

EXPLANATORY MEMORANDUM TO
THE SAFEGUARDING VULNERABLE GROUPS ACT 2006 (REGULATED
ACTIVITY, MISCELLANEOUS AND TRANSITIONAL PROVISIONS AND
COMMENCEMENT NO. 5) ORDER 2009

2009 No. 2610 (C.114)

1. This explanatory memorandum has been prepared by the Department for Children, Schools, and Families in consultation with the Department of Health, and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1. This Order contains provisions that are necessary in relation to the commencement on 12th October 2009 of the barring provisions under the Safeguarding Vulnerable Groups Act 2006 (“the Act”). The Order amends the definition of regulated activity in Schedule 4 to the Act (i.e. the activities that a person included in the barred lists under the Act is prohibited from engaging in), amends the criteria for automatic barring prescribed in the Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009¹ and makes various transitional provisions including provision enabling the Secretary of State to refer cases being considered by him under section 142 of the Education Act 2002 (unfinished “List 99” cases) to the Independent Safeguarding Authority (ISA)² and modifying provisions of the Police Act 1997.

3. Matters of special interest to the Select Committee on Statutory Instruments

3.1. This Order is subject to the affirmative resolution procedure.

4. Legislative Context

4.1. The Safeguarding Vulnerable Groups Act 2006 (“the Act”) reforms arrangements for safeguarding children and vulnerable adults from harm or the risk of harm by employees (paid or unpaid) whose work gives them significant access to these groups. The new arrangements it introduces will replace those provided for under the Protection of Children Act 1999, the Care Standards Act 2000, the Criminal Justice and Court Services Act 2000 and the Education Act 2002.

4.2. Activities that fall within the definition of a “regulated activity” are specified in Schedule 4 to the Act. Broadly, this includes a range of activities that provide an opportunity for close contact with children or vulnerable adults, other activities in key settings such as schools and care homes which provide an opportunity for contact with vulnerable groups, and key positions of responsibility.

¹ SI 2009/37.

² See Annex, footnote 7.

- 4.3. Paragraph 14 of Schedule 9 to the Act amends Part 5 of the Police Act 1997. These amendments include provisions relating to information that is to be included in enhanced criminal record certificates as to whether a person is on a barred list. In the transition to the new Scheme there will be a period of time where some people are still on old barred lists³ and some are on ISA barred lists.
- 4.4. Further detail on the legislative background to the Act is in the Annex to this memorandum. The Annex is a supplement to the overarching memorandum on the implementation of the Act which was submitted to Parliament in February 2008. That overarching memorandum is annexed to the following explanatory memoranda which accompanied the first group of Statutory Instruments under the Act:
- Explanatory Memorandum to the Safeguarding Vulnerable Groups Act 2006 (Transitional Provisions) Order 2008:
www.opsi.gov.uk/si/si2008/em/uksiem_20080473_en.pdf;
 - Explanatory Memorandum to the Safeguarding Vulnerable Groups Act 2006 (Barring Procedure) Regulations 2008:
www.opsi.gov.uk/si/si2008/em/uksiem_20080474_en.pdf, and
 - Explanatory Memorandum to the Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria) (Transitional Provisions) Regulations 2008:
www.opsi.gov.uk/si/si2008/em/uksiem_20081062_en.pdf.
- 4.5. An earlier version of the Annex was attached to the following explanatory memoranda, which accompanied the most recent Statutory Instruments under the Act:
- Explanatory Memorandum to the Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria)(Foreign Offences) Order 2008:
www.opsi.gov.uk/si/si2008/em/uksiem_20083050_en.pdf;
 - Explanatory Memorandum to the Safeguarding Vulnerable Groups Act 2006 (Prescribed Information) Regulations 2008
www.opsi.gov.uk/si/si2008/em/uksiem_20083265_en.pdf;
 - Explanatory Memorandum to the draft Safeguarding Vulnerable Groups Act 2006 (Transitory Provisions) Order 2009:
www.opsi.gov.uk/si/si2009/em/uksiem_20090012_en.pdf, and
 - Explanatory Memorandum to the draft Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009:
www.opsi.gov.uk/si/si2009/em/uksiem_20090037_en.pdf;
 - Explanatory Memorandum to the Safeguarding Vulnerable Groups Act 2006 (Devolution Alignment) Order 2009:
www.opsi.gov.uk/si/si2009/em/uksiem_20090265_en.pdf.

³ i.e. the lists kept under section 1 of the Protection of Children Act 1999 or section 81 of the Care Standards Act 2000 or the non-statutory list known as “List 99” which includes people subject to directions made under section 142 of the Education Act 2002.

4.6. The Annex is now updated with the numbers for Statutory Instruments made to date and details of more recent steps in transition to the new Scheme.

4.7. This Order is the first to include provisions made under section 5(3) of the Act.

5. **Territorial Extent and Application**

5.1. This instrument extends to England and Wales. A future Order will commence, for Northern Ireland, the provisions in Schedules 9 and 10 which either amend or repeal sections of Part 5 of the Police Act 1997.

5.2. The Scottish Executive is introducing a parallel scheme under the Protection of Vulnerable Groups Act (Scotland) 2007. The Northern Ireland Office is also legislating similarly for Northern Ireland in relation to the parts of this Order which extend only to England and Wales.

6. **European Convention on Human Rights**

6.1. Baroness Morgan of Drefelin, Parliamentary Under Secretary of State for Children, Young People and Families, has made the following statement regarding Human Rights:

In my view the provisions of the Safeguarding Vulnerable Groups Act 2006 (Regulated Activity, Miscellaneous and Transitional Provisions and Commencement No. 5) Order 2009 are compatible with the Convention rights as defined in section 1 of the Human Rights Act 1998.

7. **Policy Background**

7.1. The provisions in this Order support the commencement of the full range of barring provisions under the new Scheme and the repeal of existing barring schemes, bringing about a further milestone in transition to the new Scheme.

Transitional provisions: Checking barred lists

7.2. Parts 2 to 5 mainly commence amendments to the Police Act 1997 under Schedule 9 of the 2006 Act, and modify those amendments, in order to enable employers and others to check, during specified transitional periods in the implementation of the new Scheme, whether a person is barred from work with vulnerable groups. In the main, individuals who are currently on the existing barred lists will have been migrated by 12th October 2009 to the new barred lists by the ISA, under the terms of the Safeguarding Vulnerable Groups Act 2006 (Transitional Provisions) Order 2008 (2008/473), or the ISA will have determined that it is not appropriate to put them on the new barred lists. But the Government expect that this process will not be entirely complete by 12th October 2009. The commencement of the repeal of the existing barred lists will include savings provisions to preserve the existing bars in cases where the ISA's determination under the Transitional Provisions Order is incomplete. The provisions in Parts 2 to

5 of this Order ensure that a CRB enhanced disclosure will reveal that an individual is barred both in the event of a match against the existing barred lists to be preserved by the savings provisions and in the event that they are included in one of the ISA barred lists.

Other transitional provisions

7.3. Article 9 modifies the provisions in Schedule 3 to the Act relating to automatic inclusion in the ISA barred lists. This places the onus on the ISA to determine whether or not an individual meets the criteria for automatic inclusion. These modifications will be needed until further legislation comes into force making permanent amendments with a similar effect.

7.4. Articles 16 to 23 mostly re-enact provisions from the Safeguarding Vulnerable Groups Act 2006 (Transitory Provisions) Order 2009 (SI 2009/12), in order to continue them for a further transitional period. These cover teachers' pensions (pending a forthcoming consolidation of teachers' pensions regulations); the General Teaching Council for England; and provision of barred list information by ISA to third parties (which in some cases will include information about current barred lists, until ISA determination of those cases is complete; and in other cases is needed pending the commencement of monitoring functions under the new Scheme).

7.5. Article 18 enables the Secretary of State to refer to the ISA any cases referred to him before 20th January 2009 for a possible bar under "List 99" but not yet decided at October 2009, in order to complete that aspect of transition to the new Scheme in a timely manner. Part 6 of the Order sets out minor changes to the criteria for automatic barring under the Scheme, to rectify two omissions.

Regulated Activity

7.6. Following further consultation with key stakeholders such as Ofsted, and bodies representing school governors, articles 25 to 27 of the Order amend the definition of regulated activity, in order to improve the practical working of the Scheme.

Definition of relevant child care premises

7.7. Article 25 of the Order amends the definition of "relevant childcare premises" in Schedule 4 in two ways. The first is to bring within the definition premises in Wales on which child minding takes place. As currently enacted, "relevant childcare premises" includes any premises in England on which childcare is provided to a child (i.e. childminding and other forms of childcare) and premises in Wales on which care that is not childminding (e.g. day care provided in nurseries) takes place. The amendment aligns the position in Wales with that in England. The effect of this is that any person working on relevant childcare premises in Wales and who has the opportunity to have contact with children is engaging in a regulated activity relating to children. This would include workers on such premises, such as cleaners, who are not involved in providing care to a child.

7.8. The second amendment to the definition of "relevant childcare premises" provides for an exception to that definition by excluding premises on which a person cares for a child in the home of the parent or other carer of that child (or

cares for children in the home of one or more of the parents of children to whom care is being provided). For example, nannies care for children in the home of parents; in such circumstances, a parent's home will not be "relevant childcare premises" for the purposes of the Act. The effect of this amendment is in line with the general intention of the Act not to impose requirements on people in their own homes. This means, for example, that a cleaner in a parent's house (employed by the parent) will not be engaging in regulated activity.

Office holders

7.9. Article 26 adds further categories of offices and people to the list of "office holders" in Schedule 4 to the Act. These are: clerks to governing bodies; associate members of governing bodies; chief executives of local authorities that discharge education and/or social services functions; persons providing and managing establishments and agencies in relation to which such persons are required to be registered under Part 2 of the Care Standards Act 2000 (e.g. providers and managers of fostering agencies, children's homes, care homes, etc) and a person appointed as the lead director for children and young people's services in Wales.

Activity relating to Vulnerable Adults

7.10. Article 27 of the Order adds categories of persons to the list of office holders in relation to regulated activity relating to vulnerable adults, similar to the provisions for regulated activity with children set out above.

Miscellaneous

7.11. Article 28 corrects an omission in section 21(10) of the Act by including further functions of the Welsh Ministers for the purposes of the definition of controlled activity relating to children. In brief, a controlled activity includes an activity (which is not a regulated activity) which provides a person with access to specified records relating to children. Article 29 corrects what appears to be a further omission in the Act by amending Schedule 4 so that the exercise of a function relating to the inspection of an independent school in England by a body approved by the Secretary of State is a regulated activity.

8. **Consultation outcome**

8.1. There was a public consultation on various aspects of the Vetting and Barring Scheme, including some which are implemented by this Order, in November 2007, with the Government's response being published in May 2008. The Government response can be viewed at www.dcsf.gov.uk/consultations.

8.2. The consultation invited views on issues including:

- The definition of vulnerable adult
- The extent of regulated activity
- Who is eligible to make checks of a person's ISA status
- Controlled activity
- Applying to be monitored under the scheme
- The phased introduction of the scheme
- Referring information to the ISA

8.3. There were 326 responses to the consultation. These came from bodies

including Local Authorities, Local Safeguarding Children Boards, voluntary sector organisations, unions, national and professional organisations, and health and care sector organisations, as well as parents. The opportunity to comment on the scheme in advance of implementation was welcomed, and most of the proposals within the consultation document were met with overwhelming levels of agreement.

8.4. Further to the above consultation, DCSF has discussed detailed proposals with key stakeholders affected by provisions in this Order such as Ofsted. In addition, a targeted consultation exercise invited comment from all school governing bodies and Local Authorities in England and Wales on provisions relating to school governors, and local authority officers. The relevant provisions in this Order have taken into account the views given, and reflect the opinion of the overwhelming majority of the responses received in these exercises.

9. Guidance

9.1. Comprehensive guidance about the operation of the Scheme will be published during 2009. It is essential that both the 11 million strong workforce to whom the Vetting and Barring Scheme will apply and their employers are aware of the requirements of the scheme in relation to registration to work in regulated activity, checking applicants for posts and the implications of the bar. Guidance is under development in consultation with stakeholders. At the same time, marketing and communications campaigns are publicising the scheme to stakeholders, by means of direct mailing, a programme of roadshows and various other methods.

10. Impact

10.1. The impact on business, charities or voluntary bodies will broadly be to continue for a further period, provisions now in force for the current transitory period. They will continue to be able to make barred list checks as now.

10.2. The impact on the public sector is as for business, charities and voluntary bodies. The requirements on school governing bodies are clarified.

10.3. At Annex B of the attached supplement to the overarching memorandum is a copy of the announcement by the Home Office Minister, which showed revised total cost figures. The Home Office is reviewing the Impact Assessment and an updated version reflecting these figures will be published once this review is completed. The existing published Assessment for the overall Vetting and Barring scheme signed by a Minister in July 2006, is at:

www.dfes.gov.uk/ria/index.cfm?action=assessments.view&i_assessmentID=73

11. Regulating small businesses

11.1. The legislation applies to small business.

11.2. To minimise the impact of the requirements of the new Scheme on firms employing up to 20 people, the approach taken is to consider how far it is

necessary that such firms comply with the same duties applying to larger firms. Generally, the requirements of the Act will apply to some small businesses that work with vulnerable groups, such as care homes for vulnerable adults. Employees of such businesses will have to register with the ISA in order to engage in regulated activity, and employers will be strongly encouraged to register their interest in such staff. In response to concerns raised by people operating small businesses, we have agreed that:

- in relation to those working with under-16 year olds who are employed or engaged as part of work experience or otherwise in workplace settings, there will be no requirement to register under the VBS or for an employer to check such workers. This does not reduce safeguarding for children in the workplace, but simply maintains current arrangements (namely that a barred person is not permitted to take up certain posts that involve work with children or vulnerable adults), including the employer retaining the discretion and the responsibility to decide what checks to make and who to check;
- once monitoring starts under the Scheme, any person making a check on an individual will be able to do so by means of a quick and free on-line check (with safety measures to preserve confidentiality) which will confirm whether the individual is registered with the ISA, with the assurance that an individual who is so registered is not barred;
- employers of small and other businesses alike will be encouraged to register an interest (under section 32 of the Act) in an individual that they allow to engage in regulated activity, leading to any such employer being notified if there is any change in the monitored status of the individual.

11.3. The Government balanced its final decision on what action to take to help small businesses with its commitment to have in place appropriate safeguards for children and vulnerable adults. These issues were also covered in the DCSF consultation referred to in paragraph 8.1 above. Paragraphs 45 to 48 of that document gave the Government's response to points made by businesses on issues concerning under-16s in work experience and employment.

12. **Monitoring & review**

12.1. Paragraphs 153 to 160 of the published Impact Assessment (see link at paragraph 10.3 above) contain details of monitoring and review of the VBS as a whole. The proposed revised impact assessment (see paragraph 10.3 above) will include a fully updated cost / benefit analysis, which will also take account of the revised costs announced by Home Office Ministers on 1st April 2008 (see Annex B of the attached supplement to the overarching memorandum).

12.2. The ISA will produce statutory annual reports, and any additional reports that the Home Secretary may direct, on any aspect of the exercise of its functions.

12.3. The ISA, as a non-departmental public body, is under the sponsorship of the Home Office, which will exercise its responsibility as sponsor in consultation with the Government Departments which have policy responsibility for the workforces and vulnerable groups covered by the Scheme.

12.4. The ISA is committed to openness and consultation in order to provide an assurance of its independence and that the Vetting and Barring Scheme is robust and has the confidence of the public and stakeholders

13. Contact

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DCSF, 15th June 2009

Annex: supplement to overarching memorandum

Annex

Supplement to Explanatory Memorandum on Safeguarding Vulnerable Groups Act 2006 (Regulated Activity, Miscellaneous and Transitional Provisions and Commencement No. 5) Order 2009 (Reference: para 4.4 of that E.M.)

EXPLANATORY MEMORANDUM ON THE IMPLEMENTATION OF THE SAFEGUARDING VULNERABLE GROUPS ACT 2006

1. The Department for Children, Schools and Families (DCSF) prepared this memorandum in consultation with the Home Office and the Department of Health, and submitted it voluntarily to Parliament.

2. Description

- 2.1 This is a second supplement to DCSF's over-arching explanatory memorandum dated 27th February 2008 which explained the context to the first set of Statutory Instruments laid before Parliament under the Safeguarding Vulnerable Groups Act 2006⁴ ("the Act"). These (see details at 4.10 below) were:

- The Safeguarding Vulnerable Groups Act 2006 (Transitional Provisions) Order 2008;
- The Safeguarding Vulnerable Groups Act 2006 (Barring Procedure) Regulations 2008; and
- The Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria) (Transitional Provisions) Regulations 2008.

The above over-arching explanatory memorandum is available with each of the above Statutory Instruments, at:

www.opsi.gov.uk/si/si2008/em/uksiem_20080473_en.pdf ;

www.opsi.gov.uk/si/si2008/em/uksiem_20080474_en.pdf ; and

http://www.opsi.gov.uk/si/si2008/em/uksiem_20081062_en.pdf ;

and where relevant, its content is repeated in this supplement.

- 2.2 The first supplement explained the context to the second set of Statutory Instruments to be laid before Parliament under the Act. These are:
 - The Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria) (Foreign Offences) Order 2008, SI 2008/3050;
 - The Safeguarding Vulnerable Groups Act 2006 (Transitory Provisions) Order 2009, SI 2009/12;
 - The Safeguarding Vulnerable Groups Act 2006 (Prescribed Information) Regulations 2008, SI 2008/3265;
 - The Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009, SI 2009/37;
 - The Safeguarding Vulnerable Groups Act 2006 (Devolution Alignment) Order 2009, SI 2009/265.

These instruments are described in their respective explanatory memoranda, to

⁴ 2006 c.47.

each of which the first supplement is appended.

2.3 This supplement explains the context to the third set of Statutory Instruments to be laid before Parliament under the Act. These are:

- The Safeguarding Vulnerable Groups Act 2006 (Miscellaneous Provisions) Order 2009, to be laid in June by DCSF under the negative procedure;
- The Safeguarding Vulnerable Groups Act 2006 (Miscellaneous Provisions) Regulations 2009, to be laid in June by DH under the negative procedure;
- The Safeguarding Vulnerable Groups Act 2006 (Commencement No. 4) Order 2009, to be made by Home Office in June 2009 to enable Home Office to make regulations to support the new VBS in time for 12th October 2009;
- The Safeguarding Vulnerable Groups Act 2006 (Regulated Activity, Miscellaneous and Transitional Provisions and Commencement No. 5) Order 2009;
- The Safeguarding Vulnerable Groups Act 2006 (Commencement No. 6) Order 2009, to be made by DCSF in September 2009.

These instruments (except the Commencement Orders) are described in their respective explanatory memoranda, to each of which this supplement will be appended.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 As noted in the explanatory memorandum relating to that Instrument (to which this supplement is annexed), the draft Safeguarding Vulnerable Groups Act 2006 (Regulated Activity, Miscellaneous Provisions and Commencement No.5) Order 2009 is subject to the affirmative resolution procedure.

4. Legislative background

Introduction

4.1 The Act provides for a new Vetting and Barring Scheme (VBS) to replace the existing arrangements for safeguarding children and vulnerable adults⁵ from

⁵ Vulnerable adult is defined at S.59(1) of the Act as follows:

"59 Vulnerable adults

(1) A person is a vulnerable adult if he has attained the age of 18 and—

(a) he is in residential accommodation,

(b) he is in sheltered housing,

(c) he receives domiciliary care,

(d) he receives any form of health care,

(e) he is detained in lawful custody,

(f) he is by virtue of an order of a court under supervision by a person exercising functions for the purposes of Part 1 of the Criminal Justice and Court Services Act 2000 (c. 43),

(g) he receives a welfare service of a prescribed description,

(h) he receives any service or participates in any activity provided specifically for persons who fall within subsection (9),

(i) payments are made to him (or to another on his behalf) in pursuance of arrangements under section

harm or the risk of harm by employees (paid or unpaid) whose work gives them significant access to these groups. A public consultation for the new Scheme, “*Making Safeguarding Everybody’s Business: A Post-Bichard Vetting Scheme*” (Ref: 1485-2005DOC-EN), ran in 2005. That consultation paper and a summary of responses are at www.dcsf.gov.uk/consultations .

- 4.2 The purpose of the new Scheme is to minimise the risk of harm to children and vulnerable adults from those who might seek to harm them through their work (paid or unpaid). It seeks to do this by barring unsuitable individuals not just on the basis of referrals, but also at the earliest possible opportunity, as part of a centralised vetting process that all those working closely with children and/ or vulnerable adults will have to go through. The new arrangements introduced by the Act have already begun to replace the existing arrangements provided for under the Protection of Children Act 1999, the Care Standards Act 2000, the Criminal Justice and Court Services Act 2000 and the Education Act 2002. The Government has announced that barring under the new Scheme will “go live” on 12th October 2009⁶: from that date, inclusion in a barred list will take effect to bar individuals from engaging in “regulated activity” (see 4.4.6 below).
- 4.3 The current system for vetting people who wish to work with children or vulnerable adults operates through employers obtaining enhanced criminal record certificates issued by the Criminal Records Bureau (“CRB disclosures”) for new job applicants. CRB disclosures give employers information about an individual’s criminal records history, which informs their assessments about the individual’s suitability to work with children or vulnerable adults. They also show whether a person has been made subject to a disqualification order (see below), where that Order forms part of the records of a conviction, or is included in any of the three lists the Government maintains of persons barred from working with children or vulnerable adults. These lists, which are each subject to different legislation, criteria and procedures, are: “List 99” (a list of those in respect of whom a direction under section 142(1) of the Education Act 2002 has been made), the Protection of Children Act (PoCA) List (kept under section 1 of the Protection of Children Act 1999) and the Protection of Vulnerable Adults (PoVA) List (kept under section 81 of the Care Standards Act 2000). Disqualification orders made by a court (under section 28, 29 or 29A of the Criminal Justice and Court Services Act 2000) also bar individuals from working with children. We refer below to being on one of these lists or being subject to a disqualification order as being subject to an existing restriction.

Key features of the Act

- 4.4 When implemented fully, the Act will replace the existing arrangements with a Scheme with the following key features:

57 of the Health and Social Care Act 2001 (c. 15), or
(j) he requires assistance in the conduct of his own affairs.”

We have consulted publicly on minor refinements, but the definition will remain substantially as above.

⁶ Written Ministerial Statement on 19th March 2009 by Meg Hillier MP, Parliamentary Under Secretary of State, Home Office; see copy at Annex B, below.

4.4.1 an **Independent Safeguarding Authority** ("ISA")⁷: ISA⁷ was established on 2nd January 2008 and has taken all barring decisions on new referrals under existing barring schemes since 20th January 2009. It is a non-departmental governmental body sponsored by the Home Office. Its primary functions will be to maintain the barred lists (see below) and to make decisions about whether individuals should be included in one or both lists;

4.4.2 **Barred lists**: there will be two barred lists - one of individuals barred from engaging in "regulated activity" (see below) with children (the "children's barred list"), and one of those barred from engaging in "regulated activity" with vulnerable adults (the "adults' barred list").

4.4.3 There will be **four routes to inclusion** in one or both barred lists:

(i) automatic inclusion in one or both of the barred lists without the right to make representations or to appeal⁸. Inclusion in the lists on this basis will happen only where a person has been convicted of, or received a caution in relation to, one of a list of specified offences, or meets other prescribed criteria (such as being subject to an order, foreign order or direction of a prescribed description, or being included in a specified foreign barred list) that indicate, of themselves, that any offender would pose such a high risk to vulnerable groups that they simply could not make a case as to why they should be allowed to engage in regulated activity;

(ii) automatic inclusion in one or both of the barred lists with the right to make representations as to why the person in question should be removed and a subsequent right of appeal following inclusion. Inclusion in the lists on this basis will happen where a person has been convicted of, or received a caution in relation to, one of a further list of specified offences or as a result of having met some other prescribed criteria;

(iii) inclusion at the ISA's discretion, on the basis that the person in question has engaged in "relevant conduct" i.e. broadly, that they have behaved in a way that has harmed a child or vulnerable adult, or could have done so, or in a way involving child pornography or inappropriate sexual behaviour. In this case, the relevant individual will have the opportunity to make representations before they are included in a list and will have a subsequent right of appeal;

(iv) inclusion at the ISA's discretion, on the basis that the person in question seems to ISA to pose a risk of harm to children or vulnerable adults. Again, in this case the relevant individual will have the

⁷ "Independent Safeguarding Authority" (ISA) is the working name, and is now proposed as the legal name, of the body which the 2006 Act called the Independent Barring Board (IBB). The Policing and Crime Bill proposes to rename IBB as ISA, at clause 79 in the Bill as published 21 May 2009 after Lords First Reading on 20 May 2009.

⁸ See at Annex C, the relevant extract from a DCSF memorandum to the House of Lords Merits Committee on why the provisions described in this sub-paragraph are deemed compatible with the right to a fair trial (Article 6 of the ECHR).

opportunity to make representations before they are included in a list and will have a subsequent right of appeal.

- 4.4.4 When ISA receives any information, it must consider whether it is relevant to ISA's consideration of whether the individual to which it relates should be included in either list.
- 4.4.5 **Appeals:** there is a right of appeal (against inclusion in a barred list) to the Upper Tribunal, with the permission of the Tribunal, on a point of law or on a finding of fact made by ISA. When the ISA is minded to bar an individual, they write to that person seeking representations, and outline in their letter the reasons behind their intention to bar, and outline the evidence they have used to reach this decision. The provision for the Upper Tribunal to hear appeals on ISA decisions is at Schedule 1 of the Transfer of Tribunal Functions Order 2008⁹. The Tribunal Procedure Committee consulted publicly on its Upper Tribunal rules, agreed by the Ministry of Justice¹⁰, which came into force on 3rd November 2008.
- 4.4.6 **Regulated activity:** this is defined in Schedule 4 to the Act. Broadly, it covers a range of specified activities that provide an opportunity for close contact with children or vulnerable adults, other activities in key settings such as schools and care homes which provide an opportunity for contact, and key positions of responsibility such as the Children's Commissioner and the Director of Adult Social Services. DCSF will fully commence the definition of regulated activity at 12 October 2009.
- 4.4.7 **Controlled activity:** this is defined in sections 21 and 22 of the Act. Broadly, it covers support work in general health settings, further education settings and adult social care settings. It also covers work which gives a person the opportunity for access to sensitive records about children and vulnerable adults, e.g. education or social services records. The Secretary of State has power to make regulations determining who may engage in controlled activity, what steps must be taken by the person permitting them to do so, and the circumstances in which a person must not allow another person to engage in controlled activity. DCSF will fully commence the definition of controlled activity at 12 October 2009. DCSF and DH plan to bring forward interim draft Regulations on controlled activity in early 2010, and full Regulations for the end of the period of phasing-in of requirements to become subject to monitoring (see next paragraph). A detailed timetable for the phasing period will be announced well in advance.
- 4.4.8 **Monitoring:** to become "subject to monitoring", individuals will make an application to the Secretary of State - in practice, to the Criminal Records Bureau (CRB). The CRB will check for any information relating to the individual and pass any that it discovers to ISA. ISA will then consider whether the person should be barred from working with children and/ or vulnerable adults. The CRB must repeat these checks at intervals for as long as the individual remains subject to monitoring, again passing on any

⁹ The S.I. is at: www.opsi.gov.uk/si/si2008/pdf/uksi_20082833_en.pdf. See also para 4.10.5 below.

¹⁰ The rules are at: www.opsi.gov.uk/si/si2008/pdf/uksi_20082698_en.pdf.

information that it discovers to ISA. Monitoring will be phased in, starting with new entrants and job movers into regulated activity. For those groups, monitoring can start from July 2010, and must start from November 2010, see Annex A.

4.4.9 **Offences:** there will be a series of criminal offences to:

- prevent barred individuals engaging in regulated activity in relation to children or vulnerable adults;
- ensure that people permitted to engage frequently or intensively in regulated activity in relation to children or vulnerable adults with the permission of a “regulated activity provider” (usually, the employer) are “subject to monitoring” (see above);
- ensure that relevant employers check an individual's status in the scheme before permitting an individual to engage in regulated activity in relation to children or vulnerable adults.

Transition

- 4.5 Schedule 8 to the Act makes provision for the transition from the current system to the new arrangements under the Act. During the period leading up to the full implementation of the Act, this has two main elements. Firstly, all those who are subject to an existing restriction must be included, or considered for inclusion, in the new barred lists kept under the Act, in accordance with the Statutory Instruments listed at paragraph 2.1 above, which are now in force. Secondly, ISA must give the Secretary of State advice, on request, in relation to outstanding cases under the existing arrangements (see paragraph 1 of Schedule 8) which were referred before 20th January 2009; since 31st March 2008, ISA has been so advising.
- 4.6 The Government proposes to continue managing the transition in stages, to help ensure that it will be effective and maintain high levels of protection for vulnerable groups at every stage. Therefore under the Statutory Instruments listed above at paragraph 2.2, Ministers ceased to take barring decisions on new referrals under the current arrangements from 20th January 2009, and the law instead requires ISA to take barring decisions on referrals received after that date under the current List 99, PoCA and PoVA legislation (as listed at paragraph 4.3 above).
- 4.7 Further detail on how the new scheme will work is in Explanatory Notes to the Act at www.opsi.gov.uk/acts/acts2006/pdf/ukpga_20060047_en.pdf (36 pages).

Grouping of implementation of secondary legislation

- 4.8 The Government proposes three main groups of secondary legislation in the lead-up to go-live of the new Vetting and Barring Scheme:

- the first created the ISA as a Non-Departmental Public Body and provided for people subject to existing restrictions or whose cases are being considered under the existing arrangements to be included or considered for inclusion in one or both of the two new lists;
- the second provided for transitory arrangements under which the ISA started to take barring decisions in accordance with the Act, and provided for the commencement of automatic barring on the basis of criteria prescribed in Regulations;
- the third provides for full commencement of barring under the Act, the repeal of the legislation underpinning the existing arrangements, and the phasing-in of the duties and offences under the Act in relation to different groups of employees who are seeking or engaged in regulated activity, all to start to take effect from the “go-live” date (see 4.2 above);
- after go-live of VBS barring, a further commencement order will cover aspects of monitoring which will start from 2010. Controlled activity will be fully covered at a later stage of the phasing-in period.

4.9 For each Statutory Instrument, the lead Department will submit an individual explanatory memorandum setting out the detail of the SI, and where relevant, an update of the Regulatory Impact Assessment completed for the Act. Government consultation on policy issues in these S.Is included two formal consultation documents, one in summer and one in autumn 2007 – details below.

4.10 The Statutory Instruments for the first group are as follows:

- 4.10.1 The Safeguarding Vulnerable Groups Act 2006 (Commencement No.1) Order 2007, S.I. 2007/3545, made on 17th December 2007, and (Commencement No.2) Order 2008, SI 2008/1320 made on 14th May 2008; and The Safeguarding Vulnerable Groups Act 2006 (Barred List Prescribed Information) Regulations 2008, in force 4th February 2008 (these specify information which ISA must keep about people included in the barred lists);
- 4.10.2 The Safeguarding Vulnerable Groups Act 2006 (Transitional Provisions) Order 2008, SI 2008/473, in force 7th April 2008, which, as described above, requires ISA to transfer, or consider transferring, all those subject to existing restrictions to the new barred lists. Cases considered under this Order are handled in accordance with the procedural regulations referred to at paragraph 4.10.3 (and which are referred to in, and applied by, the Order) and by reference to the regulations referred to at paragraph 4.10.4;
- 4.10.3 The Safeguarding Vulnerable Groups Act 2006 (Barring Procedure) Regulations 2008, SI 2008/474, in force 7th April 2008. They make provision in relation to the making of representations, and the periods that must elapse before a person may apply for permission to apply for a review of their inclusion in one of the barred lists;
- 4.10.4 The Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria)

(Transitional Provisions) Regulations, SI 2008/1062, in force 7th April 2008. They specify the criteria which enable ISA to identify which of the people it considers in accordance with the Transitional Provisions Order do not have the right to make representations as to their inclusion in the new lists; and

4.10.5 The Protection of Children and Vulnerable Adults and Care Standards Tribunal (Children's and Adults' Barred Lists) (Transitional Provisions) Regulations 2008, SI 2008/1497 in force 2nd July 2008. They set out the procedure to be followed by the Care Standards Tribunal when considering appeals against decisions taken by ISA under the Order at 4.10.2 above. Under the Transfer of Tribunal Functions Order 2008 (see footnote 9 to para 4.4.5 above) from 3rd November 2008, the role of the Care Standards Tribunal in such appeals passed to the new First-tier Tribunal¹¹.

4.11 The Statutory Instruments for the second group are as follows:

4.11.1 The Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria) (Foreign Offences) Order 2008, SI 2008/3050, in force 13th November 2008. This Order amends Schedule 3 to the Act to allow foreign offences to be prescribed as forming the basis for criteria that will cause a person to be barred automatically. It also clarifies the duty on courts under paragraph 25 of that Schedule;

4.11.2 The Safeguarding Vulnerable Groups Act 2006 (Prescribed Information) Regulations 2008, SI 2008/3265, some provisions of which came into force on 20th January 2009 and the rest of which will come into force on 12th October 2009. They prescribe the information that the ISA may demand from employers and others as well as the information that anyone must provide to the ISA when making a referral pursuant to a requirement under the Act;

4.11.3 The Safeguarding Vulnerable Groups Act 2006 (Transitory Provisions) Order 2009, SI 2009/12, in force 20th January 2009. This Order provides for referrals under the existing arrangements referred to at para.4.2 above to be made to the IBB rather than the Secretary of State and for the ISA to take barring decisions in relation to them in accordance with the provisions of the Act;

4.11.4 The Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009, SI 2009/37, in force 20th January. They prescribe the criteria (which are principally the fact that a person has been convicted of or received a caution in relation to one of the offences specified in the Regulations) which will lead to the ISA being required to include the person in one or both of the barred lists maintained under the Act.

4.11.5 The Safeguarding Vulnerable Groups Act 2006 (Commencement No.3) Order 2009, SI 2009/39, made 14th January 2009, commenced the provisions necessary for the above instruments to have effect.

¹¹ Schedule 1, table 1 of the Order.

- 4.11.6 The Safeguarding Vulnerable Groups Act 2006 (Devolution Alignment) Order 2009, SI 2009/265, made on 11th February 2009, in force 13th March 2009. This bars, in England and Wales, anyone on the ISA Northern Ireland barred lists.

5. Extent

- 5.1 The Act mainly extends to England and Wales. The main provisions of the Act which also extend to Northern Ireland are section 1 and Schedule 1, which provide for the establishment of ISA. Otherwise, the provisions of the Act are essentially mirrored in the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007. The Scottish Executive passed its own legislation, the Protection of Vulnerable Groups (Scotland) Act 2007, and has consulted on its implementation. The explanatory memorandum for each Instrument made under the Act will set out the Instrument's extent or application.

6. Policy background

- 6.1 The Bichard Inquiry Report (2004), at <http://www.bichardinquiry.org.uk>, identified systemic failures in current vetting and barring systems. These included the following factors:
- 6.1.1 inconsistent decisions were being made by employers on the basis of CRB disclosure information;
 - 6.1.2 CRB disclosure information is only certain to be accurate on the day of issue;
 - 6.1.3 there are inconsistencies between List 99, and the POCA and POVA lists, which operate under different legislative procedures;
 - 6.1.4 the current barring system is reactive to harmful behaviour rather than preventive;
 - 6.1.5 there are inconsistencies between police authorities in the disclosure of police information.
- 6.2 The aspects of policy most relevant to each of the Instruments referred to at paragraph 2.1 are described in those Instruments' respective Explanatory Memoranda. Looking at the broader policy behind the Act, the intention is to address the failings identified at paragraph 6.1 and – as implemented in January 2009 - to put barring decisions into the hands of a body of experts that is independent of Government.
- 6.3 As described above, all those who are subject to current restrictions are being included or considered for inclusion in the new barred lists. From 12 October 2009, inclusion on those lists will take effect to bar the relevant individuals from engaging in regulated activity with children and/ or vulnerable adults (the legislation does not prevent a barred individual engaging in controlled activity, though those with responsibility for managing controlled activity will be

required to put in place safeguards to manage the risks posed by barred individuals).

- 6.4 The Government's intention is that it will seek to commence repeal (as provided for in the Act) of the current restrictions at 12 October 2009 (subject to savings for any cases referred to the Secretary of State which remain unfinished at that date). In relation to people who had been on List 99 and whom ISA has decided not to transfer to the new barred lists, the General Teaching Councils for England and Wales will (where relevant) have to make a decision as to individuals' suitability to be teachers.
- 6.5 Monitoring for new workers will be possible from July 2010, and compulsory from November 2010. Because the Government is still finalising details about timing for the later stages of the phasing in, from February 2011 onwards, of existing workers becoming subject to monitoring, a further supplementary overarching memorandum will be submitted for early 2010, on the details of these aspects. By early summer 2009, the Government will have published a suite of guidance documents to help intermediary bodies, employers, employees and volunteers understand clearly their rights and responsibilities under the new scheme. The guidance will take account of the outcome of the Government's most recent public consultation, see below.
- 6.6 **Public Consultation:** The Government consulted publicly in summer and autumn 2007. The results were published, first on 14 November 2007 at: www.dfes.gov.uk/consultations/conResults.cfm?consultationId=1476 ; and second on 30th May 2008 (details below) at: www.dcsf.gov.uk/consultations/conResults.cfm?consultationId=1516 . The explanatory memorandum with each Statutory Instrument, where relevant, gives further detail on any consultation responses relevant to that SI.
- 6.7 In 2007 and 2008 we undertook a series of stakeholder information events in major cities around England, Wales and Northern Ireland. Further events are scheduled for summer 2009; dates and locations are at: www.isa.gov.org.uk . That website also contains a number of fact sheets and background documents on the new Scheme. Also, a Vetting and Barring Scheme contact centre is now live for queries about the Scheme on 0300 123 1111 (Lo-call) available Monday to Friday between 8am and 5.30pm, to help support stakeholders, including employers and employees, with their understanding of the new Scheme.
- 6.8 The second formal consultation on implementation of the Scheme, undertaken when details of the Scheme's procedures and computer systems were still to be designed or built, set out in detail how it is intended that the Scheme will operate. This consultation invited views on a range of issues that are fundamental to implementing the Scheme. It covered:
- the definitions of children and of vulnerable adults;
 - further defining the scope of regulated activity and controlled activity;
 - eligibility to make checks on an employee's status in the Scheme;
 - how to apply to the Scheme;
 - phasing-in of applications to the Scheme;
 - the application fee;

- referring information to ISA; and
- representations and appeals against barring decisions.

7. Impact

- 7.1 At Annex B is a copy of the announcement by the Home Office Minister, which showed revised total cost figures. An updated impact assessment, reflecting these figures, will be made available by the Home Office. The existing published Assessment for the overall Vetting and Barring Scheme, signed by a Minister in July 2006, is at:
www.dfes.gov.uk/ria/index.cfm?action=assessments.view&i_assessmentID=73.

8. Contact

- 8.1 Matthew Tagney, Safeguarding Vulnerable Groups Act Implementation Division, Department for Children, Schools and Families, Level 1, Sanctuary Buildings, Great Smith Street, London SW1P 3BT
matthew.tagney@dcf.gsi.gov.uk tel: 020 7783 8253 or 7273 1203.

DCSF, 15th June 2009.

Annexes

- A Written Ministerial Statement by the Parliamentary Under Secretary of State for Identity (Meg Hillier), Thursday 19 March 2009
- B Written Ministerial Statement by the Parliamentary Under Secretary of State for Identity (Meg Hillier), Tuesday 1 April 2008.
- C DCSF memorandum to the House of Lords Merits Committee, published in the 15th Report of Session 2007-08, 19th March 2008.

Annex A

Reference from Supplement to Explanatory Memorandum, para 4.4.8

WRITTEN MINISTERIAL STATEMENT

Thursday, 19 March 2009

HOME OFFICE

Vetting and Barring Scheme

The Parliamentary Under-Secretary of State for the Home Department (Meg Hillier): Since January this year, the new Independent Safeguarding Authority (ISA) has been taking all barring decisions on new cases referred to it under the current barring provisions of POVA, POCA and List 99. This has replaced barring decisions by Ministers with independent decision making in relation to those persons considered unsuitable to work with children or vulnerable adults.

From 12 October this year, we will bring into force the barring provisions under the Safeguarding Vulnerable Groups Act 2006, significantly extending the range of activities and workplaces from which individuals may be barred to include all regulated activities, as defined by the Act. In particular, a wider range of posts and workplaces which provide for vulnerable adults will now be covered by the barring arrangements. The ISA will make independent barring decisions on cases referred to it, and bars will apply to paid employment and voluntary work in regulated activities. From this date, those barred under current arrangements who have been transferred to the new barred lists by the ISA will also be barred from the wider scope of regulated activities. It will be an offence for any barred person to work in regulated activities, and for any employer to employ someone he knows to be barred, in either a paid or voluntary capacity. Requirements will also come into force for employers to refer relevant cases to the ISA in instances of harm to the vulnerable groups.

With effect from July 2010, the final element of the new scheme will be phased in. Those wishing to work with children or vulnerable adults will be able to apply for registration with the new scheme; the ISA will consider all cases referred to it and will be able to bar those considered unsuitable for such work; and continuous monitoring of those registered with the scheme will commence. New entrants to the workforce and those changing posts will apply to the scheme first under plans to phase in the workforce gradually. In order not to disrupt normal recruitment processes over the summer period, relevant criminal offences will not be brought into force until November 2010. At this point registration with the new scheme and the requirement for employers to check registered status will become mandatory for the phased-in groups.

Annex B

Reference from Supplement to Explanatory Memorandum, para 4.2 (footnote) and 7.1

WRITTEN MINISTERIAL STATEMENT

Tuesday, 1 April 2008

HOME OFFICE INDEPENDENT SAFEGUARDING AUTHORITY

The Parliamentary Under Secretary of State for Identity (Meg Hillier): Further to the Written Statement made by my rt hon Friend the Secretary of State for Children, Schools and Families on 17 March, I am pleased to announce plans for the work of the new Independent Safeguarding Authority (ISA), together with the fee to be charged for applications.

The Independent Safeguarding Authority was established in January this year under powers in the Safeguarding Vulnerable Groups Act 2006. It will meet the aims of one of the key recommendations made by the Bichard Inquiry, which pointed to the need for a scheme to register those seeking work with children or other vulnerable groups.

The ISA's role will be to consider all relevant information relating to the risk of harm posed by persons seeking to work with children or vulnerable adults, in either a paid or voluntary capacity, and to bar those considered unsuitable for such work. The transition to the new scheme is now underway. From 31 March this year, the ISA began to advise the Secretaries of State for Children, Schools and Families and for Health in connection with new cases arising under the existing barring arrangements, in accordance with the provisions of paragraph 1 of Schedule 8 to the Safeguarding Vulnerable Groups Act. From 7 April this year, cases will be referred to the ISA under the Safeguarding Vulnerable Groups Act 2006 (Transitional Provisions) Order 2008, under which ISA must include, or consider including, in the new barred lists those individuals who are barred under the current schemes.

From October 2009 the new ISA scheme will "go-live". From that point, the scheme will consider new applications in relation to persons seeking work with children or vulnerable adults. The fee charged for ISA scheme applications has been set at £28. This is based on cost recovery of the operational costs for the scheme over its first five years of operation, estimated at £246m. The scheme will cost £84m to set up.

Taken together with the fee required for an enhanced Criminal Records Bureau disclosure check, the total fee for an initial application will be £64. Under the planned arrangements, the ISA element of the fee will be payable only on first joining the scheme. Once registered, employers will be able to verify an applicant's registered status in the scheme by means of a free on-line check. No fee will be payable by those in unpaid voluntary work. The need for subsequent CRB checks will remain a matter for employers, except in those sectors where it is a legal requirement.

The establishment of the ISA plays an important part in the Government's agenda to meet the Bichard recommendations and ensure the most robust procedures are in place to safeguard children and other vulnerable groups.

Annex C

Reference from Supplement to Explanatory Memorandum, para 4.4.3 (i) footnote

Extract from DCSF memorandum to the House of Lords Merits Committee, published in the 15th Report of Session 2007-08, pages 31-32, 19th March 2008

Q1: In order to understand why the provisions described at 4.4.3(i) of the overarching memorandum, i.e. withholding the right to make representations or appeal, are deemed compatible with the right to a fair trial (Article 6 of the ECHR), the Committee would like more information about what individuals would be covered by them, i.e. what are the offences / criteria that would place them in this category.

A1: The information requested is below.

1. By way of introduction:

[a] in the Government's view, the act of barring a person from engaging in an area of activity *automatically, without the right to make representations (as described in para. 4.4.3(i) of the Overarching Memorandum)* does not constitute the determination of a civil right. Consequently, the Government's view is that the right to a fair trial is not engaged by these Regulations. As the Minister said in his reply to the Joint Committee on Human Rights:

"Article 6(1) provides: "In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ...". But these guarantees apply only where there is a *determination* of a person's civil rights. As the bar is an automatic one, arising by operation of law, there can be no dispute of law and so I am advised that article 6 has no relevance." (PUSS Parmjit Dhanda MP to Andrew Dismore MP, Chair, JCHR, 10th October 2006);

[b] paragraph 4.4.3 of the Overarching Memorandum relates to how barring will work once the Safeguarding Vulnerable Groups Act 2006 has been brought into force fully, rather than to the process of transferring everyone who is currently barred from working with children or vulnerable adults to the new lists. The intention is that the future list of offences which will lead to a person being included in a barred list without the right to make representations should be as close as possible to the list which will mean that a currently barred person has no right to make representations when transferred to new lists under the 2006 Act: see paragraph 7.5 of the Explanatory Memorandum for the Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria)(Transitional Provisions) Regulations.

2. Turning to the specific information requested by the Merits Committee: as stated at para 4.9.4 of the overarching memorandum, it is the Prescribed Criteria - Transitional Provisions regulations themselves which specify the criteria which will enable the Independent Safeguarding Authority (the ISA; called IBB in the legislation) to identify individuals who "will not have the right to make representations". The offences and criteria are in the Schedule: paragraph 1 and its

table relate to children; paragraph 2 and its table relate to vulnerable adults.

3. The Committee will appreciate that the nature of the offences here is very high-risk and serious, and along with the specified circumstances of commission (e.g. where the offence was committed against a child) very specific. They are all offences of a sexual nature, involving young children, a lack of consent and/ or an abuse of a position of trust. In addition, they relate to where the offence was committed fairly recently – within the last 10 years – which places it at the high end of the risk spectrum. The Committee might wish to note that the starting point for this list of offences was the list that currently leads to an automatic direction, without the right to make representations, under section 142 of the Education Act 2002 (which governs “List 99”). To this were added some further offences, particularly offences relating to the health care sector. However, the key point that we would wish to draw to the Committee’s attention is that the concept of a scheme under which a person may be barred from working with a particular group without being given the chance to make representations in his own favour is nothing new.

Finally, the Committee may find it helpful to note that these regulations cover individuals who are already barred, and will continue to be barred on the current lists until the new scheme comes into force. The new scheme merely changes the scope of that bar. A barred individual will of course have an opportunity to apply for a review of his listing at the end of his barred period if his circumstances change. And the provisions of the associated Barring Procedure Regulations mean that this period is merely the balance of the period of his original bar.

[Ends]