office.

29. *Paragraph 4* confers a discretion on the President to arrange meetings of panel members, and for their training.

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30. *Paragraphs 5,6 and 7* empower the Secretary of State, with the consent of the Treasury, to provide the Tribunal's staff and accommodation, to pay the President and panel members, and to pay attendance allowances.
31. *Paragraph 8* provides for the insertion of the new Tribunal in Schedule 1 to the Tribunal and Inquiries Act 1992, thereby putting the Tribunal under the supervision of the Council.

DETAILS OF THE BILL'S PASSAGE THROUGH PARLIAMENT WERE AS FOLLOWS:

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