Fair Play for Children

for the Child's Right to Play

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To: Ministers and MPs

Protection of Freedoms Bill

Please find attached our comments on Part V of the Bill. We have done so by reference to the explanatory documentation re the Bill, the Impact Assessment on proposed changes to the Vetting & Barring Scheme, and EUROPEAN CONVENTION ON HUMAN RIGHTS MEMORANDUM BY THE HOME OFFICE

Yours sincerely

Jan Cosgrove
National Secretary

Office Opening Times: Tuesday to Friday 10am-4pm

RESPONSE BY FAIR PLAY FOR CHILDREN RE

Part 5 of The Protection of Freedoms Bill

Summary

Fair Play for Children is an organisation founded in 1972 and dedicated to to promotion of the Child's Right to Play within the context of the United Nations Convention on the Rights of the Child.

Our membership includes several hundred organisations, many of them small local bodies who as late as 2001 had no access to information about the previous convictions of prospective employees and volunteers.

We are confident that, based on our online survey of employers a couple of years back (over 1200 responses), the CRB system has improved child protection good practice and awareness to a remarkable degree.

We have long experience in this field having taken part in the pre-CRB pilot, VOCS (Voluntary Organisations Consultancy Service)funded by the Department of Health, between 1994 and 2002.

We are highly critical of any attempts to make this into a party political issue as has been evident in recent weeks by a senior government minister and we also are concerned by the unfortunate tendency to refer to alleged 'common sense' in place of firm evidence.

We also favour use of pilots, as with the 'Sarah's Law' situation, with this Bill when enacted.

Our concerns cover basic aspects of the Bill especially clauses 66 and 71.

We have adopted the position that the proposal to send certificates to applicants only seriously undermines the principle purpose of the 1997 Police Act re disclosure, that employers should be able to access an independent, third party disclosure unmediated by the applicant, as an aid to making safer employment decisions.

We also are able to propose that consideration of regulated activity status be aided by a statutory risk assessment guidance framework which employers would be able to access online for a step-by-step process which would inform them that the position was regulated, or not, or borderline and requiring further consultation with CRB. We propose that this would enable case-by-case determination of regulated status before the recruitment stage rather than a blanket approach and thus be more proportionate.

Our Comments

1 **We are basing our response on government publications enabling a paragraph by paragraph response below.**

2 **However our main concern must centre on Clause 66:**

3 ***"Clause 66*** *would amend the eligibility criteria for barring. Under the current system,* ***anyone*** *convicted of an offence resulting in automatic barring, or subject to discretionary barring because of other convictions or conduct, could find themselves placed on the barred list regardless of whether they had ever worked with children or vulnerable groups or ever intended to do so. The Bill would amend this by limiting the barring provisions to those individuals who had previously worked, or had expressed an intention to work in, regulated activity. People who had never worked in, or had no intention of working in, regulated activity would no longer be covered by the system and would not be entered on the barred lists even if convicted of a relevant offence."*

4 **We hold this to be introducing a serious regression in child protection law** in that it has been the case since the 1933 Children and Young Person's Act that someone convicted of relevant Schedule 1 offences is barred from working with children under 18. This proposal would change that based on no sound evidence that such a change is warranted. The previous barring schemes such as List 99 would have had such information passed to them. Disqualification under Part 2 of the Criminal Justice and Court Services Act 2000 Section 28 also is relevant.

5 **The key issue here is that both the Bichard and Cullen Reports, based on real and tragic events, underlined the necessity to share information about those who are known risks to children** and that is why these are the subject of automatic referral and of barring. Those who are subject to such barring know they are disallowed from working with children as a result of their convictions. It is entirely reasonable that at an early stage an employer should be able to find out this by making a simple enquiry to ISA. This will deter people with such disqualifications from even considering applications. One thing is certain and that is that there are serious offenders who will seek out any loophole they can to circumvent the law. If we are speaking of 'common sense' one need ask just a few parents and other adults and they would say it was axiomatic such people go at once onto the barring list.

6 **Reading the Research Paper RP11-020 of 23rd February 2011 we can find no evidential basis that such a change has any basis in known offender behaviour, in criminal offending and re-offending statistics**. There is no Article 8 gain here that can be justified when set against A8 rights

of children and also their Article 19 Rights per the UN Convention on the Rights of the Child which we hold has equal merit and claim on the UK as the ECHR. The person who has committed such an offence has no special right to additional protection which we believe this proposal offers for no justifiable reason. The offence and sentence are what they are, and the need for that information to be placed with ISA is in promotion of A19 UNCRC. The 2000 Act makes no reference to whether the person will ever seek a position working with children and to introduce a different measure re ISA is wholly unsustainable. Indeed one measure would contradict the other.

7 If the person is disqualified there is no reason they cannot be placed on the ISA list, no appreciable costs and no threat to the rights of the individual who is disqualified. The public will not be happy with such a change once it becomes understood – this is not a scaling back of the 2006 Act alone, it goes against the grain of legislation over many years including the 2000 Act .

8 In our Report, 'Out with the Bathwater?', we cite the case of David Lawrence whom we encountered during the pre-CRB pilot, VOCS. We were able to supply checks to a junior football league akin to CRB Enhanced, and a good deal of soft intel was revealed which led to the league removing his access to children. Later he was convicted of multiple offences. On leaving prison in November 2002, it took him until the following March to become involved similarly in another league then unable to access CRB checks (as the FA had not got its act together). It took the FA and others a Court Order using the 2000 Act to remove him. His access frequency? Less than the period brought in by ED Balls early in 2010. He is a multiple offender and, on the evidence, recidivist. He is typical of a class of dangerous offender who pose continued risk to children, the evidence is that they seek opportunity. Sharing of information as envisaged by Cullen and Bichard, the latter through barring, is one of the most effective means of preventing this.

9 **Our argument is that such persons should be permanently barred whether or not they seek employment** because the evidence is that they will try to gain entry to opportunities to access children and that this bar is one element in the machinery to prevent and dissuade them. Since this would not affect their A8 rights unless they did attempt to seek such opportunity and would help protect the A8 ECHR and A19 UNCRC rights of children, we believe S66 should not be enacted as envisaged, and consistency with S28 of the 2000 Act ought to be maintained. We can see no argument that the right to privacy extends to an individual who has been convicted of such offences to the extent proposed under S66.

10 **Differentials in home-based and activity-based settings.** Much has been made by those hostile to vetting and barring in activity settings of the

notion that offending against children occurs more often in home-based situations than activity-based, as if this somehow justifies reducing or even eliminating the need for vetting. Fair Play has encountered numerous such claims where vetting is characterised as evidence of 'nanny state' and over sinister trends against individual freedom and civil rights. Many nonsense scare stories originated from such sources and they have had an impact in the media and possibly in decision-making. They are as corrosive as the equally-numerous 'laws' people seem to think exist but do not. [Often we find people saying it's against the law e.g. to take photos of children, or to let them sit on laps etc in play projects. This is where common sense can be encouraged.]

11 However, Fair Play wishes to point out that although there are more offenders in home-based settings, the attached document **diff.pdf** (link at http://www.arunet.co.uk/fairplay/diff.pdf) sets out the effect of the number of victims an offender will access in both such settings. We start with a disadvantage that not much solid data exists. So we have had to make estimates. So, in the domestic situation, where it will be mainly parental/close family, common sense will suggest there will be 1 or 2 victims in most situations. We do not have data on whether such offenders will tend also to offend in activity settings but we feel this is not likely to be the case though we admit we have no basis for that particular opinion bar anecdotal.

12 The activity setting provides far more doubt as to the victim level. Those convicted of offences are unlikely to admit any more offences than plea bargaining will require for leniency. At the extreme end, a study in the US of those admitting offending but undetected suggests that over 24,000 victims were accessed by just 160 offenders giving a victim 'tally' per offender of 160. There may have been exaggeration but even a proportion of one quarter that rate would be a sobering matter.

13 What is known is that the percentage of offending is 89.6% by Family member, 6.2% by professionals and 4.2% others. Our calculations attached show projections based on numbers of victims per offender and we show 4 scenarios. If there are 5 victims per professional, 1 per family and 1 other the victim ratio is 75% family, 24% professional and 3% other. At 15 victims per professional, 1 per family and 2 other, the difference is profound in that 49% of victims are of professionals, 48% family and the rest Other. As it is accepted that offenders in professional settings (and we include volunteers in this) will tend to seek more than one victim either simultaneously or one after the other over a period of years, we conclude that the claims about the scarcity of offending in activity settings in comparison with family are wholly undermined.

14 The tendency of activity-based offenders to have multiple victims and possibly also to use existing compliant victims in recruitment must form a strong basis re measures to vet and bar known offenders. In our Report, 'Out with the Bathwater?', David Lawrence is such an offender, almost compelled it may seem to seek opportunity, and whose offending occurred over more than 2 decades and involved multiple victims.

15 We also wish to draw attention to the fact that many victims do not come forward and that many prosecutions are based on sample charges not on totality of victims.

16 The outcome of our concern is that the proposals in the Bill must take full account of the serial nature of much offending of this type even after conviction and release from prison.

17 During this response we introduce the concept of 'secondary access' where children are accessed in terms of creating trust in situations which may not appear to warrant checking but because the worker may live in the same community as children at an activity, secondary access can occur in that community. Example: David Lawrence was a football referee and coach for a junior league but had a shop where the police say they had reason to believe he committed offences, often on boys accessed via the league. Fair Play has seen the value of access to enhanced level checking in such situations, not based on frequency of activity nor on lack of supervision, but based on risk assessment re opportunity.

18 Our conclusion is that the proposed changes do not match 'real life' and need to be reconsidered as fact would suggest a less lax regime is needed than the Freedom Bill would provide.

19 The proposal re S66 of the Bill will introduce ambiguity and lack of clarity into the barring system. It could mean that an employer would find it hard to find out if someone was subject to a Disqualification Order etc in a situation where they believed a check justified.

20 **This also illustrates the danger of a one-size-fits-all approach inherent in the attempt to redefine regulated activity**. In the comments to government papers below, we recommend a risk-assessment approach to defining regulated activity where a framework is established to which employers (including voluntary bodies taking on volunteers) can apply (online pre-advertising of posts) to establish whether a check ought to be sought. In such a system, the barring information quickly establishes whether an applicant is OK or not, and the applicant will understand that this will be so. This will deter those who are barred even from applying.

Deterrence is a major element in vetting and barring, one little researched, but it is as important as information to employers in our view.

21 **We also believe that even in non-regulated situations where trust of children is involved, employers ought to be able to consult the barring list online**. No unreasonable intrusion into A8 rights is involved as any barred person ought not to be applying and we can see no basis for protection of privacy or reputation if the matter is that by applying the applicant is committing an offence, and the A8 and A19 rights of children will be protected by the revelation of this. This would be a simple process and would not involve the applicant in such positions being the subject of a CRB/ISA full application, or employers in cost and is akin to the Sarah's Law system already proven effective.

22 **No regard has been paid to the A8 rights of other staff and volunteers, only to the applicant's** . We know that there have been situations where the ignorance of other staff and volunteers as to the previous convictions of people working with them have created situations where their A8 rights re reputation have been involved. We have seen the effect of newspaper publicity that a convicted child offender has been working with them unknown, and of public association of others with the offender in the aftermath. This was where there was no access to such conviction or barring information. The colleagues of applicants deserve the re-assurance and protection of their reputations that our approach would offer.

23 **The issue of numbers of people to be the subject of checks has been central but we can find no evidence to sustain what the actual numbers would have been under the original 2006 Act system**. 11 million, 9 million – we feel numbers have been plucked from the air. This exercise indeed has become all too much a numbers game. We put it plainly – if a risk-based system were to show the need a) to regulate and b) allow access to barred status information about e.g. 11 million, would that be wrong, would it be disproportionate? . It would be 'common sense' and it would be consistent with A19 UNCRC. Maybe the figure would be much lower, as the government intends, but only time and experience of working the proposed system will tell, and we argue that no government should worry if it can show on that accumulated evidence that the situations covered were indeed justified.

24 **Our proposed approach would, for example, mean that one employer sending staff into schools regularly re maintenance work would not need to seek barring information, based on the risk assessment framework we envisage, but another might**. This would cover variation and be case-by-case. In our responses below we demonstrate

that this could be done pre-advertising of posts so A8 rights of applicants would not be affected. The approach informs employers of whether they should seek checks and would enhance employers employment good practice.

25 **Fair Play also wishes to propose that any new scheme be the subject of pilots, in the same way as the Sarah's Law proposals were tested**. This would enable refinement of procedures based on pilot experience and evidence, prior to full roll-out.

26 ***"Clause 71*** *would introduce new arrangements for informing bodies providing regulated activities about whether a person is barred. Two options would be available: reactive and proactive. The reactive option would enable a regulated activity provider to apply to the ISA to find out whether a particular person is barred. Under the proactive option, the regulated activity provider could register with the ISA to be automatically informed if a particular person becomes barred. Both options would require the consent of the individual in question."* (Research Paper 11/20) The central purpose of sharing of information to promote child protection is not served if the applicant has to give consent if the employer is making a check within the employment period. An employer may suspect that an employee's status may have changed and should have the facility to check. But we believe very firmly that a system where the current employer is informed automatically has real child protection merit, and that this would require retention of the monitoring function of ISA. Indeed we cannot see how a barring system which makes it mandatory for employers to check at application stage can make much sense unless there is the automatic updating system.

27 This will not mean a separate ISA registration process and record keeping. When a CRB application is made, that in effect is a form of recorded registration and we understand CRB retains that information, for example in case there are disputes, for confirming to employers that a CRB disclosure has been made etc. Such disclosures contain information re –barring and surely it would not take much effort to inform that last-known employer of status change. That might also enable an employer to respond that the person has moved from their employment and maybe to what kind of position if known.

28 The CRB notification of update would invite the employer's response and ask especially if it were known whether the employee's new position elsewhere might involve work with children. Such a system could help promote child protection and deter re-offending/assist in detecting breaches of the law.

29 **An issue passed over by the review is the charging scheme for volunteers**. In our Report we outlined the result of an FoI we undertook

through CRB to establish how CRB paid for the non-charge. It emerged that, as we understand, there is no Government grant to cover the cost of provision of checks to volunteers. CRB is required to balance its budget in this regard by loading the charge to employers for paid staff checks. This in fact adds 25% to the cost of each Enhanced Disclosure from the figures CRB provided.

30 Frankly this is unfair on employers and a hidden charge on employment. Whilst many we surveyed in the voluntary sector, of which we are firmly a part, want no change, we have to be upfront about self-interest and say this is not justifiable. There seem to us to be 3 routes: such posts are charged for regardless of paid or unpaid status, volunteers are charged or the government makes subsidy available.

31 Successive governments have expressed full support for volunteering and for not burdening voluntary bodies or volunteers with such costs, and this is not the time, if there ever could be one, for the first or second options in 27 above. The government talks of the Big Society and we say that on this, where the sum will not be a huge one, that it should put its money where its mouth is. The most cost-effective means is subsidy to the CRB. If it also wants Umbrella Bodies not to charge for administration to organisations for volunteer applications, maybe some form of grant-in-aid to a maximum per application could be available, removing even a £10 or more processing charge borne by voluntary groups where their volunteers' applications are concerned.

32 Budget implications we worked out as £31 million p.a. re CRB charges and the grant-in-aid would not be excessive on top of that.

33 *"However, we fear that the proposed changes to criminal record checks will add to the burden faced by voluntary organisations such as the Scouts. The decision to send a single copy of the CRB disclosure to a potential volunteer who must then pass it to their local Scout leader will undoubtedly save the Government money but it will increase the amount of bureaucracy expected of local volunteers, who give their time to support young people not to chase CRBs. We call on the Government to retain a system where a copy of the CRB disclosure is sent direct to the organisation to ensure that local volunteers remain free to do what they do best, unfettered by unnecessary bureaucracy*." We agree with the Scouts Association concerns here and have sympathy with their views about employers being sent copies.

34 **<u>One of the central tenets of Cullen was that the employer receive such information directly from an independent third party not the employee</u>**. Our concern is that the employee might then attempt forgery or

other deception re the certificate in their possession. This proposal in the Bill entirely negates the original sense of Cullen and puts too much control into the hands of the applicant in our view. **After all, CRBs were meant all along to be an <u>employer's</u> tool for helping make better recruitment decisions and we see this idea as a total retreat from that principle.** How can that be served if the employee wants to withhold that information? We can see the sense of a delay period – the applicant would need to be able to inform CRB of the need for delay which would be automatic where the applicant was arguing about being barred. That delay would remain in place until resolution of dispute by the VBB.

35 **<u>Now the Bill proposal not to consider barring until the person made application clearly would cause long delays in recruitment</u>**. The current SVGA system considers barring at the time of conviction/report and any dispute and A6.1 situation is resolved then. The applicant is fully aware of barring status re employment before making application. In the proposed system, this all happens at the point of application. That not only hinders the employer's wish for a smooth recruitment process (and risks delay and/or expensive re-advertising and re-interviewing) it is hardly fair to the applicant who later is able to show s/he has successfully appealed the ISA proposal to bar. The new proposal is actually an A8 regression for the applicant as well as unsound in child protection terms.

36 In our view, if the applicant makes no bid for a delay, the information should then go to the employer as now. The central purpose of the CRB was not for the employee to have such a certificate, it was for the employer to do so to aid recruitment, the employee having a copy to safeguard rights. The idea that the applicant/employee has the decision whether to release information or not is, frankly, nonsense. Providing that there is the option of delay in the appeal situation, the best course is to retain employer disclosure. That was the purpose of disclosure!

3rd April 2011

Appendix

Below are various government documents concerning the Bill, our comments are given para by para in red.

Part 5: Safeguarding vulnerable groups, criminal records etc.

Chapters 1 and 2: Safeguarding of vulnerable groups and criminal records

45. The Programme for Government (section 14: families and children) said "*we will review the criminal records and vetting and barring regime and scale it back to common sense levels*".

Fair Play published its Report, *'Out with the Bathwater?'*, in June 2010, anticipating the review of the VBS scheme. It made a number of recommendations which would have both simplified the original scheme and at the same time made it more rigorous in the protection of children. Additionally it proposed improved civil liberties safeguards for applicants and for a fairer and more proportionate disclosure of Local Police Intelligence ('soft') to employers.

http://www.fairplayforchildren.org/pdf/1281540226.pdf

http://www.fairplayforchildren.org/index.php?page=HTML_News&story_id=7374

6. The Vetting and Barring Scheme was established in response to a recommendation made by Sir Michael (now Lord) Bichard in his June 2004 report following an inquiry into the information management and child protection procedures of Humberside Police and Cambridgeshire Constabulary1; the Bichard Inquiry was established in response to the conviction of Ian Huntley, a school caretaker, for the murders of Holly Wells and Jessica Chapman. The Inquiry Report recommended, amongst other things, that a registration scheme should be established for those wishing to work with children or vulnerable adults.

Fair Play would remind all MPs and current Ministers that the 2006 Act was drafted and legislated in the wake of a serious Report into a tragedy. Also, that it was adopted without Division in either House. The current Deputy Prime Minister was, indeed, newly appointed as Shadow Home Affairs spokesman for his Party. As an organisation which was deeply involved in the pre-Bill stages in a DFES Implementation Working Party, we have been deeply disappointed by the representation of the original Act by Members whom we feel ought to know better. Whilst 'Protection of Freedoms' has a laudable 'ring' to it, one of those freedoms is to be protected as a child.

Bichard, as our Report demonstrates, in fact proposed a registration which would have been a registration of all those working with children as a condition of being able to work. What emerged with VBS was in fact a scheme to identify those who should NOT work with children. In identifying this, the VBS scheme in fact was predicated to build on and put onto a proper statutory basis up to 7 existing barring

schemes run by Ministers, such as List 99. The migration from List 99 and the others to the Vetting and Barring Scheme has been completed.

We would identify the error, if there were one, that the VBS that emerged required all who were within the Act's scope to 'register' not in the original Bichard sense of "licence to work with children" in effect, but in order for existing criminal records, barring and LPI to be reviewed and the employer advised as to whether the person was barred or not and what criminal records information and LPI was known.

It would be interesting perhaps to ask CRB what happends to e.g. applications for Enhanced Disclosures now, what is retained and in what form.

Fair Play proposed that a simplified scheme would:

1. Require the employer to register online with CRB/ISA (eg provide PAYE ref details, Co number, charity registration) and to be given a single ID
2. Require the applicant to register online an intent to apply for a post with employer, quoting the employer ID. S/he then sent by email one-time applicant ID to be used to verify the application.
3. Employer submits applicantion online, validated by employer ID and one-time applicant ID
4. Application carries test for eligibility based on regulated activities which could help reduce number of inappropriate applications at source.
5. CRB receives online applications and immediately submits these to PNC, ISA and local Police Force(s)
6. Police check for LPI and send any which can reasonably be regarded as relevant to ISA who then consider any such with regard to their barring functions.
7. ISA checks against its List, makes any new or revised barring decision and remits this with any remaining LPI to CRB. This subjects LPI to more rigorous Article 6.1 consideration as the VBB is a quasi-judicial body, a fact underlined by recent judgments. It is at this stage that we believe the apoplicant must be engaged in the consideration of allegations, representation, cross-examination etc, prior to decision on barring status. We do not believe it is very fair to suddenly unload on an applicant a pile of LPI data outside of such a machinery.
8. CRB combines ISA idecision., PNC records and any relevant LPI remaining into a CRB Enhanced Certificate.
9. However we are strongly of the view that an end must be made to the indiscriminate issuing of all LPI and unspent records to employers at the behest of the Police. We believe it would be better if an outside and independent body, such as ISA, made the decision as to what should be released and that there should be a relevancy test – i.e. based on a detailed job description provided by the employer. **Our long experience is that on too many occasions applicants were disadvantaged unnecessarily by employers having access to information of no justifiable relevance to the post on offer**. This has, in our view, militated against the Rehabilitation of Offenders intentions of the CRB scheme, and our Survey of

employers concerning our proposals was quite clear in the support we gathered for a more balanced approach. Indeed, we felt our concerns backed by one negative comment where a religious body opined that they wanted full access to such records, as now, as this helped them gauge the moral status of the applicant as set against their own beliefs. We took the view, very strongly, that this is not what a vetting and barring scheme is there to supply. Such questions are for interview etc, outside such a statutory scheme.

10. MOST IMPORTANTLY, whilst we are open-minded on the question of a single certificate going to the applicant (we assumed one would also go to the employer), we are adamant that one requirement MUST be made of an employer in a Regulated Activity situation. That is, it MUST be mandatory for the employer to consult the relevant Barring List, and we say this can be done quickly, within minutes, online. Any retreat on this must put children at risk. Again, if the Certificate issued to the applicant carried some ID (e.g. the issue 12 number ID currently borne on each certificate) plus an Applicant ID (provided to the Applicant as above) this information plus the Employer ID (as above) would validate the request and the information could be released through a secure online portal for download etc. In our view, all it would need to state is that [Applicant A] [Certificate ID] was issued on [date] and [Barring Status] – plus warning of penalties for employing in Regulated activity.
11. Our KNOWLEDGE is that people will apply to employers where they perceive laxness and non-checking. Our Report has detailed information on this.

1 http://www.bichardinquiry.org.uk/10663/report.pdf

47. The Safeguarding Vulnerable Groups Act ("SVGA") provided for such a scheme maintained by the Independent Safeguarding Authority ("ISA")1. Originally some 11 million people working with children or vulnerable adults would have been required to be monitored under the Scheme. In response to concerns about the scope of the Scheme, the then Government commissioned its Chief Adviser on the Safety of Children, Sir Roger Singleton, to conduct a review of the Scheme. Sir Roger Singleton's report2 and the Government's response was published on 14 December 2009 (Hansard, House of Commons, column 50WS to 53WS).

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1 The ISA was originally known as the Independent Safeguard Board; the change of name was made by section 81 of the Policing and Crime Act 2009.

2 'Drawing the Line' – A Report on the Government's Vetting and Barring Scheme, available at:
http://www.ccpas.co.uk/Documents/VBS%20Draw%20Line%20Report.pdf

Fair Play would remind that there was a good deal of inaccurate and anecdotal material which made specious claims about the VBS. We'd use the Respected Authors example much quoted in the national media, Mr Pullman and others fulminated about having mandatorily to register with ISA to be able to go into schools for single visits.

There was one simple problem with such a claim – it was never the case because authors will be free-lance and exempted from compulsory registration and in any case single visits would not have been covered even if they had had PAYE status. However, it is our understanding that ANYONE who has been barred by statute may not enter such establishments. Whilst we can see the sense of an author choosing not to seek what would have been voluntary ISA registration (surely a matter of cost) we can see a case for schools being able to consult the barring list. Surely if parents were asked, they would not want such a barred person in their children's schools for whatever reason, nor if children were asked (no one thinks of this) would they be likely to agree. It should remain an offence for such a barred person to enter such an establishment, full stop.

We cite the following cases re authors:

http://www.fairplayforchildren.org/index.php?page=HTML_News&story_id=7749

http://www.fairplayforchildren.org/index.php?page=HTML_News&story_id=4743

http://www.guardian.co.uk/books/2010/apr/05/william-mayne-obituary and http://en.wikipedia.org/wiki/William_Mayne

This is no desire to 'hound' it simply recognises that such a person as the latter case has no lawful business going into a school whatever his renown, and that this is so for very sound reasons.

48. The revised Vetting and Barring Scheme, as recommended by Sir Roger Singleton, would have involved some 9.3 million individuals.

Our view of Sir Roger's Review was that it was not predicated in sound child protection good practice. A numbers game arose, as if per se this was or is the real issue. We ask Members to accept that, if sound child protection good practice principles worked out in practice to require the vetting of 11 million people that would be right. The poor basis of the review was inherent in one of its major yardsticks, to change the basis for checking from e.g. 2 sessions a month to one or more a week. Such a crude yardstick goes completely against the risk assessment criteria Fair Play has urged its Member organisations to use and which we hope will invest the new scheme.

Our Report makes it clear that the basis for risk assessment here must be principally the opportunity any activity presents for the building of trust between child and adult and the vulnerability of the child where the adult has mal-intent. That, as we know from long and positive experience of direct work with children, can be built on frequencies well below Sir Roger's recommendations. It seemed to us that his brief denied him much scope in this regard.

It was an error to assume the number to be checked must be reduced because it was too high. The correct question would have been "how many situations are there where regulation is needed and what is the proper basis for evaluation and

risk assessment?" We are clear that the issue of Trust is the sound basis and that risk assessment case-by-case is indeed the answer. But if that were to increase the number to be checked that would be the right thing to do.

One other aspect neglected in all reports we have seen is that of what we have come to term **'Secondary Access'**. Put simply, after a club sesson, we do not put children away in a locked cupboard until next time (though sometimes we are sure workers feel this might be a good thing ...), nor are workers. If they all live in a small community/neighbourhood, then the trust built by virtue of attendance at a club etc can be carried into the community, and can and has been exploited by offenders. Secondary Access is a serious component of any risk assessment and must, therefore, be considered in any new regime. **Neither CRB nor VBS allowed for this yet it must be one of the principal routes to access**. If the scope of the activity on its own might not reach the regulated activity definition, the secondary access may well move it into that definition.

Two examples. Mum takes son to judo, stays or there is close supervision of volunteers – and she then drives him home and he does not see the judo people again for a week. Maybe a case for not checking BUT such an approach fails to do justice to a situation where 6 volunteers suddenly find that another volunteer is indeed an offender and their organisation was blocked from making even an online check of the barring list – Members need to imagine waking up one morning to find that the 7th person has been arrested and is a known offender. We have seen this. It hardly helps attract new volunteers, it can wreck an organisation, and affects their rights re reputation.

2nd case. Boy/Girl walks to club, gets to know a volunteer who grooms him/her and meets him/her outside club hours in local community. Secondary access - parents may be lulled into thinking this is healthy and nice. It has happened. Checking on barred status will help activity organisers avoid this. This need not be an onerous or time-consuming matter.

Based on what is being proposed, we would see scope for a means, again online, for applicant to ask for onetime ID, organisation to provide evidence of status and for a simple request, backed by the volunteer's ID to consult the barred list. A matter of minutes and peace of mind for all concerned.

Our view is that most volunteers would have no problem with this and would be glad to be working in a set-up where they know this is common and good practice.

On 15 June 2010 the Home Secretary announced that voluntary applications to be monitored under the Scheme, which was due to begin on 26 July 2010, would be suspended pending a further review and remodelling of the Scheme (Hansard, House of Commons, column 46WS to 47WS). The Home Secretary announced the terms of reference of the remodelling review on 2 October 2010 (Hansard, House of Commons, column 77WS to 78WS), as follows:
"In order to meet the coalition's commitment to scale back the vetting and barring regime to common-sense levels, the review will:

Consider the fundamental principles and objectives behind the vetting and barring regime, including;

Evaluating the scope of the scheme's coverage;

- Our deep concern is that this whole business was not the outcome of any rigorous or fact-based evidence. Ministers of 2 governments reacted to a lot of unfounded anecdotal verbiage and claims, ignored evidence from CRB's surveys and played the gallery. What on earth does "common sense levels" mean? What plays to that gallery? MPs and Ministers will soon find out that that gallery will soon yell blue murder when inadequate measures full of holes, uncertainties and contradictions are found wanting. **"Adequate"** is the word not "common sense". Or should the question have been worded "Could the balance between adult liberties and children's rights be improved by scaling back the employment vetting systems which involve the CRB?" We ask this because it is misleading to portray the issues as those of liberties re over-weaning bureaucracy. This might suit the purposes of ex-Marxist now-turned-general-purpose-pundits-on-liberties but it does not stand up to rigorous scrutiny.

  What is depressing is that the actual public vetting part of VBS was never trialled. This is simply ludicrous, to go the the time, effort, upheaval and expense of a legislated public safety function and to call it in on grounds of political expediency untried. The damage done to confidence in the legislative process in the final moths of the last government and in this one apropos children's safety is considerable amongst those of us who have worked in this field over more than2 decades in one way or another.

  What Fair Play hopes to see is for any new system to be piloted first, ,maybe over a year, in limited areas, and evaluated. This was not done with VBS, with a resulting mess, but was implemented very successfully with "Sarah's Law", piloted in a few areas and now rolling out nationally. *MPs and Ministers may like to recall the dreadful predictions from so-called civil liberties pundits about how Sarah's Law would be a vigilante-filled nightmare.* We commend a pilot.

The most appropriate function, role and structures of any relevant safeguarding bodies and appropriate governance arrangements;

Recommending what, if any, scheme is needed now; taking into account how to raise awareness and understanding of risk and responsibility for safeguarding in society more generally."

Fair Play has been involved in criminal records checking since 1994. We 'went' with CRB when it came on streem in 2002. Prior to this we accessed police records with LPI from 1994 as part of the Home Office funded VOCS (Voluntary Organisations Consultancy Service) scheme. We probably processed 8-10,000 VOCS checks on behalf of member organisations in the period to March 2002 and had experience of disclosure of LPI – see our Report for detail. Throughout this period we have maintained that any such disclosure scheme is only part, albeit an important one, of an overall good child protection practice by employers, staff and volunteers.

Typically our Members have been small community based bodies delivering 'front line' often inexposed situations. Until VOCS they had no access to criminal records and little child protection awareness along with the rest of the voluntary sector.

49. The report of the remodelling review was published on 11 February 20111. Amongst other things, the report recommended that the requirement on those working with children and vulnerable adults to be monitored under the Scheme should be dropped. Chapter 1 of Part 5 of the Bill gives effect to the report's recommendations.

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1 http://www.homeoffice.gov.uk/publications/legislation/protection-freedoms-bill/

50. Part 5 of the Police Act 1997 ("the 1997 Act") makes provision for the Secretary of State (in practice, the Home Secretary) to issue certificates to applicants containing details of their criminal records and other relevant information. In England and Wales this function is exercised on behalf of the Secretary of State by the Criminal Records Bureau ("CRB"), an executive agency of the Home Office. These certificates are generally used to enable employers and prospective employers or voluntary organisations to assess a person's suitability for employment or voluntary work, particularly where this would give the person access to children or vulnerable adults. The CRB has operated since March 2002.

51. Part 5 of the 1997 Act provides for three types of disclosure:

- A criminal conviction certificate (known as a 'basic certificate') which includes details of any convictions not "spent" under the terms of the Rehabilitation of Offenders Act 1974. Basic certificates are not yet available from the CRB ;
-
- **If these are brought in at last, they should have clearly stated what they do not contain and that they are unsuited to employment with vulnerable groups** – otherwise it is almost certain that unsuspecting parents may be conned in informal home care situations, legal or otherwise
-
- A criminal record certificate (known as a 'standard certificate') which includes details of all convictions and cautions h e ld on police records (principally, the Police National Computer (" P NC "), whether those convictions and cautions are spent or unspent ;
- CRB no longer accepts these as appropriate to children and young people situations, we do not provide a service for these as an Umbrella Body
- and
- An enhanced criminal record certificates (known as an 'enhanced certificate') which includes the same information as would appear on a standard certificate together with any other relevant, non-conviction information contained in local police records and, in appropriate cases, barred list information held by the ISA .

52. Mrs Sunita Mason was appointed by the previous Administration in September 2009 as the Government's Independent Adviser for Criminality Information Management and was commissioned to undertake a review of the arrangements for retaining and disclosing records held on the PNC. Mrs Mason's report1 was published on 18 March 2010 alongside the Government response set out in a Written Ministerial Statement (Hansard, House of Commons, column 73WS).

Our National Secretary was one of those who met Ms Mason during her 2nd Phase review. We raised concerns with her about her 2nd Report draft.

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1 'A Balanced Approach: Safeguarding the public through the fair and proportionate use of accurate criminal record information' available at http://library.npia.police.uk/docs/homeoffice/balanced-approach-criminal-record-information.pdf

53. On 22 October 2010, the Home Secretary announced a further review, again by Mrs Mason, of the criminal records regime (Hansard, House of Commons, columns 77WS to 78WS). The review was to be undertaken in two phases. The questions to be addressed by Mrs Mason in the first phase were:

- Could the balance between civil liberties and public protection be improved by scaling back the employment vetting systems which involve the CRB ?
-
- **Or should it have been worded "Could the balance between adult liberties and children's rights be improved by scaling back the employment vetting systems which involve the CRB?"** We ask this because it is wholly misleading and inappropriate to portray the issues as those of liberties re over-weaning bureaucracy
-
- Where Ministers decide such systems are necessary, could they be made more proportionate and less burdensome?
-
- Ministers did not decide VBS, it arose from an Independent Report translated into an Act of Parliament, supported without a Divsion. This smells of revisionism!
-
- Should police intelligence form part of CRB disclosures?

54. Mrs Mason's report on phase one of the review was published on 11 February 20111. Amongst the recommendations made in the report were:

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1 http://www.homeoffice.gov.uk/publications/legislation/protection-freedoms-bill/

- children under 16 should not be eligible for criminal records checks (recommendation 1);
-
- Fair Play agrees with this.
-
- criminal records checks are portable between positions within the same employment sector (recommendation 2
-
- Fair Play agrees with this
- ;
- the CRB introduces an online system to allow employers to check if updated information is held on an applicant (recommendation 3);

Fair Play agrees with this but this MUST be mandatory for regulated activities and maybe voluntary for other employers who can show their scope of work as relevant and that they have risk-assessed in making a decision to seek to check the list

- a new CRB procedure is developed so that the criminal records certificate is issued directly to the individual applicant who will be responsible for its disclosure to potential employers and /or voluntary bodies (recommendation 4);

  We see some merit in this, it enables the applicant to make a choice as to whether to disclose it. However, with regulated activity, the employer must have a right to know the reference number of the disclosure for the purpose of checking the barred list online and they MUST check that list by law. To fail to require this will open up opportunities for prospective employees and volunteers to attempt to mislead gullible employers. Many employers will feel most unhappy that at post-interview stage they could not access the relevant criminal records and LPI before making a decision. We feel our proposed system would be more suitable. Also we have argued above that the proposal changes entirely the purpose of CRB disclosures which were always envisaged as a means to enabling employers to make safer recruitment decisions and that this was obtained from an independent third party source. We have seen no argument to change the purpose of a CRB disclosure from this to one which is applicant mediated.

- the introduction of a package of measures to improve the disclosure of police information to employers (recommendation 6) :
  - the test used by chief officers to make disclosure decisions under section 113B(4) is amended from 'might be relevant' to 'reasonably believes to be relevant' (recommendation 6a);

  Support but we believe the decision would be better made at ISA with the help of an ACPO appointee.
  - the development of a statutory code of practice for police to use when deciding what information should be disclosed (recommendation 6b);

  Support – but used by VBS – see our ideas on this

  - the development and use of a common template to ensure that a consistent level of information is disclosed to the individual with clearly set out reasons for that decision (recommendation 6c); Support as above
  - a timescale of 60 days for the police to make decisions on whether there is relevant information that should be disclosed on an enhanced disclosure (recommendation 6d); Support
  - the current 'additional information' provisions under section 113B(5) are abolished so that the police use alternative methods to disclose this information outside of the criminal records disclosure process (recommendation 6e); this is unsound
  - the effective use of the development of the PNC to centralise criminal records check decision making through the amendment of legislation to allow any chief officer to make the relevancy decision in enhanced disclosures, regardless of where the data originated (recommendation 6f).

Fair Play feels this leaves the Police as judge jury and executioner and we would prefer to see an independent machinery, as per the VBB, and the Police submit all LPI to ISA unless this might hamper an investigation. But we think the code of practice idea plus the common template could be useful also. We want to see Article 6.1 rigour on this.

We want to see the PNC developed so that the existence of LPI in a Force is flagged up on the PNC – not the detail but the fact it is there

- t he CRB develop an open and transparent representations process for individuals to challenge inaccurate or inappropriate disclosures and that the disclosure of police information is overseen by an independent expert (recommendation 7).

The Vetting and Barring Board duly revised should offer the means to this. Once PCN, LPI and Barring Information are known to ISA, the A6.1 process must be to inform the applicant prior to decision-making.

PROTECTION OF FREEDOMS BILL

EUROPEAN CONVENTION ON HUMAN RIGHTS

MEMORANDUM BY THE HOME OFFICE

Introduction

1. This memorandum addresses issues arising under the European Convention on Human Rights (ECHR) in relation to the Protection of Freedoms Bill introduced in the House of Commons on 11 February 2011. The memorandum has been prepared by the Home Office with input from the Department for Education, Ministry of Justice, Northern Ireland Office and Cabinet Office. The Home Secretary has signed a statement under section 19(1)(a) of the Human Rights Act 1998 that, in her view, the provisions of the Bill are compatible with the Convention rights.

2. This is a human rights enhancing Bill.

4. The provisions about criminal records protect the freedom of the individual by limiting the age at which people can apply for certificates and the persons to whom the information is revealed as well as by introducing additional safeguards into the regime. It also protects the wider freedom of society to live safely by providing for more regular up-dating of the certificates and making other minor amendments to the regime. The provisions about vetting and barring are also a mix of protecting the freedom of the individual from undue state interference while protecting the wider freedom of society to live safely.

5. This memorandum deals only with those clauses of and Schedules to the Bill which raise European Convention on Human Rights (ECHR) issues.

Fair Play for Children considers this memorandum defective in a serious degree. It deal soley with the incorporated Rights 1-12 and 14 of the ECHR as legislated in the HRA 1998. This is a proper consideration but we are bound to ask would this have been done had the HRA 1998 not been enacted? The UK was signatory to and have ratified the ECHR many years before, and until the HRA the best courts could do was to "take the ECHR into account". One of the principal reasons for non-ratification may well have been supremacy of parliament considerations, based on the relationship of the UK judiciary and Parliament to the Court at Strasbourg. The HRA 1998 and the device of Declaration of Incompatibility seems to have addressed that issue.

The new Bill raises issues around numerous of the ECHR articles, especially A6, 8, 14 and it will be seen that Fair Play addresses aspects of the proposals with those matters in mind.

One of our principal concerns is the lack of evidential base for changes to an Act whose main vetting procedures have never been put into practice. We will criticise as sloppy thinking the recourse to phrases such as "common sense levels" as any form of yardstick for measuring the actual or indeed potential impact of the original scheme. We will make reference, as a comparison, with the history of **Sarah's Law**, the scheme to enable e.g. someone with children intending to marry, to make checks about the child protection history of a prospective partner. There was a commotion amongst some civil liberties groups, and grim predictions of leaked information leading to vigilante action etc. The wholly sensible approach was to subject the scheme to a pilot phase specifically to monitor potential concerns. It is quite clear that this has proven a total success as an exercise, and the scheme is able to be rolled out nationally across police force areas.

Would that both this and the previous government adopted such an approach with the SVGA. Take the allegation about numbers to be required to submit an application to CRB for a VBS check. 11 million? 9 million? Where is the evidence for numbers and where is the evidence the new scheme will reduce and to what numbers?

In any case, this is not a "numbers game", though this is what has been focused on. It is about ensuring that in every situation where such a check is needed, it is carried out. If that meant 4 million, so be it – or 12 million .... A pilot might have given some indication of the scale nationally, and that might have been the time for re-think based on analysis of the above core principle of need.

We support the idea that any requirement to be VBS checked ought to be based on risk analysis. That may well, however, be in contradiction to the "common sense levels" claim and also make a nonsense of the decision to abolish all controlled activity situations.

Indeed, the very strong part of this Bill, the risk analysis, echoes our own Report ('Out with the Bathwater?', June 2010) where we say that it is the production by the employer of a detailed job description presented as part of the VBS/CRB application, which will enable e.g. ISA to determine what LPI and relevant exempt conviction information should be released.

We agree with the aim of the Bill to encourage better-informed employer decisions on recruitment (an aim of the CRB scheme also from the outset) but the too-narrow categorisation of jobs in order to reduce numbers for its own sake will risk situations not being checked where this is necessary.

What would be better is an easily-accessed online test which employers would use to determine whether the post (paid or unpaid) should be the subject of a VBS application. Fair Play envisages a step-by-step discovery process where the employer, at the stage of planning the post as a new job application would log on to the site and undertake a detailed questionnaire which would seek detail of e..g age range, premises, activity, types of access including secondary access (see below), supervision, frequency and, crucially, facility to build trust with children. In the large majority of cases the outcome would be a simple response – "From the detail and answers you have supplied, this activity would/not be a Regulated Activity and a VBS check will/not be required" with a caveat that it is the employer's legal duty to make sure on this and that if in doubt consult [VBS]. In a minority of cases, the advice might be that the employer should consult VBS, giving a reference number so VBS and the employer can refer to the same document produced as a result of the questionnaire. We suggest that this be required in any situation where a post would involve regular access to e.g. premises or situations where children are present on a regular basis at the same time as the post-holder.

With an existing post or one of a similar number of posts and where there is no change the employer could use the existing VBS advice for that type of post.

In this approach, Regulated Status is defined quickly on a case-by-case basis. The approach would allow for one job to determine others of a similar nature for that employer by use of an ID. ["This post is similar to ID number" at the point the application for a VBS/CRB is made.] It also will aid small voluntary bodies unsure as to whether their volunteers need a CRB/VBS. In many cases it will show perhaps they will not. Bodies like Fair Play who deal with child protection issues and also are Umbrella Bodies with CRB will find this approach immensely useful in our role of education and information. One of our forthcoming free online publications will be a risk assessment system we term 'Child Protection Auditing".

This case-by-case risk-based approach will give also a good indication of the real numbers involved over a period of time.

Fair Play for Children is concerned that the issues have been presented as child protection v. Liberties, and that no mention has been made of the UN Convention on the Rights of the Child. This contains obligations the UK

has ratified and there can be no moral or other argument, other than wholly-inappropriate narrow legalism, that it should not have equal status with the ECHR in the consideration of these issues.

Child protection is a RIGHT, it certainly comes within the scope of ECHR A8 (right to respect for home etc) as child protection failure impacts upon a child's home and privacy. But the UNCRC has equally important rights which apply to children, and they may be balanced one against the other but there is no precedent or legal basis that we can determine for the Government to balance these against ECHR rights. This means they must be considered entirely on their own merits.

The relevant UNCRC Rights:

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 4

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international cooperation.

Article 6

1. States Parties recognize that every child has the inherent right to life.

2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the

views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law

Article 19
1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Article 25
States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.

Article 33
States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances.
Article 34
States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent: >
(a) The inducement or coercion of a child to engage in any unlawful sexual activity;
(b) The exploitative use of children in prostitution or other unlawful sexual practises;

(c) The exploitative use of children in pornographic performances and materials.

Article 36

States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

Article 39

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

Article 41

Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in:
(a) The law of a State Party; or
(b) International law in force for that State.

We have highlighted those Articles directly relevant and we believe firmly that analysis must also be carried out as to how the proposed legislation will square with those UNCRC obligations. The point is that, as a child aggrieved because of alleged deficiency cannot make reference in Court proceedings to the UNCRC other than to urge its provisions be "taken into consideration" and as no Court can make a ruling based on the UNCRC provisions, the Government must ensure that the Act is sound with regard to those obligations. As the UNCRC, unlike the ECHR, provides no machinery for individual submission for redress or complaint to a treaty-based court or tribunal, this point is especially relevant.

Numbers to be registered, so-called "common sense" levels etc have no bearing at all in this regard, and we underline Article 3.1's provision *the best interests of the child shall be a primary consideration"* a requirement unparalleled in the ECHR.

We are clear that the Freedom Bill Part V needs further examination through this UNCRC filter.

Incidentally, we believe such analysis should always be applied to all Government Bills etc and a Ministerial declaration made as per the ECHR. This will help promote liberties, and of one of society's recognised most vulnerable groups.

For the record, Fair Play sees justice in a proposal to incorporate the UNCRC into UK domestic law, a subject for another forum.

Part 5: Safeguarding vulnerable groups, criminal records etc.

Chapter 1: Safeguarding of vulnerable groups

145. The Vetting and Barring Scheme ("VBS") operates under the Safeguarding Vulnerable Groups Act 2006 ("SVGA"). As currently drafted, there are two key elements to the VBS – firstly the Independent Safeguarding Authority ("ISA") can bar individuals from engaging in a regulated activity in relation to children and/or vulnerable adults; secondly, any person engaging in such an activity is subject to monitoring by the Secretary of State (in practice the Criminal Records Bureau ("CRB")). Whereas the ISA is currently barring individuals, the monitoring system has not yet been brought into force.

146. The SVGA contains offences for individuals to work in activity from which they are barred and for employers to employ barred individuals in such activity. Regulated activity is defined in the SVGA and concentrates on roles involving contact with children and adults defined as "vulnerable" under the Act.

147. The SVGA also contains offences (not yet in force) for individuals to work in regulated activity when not monitored by the CRB and for employers who fail to check whether their employees are monitored.

148. The SVGA contains provision for information about barred individual to be shared with employers and other relevant parties (for example, keepers of registers such as the General Medical Council) and contains obligations on certain parties (for example, employers and keepers of registers) to provide the ISA with information that it might consider relevant for a barring decision.

149. The Vetting and Barring Scheme's purpose is to strike a necessary balance between the public interest in protecting vulnerable groups on the one hand, and ensuring that those who are in close contact with such vulnerable groups are not subjected to disproportionate scrutiny or to a culture of suspicion on the other hand. The Scheme itself will engage the Article 8 rights of those working with vulnerable groups, because of the need to carry out checks to establish that they are appropriate people to have contact with these groups.

The scheme will also involve the A8 rights of vulnerable groups, their right to be protected by the state from exploitation. Not a single mention has been made of the obligations the UK has under the UN Convention on the Rights of the Child, one of which is that the child's interests will be a primary consideration.

150. Chapter 1 of Part 5 makes significant amendments to the VBS which operates under the SVGA. As part of the Coalition Agreement, the Government committed to reviewing the Vetting and Barring Scheme to scale it back to common sense levels. This is being done by ensuring that the tension between the individuals' rights and the need to protect the public is re-balanced.

The term "common sense" is too imprecise and emotive to be a sound basis for a wholesale review of a law many of whose main provisions have never been put into practice. That this issue has become a party political matter/contention and that little evidence has been advanced for such a change before implementation is symptomatic of bad law-making. In our view, the original scheme should have been subject to pilots, as per the equally controversial "Sarah's Law" of which many alarming claims were made prior to the pilots and of which few if any have been found to have been justified.

151. Clause 66 amends the barring regime set out in Schedule 3 to the SVGA in two ways. Firstly it ensures that the ISA can only bar an individual from working with either children or vulnerable adults if the ISA is satisfied that the individual is working or is likely to work with these groups. At present, there need be no suggestion that that the individual is seeking to work (or is actually working) with these vulnerable groups. This will mean that the stigma of being barred from working with either children or vulnerable adults will only attach to those who are seeking to engage in this work. This is in keeping with the re-balancing of individual Article 8 rights and the general interest in protecting vulnerable groups. There is a specific UNCRC obligation to protect children from exploitation etc. The Government considers that this is a more targeted barring scheme which will result in fewer people barred without lowering the level of protection afforded to vulnerable groups.

Fair Play has seen no evidence advanced that this claim is sustainable. The use of the term 'common sense' relates to opinion of what might be regarded by "the man on the Clapham omnibus" as sensible but it has no relation to any studies nor indeed to actual operation of the original scheme. Commitments have been made by governments (both the previous and current) which had no evidential basis.

On this basis it is considered more proportionate than the current scheme. On no evidence.

The original scheme carries forward a practice in place for many decades so that people convicted of certain offences have an automatic bar re future contact with

children. No evidence has been advanced that changing this would be safe. Auto-barring must remain in all such cases. If any change is needed it may be to ensure A6.1 compliance where affected individuals seek review of their barring. It is an offence for such a barred person to seek such employment, this has been the case for many years and the VBS scheme simply carried through that principle. The current situation, maintained by the original VBS, is that such a person knows that they are barred by statute and that this has been logged with the VBS. Thus the children barring scheme is a register of such barrings by statute and extreme caution must be applied before this is altered.

The other routes to barring (referral by employers etc) were brought into being because employers had no statutory obligation – other than List 99 and latterly POCAL situations) - to refer employees re unsuitable if non-criminal behaviours. That general requirement MUST remain, that employers remain mandated to make such reports. If the Bill's proposals are carried through this will mean that a person will be able to make an application to work with children and the employer will find there is no existing bar in place. ISA will then have to await receipt of information via CRB which will delay the process. The ideal situation is that the employer should have a mandatory obligation to consult the list or at the very least be able to seek the agreement of the person to consult the barring list at an early stage, via a quick online procedure, and the person's barring, if there, will come to light even before interview. As the employer has a statutory obligation to refer any such application to the police as a breach of the law, this will act as a deterrent to those who are barred and still seek access.

As the VBS system only applies when people are seeking to work with children etc, the proposed change is hardly effective anyway. Enhanced CRBs applied for in such circumstances would be the only way for such barring information to be accessed anyway. It is very odd indeed to read an argument that someone should not be placed on the barring list because they will not be working with a vulnerable group. This is frankly insane! If someone's behaviour is so questionable as to be needed to be reported, then s/he should be considered by ISA at the time of the report and placed on the barring lists if found to fulfil barring criteria not wait for an application. If that were carried through it would mean delay and if the person then wanted to appeal the decision to bar even more delay.

What is the A8 issue in this? That the applicant, if he has such a conviction, has a right to privacy if he does not make an application to work with children? This has no practical relevance because no one will get to know the fact unless s/he makes application to work with that group. In that situation, the fact will come to light quickly and indeed ISA will have evidence of an attempt to breach the law by the applicant and thus make a complaint to the police in the applicant's locality. That will have a greater deterrent effect on re-offending and will remove the possibility that an employer might choose not to make such reference. In any case we do not see there can be such an A8 argument anyway. The information is private to the applicant unless and until s/he seeks to breach the law which must be that the person may not lawfully apply to work with children. If s/he does so, a breach of law is committed and it is easily detected.

The barring list system was intended to record ALL who are barred from working with children and vulnerable adults and it MUST be maintained. The key issue for both Cullen and Bichard was sharing of information and the proposed alteration does not improve the rights of children nor is it any real advance for applicants for such work. Children too have A8 rights under the ECHR as well as the **equally-important**, if not incorporated, rights under the UNCRC. (Attention should be paid to the effects of recent Welsh Assembly decisions re the UNCRC).

152. The second change to the barring system is to the "automatic barring subject to representations" manner of barring an individual. At present, an individual who meets prescribed criteria under paragraph 2 or 8 of Schedule 3 to the SVGA will be automatically barred from working with children or vulnerable adults subject to their representations. At present these representations are made after the ISA has barred the individual, however this was ruled incompatible with Article 6 and 8 in the November 2010 High Court judgment: Royal College of Nursing and others –v- Secretary of State for the Home Department [2010] EWHC 2761 (Admin). Therefore clause 68 amends paragraphs 2 and 8 to ensure that representations must be considered before the ISA bars any individual under these paragraphs. The Government considers that this will ensure compatibility with Articles 6 and 8 in light of the High Court judgment.

Fair Play believes the RCN judgment requires the ISA regime to be changed to be properly A6.1 compliant, and the proposed changes are a step in the right direction. The quasi-judicial nature of the VBB is important and must be strengthened so that there are full appeal rights before decisions are made, that decisions are fully appealable in the higher courts on the usual grounds for appeals at law. It would be better if such decisions were made not at the time of application for a job, as the Bill's proposals would entail, but as per the original SVGA system.

153. Clause 67 abolishes the concept of controlled activity in sections 21 to 23 of the SVGA. This was the activity which was not "regulated activity" under the SVGA because there was not direct or close contact with vulnerable groups, but nevertheless this activity would be controlled to a certain extent because it enabled individuals to access, for example, personal records about vulnerable groups. It has been decided that in line with reducing the overall scope of the Scheme, it would be targeted and proportionate to remove this concept from the Scheme on a risk-based approach.

Fair Play understands the concern but risk assessment would demand a case-by-case basis and we would propose that controlled activity not be retained but that all such activity be subject to risk-assessment based on a statutory code of practice which we think should be the basis for all applications so that the distinction between controlled and regulated would be replaced by compliance with such a statutory code of practice. This would mean that employers would be required to show due cause, based on the statutory guidelines, as to why why the position

should be subject to a-regulated activity status. That there are situations which would not pass the threshold is certain but it would not serve child protection and their rights for cases to be excluded where it could be shown there was a real assessed risk. Some current controlled activities would not pass the assessment, others would.

Fair Play wishes to introduce the concept of "Secondary Access" at this stage, one which is based on real-life and known situations. Our report "Out with the Bathwater" contains examples. In short, someone may be working in a situation with children where there would under the new scheme no requirement on the employer to make reference to ISA via CRB. This might be an ancillary post connected with e.g. a youth club where the main staff would be covered, or in an organisation where such checks would not be possible. In many such situations such staff and employees not covered do live in the same communities as the children who use the facilities. We are clear that those who seek to access children for illegal purposes will use such situations within an organisation to build trust which they can exploit unmonitored outside that setting. No opportunity for preventing such people to avoid their known convictions and barrings should be lost.

In our view, a very simple online system would enable an employer who can show "due cause" to consult the barring lists, it would require the electronic signature of the applicant, and would be a good balance of rights. In this, the employer registers as an organisation fitting a statutory code definition and a permanent ID is issued. The applicant makes online application for a one-time ID for the post s/he is seeking, and when the employer and applicant IDs are submitted, ISA can confirm simply whether the person is barred or not. If offered a position the full Enhanced CRB process can be applied to.

154. Clause 68 abolishes the concept of monitoring in section 24 of the SVGA. This, in addition to the barring function of the ISA, was one of the two main tenets of the SVGA's scheme. The monitoring system would have required any individual engaged in "regulated activity" in relation to either children or vulnerable adults to make an application to the Secretary of State to be monitored. This would have involved the collation of any updated material (such as new convictions, cautions or referrals from employers and professional regulators) in relation to people registered with the scheme, and referral of any new information to the ISA. Offences would have attached to individuals who were not subject to monitoring and employers who employed those who were not subject to monitoring. The monitoring provisions have not been brought into force and the Government announced a halt to the start of monitoring when it decided to review the whole VBS. The approach taken in the new provisions is to remove the monitoring provisions and instead enable employers to check whether their employees are barred and be informed if current employees become barred (clause 71). In order to ensure that these provisions do not create a safeguarding gap, there will also be a duty for employers to check an employees barred status if that employee will be engaged in regulated activity (clause 72). The Government considers that this is a more

proportionate interference with Article 8 rights since information will only be shared if it is serious and suggests a risk of harm to vulnerable groups.

Because of our arguments re controlled activity etc, we believe there is a case for risk-assessed situations outside of regulated activity to be within the scope of the provision highlighted in yellow above.

155. The provisions also significantly reduce the scope of regulated activity, namely activity from which individuals can be barred, both in relation to children and in relation to vulnerable adults (clauses 63 to 65). This has been done in order to scale back the coverage of the VBS to common sense levels by taking a risk based approach, thereby resulting in what the Government believes to be a more targeted and proportionate scheme. The reason for this is that the legitimate aim of protecting vulnerable groups is being achieved in a less wide-ranging manner, which focuses on a risk-based approach.

We dispute that 'common sense' is an appropriate yardstick. "Risk-based" has to allow for both controlled and 'secondary access' situations otherwise it is not truly risk-based. Nor would the exclusion of such situations fulfil UK obligations to children under the UNCRC nor A8 as they have equal claim to that right. Indeed there has been reference to child protection v rights in this document as if the former is not a right, as it is in A8 and UNCRC terms. The harm done, the effects suffered where we get the balance of rights wrong has to make for real caution.

156. Finally the provisions give the ISA discretion to review cases and remove persons from the list in certain circumstances (clause 70) which the Government considers is important to ensure that exceptional cases can be dealt with swiftly.

Fair Play sees this as good in A6.1 terms. Redress through appeal is sound 'Rule of Law' and that term is the one that applies, not "common sense".

Chapter 2: Criminal records

157. Chapter 2 of Part 5 amends Part 5 of the Police Act 1997 ("the 1997 Act") which provides for the disclosure of criminal records for employment vetting and related purposes. Part 5 of the 1997 Act provides for three levels of criminal record certificates. Firstly, section 112 provides for a criminal conviction certificate which contains the details of all un-spent convictions that are recorded on central records. Section 112 is not yet in force in England and Wales. Section 113A provides for a criminal record certificate (known as a "standard certificate") which contains all details of all convictions (including spent convictions) that are recorded on central records. Section 113B provides for an enhanced criminal record certificate (known as an "enhanced certificate") which contains all details of all convictions (including spent convictions) that are recorded on central

records plus any information which a chief officer thinks might be relevant to the purpose for which the enhanced certificate was requested and ought to be disclosed; in prescribed cases, it can also contain information about the ISA's barred lists.

158. Convictions become spent in accordance with the Rehabilitation of Offenders Act 1974 ("ROA"), which determines whether a conviction becomes spent and, if so, after what period of time, which in turn is determined by the length of sentence attached to the conviction. However the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (SI 1975/1023 as amended – "Exceptions Order") provides for situations in which the protection for spent convictions is removed. The 1997 Act links into the Exceptions Order as the application for either a standard certificate or an enhanced certificate must state that the purpose for which the certificate required is an "exempted question" within the meaning of the Exceptions Order. What this means in practice is that applications for a standard certificate or an enhanced certificate are limited to certain positions including caring for children, child minding, being a foster parent, or being a registered immigration advisor amongst others. Coming within the scope of the Exceptions Order is sufficient for a standard certificate, however an application for an enhanced certificate must also fall within the prescribed purposes as set out in the Police Act 1997 (Criminal Records) Regulations 2002 (SI 2002/233 – regulation 5A, as amended).

Our experience is that much information provided by virtue of the Exceptions Order is both irrelevant to the job under offer and often embarrassing to the applicant for no good child protection purpose. A filter is required and we believe this can be based upon a detailed job description provided by the employer to ISA or CRB at which stage, having established there is no requirement to bar, it is decided what such conviction information it is proper and proportionate to release. We want to see the end of a practice we knew was happening and which our survey confirmed. That is a church group wanted the retention of the supply of all Exceptions material as it was argued they might want to know about the moral character of the applicant in making a decision. This is not in any sense the proper use of conviction information, it intrudes on A8 rights without due cause. Employers can ask such questions at interviews, it is no place of CRB/ISA to assist in this.

159. Once the CRB (all of the functions of the Secretary of State under Part 5 of the 1997 Act are carried out by the CRB, an executive agency of the Home Office) has obtained all the information required in accordance with section 113A or section 113B, the CRB issues the certificate to both the applicant and the registered body who countersigned the application (or who transmitted the application electronically).

160. The Government considers that the CRB process engages Article 8 rights as it is concerned with disclosing sensitive personal data. Although the Government considers that this is done in pursuance of a legitimate

aim – namely the prevention of crime and the protection of the rights of others (for example, by ensuring that those working with vulnerable groups are suitable to do so), the current provisions aim to meet this legitimate aim in a more proportionate manner.

161. In total this Chapter amends the current provisions relating to CRB certificates in eight ways.

162. Firstly, this Chapter (clause 78) ensures that no application for any type of CRB certificate can be made unless the individual making the application is aged 16 or over. The current provisions do not set any age limit. The Government considers there to be human rights implications in carrying out CRB checks on minors in that this constitutes an interference with their Article 8 rights which is hard to justify in light of the need to protect children under both Articles 3 and 16 of the UN Convention on the Rights of the Child. As children are to be protected, the Government considers that they should not be subject to a criminal records disclosure process unless they are at the stage of working in positions of trust with vulnerable groups – therefore the Government has decided that under 16s should not be able to apply for any type of CRB certificate and no person aged under 16 should ever be asked to make such an application. On this basis the Government therefore considers that we are making the provisions in Part 5 more proportionate by including an age limit and also ensuring compliance with our UNCRC obligations.

We agree with this, it has caused problems and uncertainty, and over-reaction. However clear advice should be formulated as to the types of suitable reference that might be sought. We would suggest GP in the sense that the young person e.g. volunteering might be protected from undue stress etc

163. Secondly, these provisions (clause 77) ensure that, contrary to the current position, the standard certificate and the enhanced certificate will be sent to the applicant only, rather than also to the registered person (normally the employer) at the same time. This means that sensitive personal data is only being disclosed to the person about whom it relates. This will enable an individual to decide whether to show the certificate to any other person and also enables any dispute about the information released on the certificate to be determined before it is seen by the potential employer. This means that sensitive personal data is sent only to the data subject who can then make an informed decision about any onward disclosure. We consider that this will remove any interference with the data subject's Article 8 rights which resulted in light of the obligation to send a copy to the registered person.

Fair Play can see some merit in this but the concept seems flawed to us in that employers are only meant to seek an Enhanced Cert upon the offer of employment. This proposal will mean either this quite proper provision of conditional upon job offer will be breached (as it is now indeed) or the applicant will be made a job offer

and will receive the Enhanced CRB which they will then have to decide whether or not to submit to the employer. If the applicant has a record s/he knows is correct, then the employer wastes a lot of time and cost. If there is information the applicant wishes to dispute this will take time and the whole object of the clause is lost because the employer will know "something is up" and may quite likely press for an answer from the applicant which s/he may be poorly-placed to give.

This hardly addresses A8 issues. We would suggest that the same effect could be achieved if at the application stage the applicant is given an option for a copy of the disclosure to be :

a. Sent to the employer/reg body etc at the same time as the applicant's copy or
b. Sent to the applicant only but who can opt then for a copy to go to the employer by return. The reason for this is that the employer gets a copy which is theirs, its forwarding has been allowed by the applicant but it also enables the employer to retain the copy for a set period to enable consideration of any information contained on it.

Consideration ought to be given to defining how long employers could retain disclosures issued in this manner. Also as to what information on the disclosure might be retained and how.

The government proposal says nothing about how long the employer is able to retain the applicant's copy, whether they can make copy or extract. Our proposal enables better consideration of any "allowed" disclosure.

164. This is linked to the third change which is an amendment to the disputes process, whereby we are ensuring that any dispute over police intelligence information can be sent to an independent chief officer of police for consideration (clause 79). At present, the information is re-considered by the same chief officer of police who took the original decision to disclose the information. The Government considers that this should improve the disputes process by enabling an independent but expert chief officer to consider any dispute.

This seems to us to make for delays and also it places in a single person power to make such a decision. Fair Play believes that the existence of ISA and the quasi-judicial nature of the VBB makes it the logical place for the consideration of LPI. We propose that ALL LPI held by the police on an applicant be sent to ISA for consideration as to barring. If the applicant is barred as a result of the LPI, the employer will not see it, as the application will fall. If there is no barring situation, then we believe ISA should decide whether any remaining LPI is relevant to the position being applied for, based on a detailed job description which the employer should have to supply to ensure compliance with regulated/controlled (see above) status, and to help decide what LPI is relevant. If the proposal to send the disclosure certificate to the applicant only is carried through, this route will reduce the amount of LPI published and make it more proportionate to the post being

applied for. We would add that this route also can be applied to the vexed issue of disclosure of previous convictions etc. It is not proportionate in our view to allow the wholesale disclosure of convictions many of which will have no bearing on the job in hand. Our LONG experience is that this has been a subject of real and unnecessary discomfort to applicants – a conviction many years before may have no bearing on ability to do a job. We think ISA should also "filter out" irrelevant past convictions. This will be appealable, in our view, and will considerably assist Rehab of Offender objectives and A8 compliance in that regard.

To help consistency, we believe that ISA/VBB should have an ACPO officer allocated to advise, and where there is an appeal, a 2nd ACPO officer for "second opinion".

165. The fourth, fifth and sixth changes are linked to the disclosure of police intelligence information on enhanced certificates (clause 79). The provisions heighten the test that must be met in order for a chief officer to decide to disclose police intelligence or other information from a "might be relevant" test to a "reasonably believes to be relevant" test. The provisions also enable a more centralised system of decision making. At present, each chief officer of police takes decisions in relation to information that they hold. As the computer systems are centralised, these provisions will enable all "relevancy" decisions to be taken by a smaller number of chief officers which should help to ensure a minimum level of expertise and consistency. In addition, the provisions enable the Secretary of State to issue guidance in relation to information disclosed by the police which should also help to ensure consistency of decision. The Government considers that these three measures should result in more proportionate disclosure of information, because of the higher test for disclosure and the more consistent decision-making process which should result in less sensitive personal information being disclosed overall.

Our proposal above achieves the objectives even more consistently. The "reasonably believes" change is wholly correct. Our system allows for full A6 challenge.

166. The seventh change is to remove the statutory basis under the enhanced CRB certificate provisions for the police to disclose information directly to the registered person while not disclosing to the individual (in relation to whom the information pertains) when doing so would harm the interests of crime prevention or detection (clause 77(1)(b)). The Government considers that this can already be properly done when appropriate under the police's common law powers to disclose information. The Government believes that it would help to emphasise the exceptional nature of the circumstances and the need for the police to justify the approach in each individual case on the basis of their operational discretion supported by common law powers. Again the Government consider this to be more proportionate approach to disclosing sensitive personal information.

Our proposal above would better accommodate such a measure because of the quasi-judicial nature of VBB. However we are VERY uneasy about this whole idea and suggest there should be further research and consideration. Whatever the outcome, we believe it will have chance of being done proportionately and fairly if routed via ISA with ACPO officers giving advice at that stage.

167. The eighth change is to make CRB certificates portable (clause 80). At present, a CRB certificate is a snap-shot in time and any new employer will need to see a new certificate and employers who continue to employ the same person may still at various intervals require a new certificate. The updating system will enable an employer to go online, with the individual's consent, and check whether there is any information that would appear on a new CRB certificate if applied for now, or whether there is no new information. It is estimated that over 90% of re-checks result in no new information. The online system will not disclose any personal information, simply an indication as to whether there is no new information or whether a new application for a CRB certificate should be made. As well as being a measure likely to be welcomed by both the employer and the individual, the Government considers that this will significantly reduce the amount of personal data being re-sent (because certificates with the same information will not be re-sent) and therefore will result in a more proportionate system.

Fair Play FULLY supports a one-time certificate, fully portable. We see the sense of applicant consent if at the stage of job offer though we prefer the Scouts idea of a delay before the employer is sent a copy. However, we do NOT see the sense of requiring employee consent if an employer has reasonable cause to believe there may have been a change affecting employee's suitability to undertake work involving significant access to children, we believe they should have a right to make reference to an online update service. If they do so we suggest a statutory requirement to inform the employee they are doing so, and that the employee should be able to have written evidence this has been done.

168. Overall the Government considers that this package of measures enhances the respect for an individual's private life and will lead to a more targeted and proportionate CRB disclosure system.

Chapter 3: Disregarding certain convictions for buggery etc.

Given that private consexual gay sex between adults ought never to have been a criminal offence, these measures are overdue and have no bearing on Fair Play's concerns. If there were a conviction involving an adult and a person over 16 but under 18 at the time when the age of consent was 18 there will be need to consider the implications where the regulated activity involvs work with people in the 16-17 age group. However, we feel this may well be covered by existing measures which are not related to age of majority but to vulnerability. Currently a teacher becoming involved with a student in that age range can find themselves in trouble, rightly so in our view.

Likewise over 16 but under 21 when consent was 21.

169. Chapter 3 of Part 5 set up a scheme whereby individuals who were convicted or received a caution in respect of section 12 (buggery) or 13 (gross indecency between men) of the Sexual Offences Act 1956 (or corresponding military service offences) may apply to the Secretary of State to have their convictions or cautions disregarded. An individual will only be successful in his application if the behaviour which constituted the offence was consensual and the other party was aged 16 or over.

170. Consensual heterosexual activity in private has never been criminalised, however until relatively recently consensual homosexual activity in private was still criminal. The European Court of Human Rights in the 2000 case of A.D.T. –v- UK considered that, bearing in mind the narrow margin of appreciation in the case, the absence of any public health considerations and the purely private nature of the behaviour in the case, the continuing existence of section 13 and prosecution for that offence, in the particular case, was not justified under Article 8.