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US, EU & UK Employment Vetting as Strategy for Preventing Convicted Sex Offenders from Gaining Access to Children

James B. Jacobs

Dimitra Blitsa
db1497@nyu.edu

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> "Persons convicted of violent offences and sexual abuse of children should be prevented from working with children" The 2006 United Nations, World Report on Violence Against Children (2006)[1]

Introduction

No crime generates more social anxiety and demand for political action than sexual violence against a child. Outrage is heightened when the perpetrator is a recidivist. Highly publicised child rape/murders in the US, continental Europe and the UK by recidivist sex offenders have produced a stream of political and legal initiatives to more severely punish, more closely monitor and better protect society from recidivist child sex offenders, sometimes referred to as "paedophiles." This article focuses on US, EU and UK initiatives to prevent convicted child sex offenders from obtaining access to children via employment or volunteer work.[2] All three jurisdictions have recognised the need for public and private employers and voluntary organisations to check the criminal background of applicants for employment and volunteer work involving children. However, they differ significantly with respect to how employers can access criminal records, what kind of information employers are entitled to see, the extent to which vetting and barring is carried out by the government or left to the discretion of employers,

[1] See <www.unviolencestudy.org/>.

[2] Children are far more likely to be sexually abused by a relative or family friend than by a teacher or an employee of a children's services organisation (see e.g. <www.coe.int/t/dg3/children/1in5/default_en.asp>). Child sexual abuse perpetrated by parents, relatives and friends should also be the target of public policy.

which convictions are disqualifying for which positions, and whether incumbent employees, as well as prospective employees, should be screened.

The US does not recognise a privacy interest in one's adult criminal record and, via open court records, makes all criminal history records publicly accessible. Unless refusing to hire ex-offenders has the effect of discriminating on the basis of race, religion or gender (and, if so, cannot then be justified by business necessity), employers are free to decide for themselves how to weigh a prior conviction in their hiring decision.[3] However, sex offenders face some mandatory disqualifications that do not apply to other ex-offenders.

Although the EU's relationship to its Member States differs from the US federal government's relationship to US states, EU criminal legislation requires Member States to conform their laws to EU common minimum standards, while leaving Member States substantial implementing discretion. Continental European countries and the EU keep individual criminal history information confidential in order to protect privacy and promote rehabilitation. However, the political and practical need to increase the flow of child sex offender information within and among the EU Member States has recently put pressure on these policies.

The UK, an EU Member State, has not needed to be encouraged to screen sex offenders from child-sensitive positions; it has been the most aggressive EU Member State in this regard. The UK is less concerned than other continental European countries about disclosing criminal records to employers, although it is more sensitive to convicted offenders' privacy interests than the US. The UK has constructed, deconstructed and reconstructed several different vetting regimes, providing an instructive example to other EU Member States about the political, legal

[3] James B. Jacobs and Elena Larrauri, 'Are Criminal Convictions a Public Matter? The USA and Spain', 14 *Punishment & Society* 3 (2012).

and logistical challenges that must be confronted in creating an effective vetting regime that does not unduly burden the general public.

Employer Access to Sex Offender Information in the US

In the US, information about criminal convictions (and even arrests) is publicly available from court records and other sources. Hundreds of commercial information vendors, adept at searching these records, offer employers, landlords, voluntary organisations and ordinary individuals criminal background information used for hiring, contracting, renting or screening social contacts.[4] Businesses have a strong incentive to purchase this information because they are strictly liable for the injuries caused by employees acting within the scope of employment; of course, they also want to minimise workplace problems and maximise efficiency. In 2004, more than eighty percent of large US private employers conducted criminal background checks on at least some prospective employees.[5] Since it is so easy to screen prospective and incumbent employees for prior convictions, and because employers have a strong financial incentive not to hire previously convicted sex offenders for positions involving contact with children, one might assume that there would be no need for laws prohibiting persons previously convicted of sex offences against children from obtaining paid or unpaid work affording access to children. That assumption would be wrong.

Community Notification Laws and Online Sex Offender Databases.

[4] James B. Jacobs and Tamara Crepet, 'The Expanding Scope, Use, and Availability of Criminal Records', 11 *N.Y.U. J. Legis. & Pub. Pol'y* 177 (2008). Both court records and police "rap" (record of arrest and prosecution) sheets provide charge, judgment and sentence information.

[5] James B. Jacobs, 'Mass Incarceration and Criminal Records', 3 *University of St. Thomas Law Journal* 387 (2005-6); Harry Holzer, Steven Raphael and Michael Stoll, 'Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers', 49 *Journal of Law & Economics* 451 (2006); SEARCH, *The National Consortium for Justice Information & Statistics, Report of the National Task Force on the Criminal Backgrounding of America* (2005) (<www.search.org/files/pdf/ReportofNTFCBA.pdf>).

The 1994 rape and murder of seven-year-old Megan Kanka in New Jersey by a paroled sex offender living anonymously in the Kanka's neighbourhood ignited a political movement that quickly achieved passage of a New Jersey "Megan's law," a federal Megan's law, and ultimately, Megan's laws in every state.[6] These laws contain both sex offender registration and community notification provisions.[7] The registration provisions, which apply both prospectively and retrospectively, require persons convicted of a criminal offence against a minor (of a sexual nature or of non-sex-related child abuse) and of sexually violent offences against adult victims to register with the police by providing identity and other information including name, photograph, fingerprints and place of residence.[8] The community notification provisions require the agency in charge of the registration regime to notify organisations and individuals who might come into contact with a previously convicted sex offender about that individual's presence in the community.

The 2006 Adam Walsh Child Protection and Safety Act,[9] provided that, in order to receive its maximum federal criminal justice grant, a state had to comply with the Sex Offender Registration and Notification Act (SORNA), which set minimum standards to strengthen state-level sex offender registration and community notification laws. SORNA requires states to assign convicted sex offenders to one of three risk-based categories based on their sex crime and other convictions.[10] Further, states must "make available on the Internet, in a manner that is

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[6] Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. 103-322, Title XVII, Subtitle A, §170101, 108 Stat. 2038, 42 U.S.C.§.14071 (1994); Megan's Law, Pub. L. No. 104-145, 110 Stat. 1345 (1996) amending 42 U.S.C.§.14071(d) (1994). New Jersey's Megan's Law can be found at <www.nj.gov/njsp/spoff/megans_law.html>.

[7] Karen J. Terry and John S. Furlong, *Sex Offender Registration and Community Notification: A "Megan's Law" Sourcebook* (2nd edn, Civic Research Institute, 2008); Wayne A. Logan, *Knowledge as Power: Criminal Registration and Community Notification Laws in America* (Stanford University Press, 2009).

[8] E.g. N.Y. Sex Offender Registration Act § 168-f (Consol. 2011).

[9] Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (2006). The Act was named after a six-year-old boy abducted in 1981 and later found murdered. In *Smith v. Doe*, 538 U.S. 84 (2003), the Supreme Court rejected an ex post facto challenge to the law.

[10] SORNA (Title I of the Adam Walsh Child Protection and Safety Act) allows for registering individuals convicted of sex offences in foreign countries. Sex Offender Registration and Notification – Final Guidelines, July 2008 (<www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf>).

readily accessible to all jurisdictions and to the public, all information about each sex offender in the registry." They must post the sex offender's physical description, sex offence conviction history and photograph, license plate number and vehicle description details, and place of work or schooling. States may choose to post additional information.

The Adam Walsh Act also authorised the Department of Justice (DOJ) to establish the Dru Sjodin National Sex Offender Public Website (NSOPW) in order to link state, territory and tribal sex offender registries. Anyone can access the NSOPW online and free of charge to obtain information about previously convicted sex offenders who live in any community in the US.[11] The searcher can query all state sex offender registries using first and last name, locality, zip code or address. If a match is found, the searcher is directed to the relevant state's website to obtain further information on the person of interest.

Employers, especially large employers, obtain from commercial information vendors job applicants' or employees' full criminal record, including all convictions, not just those for sex offences. However, casual employers or private individuals might want to check the online sex offender registry to find out if someone to be hired temporarily (e.g. baby sitter or handyman) is a previously convicted sex offender.

Mandatory Sex Offender Screening

It is up to each state to decide what positions, if any, should be closed to previously convicted sex offenders.[12] However, federal law requires criminal background checks for f*ederal* child care service employees or prospective employees and makes it lawful for an employer to

[11] The NSOPW was renamed for Dru Sjodin, a college student kidnapped, sexually assaulted and murdered by a previously convicted sex offender. See <www.nsopw.gov/Core/About.aspx>, <www.nsopw.gov/Core/Portal.aspx?AspxAutoDetectCookieSupport=1>.

[12] ABC News, *Sex Offenders Can't be Teachers, But What About Camp Counselors?* (21 June 2010) (<abcnews.go.com/US/sex-offenders-allowed-camp-counselors/story?id=10971563#.TwM8rSNWrKc>).

deny employment or dismiss a sex offender.[13] In addition, the 1993 National Child Protection Act (NCPA) authorises states to designate organisations that provide child care or child care placement services to obtain a nationwide criminal background check from the FBI that reveals whether an employee, job applicant or volunteer has been convicted of a crime that "bears upon that individual's fitness to have responsibility for the safety and well-being of children." Subsequently, Congress amended the Act to cover elderly and disabled individuals as well.[14] In 1998, the Volunteers for Children Act provided that, in the absence of state law, organisations and businesses dealing with children and vulnerable groups could request FBI criminal background checks.[15]

Amendments to the 2003 Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act authorised an 18-month (subsequently extended) pilot program to conduct *fingerprint-based* (rather than name/birth date-based) background checks on 100,000 volunteers who participate in the Boys and Girls Clubs of America, the National Mentoring Partnership and the National Council of Youth Sports.[16] The Act also directed DOJ to determine the feasibility of implementing fingerprint-based nationwide criminal background checks for all employees and volunteers who work in organisations providing services to children, the elderly and the disabled.[17] In 2009, six percent of the pilot fingerprint-based background checks revealed a disqualifying conviction, including sexual abuse of a minor. Over fifty percent of the individuals found to have a criminal history falsely denied a

[13] 42 U.S.C.A. § 13041 (West 2011).

[14] National Child Protection Act of 1993, Pub. L. 103-209, 107 Stat. 2490 (1993), and the Amendment of the National Child Protection Act.

[15] Volunteers for Children Act, Pub. L. 105-251, Title II, Subtitle B, §221, 112 Stat. 1885 (1998).

[16] The PROTECT Act, Pub. L. 108-21, 117 Stat. 650, provides that the National Center for Missing and Exploited Children may recommend to a youth-serving organisation whether an individual's criminal history renders him unfit to provide care to children. See <www.acacamps.org/sites/default/files/images/publicpolicy/documents/CampVolunteerNotice_000.pdf>.

[17] A June 2006 Attorney General's report found that the 2003 PROTECT Act and the 1998 Volunteers for Children Act "did not have the intended impact of broadening the availability of NCPA checks." Child Protection Improvements Act, H.R. 1469, 111th Cong. (2010) (findings).

past conviction on their employment application. A bill to make the fingerprint-based background checks permanent is pending (as of fall 2012).[18]

US states have enacted laws that require some employers to perform criminal background checks for positions which afford access to children. A 2010 survey of 56 US jurisdictions (including the District of Columbia and US "territories") found that 50 jurisdictions require a criminal history background check for school teachers, 43 require a background check for non-teaching school employees, including volunteers, and 31 require background checks for volunteers working with children.[19] Florida mandates that public employers check the state's sex offender registry before hiring for a range of positions:

> "A state agency or governmental subdivision, prior to making any decision to appoint or employ a person to work, whether for compensation or as a volunteer, at any park, playground, day care center, or other place where children regularly congregate, must conduct a search of that person's name or other identifying information against the registration information regarding sexual predators and sexual offenders maintained by the Department of Law Enforcement…This section does not apply to those positions or appointments within a state agency or governmental subdivision for which a state and national criminal history background check is conducted."[20]

There is probably no practical (as opposed to symbolic) need for US laws to prohibit employers from hiring previously convicted child sex offenders for jobs that involve access to children, since it is hard to imagine an employer deciding to make such a hiring decision.[21]

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[18] Child Protection Improvements Act, H.R. 1469, 111th Cong. (2010).

[19] US Department of Justice, Bureau of Justice Statistics, *Survey of State Criminal History Information Systems 2010: A Criminal Justice Information Policy Report* (2010) (<www.ncjrs.gov/pdffiles1/bjs/grants/237253.pdf>).

[20] Florida Statutes 943.04351.

[21] Previously convicted sex offenders have great difficulty obtaining any employment, even employment not involving contact with children. Human Rights Watch, *No Easy Answers: Sex Offender Laws in the United States* (2007) (<www.hrw.org/sites/default/files/reports/us0907webwcover.pdf>).

However, many states do contain such prohibitions. For example, in New Jersey it is a crime to knowingly hire an "excluded" person (i.e. a child sex offender) for child services work and for an "excluded" sex offender to serve in a paid or unpaid job in a child services organisation.[22] Wisconsin makes it a felony for a person convicted of a "serious child sex offence" to perform paid or volunteer work involving direct contact with children under 16.[23] In Iowa, a convicted child sex offender "shall not…operate, manage, be employed by, or act for pay as a contractor or volunteer" at a) a carnival when a minor is present on the premises, b) an amusement centre providing services intended primarily for minors when a minor is present, c) a public or nonpublic elementary or secondary school, child care facility or public library, d) any place primarily for use by minors such as a playground, a recreational activity area, a swimming pool or a beach.[24]

In summary, sex offenders, not just those who have victimised children, are subject to stringent registration requirements. Moreover, the names, residency, and other information about high risk registrants are posted to online publicly accessible websites.[25] If that were not sufficient to assure that paedophiles do not obtain access to children through employment or volunteer work, federal and state laws mandate that certain child services employers conduct criminal background checks; some state laws prohibit certain categories of employers from hiring previously convicted sex offenders.

The Evolution of EU Policy on Preventing Convicted Sex Offenders from Obtaining Jobs or Volunteer Positions Providing Access to Children

[22] N.J. Code Crim. Just. 2c:7-23.

[23] Wis. Stat. Ann. § 948.13 (West 2011).

[24] Iowa Statutes 692A.113.

[25] SORNA gives states discretion not to post information about tier I sex offenders, unless the victim is a minor. In 2010, information on 616,000 registered sex offenders was available on publicly accessible state sex offender registries. US Department of Justice, Bureau of Justice Statistics, *Survey of State Criminal History Information Systems 2010: A Criminal Justice Information Policy Report* (2010) (<www.ncjrs.gov/pdffiles1/bjs/grants/237253.pdf>).

Continental European countries traditionally restrict disclosure and dissemination of individual criminal history information. This is reflected and reinforced by EU Directive 95/46/EC on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, which states that conviction information is a "special category of personal data," whose processing "may be carried out only under the control of official authority, or if suitable specific safeguards are provided under national law".[26] Generally, court records are not available for public scrutiny. National criminal registers (NCRs) provide individual criminal history information only to judicial authorities and to the police. Usually private employers do not have access to NCRs, but individuals may obtain their own criminal record extract from their country's NCR.[27] Nevertheless, fear of child sex offenders has produced an important exception to criminal record confidentiality.[28]

In 1996, Belgian authorities apprehended Marc Dutroux who, having been paroled after serving a prison sentence for multiple rapes, kidnapped, raped and murdered more victims.[29] In response to public outrage, Belgium increased punishments and controls over sex offenders and

[26] See <eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1995:281:0031:0050:EN:PDF>. However, EU legislation does not explicitly prohibit employment discrimination based on criminal records. See also James B. Jacobs and Elena Larrauri, 'Are criminal convictions a public matter? The USA and Spain', 14 *Punishment & Society* 3 (2012); James Q. Whitman, 'The Two Western Cultures of Privacy: Dignity versus Liberty', 113 *Yale Law Journal* 1151 (2004).

[27] Most EU countries have a central NCR based on convictions. Some NCRs record only criminal court judgments; others include certain administrative decisions as well. White Paper on Exchanges of Information on Convictions and the Effect of such Convictions in the European Union COM(2005) 10 final (<eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0010:FIN:EN:PDF>); Commission Staff Working Paper, Annex to the White Paper on Exchanges of Information on Convictions and the Effect of such Convictions in the European Union SEC(2005) 63 (<www.statewatch.org/news/2005/mar/com-sec63-convictions.pdf>); KPMG, *Disclosure of Criminal Records in Overseas Jurisdictions, Summary of findings* (2009) (<www.cpni.gov.uk/documents/publications/2009/2009-criminal_records_disclosure_intro_and_exe_summary_march09.pdf?epslanguage=en-gb>).

[28] Martine Herzog-Evans, 'Judicial Rehabilitation in France: Helping with the Desisting Process and Acknowledging Achieved Desistance'; Christine Morgenstern, 'Judicial Rehabilitation in Germany – The Use of Criminal Records and the Removal of Recorded Convictions'; Miranda Boone, 'Judicial Rehabilitation in the Netherlands: Balancing Between Safety and Privacy'; all in 3(1) *European Journal of Probation* 4, 20, 63 (2011); Anne-Marie McAlinden, 'The Governance of Sexual Offending Across Europe: Penal Policies, Political Economies and the Institutionalisation of Risk', 14(2) *Punishment & Society* 166 (2012).

[29] BBC News, 'Child Killer Convicted in Belgium' (17 June 2004) (<news.bbc.co.uk/2/hi/3811907.stm>).

urged EU action.[30] In February 1997, the EU adopted a Joint Action; Member States agreed to criminalise trafficking and sexual exploitation of children and to cooperate in exchanging information about persons convicted of such crimes.[31] Other EU initiatives against sexual exploitation of children and child pornography followed.[32] The European Commission initiated studies of the feasibility of 1) an EU sex offender register and 2) a central European criminal records database of convicted persons (for any offences) that could support an EU employment disqualification[33] register.[34]

In December 2003, the Council of the European Union's Framework Decision 2004/68/JHA on Combating Sexual Exploitation of Children and Child Pornography required Member States to: 1) criminalise various forms of sexual exploitation of children and production and distribution of child pornography, and; 2) take measures to ensure that a convicted child sex offender (i.e. a person convicted of one of the offences referred to in the Framework Decision) "may, if appropriate, be temporarily or permanently prevented from exercising professional

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[30] C.J.C.F. Fijnaut, *Nota met vraagpunten betreffende het onderzoek in de zaak 'JULIE EN MELISSA'. (Belgische Kamer van Volksvertegenwoordigers: Parlementair onderzoek naar de wijze waarop het onderzoek door politie en gerecht werd gevoerd in de zaak "Dutroux-Nihoul en consoorten", 713/6-96/97)* (1997); Sonja Snacken, 'Penal Policy and Practice in Belgium', 36 *Crime and Justice, A Review of Research* 127 (University of Chicago Press, 2007).

[31] Council Joint Action 97/154/JHA Concerning Action to Combat Trafficking in Human Beings and Sexual Exploitation of Children (<europa.eu/legislation_summaries/other/l33072_en.htm>).

[32] Bill Hebenton and Terry Thomas, 'Capacity Building Against Transnational Crime: European Measures to Combat Sexual Offenders', 7 *European Journal of Crime, Criminal Law and Criminal Justice* 150 (1999). See also Council Decision 2000/375/JHA to Combat Child Pornography on the Internet (<eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000D0375:EN:HTML>) and Council Framework Decision 2002/629/JHA on Combating Trafficking in Human Beings (<eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002F0629:EN:HTML>).

[33] "A disqualification can be defined as a measure which restricts, for a limited or unlimited period, a natural or legal person from exercising certain rights, occupying certain functions, engaging in certain activities, going to certain places or carrying out certain measures." Communication from the Commission to the Council and the European Parliament, Disqualifications Arising from Criminal Convictions in the European Union COM(2006) 73 final (<eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0073:FIN:EN:PDF>).

[34] T. Thomas, I. Katz and C. Wattam, *Cupisco: The Collection and Use of Personal Information on Child Sex Offenders* (NSPCC, 2000); Gert Vermeulen, Fleur Dhont, Arne Dormaels, *European Data Collection on Sexual Offences Against Minors* (Ghent University, Maklu, 2001); Gert Vermeulen, Tom Vander Beken, Els De Busser, Arne Dormaels, *Blueprint for an EU Criminal Records Database, Legal, Political-Institutional & Practical Feasibility* (Ghent University, Institute for International Research on Criminal Policy, Maklu, 2002).

activities related to the supervision of children."[35] In other words, Member States had to provide *for the possibility* of barring convicted child sex offenders from obtaining jobs that entail supervision of children. They could decide the details e.g. which cases, procedures, duration.

In 2004, shortly after Dutroux's conviction, Belgian police apprehended Michel Fourniret, a French national, for attempted sexual assault of a child. Eventually, Fourniret admitted to having raped and murdered several girls and women in France and Belgium over the course of two decades. Although, in 1987 a French court had convicted Fourniret of sexual offences, he obtained employment as a school supervisor in Belgium after release from prison; neither Belgian authorities nor the school were aware of his French convictions.[36] The Fourniret case made it politically imperative for the EU to take action to improve criminal record sharing and prevent sex offenders from obtaining access to children through employment.[37]

Seeking to prevent a convicted child sex offender (like Fourniret) from travelling from one Member State to another to obtain a position which would provide access to child victims, Belgium proposed a Framework Decision requiring members states to: 1) include in their NCRs *any temporary or permanent ban on exercising professional activities related to the supervision of children, arising from a conviction* related to the offences listed in Framework Decision 2004/68/JHA; 2) ensure that employment disqualifications related to the supervision of children are communicated to other Member States when transmitting criminal record information; and 3) ensure that the Member State where the convicted sex offender resides recognises and enforces

[35] See <eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004F0068:EN:HTML>.

[36] BBC News, 'How Fourniret Slipped Through the Net' (8 July 2004) (<news.bbc.co.uk/2/hi/europe/3875987.stm>).

[37] Deutsche Welle, 'EU Rules Out Central Criminal Register' (19 July 2004) (<www.dw-world.de/dw/article/0,,1262357,00.html>); Kate Fitch, Kathleen Spencer Chapman and Zoë Hilton, *Protecting Children from Sexual Abuse in Europe: Safer Recruitment of Workers in a Border-Free Europe* (NSPCC, 2007).

employment disqualifications imposed by other Member States.[38] That the EU did not adopt Belgium's proposal after the uproar caused by Fourniret's case demonstrates the practical and political obstacles to aligning the diverse Member States' vetting and disqualification rules. Some Member States impose employment disqualifications via a criminal judgment, others via administrative proceedings and still others by means of occupational licensing laws. The scope and duration of these disqualifications vary. Moreover, Member States differ on how, if at all, to record employment disqualifications in their NCR.[39]

Meanwhile, the EU sped up plans to improve exchange of criminal record information among Member States.[40] The 2005 Council Decision 2005/876/JHA on the Exchange of Information Extracted from the Criminal Record required Member States to designate "central authorities" responsible for sending and receiving criminal record information expeditiously and efficiently.[41] It further required Member States to send prompt notifications of their courts' convictions of foreign EU nationals to the convicted individual's home country's designated central authority. This Council Decision applied prospectively.[42]

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[38] See the Kingdom of Belgium's proposal for a Framework Decision on the Recognition and Enforcement in the European Union of Prohibitions Arising from Convictions for Sexual Offences Committed Against Children (<register.consilium.europa.eu/pdf/en/04/st14/st14207.en04.pdf>, <eurocrim.jura.uni-tuebingen.de/cms/en/doc/964.pdf>).

[39] White Paper on Exchanges of Information on Convictions and the Effect of such Convictions in the European Union {SEC(2005)63} (<eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005DC0010:EN:HTML>); Communication from the Commission to the Council and the European Parliament, Disqualifications Arising from Criminal Convictions in the European Union COM(2006) 73 final (<eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0073:FIN:EN:PDF>); Graham Ritchie, *Study on Disqualification from Working with Children within the EU* (Institute of Advanced Legal Studies, 2001). E.g. in Greece, employment laws determine which occupations are closed to a convicted sex offender. Disqualifications are not part of the criminal record. Dimitra Blitsa, *Conviction and Employment in Greece: from National Legislation to European Requirements*, presentation delivered at Employment Discrimination Based on Criminal Records seminar, Universitat Pompeu-Fabra (2011).

[40] James B. Jacobs and Dimitra Blitsa, 'Major "minor" Progress Under the Third Pillar: EU Institution Building in the Sharing of Criminal Records', 8 *Chicago-Kent Journal of International and Comparative Law* 111 (2008); BBC News, 'Widening the EU's Criminal Justice Net' (5 October 2006) (<news.bbc.co.uk/2/hi/europe/5410518.stm>). The Fourniret case led France, Germany, Spain and Belgium to implement a pilot project ("Network of Judicial Registers") to connect their national criminal registers. Deutsche Welle, 'EU Countries to Share Criminal Records' (6 April 2005) (<www.dw-world.de/dw/article/0,,1543837,00.html>); <ec.europa.eu/justice/criminal/european-e-justice/ecris/index_en.htm>.

[41] See <eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32005D0876:EN:NOT>.

[42] Two years later, the campaign to find missing (UK national) four-year-old Madeleine McCann, who was abducted in Portugal, reported that 97% of European Parliament members favoured the creation of an EU sex offender register. However, no

Paralleling the EU's efforts, the 2007 Council of Europe's (COE) (consisting of 47 member countries, including all EU Member States) *Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse* commits members countries to criminalising various forms of sexual abuse and exploitation of children and to ensuring that applicants for jobs requiring "regular contacts with children" "have not been convicted of acts of sexual exploitation or sexual abuse of children".[43]

In 2009, the EU replaced Council Decision 2005/876/JHA with Framework Decision 2009/315/JHA on the Organisation and Content of the Exchange of Information Extracted From the Criminal Record Between Member States. It requires a Member State's central authority, upon receiving notification that another Member State convicted one of its nationals, to record that conviction.[44] The goal is *eventually* for each Member State's NCR to hold the EU-wide conviction records of its own nationals and thus become capable of providing that information to other Member States who request the information for criminal proceedings or another purpose, e.g. employment vetting.[45] (The requesting state's central authority may make a request outside the context of criminal proceedings on behalf of a judicial authority, a competent administrative authority or the record subject.) This Framework Decision is meant to achieve the essential purpose of Belgium's 2004 proposal, i.e. to prevent an individual convicted of a sex offence in one Member State from obtaining a position entailing supervision of children in

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proposal was actually introduced. BBC News, 'MEPs Want Sex Offender List' (22 August 2007) (<news.bbc.co.uk/2/hi/uk_news/6958807.stm>).

[43] See <conventions.coe.int/Treaty/EN/treaties/Html/201.htm>. According to the Council of Europe, 20% of European children are victims of sexual violence (<www.coe.int/t/dg3/children/1in5/default_en.asp>). As of mid-2012, 11 EU Member States and 8 other COE members have ratified this Convention (<conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=201&CM=&DF=&CL=ENG>).

[44] See <eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:093:0023:0032:EN:PDF>.

[45] Framework Decision 2008/675/JHA on Taking Account of Convictions in the Member States of the European Union in the Course of New Criminal Proceedings requires that, in criminal proceedings, Member States give the same weight to convictions rendered by other EU countries' courts as they give to domestic convictions (<eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:220:0032:0034:EN:PDF>).

another Member State.[46] Council Decision 2009/316/JHA on the Establishment of the European Criminal Records Information System (ECRIS) in Application of Article 11 of Framework Decision 2009/315/JHA establishes a uniform computer-transferable standardised format for electronic exchange and automatic translation of criminal records information.[47]

In 2010, a COE Parliamentary Assembly *Resolution*, recommended that member countries *reinforce measures against sex offenders*. Rejecting a European-wide sex offender register, on account of varying laws on sexual offences and personal data protection considerations, the Assembly recommended that member countries "take effective national measures to prevent sexual offences" such as a national sex offender register; monitoring sex offenders' movements, including foreign travel; and, introducing employment vetting and barring schemes for posts with vulnerable groups. Additionally, the Assembly urged better information sharing.[48]

The 2011 Directive 2011/92/EU on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography, and Replacing Council Framework Decision 2004/68/JHA introduced minimum definitional requirements and sanctions for offences related to child sexual abuse and exploitation, child pornography, and solicitation of children for sexual purposes.[49] It is

[46] However, this Framework Decision requires the defendant's home Member State to record disqualification information if transmitted by the convicting Member State.

[47] See <eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:093:0033:0048:EN:PDF>.

[48] Parliamentary Assembly, Resolution 1733 (2010), *Reinforcing Measures Against Sex Offenders* (<assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta10/ERES1733.htm>); Parliamentary Assembly, Doc. 12243, Report, Committee on Legal Affairs and Human Rights, *Reinforcing Measures Against Sex Offenders* (4 May 2010) (<assembly.coe.int/Documents/WorkingDocs/Doc10/EDOC12243.pdf>).

[49] See <eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:335:0001:0014:EN:PDF>. That same year, Directive 2011/36/EU on Prevention and Combating Trafficking in Human Beings and Protecting its Victims, and Replacing Council Framework Decision 2002/629/JHA was adopted (<eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:101:0001:0011:EN:PDF>).

the EU's most far-reaching initiative towards preventing convicted sex offenders from obtaining paid or volunteer positions affording access to children. The Directive:[50]

1) requires Member States to ensure that those convicted of any offences against children listed in the Directive "may be temporarily or permanently prevented from exercising at least professional activities involving direct and regular contacts with children". Member States retain discretion regarding what kind of vetting scheme to adopt (e.g. via a criminal/administrative decision or an occupational licensing law) and regarding how to interpret *direct and regular contacts with children.* Additionally, Member States are encouraged *to consider* extending disqualifications to positions in voluntary organisations that provide services to children;
2) for the first time, recognises, that an employer, who is recruiting staff for professional or voluntary activities involving direct and regular contacts with children, has a right to be informed of job applicants' convictions for sexual offences against children and of related employment disqualifications. Thus, a Member State that does not currently provide for disclosure of criminal records to employers working with children will have to change its national law. Member States are free to adopt their preferred strategy for complying and making such information available (e.g. access upon request or via the person concerned; official summary of criminal record information or official proof of a clean record);[51]

[50] With implementation of the Treaty of Lisbon, Directives replaced Framework Decisions (<ec.europa.eu/justice/criminal/index_en.htm>).

[51] The Directive will impact Member States differently because they currently differ with respect to how much, if any, access to criminal records they allow employers. For example, in the Netherlands, the Central Organisation for Certificates of Good Conduct (COVOG) is responsible for issuing certificates of good conduct for employment purposes. Certificates are required for all educational, child care and nursery jobs. A certificate is issued if the applicant does not have a criminal record (including convictions, open cases, dismissals and "*transacties*") that is relevant to the job for which the certificate has been requested. Miranda Boone, 'Judicial Rehabilitation in the Netherlands: Balancing between Safety and Privacy', 3(1) *European Journal of Probation* 63 (2011). In Germany, since 2009, all employers providing child care and youth welfare services must request an "extended certificate of conduct" (listing all convictions) from job applicants and employees. The scheme has been implemented hesitantly because of problems related to the huge number of positions covered. Christine Morgenstern, 'Judicial Rehabilitation in Germany – The Use of Criminal Records and the Removal of Recorded Convictions', 3(1) *European Journal of Probation* 20 (2011). In Greece, the onus is on the state to prevent sex offenders from working with children by means of a

3) requires that Member States, for the application of paragraphs 1) and 2), transmit information, on criminal convictions for the crimes included in the Directive or of any relevant employment disqualifications, when requested by other Member States, via the procedures set by Framework Decision 2009/315/JHA. In other words, the Directive requires Member States to exchange child sex offence conviction information for the purposes of 1) enabling the requesting Member State to identify and bar sex offenders convicted in other Member States from working with children and 2) enabling EU employers to make informed decisions about the suitability of EU job applicants for positions affording close contact with children. However, the Directive does not require Member States to enforce other Member States' employment disqualifications;[52]
4) encourages Member States to consider adopting additional child-protection measures such as a national child sex offender register, but it adds the caveat that access to such registers shall be in accordance with "national constitutional principles and applicable data protections standards". Member States shall comply with the Directive by December 2013.

Unfinished Business

Over the past few years, the EU has steadily moved towards the goal that each Member State's NCR will contain a complete record of all EU convictions of that Member State's nationals. Member States have also agreed on minimum rules on criminalisation of sexual offences against children. However, much work remains in reducing the risk that European

licensing scheme. There are no express provisions providing for the disclosure of criminal records to private employers. The Directive will require the state to provide employers working with children a means of obtaining information about disqualifying criminal records. Dimitra Blitsa, *Conviction and Employment in Greece*: *from National Legislation to European Requirements*, presentation delivered at Employment Discrimination Based on Criminal Records seminar, Universitat Pompeu-Fabra (2011).

[52] Contra Commission's proposal (<eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0094:FIN:EN:HTML>).

children will fall victim to previously convicted sex offenders who might take advantage of anonymity afforded by diverse national legal regimes.

First, the 2011 Directive recommends, but does not require, that employers conduct pre-employment criminal background checks for child-related positions.[53] It limits criminal background checks to job applicants, and thus does not cover employees whose prior convictions come to light after being hired or who are convicted after being hired.[54] In addition, it does not apply to sex offences against an adult victim, even though, arguably, a person with that kind of conviction also poses a risk to children.

The 2011 Directive leaves interpretation of *direct and regular contacts with children* to each Member State. Consider a school. Teachers, of course, fall within this definition, but what about the cooks, janitors and administrative staff? Should the answer vary from school to school, depending on the configuration of the building and on the specifics of the routines/duties of each school's personnel? In a hospital, are all doctor, nurse and attendant positions covered? Each Member State will have to answer these questions. Perhaps Member States that do not provide for disclosing prospective employees' relevant criminal history and employment disqualification information to child-services organisations will now decide to issue guidelines to employers/job applicants and the NCR with respect to what positions are covered. As we will see

[53] Before the implementation of the Treaty of Lisbon, the Commission stated that mandating criminal background checks "would involve regulating the conditions for access to employment in Member States, which would go beyond the scope of … any EU instrument in criminal matters…However, where Member States' legislation does require such mandatory checking, the proposal would ensure that the criminal record database represents an accurate picture of prohibitions arising from E.U.-wide convictions." Commission Staff Working Document, Accompanying Document to the Proposal for A Council Framework Decision on Combating the Sexual Abuse, Sexual Exploitation of Children and Child Pornography, Repealing Framework Decision 2004/68/JHA, Impact Assessment SEC(2009) 355 (eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2009:0355:FIN:EN:PDF>).

[54] The European Parliament's LIBE Committee supported employers' access to employees' sex offence convictions and employment disqualifications, should serious suspicion arise. Draft Angelilli Report on the Proposal for a Directive of the European Parliament and of the Council on Combating Sexual Abuse, Sexual Exploitation of Children and Child Pornography, Repealing Framework Decision 2004/68/JHA, Committee on Civil Liberties, Justice and Home Affairs (<www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-452.564+03+DOC+PDF+V0//EN&language=EN>).

in our examination of the UK's experience, designating which positions involve sufficient contact with children to warrant a criminal background check can prove quite complex.

Member States' different vetting standards and procedures are also likely to cause problems when it comes to foreign job applicants. How will an employer from Member State A find out about a foreign applicant's criminal record for a position which state A, but not state B (the applicant's home state), regards as involving *direct and regular contacts with children*?[55] Moreover, how can an EU employer be certain that a job applicant who is a citizen of another Member State has not been previously convicted of a sex crime somewhere in the EU? For that matter, how can the employer be sure that even a national applicant has not been convicted of a crime in another EU country where he or she resided or vacationed? Consider the 2010-2012 case of Robert Mikelsons, apparently one of the most prolific European sex offenders of all times. A Latvian national, employed in the Netherlands at a crèche and as a child minder, Mikelsons was convicted of sexually abusing 67 children and trafficking in child pornography. The Dutch agency responsible for conducting criminal background checks for child services employers, unaware of a previous German conviction for possessing child pornography, had given him a "certificate of good conduct" (i.e. a clean criminal record).[56]

It will be many years before Member States have a comprehensive record of their nationals' EU-wide convictions. Framework Decision 2009/315/JHA's requirement that Member

[55] Directive 2011/92/EU refers back to Framework Decision 2009/315/JHA regarding procedures for transmitting criminal record information, i.e. when a Member State receives a criminal records request for a purpose other than a criminal proceeding, it may transmit information in accordance with its national law. The requesting Member State may use the information only for the purposes for which it was requested and according to any restrictions specified by the requested state. Transmission for the purposes of pre-employment vetting would fall outside the context of criminal proceedings. Thus, in our example, state B could perhaps take the view that it is not obliged to share the requested information with state A.

[56] Radio Netherlands Worldwide, 'Parliament Shocked by Earlier Conviction of Robert Mikelsons' (16 December 2010) (<www.rnw.nl/africa/bulletin/parliament-shocked-about-earlier-conviction-robert-mikelsons>); The Huffington Post, 'Robert M. Pedophilia Conviction: "Monster of Riga" Sentenced To 18 Years' (21 May 2012) (<www.huffingtonpost.com/2012/05/21/robert-m-pedophilia-conviction_n_1532428.html?ref=world>).

States record their nationals' foreign EU convictions didn't become effective until April 2012.[57] Even in the UK, with its aggressive employment vetting regime, a 2007 report of notifications of UK nationals' convictions by other countries' courts found some 20,000 convictions that had not been recorded in the UK Police National Computer. The report found that for more than ten years, the Home Office had failed to properly record conviction information transmitted by other countries.[58]

Effective mutual recognition of employment disqualifications will not become a reality as long as Member States' disqualification regimes vary so significantly. Some Member States may object to enforcing a disqualification imposed by another Member State's administrative authority. No doubt there will be strenuous objection to enforcing another Member State's very lengthy (even lifetime) employment disqualification. There is disagreement, not to mention confusion, over what positions a disqualification covers. Ultimately, it would be desirable to harmonise employment disqualifications with respect to nature, scope, weight and duration, before requiring Member States to recognise each other's disqualifications.[59]

It remains to be seen whether Member States will act on the EU's and COE's recommendations for the establishment of national (child) sex offender registers. So far, only the

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[57] Few Member States made use of the procedures established by Council Decision 2005/876/JHA. In addition, although Framework Decision 2009/316/JHA required Member States to develop capacity to exchange criminal record information electronically by April 2012, as of mid-2012, not all Member States are able to exchange records electronically. Personal communication with Mr Kosmas Papachrysovergis, Head of Independent Department of Criminal Records, Greek Ministry of Justice (April-May 2012).

[58] Home Office, *Report of the Enquiry into the Handling by Home Office Officials of Notifications, by other European Countries, of Criminal Convictions for UK Citizens* by Dusty Amroliwala (2007).

[59] Communication from the Commission to the Council and the European Parliament, Disqualifications Arising from Criminal Convictions in the European Union COM(2006) 73 final (<eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0073:FIN:EN:PDF>). "In Sweden, workers in the healthcare sector do not have to be vetted before they can work with children or vulnerable adults; in Poland, there appears to be some vetting in the education sector, no vetting is required for people working in children's homes…In Belgium, individuals can be disqualified from working with children under the age of five, for instance…However, if such an individual moved to the UK, they would face a much more stringent ban, as the only form of disqualification that exists in the UK is for employment with all children and vulnerable adults." Kate Fitch, Kathleen Spencer Chapman and Zoë Hilton, *Protecting Children from Sexual Abuse in Europe: Safer Recruitment of Workers in a Border-Free Europe* (NSPCC, 2007), p. 29.

UK, the Republic of Ireland, France and, to a limited extent, Germany have (non-publicly available) sex offender registers.[60] If all or most Member States were to create sex offender registers, these registers eventually might be merged into an EU-wide sex offender register. Before hiring someone for a position requiring close contact with children, EU employers could be permitted, even required, to get an "all clear" from the sex offender register. However, there already is political resistance to creating such a supra-national criminal justice entity. Moreover, an EU sex offender database would have to overcome a number of questions regarding reliability, duration of data storage, cost, managing authority, as well as substantial data protection and rehabilitation concerns. [61]

Lastly, the EU's employment screening initiatives have yet to address what to do about non-EU nationals' convictions in the EU. Member States, as of mid-2012, are not able to determine whether a non-EU national residing in the EU has previously been convicted of a sex or other offence within the EU. [62] They are even less likely to find out whether that individual

[60] Parliamentary Assembly, AS/Jur (2008) 51, Committee on Legal Affairs and Human Rights, *For a Europe-Wide Sex Offenders Register,* Introductory Memorandum (2008) (http://assembly.coe.int/CommitteeDocs/2010/20081104_ajdoc51.pdf); Terry Thomas, *The Registration and Monitoring of Sex Offenders, A Comparative Study* (Routledge, 2011).

[61] Gert Vermeulen, Tom Vander Beken, Els De Busser, Arne Dormaels, *Blueprint for an EU Criminal Records Database, Legal, Political-Institutional & Practical Feasibility* (Ghent University, Institute for International Research on Criminal Policy, Maklu, 2002); Deutsche Welle, 'EU Rules Out Central Criminal Register' (19 July 2004) (<www.dw-world.de/dw/article/0,,1262357,00.html>); Parliamentary Assembly, Doc. 12243, Report, Committee on Legal Affairs and Human Rights, *Reinforcing Measures Against Sex Offenders* (4 May 2010) (<assembly.coe.int/Documents/WorkingDocs/Doc10/EDOC12243.pdf>). The European Parliament's LIBE Committee favoured establishing a national and, when appropriate, a European certificate of good conduct that would certify the absence of convictions for any offence referred to in the Directive or any relevant employment disqualification. However, the Presidency was of the view that "the European certificate of good conduct is too ambitious to be achieved in the framework of a criminal directive with the intention of harmonising criminal law. There is no legal basis for such certificate." Council of the European Union, Working Document DS 1114/6/11 REV 6, Proposal for a Directive of the European Parliament and of the Council on Combating Sexual Abuse, Sexual Exploitation of Children and Child Pornography, Repealing Framework Decision 2004/68/JHA (<www.statewatch.org/news/2011/may/eu-council-trilogue-child-abuse-multi-column-ds1114-rev6-11.pdf>).

[62] Commission Working Document on the Feasibility of an Index of Third-Country Nationals Convicted in the European Union COM(2006) 359 final (<eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0359en01.pdf>)

has ever been convicted of a sex crime outside the EU. Similarly, EU Member States lack information on their own nationals' criminal convictions outside the EU.[63]

The Tortuous History of the UK's Efforts to Prevent Sex Offenders from Obtaining Placements that Provide Access to Children

The explosive growth of criminal background screening in the UK can be traced back to mid-1980s initiatives to prevent convicted sex offenders from obtaining employment or volunteer positions that provide access to children.[64] Until that time, the police were not permitted to disclose criminal record information to members of the public, "unless there [were] weighty considerations of public interest which justify departure from the general rule". Pre-employment criminal background checking was limited to certain "sensitive posts", such as police officers, casino workers and securities dealers. While the police were authorised to provide criminal history information to local authorities tasked with approving foster/adoptive parents and child-minders, employers working with children were not empowered to obtain job applicants' criminal background information from the police.[65]

Local police were supposed to inform the Department of Health and Social Security (DHSS) when an individual known to be employed in child care work was convicted of certain crimes (such as theft, violence, drugs or indecency). Local authorities and volunteer organisations were supposed to inform the DHSS when a member of their staff was fired or

[63] Home Office, *A Common Sense Approach, A Review of the Criminal Records Regime in England and Wales by Sunita Mason, Independent Advisor for Criminality Information Management, Report on Phase 2* (2011) (<www.homeoffice.gov.uk/publications/crime/criminal-records-review-phase2?view=Binary>).

[64] Terry Thomas and Bill Hebenton, *Dilemmas and Consequences of a Criminal Conviction: a Criminological Perspective from England and Wales*, paper delivered at Employment Discrimination Based on Criminal Records seminar, Universitat Pompeu-Fabra (2011); Terry Thomas, *Criminal Records: A Database for the Criminal Justice System and Beyond* (Basingstoke: Palgrave Macmillan, 2007).

[65] Bill Hebenton and Terry Thomas, *Criminal Records: State, Citizen and the Politics of Protection* (Brookfield, Vermont: Ashgate Publishing Company, 1993); Home Office, *Police Reports of Convictions and Related Information* (Circular No. 140/1973) (1973). In addition, the police were supposed to report to employers or professional associations if employees in "notifiable occupations", e.g. medical practitioners, nurses, teachers, youth leaders, residential care workers with children, barristers, magistrates, were convicted of certain offences.

resigned under circumstances suggesting a risk to children; the DHSS used this information to construct the "Consultancy Service" register, a list of individuals unsuitable for employment in the child care field. While local authorities and volunteer organisations could query the Consultancy Service when considering an applicant for a child care post, the DHSS had no power to bar anyone from employment or volunteer work. By contrast, the Secretary of State for Education and Science did have authority on grounds of "misconduct" to prohibit or restrict (via "List 99") the employment of teachers and other education staff. The police were supposed to send the Department of Education and Science (DES) conviction information about current or former teachers; local education authorities and independent schools were obliged to inform the DES of cases of misconduct leading to dismissal or resignation. Local education authorities were required to check List 99 before employing teachers and others whose work brought them regularly into contact with children.[66]

Anxiety over sex offenders obtaining employment with children escalated in 1984, when Colin Evans, who had several previous convictions involving child victims, was arrested (later convicted) for murdering four-year-old Marie Payne. While Evans had not obtained access to Marie through employment or volunteer work, media charged that Evans' probation officer had not provided information about his prior offences to the Christian volunteer organisation where Evans worked as a child-minder.[67] These revelations triggered a joint Home Office and DHSS review of criminal record disclosure policies. The 1985 review concluded that the scope of police criminal record disclosures was too limited, the Consultancy Service register and List 99 were incomplete and checks against the DHSS register were haphazard.[68]

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[66] Home Office/DHSS, *Disclosure of Criminal Convictions of Those with Access to Children, First Report* (1985). The Consultancy Service and List 99 applied to England and Wales. In 1985, the DHSS register held 3,000 names and List 99 held 1,500 names. A conviction was not a prerequisite for inclusion on the list.

[67] Bob Franklin (ed.), *Social Policy, the Media, and Misrepresentation* (Routledge, 1999).

[68] Home Office/DHSS, *Disclosure of Criminal Convictions of Those with Access to Children, First Report* (1985).

Thus, in 1986, the Home Office introduced, by means of "circular guidance", criminal background checks for individuals with "substantial access to children".[69] The guidance authorised designated public sector employers and some volunteer organisations to request from the local police information about job applicants' criminal records. It authorised the police to disclose any past convictions, cautions, bind-over orders and intelligence information.[70] To facilitate this flow of information, the Rehabilitation of Offenders Act (ROA) 1974 (Exceptions) Order 1975 was amended to permit police to disclose and employers to consider even "spent" (expunged) convictions.[71] The guidance provided advice about how to determine whether a position afforded substantial access to children and whether a conviction was "relevant" to filling such position. The DHSS and List 99 blacklists remained in place.

Once authorised, pre-employment criminal background checking has a tendency to expand. In 1993, the number of child-care-related criminal record checks (665,000) far exceeded the 1985 prediction of 100,000 per annum. The Home Office (and job seekers) charged that employers were requesting background checks for positions that did not afford substantial access

[69] Home Office, *Protection of Children: Disclosure of Criminal Background of Those with Access to Children* (Circular No. 44/1986) (1986); Home Office, *Police Reports of Convictions and Related Information* (Circular No. 45/1986) (1986); Home Office, *Protection of Children: Disclosure of Criminal Background of Those with Access to Children* (Circular No. 102/1988) (1988); Home Office, *Disclosure of Criminal Records for Employment Vetting Purposes: A Consultation Paper by the Home Office,* Cm 2319 (1993); Home Office, *Protection of Children: Disclosure of Criminal Records of Those with Access to Children* (Circular No. 47/1993) (1993).

[70] Police cautions are used to dispose, without formal arrest, of minor crimes (<www.direct.gov.uk/en/CrimeJusticeAndTheLaw/Beingstoppedorarrestedbythepolice/DG_196450>). For bind-over orders, see <www.cps.gov.uk/legal/a_to_c/binding_over_orders/>. Local police intelligence included "… factual information which the police would be prepared to present as evidence in court, of details of acquittals or decisions not to prosecute where the circumstances of the case would give cause for concern." Home Office, *Protection of Children: Disclosure of Criminal Background of Those with Access to Children* (Circular No. 102/1988) (1988).

[71] The Rehabilitation of Offenders Act 1974 (<www.legislation.gov.uk/ukpga/1974/53/contents>) requires ex-offenders, if asked by their employers, to disclose past criminal convictions. However, a conviction is considered "spent" if, after completing the sentence, the convicted offender has remained crime-free for a designated number of years, which varies according to the seriousness of the crime. Spent convictions do not have to be disclosed on an employment application and in other contexts. However, for purposes of obtaining employment in certain exempted professions, employments and occupations e.g. those involving access to children, applicants have to disclose spent convictions. See the ROA 1974 (Exceptions) Order 1975 (<www.legislation.gov.uk/uksi/1975/1023/contents/made>) and the ROA 1974 (Exceptions) (Amendment) Order 1986 (<www.lawgazette.co.uk/news/criminal-law-rehabilitation-offenders-act-1974-exemptions-amendment-order-1986-si-1986-no-1249>).

to children. Other critics pressed to extend background screening to cover private child care organisations, more volunteer organisations and positions affording close contact with members of other vulnerable groups (e.g. the elderly and adult mentally handicapped people). Still other organisations wanted to extend employment vetting to assure integrity in other occupations, e.g. firefighters and private security personnel. The police complained about the burden and expense of ever-increasing criminal background checking for employment purposes.[72]

After a wide-ranging review,[73] the Police Act 1997 instituted a national employment vetting scheme to be managed by a new Criminal Records Bureau (CRB).[74] The CRB (which became operational in spring 2002) would be responsible for disclosing job seekers' criminal records to employers in certain public, private and volunteer sectors, especially those involving children and vulnerable adults. Employers could ask applicants for "exempted positions" (as defined by the ROA 1974 (Exceptions) Order 1975, amended in 2001[75]) to request from the CRB a criminal record "certificate" (i.e. a criminal record extract). Applicants for these professions, employments and occupations, had to disclose all prior convictions, even "spent" convictions. With respect to children, this included any work in a "regulated position" (e.g. a position whose normal duties included work in a school or a sixth form college, on day care premises, or in children's home or hospital).[76] The CRB enabled *many more organisations* serving children to obtain criminal record checks.[77]

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[72] Terry Thomas, *Criminal Records: A Database for the Criminal Justice System and Beyond* (Basingstoke: Palgrave Macmillan, 2007); Home Office, *Disclosure of Criminal Records for Employment Vetting Purposes: A Consultation Paper by the Home Office,* Cm 2319 (1993).

[73] Home Office, *On the Record: The Government's Proposals for Access to Criminal Records for Employment and Related Purposes in England and Wales,* Cm 3308 (1996).

[74] See <www.legislation.gov.uk/ukpga/1997/50/contents>. The equivalent for Scotland is Disclosure Scotland and for Northern Ireland is Access Northern Ireland.

[75] See the Rehabilitation of Offenders Act 1974 (Exceptions) (Amendment) Order 2001 (<www.legislation.gov.uk/uksi/2001/1192/made/data.pdf>).

[76] According to the Criminal Justice and Court Services Act 2000 (<www.legislation.gov.uk/ukpga/2000/43/contents>) regulated positions covered a) any work in a school or a sixth form college, on day care premises, or in children's home or

The CRB functioned as an intermediary ("one-stop shop") between employers and the police and the various government information sources. For "standard disclosure" involving work with children, a CRB check searched the Police National Computer (PNC) for any convictions, cautions, reprimands and warnings, as well as the Protection of Children Act (PoCA) List (which replaced the Consultancy Service register) and List 99. An "enhanced disclosure," required for positions affording even closer contact with children ("regularly caring for, training, supervising or being in sole charge of people aged under 18"), provided the standard disclosure information, plus police intelligence information about the job applicant. For work with vulnerable adults, the CRB checked the Protection of Vulnerable Adults (PoVA) List. CRB certificates would be issued to the employer or volunteer organisation and to the subject of the record. When hiring someone for a regulated position, an employer had to check via the CRB against the PoCA List and List 99. (Such employers were also required to report cases of misconduct leading to dismissal or resignation to the Secretary of State.) Whereas the disclosure regime would leave the final decision to the employer, employers were forbidden, on pain of criminal sanction, from hiring barred individuals for regulated positions. Similarly, it was a criminal offence for "blacklisted" individuals to work in or apply for positions for which their prior conviction disqualified them.[78]

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hospital, b) any position in which the normal duties include caring for, training, supervising or being in sole charge of children under the age of 18, c) any position involving unsupervised contact with a child under arrangements made by the child's parents and guardian, the child's school or a registered day care provider, d) a position as a governor of a school or sixth form college. Department of Education and Skills, *Child Protection: Preventing Unsuitable People from Working with Children and Young Persons in the Education Service*, (May 2002) (<dera.ioe.ac.uk/5066/1/ChildProtect.pdf>).

[77] See <www.homeoffice.gov.uk/agencies-public-bodies/crb/about-crb/>; Home Office, *Revised Arrangements for Police Checks* (Circular No. 47/2003) (2003).

[78] See the Protection of Children Act (PoCA) 1999 (<www.legislation.gov.uk/ukpga/1999/14/data.pdftransformed>), the Criminal Justice and Court Services Act 2000 (<www.legislation.gov.uk/ukpga/2000/43/contents>) and the Care Standards Act 2000 (<www.legislation.gov.uk/ukpga/2000/14/>). See also Department for Education and Skills, *The Protection of Children Act 1999, A Practical Guide to the Act for All Organisations Working with Children* (2005) (<webarchive.nationalarchives.gov.uk/20080726153637/http:/www.teachernet.gov.uk/wholeschool/familyandcommunity/childprotection/poca/>); Department for Education and Skills, *Child Protection: Procedures for Barring or Restricting People Working with Children in Education* (2005)

Paralleling the new disclosure arrangements, the Sex Offenders Act 1997 introduced a sex offender registration scheme. It required convicted (or cautioned) sex offenders, under penalty of prosecution for non-compliance, to register with their local police within fourteen days of conviction and to subsequently update the police, within fourteen days, of changes of certain personal information. However, unlike in the US, the UK sex offender "register" would not be publicly accessible.[79] In 2000, this monitoring regime received another jolt when Roy Whiting, a convicted sex offender, who was on the register, was arrested for murdering eight-year-old Sarah Payne. The *News of the World* demanded a "Sarah's Law," patterned after the US Megan's laws, that included a community notification requirement.[80] The Home Office rejected that proposal, claiming that it would be unenforceable, drive paedophiles underground and lead to vigilantism.[81] Instead, it strengthened sex offender registration provisions.[82]

In the summer of 2002, pressure on the government to ratchet up criminal background checking intensified when the UK was rocked by "the Soham murders". Ian Huntley, a school caretaker, murdered two ten-year-old girls who attended the school where he worked. The media excoriated the police for not informing the school that, from 1995 to 1999, Huntley was the subject of nine separate allegations of sexual offences, including unlawful underage sex, rape

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(<webarchive.nationalarchives.gov.uk/20080726153637/http:/www.teachernet.gov.uk/management/staffingandprofessionaldevelopment/barringprocedures/>).

[79] See <www.legislation.gov.uk/ukpga/1997/51/contents>. The Act only applied prospectively. Rather than create a US-type sex offender register, the UK's PNC would have a marker against those offenders registered as sex offenders.

[80] The *News of the World's* "name and shame" campaign published photographs and names of alleged paedophiles. This precipitated harassment of some "outed" individuals. BBC News, 'A Paper's Controversial Campaign' (16 December 2001) (<news.bbc.co.uk/2/hi/uk_news/1709708.stm>).

[81] BBC News, 'Sarah's Law "Unworkable"' (13 December 2001) (<news.bbc.co.uk/2/hi/uk_news/england/1707659.stm>); Terry Thomas, 'Collection and Use of Personal Information on Child Sex Offenders', in Corinne May-Chahal and Maria Herczos (eds), *Child Sexual Abuse in Europe* (Council of Europe, 2003).

[82] See the Criminal Justice and Court Services Act 2000 (<www.legislation.gov.uk/ukpga/2000/43/schedule/5>), the Sexual Offences Act 2003 (<www.legislation.gov.uk/ukpga/2003/42/contents>) (covering foreign sex offence convictions as well) and the Criminal Justice Act 2003 (<www.legislation.gov.uk/ukpga/2003/44/part/13/crossheading/assessing-etc-risks-posed-by-sexual-or-violent-offenders>).

and indecent assault of a minor.[83] The media then added fuel to the fire by charging that the CRB lacked resources to conduct criminal background checks on all new school staff. As the autumn 2002 term began, schools had to turn away pupils or delay opening because the CRB was unable to vet staff in time. The Education Secretary announced that she would permit new teachers and support staff to assume their duties as long as they were not on List 99.[84]

The Home Secretary commissioned an independent inquiry into employment screening, intelligence-based record keeping and inter-agency information sharing. The Bichard Inquiry's 2004 Report criticised the vetting regime's "overlaps, duplications and inconsistencies". While the functions of the three lists (PoCA, List 99 and PoVA) were similar, provisions differed on who should be listed and by what procedures. Because the criteria for standard and enhanced disclosures were unclear, 87% of applications were for enhanced disclosure. Moreover, once the CRB issued a criminal record certificate, there was no procedure for informing the employer of a subsequent conviction or new intelligence information. The Report recommended creating a new agency to register and continuously monitor individuals approved to work with vulnerable groups. It strongly recommended that the vetting process include police intelligence information. It also urged that steps be taken to prevent individuals convicted of sex offences in other countries from working with children in the UK.[85]

In response to the Bichard Inquiry's recommendations, the government introduced the Safeguarding Vulnerable Groups Act (SVGA) 2006. The Act established a new Vetting and

[83] BBC News, 'Huntley Guilty of Soham Murders' (17 December 2003) (<news.bbc.co.uk/2/hi/uk/3312551.stm>); The Bichard Inquiry Report, HC 653, The Stationary Office (2004).

[84] BBC News, 'Q&A: Vetting School Staff' (18 December 2003) (<news.bbc.co.uk/2/hi/uk_news/education/3331121.stm>); BBC News, 'School Checks Around the UK' (20 June 2006) (<news.bbc.co.uk/2/hi/uk_news/education/5097588.stm>).

[85] The Bichard Inquiry Report, HC 653, The Stationary Office (2004). The Report estimated that, in the future, potentially 40 per cent or more of UK teachers might be foreigners.

Barring Scheme (VBS), launched in 2009, that revamped employment vetting.[86] The CRB continues to be responsible for disclosing criminal records to employers, but a new Independent Safeguarding Authority (ISA) decides whether an individual should be barred from working with vulnerable groups. The three blacklists, PoCA, List 99 and PoVA, have been replaced by two ISA databases of persons barred from working with children (the Children's Barred List) and vulnerable adults (the Adults' Barred List). Individuals are blacklisted automatically if convicted or cautioned for certain serious sexual or violent offences against children or adults, or by an ISA decision based on information received from police, employers, regulatory bodies and others.[87]

The VBS extended the enhanced CRB check to far more paid and voluntary positions under an expanded definition of "regulated activity" (e.g. positions that involve close contact with vulnerable individuals, not part of a family or personal arrangement, on a frequent, intensive or overnight basis, such as teachers, children's sports coaches, youth workers, social workers and healthcare professionals).[88] An enhanced CRB certificate for individuals applying for work in a regulated activity includes information from the PNC (convictions, cautions,

[86] See <www.legislation.gov.uk/ukpga/2006/47/contents>. The SVGA 2006 and the Safeguarding Vulnerable Groups (Northern Ireland) Order (SVGO) 2007 established the scheme in England, Wales and Northern Ireland (<www.isa.homeoffice.gov.uk/Default.aspx?page=399>).

[87] Employers who dismiss an employee (or accept a resignation) under circumstances suggesting harm or risk to children or vulnerable adults have a legal duty to notify the ISA. Other employers, service providers and individuals may refer information to the ISA. "Relevant conduct" includes emotional, psychological, sexual, verbal or financial abuse (<www.isa.homeoffice.gov.uk/Default.aspx?page=399>). A foreign sex offence conviction may result in the subject's inclusion in the ISA's barred lists. See the SVGA 2006 (Prescribed Criteria) (Foreign Offences) Order 2008 (<www.legislation.gov.uk/uksi/2008/3050/made/data.pdf>).

[88] "Frequent" means once a week or more (except in health or personal care services where frequent means once a month or more); "intensive" means four days or more per month. Regulated activity can include a) teaching, training or instruction, care or supervision of children or vulnerable adults, b) providing advice, guidance wholly or mainly for children, which relates to their physical, emotional or educational wellbeing, or for vulnerable adults, c) any form of treatment or therapy provided to children or vulnerable adults, d) driving a vehicle that is being used only for the purpose of conveying children or vulnerable adults and their carers, e) working in a specified place. Home Office, *The Vetting and Barring Scheme Guidance* (2010) (<www.isa.homeoffice.gov.uk/pdf/VBS_guidance_ed1_2010.pdf>).

reprimands and final warnings), from the ISA's lists as well as police intelligence.[89] It is a criminal offence knowingly to hire or accept as a volunteer a barred person in a regulated activity. Similarly, it is a criminal offence for a person to work or attempt to obtain paid or unpaid work for which he or she is blacklisted.[90]

The SVGA also required registration of individuals wishing to work with vulnerable groups in regulated activities. The ISA would review registrants on an ongoing basis in light of new information (e.g. conviction, caution or employer warnings). A prospective employer would be able to query the ISA's online database to find out whether a job applicant is registered, but would not be able to view the applicant's criminal history details (which would require a CRB check). If a registered employee's registration status changed, i.e. the person became barred, the employer would be notified.[91] In addition, the SVGA introduced a special category of employment called "controlled activity" (e.g. positions that provide opportunities for contact with vulnerable groups or allow opportunities to access sensitive information about them, such as receptionists in outpatient clinics, catering staff and caretakers in educational institutions and hospital records clerks). Employers could employ someone barred from regulated activity to

[89] For an organisation to be eligible to obtain CRB checks, it has to be registered with the CRB (restricted to organisations that submit more than 100 application per year and be entitled to ask exempted questions) or to use the services of a CRB-registered umbrella organisation. With the advent of the ISA, an enhanced check is required for those working in regulated activity. Enhanced checks, but not standard checks, reveal whether the person-of-interest is blacklisted. See <www.businesslink.gov.uk/bdotg/action/detail?itemId=1084416048&r.l1=1073858787&r.l2=1084607697&r.l3=1084415157&r.s=m&type=RESOURCES>; <www.direct.gov.uk/en/Employment/Startinganewjob/DG_195811>. For a list of positions eligible for a CRB check see <www.homeoffice.gov.uk/publications/agencies-public-bodies/CRB/about-the-crb/eligible-positions-guide?view=Binary>.

[90] The guidance on pre-employment screening of overseas applicants recommends that UK employers request foreign nationals to provide employer references and a home country's criminal record certificate. Ironically, UK nationals who apply for work with children abroad cannot obtain a CRB check. See <www.businesslink.gov.uk/bdotg/action/detail?itemId=1087477219&type=RESOURCES>.

[91] It would be a criminal offence to allow a non-ISA-registered person to work or volunteer in regulated activity. Similarly, it would be an offence for an individual to take up employment or volunteer in regulated activity without being registered.

carry out controlled activity, provided that they implemented appropriate safeguards.[92] However, as explained below, the (Conservative/Liberal) coalition government cancelled the scheduled registration of prospective and incumbent employees and the introduction of controlled activity.

The VBS attracted a great deal of criticism. Employers, employees and volunteers complained that the vetting and barring and disclosure criteria and procedures were confusing, time consuming, redundant and applied to too many positions. The full implementation of the VBS would require registering and monitoring 9.3 million people.[93] The UK's coalition government suspended VBS registrations, announcing its intention to scale the vetting scheme back to "common sense levels." Its 2011 review of the employment vetting scheme concluded that the VBS was a cumbersome, expensive, over-bureaucratised and disproportionate response to a risk posed by a very small number of individuals. It charged that the VBS deterred responsible individuals from working and volunteering with vulnerable groups. Furthermore, the review criticised the VBS for excessive government involvement in private sector employment processes.[94] The Home Secretary commissioned a separate but aligned review of the criminal

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[92] Persuant to the Bichard Report's recommendations, the list of "notifiable occupations" (*supra* note 65) was revised to cover more posts that involve work with children or vulnerable adults. Home Office, *The Notifiable Occupations Scheme: Revised Guidance for Police Forces* (Circular No. 6/2006) (2006).

[93] Sir Roger Singleton, Chief Adviser on the Safety of Children, Chair of the Independent Safeguarding Authority, *'Drawing the Line,' A Report on the Government's Vetting and Barring Scheme* (2009) (<www.cscb.org.uk/downloads/reports_research/Drawing%20the%20Line'%20-%20a%20report%20on%20the%20government's%20barring%20and%20vetting%20scheme.pdf>); DCFS, *Vetting and Barring Myth Buster* (February 8, 2010) (<webarchive.nationalarchives.gov.uk/20100217170134/http://dcsf.gov.uk/news/index.cfm?event=news.item&id=vetting_and_barring_myth_buster>); BBC News, 'Child Abuse Vetting Scheme Cancelled as "Draconian"' (15 June 2010) (<www.bbc.co.uk/news/10314055>).

[94] Home Office, *Vetting & Barring Scheme Remodelling Review-Report and Recommendations* (2011) (<www.homeoffice.gov.uk/publications/crime/vbs-report?view=Binary>); BBC News, 'Child Safety Vetting Scheme "to be Scrapped"' (5 February 2011) (<www.bbc.co.uk/news/uk-12372097>). The current regime results in approximately 200 people a month being barred from working with vulnerable groups. By 2010-2011, the ISA's Children's List contained 14,633 names and the Vulnerable Adults List 14,365 names. ISA, Annual Report and Accounts (2010-11) (<www.isa.homeoffice.gov.uk/pdf/Annual%20Report&Accounts%202010%202011.pdf>).

records regime which partially focused on pre-employment vetting (not limited to child-related positions).[95]

The Protection of Freedoms Act 2012 embodies recommendations from both reviews.[96] The CRB and the ISA will be merged into a single agency (the Disclosure and Barring Service (DBS)), which will carry both the CRB's and ISA's functions. Since September 2012, the definition of "regulated activity" is narrower. The new scheme applies to an estimated 5 million people whose work involves close and unsupervised contact with vulnerable groups.[97] Registration is scrapped. The "controlled activity" category is abandoned. The DBS will issue criminal record certificates directly to the applicants, who can then submit them to a requesting employer or volunteer organisation. The Act also introduces "continuous updating of criminal records" (in 2009-2010, more than half of disclosure applications were repeat applications, while approximately 95% of re-applications produce a "nil return," i.e. no recorded criminality[98]). Individuals will be able to apply for a criminal record certificate once, and then, if they need to

[95] Home Office, *A Common Sense Approach, A Review of the Criminal Records Regime in England and Wales by Sunita Mason, Independent Advisor for Criminality Information Management, Report on Phase 1* (2011) (<www.homeoffice.gov.uk/publications/crime/criminal-records-review-phase1/>); Home Office, *A Common Sense Approach, A Review of the Criminal Records Regime in England and Wales by Sunita Mason, Independent Advisor for Criminality Information Management, Report on Phase 2* (2011) (<www.homeoffice.gov.uk/publications/crime/criminal-records-review-phase2?view=Binary>).

[96] See Home Office, *Independent Review of the Criminal Records Regime – Government Response* (2011) (<www.homeoffice.gov.uk/publications/crime/gov-resp-indep-rev-crim-records?view=Binary>); Protection of Freedoms Act 2012 (<www.legislation.gov.uk/ukpga/2012/9/pdfs/ukpga_20120009_en.pdf>). Also in 2012, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (<www.legislation.gov.uk/ukpga/2012/10/contents/enacted>) amended the rehabilitation periods of the ROA 1974.

[97] HM Government, *Changes to Disclosure and Barring: What You Need to Know* (2012) (<www.isa.homeoffice.gov.uk/PDF/DBS%20Summer%202012%20English%20leaflet%20web%20ready.pdf>). Regulated activity with children now covers (i) unsupervised activities: teach, train, instruct, care for or supervise children, or provide advice/guidance on well-being, or drive a vehicle only for children; (ii) work for a limited range of establishments with opportunity for contact (e.g. schools, children's homes). Work under (i) and (ii) is regulated only if done regularly. Posts no longer covered would be eligible for an enhanced criminal record check that, however, would not reveal the applicant's barred status.

[98] Home Office, *A Common Sense Approach, A Review of the Criminal Records Regime in England and Wales by Sunita Mason, Independent Advisor for Criminality Information Management, Report on Phase 1* (2011) (<www.homeoffice.gov.uk/publications/crime/criminal-records-review-phase1/>).

reuse it, their new employer would be able to check online if it still up to date, avoiding a repeat application.

The Home Office also introduced new disclosure duties for the police related to child sexual offences information. The Child Sex Offender Disclosure Scheme (CSODS), implemented on a national scale in 2011, recognises that child sex offenders "are often a member of the family, a friend of the victim, or a friend of the victim's family".[99] *Anyone* concerned about an individual who has contact with a child (e.g. parent, family member, neighbour, friend) may apply to obtain information about the named individual from the police. There is a presumption in favour of disclosure if 1) the subject has been convicted of a sexual offence against children (including cautions, reprimands and final warnings), or poses a risk of serious harm to the child concerned and 2) disclosure is necessary to protect the child. Disclosure includes information on child sexual offences and any other relevant information deemed necessary to protect the child from harm e.g. serious domestic violence. The police may provide the information, with restrictions about further disclosure.[100]

To sum up, from the mid-1980s, the UK's policy moved steadily toward more and more criminal record checking for positions that afford access to children, before being reversed by the most recent policy revision. In addition, employment screening steadily expanded to cover more positions and occupations. (In 2010-2011 the CRB conducted approximately 4.3 million criminal record checks, 4.1 million for enhanced disclosure.)[101] Like in the US, the target of UK employment vetting expanded from sex crimes against children to sex crimes against anyone, to

[99] The Scheme does not replace CRB checks or the vetting and barring process run by the ISA. See Criminal Justice Act 2003, sections 327A and 327B as amended in 2008 (<www.legislation.gov.uk/ukpga/2003/44/contents>); Home Office, *Child Sex Offender (CSO) Disclosure Scheme* (Circular No. 7/2010) (2010).

[100] The UK Child Exploitation and Online Protection Centre (CEOP) seeks to locate registered sex offenders who have failed to comply with notification requirements. Its public website provides names, photographs and other identifying information for fugitive sex offenders. See <ceop.police.uk/wanted/>.

[101] See <www.homeoffice.gov.uk/publications/agencies-public-bodies/CRB/Freedom-of-information/all-foi-responses/22107-checks-2002/>.

violent crimes against vulnerable adults. The UK even goes further than the US in disclosing credible non-conviction information that casts doubt on the subject's suitability to work with vulnerable groups. The UK disclosure policy became more like US policy by allowing anyone (other than an employer) to obtain from their local police force information on whether a particular person has a criminal record posing a risk to a child.

However, the UK set out to create a criminal record disclosure regime that would be more protective of privacy than the US system. It was and is less willing than the US to leave it to employers' discretion whether to hire a person previously convicted of a sexual offence to work or volunteer with children. It therefore created a substantial administrative infrastructure to administer its employment vetting scheme. It placed an executive agency between employers and criminal record databases (CRB) and it assigned a public body a great deal of responsibility for deciding which convictions should disqualify an individual for what kinds of work with which vulnerable groups (ISA).[102] The coalition government has cut back the government's role and returned more control to employers over background checking, hiring and retention. It is too soon to say whether the new vetting regime will reduce the administrative delays, confusion and costs, but it is not too soon to say that the UK experience with disclosing sex offence convictions to employers ought to provide important lessons to other EU Member States as they consider how best to implement the EU's and Council of Europe's requirements and recommendations.

Conclusion

Horrific sex crimes against children in the US, continental Europe and the UK have led to extensive legislative and administrative efforts to prevent convicted sex offenders from

[102] The 2011 criminal records review proposed the introduction of "basic" CRB checks (originally provided for by the Police Act 1997, but never implemented) that would allow any employer to view any job applicant's criminal record. Such checks would reveal only unspent convictions. The government has accepted this proposal in principle. NACRO opposed creating these additional barriers to ex-offenders finding work. NACRO, *The Impact of the Protection of Freedoms Bill and the Common Sense Approach Review of the Criminal Records Regime* (<www.nacro.org.uk/change-the-record/facts-and-stats/>).

committing future crimes against children. One of the most important preventative strategies has been to disqualify previously convicted sex offenders from holding jobs and volunteer positions affording close contact with children. Political reality makes it very difficult to reject this strategy, at least in principle.

The US policy is much simpler than the EU's or the UK's. Federal and state online sex offender registers allow any member of the public to identify convicted sex offenders who live anywhere in the US. All employers (not just those providing children's services) can search court and other public records for current and prospective employees' past convictions. Certain child services employers are required by federal or state law to conduct criminal background checks. Except for some state laws that prohibit convicted sex offenders from occupying certain occupations and positions, employers and volunteer organisations can decide for themselves which (not only sexual) convictions render a job applicant or employee unsuitable for certain positions. Employers prefer this regime because it gives them control over hiring and allows them to take steps they think necessary to avoid potential civil liability caused by employees who injure a client, customer or fellow employee. The disadvantage from the continental European perspective is that it violates the convicted person's privacy and hinders rehabilitation.

The EU, although committed to the confidentiality of criminal records, is encouraging Member States to commit to pre-employment sex offender vetting, while pursuing its long-term goal of better criminal record information sharing. The EU has sought to ensure: 1) that convicted sex offenders may be identified and barred from working with children, and 2) that child sex offence convictions in any EU Member State should be accessible to employers working with children in every Member State. Progress towards these goals has been slow, but steady. Many legal, practical and political obstacles remain.

The UK is the EU Member State that has gone furthest in trying to implement such a regime. A public body is responsible for determining which positions should be closed to sex offenders. Employers and volunteer organisations have a *duty to check* the criminal background of those applying for positions affording close contact with children. Employers and volunteer organisations are prohibited from hiring individuals barred from working with children.

There is good reason to believe that current employment vetting regimes are going to continue evolving. Every employment vetting scheme faces tough policy choices. Which convictions should be disqualifying and for how long? How much access to children should render a job or volunteer position subject to vetting? Should only sex offence *convictions* be disqualifying? What about pending charges? What about police intelligence? Should only convictions for prior sex crimes *against children* be disqualifying? Should a prior sex crime conviction against *an adult* victim disqualify the perpetrator from later working with *children*? What about non-sex crimes against children? And what about drug trafficking?

Is it likely that a fully established employment vetting scheme will remain limited to protecting children? Should it be? The US and the UK have already expanded their employment vetting schemes to cover positions affording close contact with other vulnerable groups, e.g. the elderly and the handicapped. There is inexorable pressure to extend employment vetting to more professions, occupations and positions. Should persons who have been convicted of fraud be screened from working as financial advisers? Should persons who have been convicted of drunk driving be disqualified from driving school buses or piloting aeroplanes?

Finally, the logic of employment vetting scheme should lead to vetting job seekers' convictions in foreign countries. A day care job applicant previously convicted of sexually abusing a child in an Asian country should be of as much concern to a US, UK, or EU employer

as a job applicant with a similar conviction in the home jurisdiction.[103] In the future, because information technology will make foreign convictions much more accessible, we should expect steady pressure to expand employment vetting to foreign convictions. However, this will require solutions to very difficult legal and logistical problems.

[103] In 2008-2009 approximately 56% of UK "travelling sex offenders" were arrested in South East Asia, while 20% of travelling sex offenders' offences took place in Europe. ECPAT, *Off the Radar, Protecting Children from British Sex Offenders who Travel* (2011) (<www.ecpat.org.uk/sites/default/files/off_the_radar_-_protecting_children_from_british_sex_offenders_who_travel.pdf>).