EXPLANATORY MEMORANDUM TO

THE SAFEGUARDING VULNERABLE GROUPS ACT 2006 (PRESCRIBED CRITERIA) (FOREIGN OFFENCES) ORDER 2008
2008 No. Draft

1. This explanatory memorandum has been prepared by the Department for Children, Schools and Families (DCSF), and is laid before Parliament by command of Her Majesty.

2. Description

2.1. This draft Order amends paragraph 24 of Schedule 3 to the Safeguarding Vulnerable Groups Act[1] 2006 ("the Act") in order to enable the Secretary of State to prescribe 'foreign offences' for the purposes of paragraphs 1, 2, 7 and 8 of Schedule 3 to the Act. Paragraphs 1, 2, 7 and 8 refer to the criteria that must be satisfied in order for the Independent Barring Board (IBB)[2] to automatically include a person in the lists established and maintained by the IBB under section 2 of the Act (namely the children's barred list and the adults' barred list).

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

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

4. Legislative Background

4.1. The Act puts in place a new system aimed at safeguarding vulnerable groups by building on vetting and barring arrangements now in force under current legislation, including Section 142 of the Education Act 2002 - colloquially known as "List 99". The Government gave a commitment to ensuring that the safeguards in the Act would not be less than those available under current legislation.

4.2. The Act creates the IBB which is under a duty to establish and maintain the children's barred list and the adults' barred list. The IBB must determine who is to be included in the lists in accordance with Schedule 3 to the Act.

4.3. Paragraphs 1, 2, 7 and 8 of Schedule 3 to the Act enable the Secretary of State to prescribe the criteria that need to be satisfied for the automatic inclusion of a person in the relevant barred list. As currently enacted, paragraph 24 of the Schedule limits the offences that can be prescribed for the purposes of paragraphs 1, 2, 7 or 8 to offences under the law in England and Wales and other parts of the British Islands.

4.4. The Education (Prohibition from Teaching or Working with Children) Regulations 2003 ("the List 99 Regulations") which relate to List 99 were amended in 2007 and provided for an automatic bar in the case of a person who had committed a specified foreign offence.

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[1] 2006 c.47.
[2] The IBB works under the name "Independent Safeguarding Authority" (ISA).

4.5. A power to prescribe foreign offences is necessary in order to increase the protection afforded to children and vulnerable adults under the Act and in order to honour the Government's commitment to ensure that the statutory safeguards for vulnerable groups under the Act are not less than those available under the current legislation including that relating to List 99.

4.6. Further details on the legislative background to the Act are in the supplement (appended to this memorandum) to the overarching explanatory memorandum on the implementation of the Act, submitted to Parliament in February 2008.

5. Extent

5.1. This instrument extends 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 (Prescribed Criteria) (Foreign Offences) Order 2008 are compatible with the Convention rights as defined in section 1 of the Human Rights Act 1998.

7. Policy Background

7.1. The broader policy objectives of the Act are set out in the accompanying supplementary memorandum.

7.2. The Act requires IBB to automatically include a person in the children's or adults' barred lists if that person satisfies any of the criteria prescribed for the purposes of paragraphs 1, 2, 7 or 8 of Schedule 3 to the Act. The intention is that the prescribed criteria will catch people convicted of offences which, of themselves, create a presumption that the offender poses a risk of harm to children or vulnerable adults. The Secretary of State proposes to prescribe criteria that include convictions for serious offences under the law of England and Wales, as well as equivalent offences under the law of Scotland and of Northern Ireland.

7.3. Individuals who have spent time abroad (i.e. lived or worked in or visited another country) may wish to engage in work with children or vulnerable adults in England and Wales. Much of this work will be caught by the definition of 'regulated activity' in the Act. Whilst abroad, such persons may have been convicted for serious criminal offences which are equivalent to the offences under the law of England and Wales and which are to be prescribed for the purposes of paragraphs 1, 2, 7 or 8 of schedule 3 to the Act. It would be inconsistent with the scheme and purposes of the Act to treat that person differently from a person who had been convicted or cautioned for the equivalent offence in England and Wales.

7.4. The proposed amendment in the draft Order seeks to address this issue and is

intended to apply to any person who has been convicted of an offence in a jurisdiction falling outside the current scope of paragraph 24 (i.e. England and Wales, Scotland, Northern Ireland, the Channel Islands and the Isle of Man). Any such offence must be broadly equivalent to an offence under the law of England and Wales which has been prescribed for the purposes of paragraphs 1, 2, 7 or 8 of Schedule 3 to the Act.

7.5. The prescribed criteria are based on a list of the most serious offences involving vulnerable groups. In so far as they relate to offences committed against children, the offences specified in the criteria will be similar to those in the List 99 regulations. An early draft of the list of offences was shown to Parliament in an information note from the DCSF Minister at the time of debates in March 2008 on transitional arrangements under the Act, and followed consultation on the offences during 2007. The Government plans to include a draft of the Regulations setting out the prescribed criteria under the Act in an information note to Parliament before the debates on the draft of this Foreign Offences Order.

7.6. A Member of Parliament asked, during the Commons Committee debate on a transitional version of these prescribed criteria[3]:

"whether there is a definite system of notification about any EU worker coming to this country who has the same or a similar conviction".

7.7. An EU Council Decision[4] on the exchange of criminal record information was agreed in 2005. The Decision provides for a Member State's central authority for criminal records to inform, without delay, its counterpart in another Member State if a national of that other Member State is convicted in the territory of the former Member State. The Council Decision will be replaced by a Framework Decision which builds on the earlier Decision. Under this new Decision, a standard format for exchanging information electronically is being developed. This will improve both the timeliness and accuracy of the information exchanged. The Council Decision provides for Member States to make and respond to requests for information on convictions according to national law. This enables information to be passed for criminal justice purposes and, where domestic law allows, for employment vetting purposes. The Framework Decision will make it mandatory to reply to requests for previous convictions in the context of criminal proceedings.

7.8. The Criminal Records Bureau (CRB) contacted all EU member states in 2007 to establish whether there was an opportunity to enter into agreements to exchange data for employment vetting purposes where national laws allowed. To date there have been positive responses from some member states: the Republic of Ireland, France, Estonia and Poland. Beyond the EU, Australia has also indicated a willingness to share information. A Home Office-chaired Steering Group has been established to oversee this project, with representatives including the Association of Chief Police Officers and CRB.

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[3] Third Delegated Legislation Committee debate on the Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria) (Transitional Provisions) Regulations 2008; column 14 in Hansard report of Committee debate on 25th March 2008.

[4] Council Decision 2005/876/JHA of 21st November 2005 on the exchange of information extracted from the criminal record.

7.9. Where a foreign national is convicted or cautioned in this country, this would be recorded on police records as with any other conviction or caution here. CRB checks would reveal convictions or cautions by persons in those areas of work where the individual is eligible for a criminal records disclosure. Similarly, where British citizens have committed offences whilst working in EU countries, these may be recorded on central records in the UK under arrangements made between EU countries for the exchange of information. This cannot however be guaranteed and employers remain responsible for ensuring other safeguards are also followed, for example obtaining appropriate references from previous employers and, where available, police certificates of good conduct.

7.10. The Government remains committed to improving access to overseas criminal convictions data for employment vetting purposes. Even where another jurisdiction is willing to exchange such information, detailed work is still needed with each overseas jurisdiction on a range of issues including forming an understanding of offence descriptions which may differ from those used in UK jurisdictions and establishing exchange arrangements where criminal records data are not held centrally in the overseas jurisdiction or are not held electronically.

7.11. **Consultation**: DCSF consulted on adding foreign offences to the List 99 Regulations, in the consultation on amending those Regulations in 2006-07[5]. There were 28 responses to the consultation; including equivalent foreign offences was not among the main issues raised by respondents. The main response on foreign offences was that the proposed amendments to the Day Care and Child Minding (Disqualification) (England) Regulations 2005, which were also being consulted on, should also cover foreign offences to align those Regulations with the amended List 99 Regulations and reflect increasingly free movement of individuals across borders. DCSF's report on the consultation noted the comments made and strong support for the improvements to children's safeguarding that these amendments make. DCSF held meetings with some respondents who had concerns about how the amended List 99 Regulations in general could be implemented and used feedback from those meetings, together with the responses to the consultation, to inform guidance to support the amended List 99 Regulations. The amendment regulations were made by the Secretary of State in relation to England and Wales, under "concurrent" powers of both the Secretary of State and the Welsh Ministers under the Education Act 2002.

8. Impact

8.1. A separate impact assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies.

9. Contact

9.1. Matthew Tagney, Safeguarding Vulnerable Groups Act Implementation, Dept for Children, Schools and Families, Level 1, Sanctuary Buildings, Great Smith Street, London SW1P 3BT matthew.tagney@dcsf.gsi.gov.uk tel: 020 7273 1203.

[5] . See report at http://www.dcsf.gov.uk/consultations/conResults.cfm?consultationId=1423 .

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 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 2006[6] ("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 This supplement explains 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;
- The Safeguarding Vulnerable Groups Act 2006 (Transitory Provisions) Order 2008;
- The Safeguarding Vulnerable Groups Act 2006 (Prescribed Information) Regulations 2008;
- The Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria) Regulations 2008.

These instruments are described in their respective explanatory memoranda, to each of which this supplement is appended.

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

3.1 As noted in the explanatory memoranda relating to those Instruments, the draft Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria) (Foreign Offences) Order 2008; Safeguarding Vulnerable Groups Act 2006 (Transitory

[6] 2006 c.47.

Provisions) Order 2008; and Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria) Regulations 2008 are subject to the affirmative resolution procedure.

4. Legislative background

Introduction

4.1 The Act provides for a new Vetting and Barring Scheme to replace the existing arrangements for safeguarding children and vulnerable adults[7] from 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 will 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 the new Scheme will "go live" in October 2009[8]: 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 criminal record certificates issued by the Criminal Records Bureau ("CRB disclosures") for new job applicants. CRB disclosures give employers information about an

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[7] 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 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.

[8] Written Ministerial Statement on 1st April 2008 by Meg Hillier MP, Parliamentary Under Secretary of State, Home Office; see copy at Annex A, below.

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) 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:

4.4.1 an **Independent Barring Board** ("IBB"): IBB[9] was established on 2nd January 2008. 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 appeal[10]. 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

[9] The IBB is working under the name "Independent Safeguarding Authority" (ISA).
[10] See at Annex B, 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).

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 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 on the basis that the person in question seems to IBB to pose a risk of harm to children or vulnerable adults. Again, 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.

4.4.4 When IBB receives any information, it must consider whether it is relevant to IBB's consideration of whether the individual to which it relates should be included in either list.

4.4.5 **Appeals**: there will be 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 IBB. On informing the barred person of IBB's decision, the Government expects that IBB will follow current practice on e.g. List 99 barring decisions, where DCSF's decision letter outlines the factors taken into account in arriving at the decision. The provision for the Upper Tribunal to hear appeals on IBB decisions is at Schedule 1 of the draft Transfer of Tribunal Functions Order 2008, which has been laid before Parliament[11]. The Tribunal Procedure Committee has consulted publicly on draft Upper Tribunal rules, which they plan to submit to the Ministry of Justice in October 2008[12] so that, subject to Parliamentary approval, they would come 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.

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

[11] The draft S.I. is at: www.opsi.gov.uk/si/si2008/draft/ukdsi_9780110817828_en_1 . See also para 4.9.5 below.
[12] The draft rules are at: www.tribunals.gov.uk/tribunalprocedurecommittee.htm

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.

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 IBB. IBB will then consider whether the person should be barred from working with children and/ or vulnerable adults; or bar them automatically, where regulations require it. The CRB must repeat these checks at intervals for as long as the individual remains subject to monitoring, again passing on any information that it discovers to IBB.

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, IBB must give the Secretary of State advice, on request, in relation to outstanding cases under the existing arrangements (see paragraph 1 of Schedule 8); since 31st March 2008, IBB has been so advising.

4.6 The Government proposes to manage 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 the Government proposes that under the Statutory Instruments listed above at paragraph 2.2 (if and when Parliament approves them), Ministers will cease to take barring decisions on new referrals under the current arrangements, and the law will instead require IBB to take barring

decisions on new referrals 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 http://www.opsi.gov.uk/acts/acts2006/pdf/ukpga_20060047_en.pdf (36 pages).

Grouping of implementation of secondary legislation

4.8 The Government's plan for the implementation of the Act entails there being two main groups of secondary legislation, in addition to the current batch of transitional Instruments:

- The first, creating IBB as a Non-Departmental Public Body and providing 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, providing for the full commencement of 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 or controlled activity, all to start to take effect from the "go-live" date (see 4.2 above).

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, came into force 4th February 2008 (these specify information which IBB 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 made on 28th February 2008, came into force 7th April 2008, which, as described above, requires IBB 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 made 28th February 2008, came into force 7th April 2008, which 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, laid in draft 5th March 2008, debated in both Houses and made 3rd April 2008, came into force 7th April 2008, which specify the criteria which enable IBB 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 made 9th June 2008, came into force 2nd July 2008, set out the procedure to be followed by the Care Standards Tribunal when considering appeals against decisions taken by IBB under the Order at 4.9.2 above. The Government proposes in the draft Transfer of Tribunal Functions Order 2008 (see footnote 4) that from 3rd November 2008, the role of the Care Standards Tribunal in such appeals will pass to the new First-tier Tribunal[13].

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 IBB. 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.

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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;

[13] Schedule 1, table 1 of the draft Order.

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 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 to be included or considered for inclusion in the new barred lists. From the go-live date (see 4.2 above), 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 provisional intention is that it will seek to commence repeal (as provided for in the Act) of the current restrictions at the go-live date (subject to any savings that may be necessary). In relation to people who had been on List 99 and have not been transferred 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 Because the Government is still finalising details about the later stages of implementation, a further supplementary over-arching memorandum will be submitted once further substantive details have been finalised. In addition, the Government will publish a suite of guidance documents to help intermediary bodies, employers, employees and volunteers understand clearly their rights and responsibilities under the new scheme. This will be published well in advance of the go-live date. 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: http://www.dfes.gov.uk/consultations/conResults.cfm?consultationId=1476 ; and second on 30th May 2008 (details below) at: http://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 will be arranged between now and go-live – information will appear at: http://www.isa-gov.org.uk . That website also contains a number of fact sheets and background documents on the new Scheme. We also hope to launch a new

telephone helpline to help support stakeholders, including employers and employees, with their understanding of the new Vetting and Barring Scheme.

The second formal consultation on implementation of the Scheme set out in detail how it is intended that the Vetting and Barring Scheme will operate. Details of the Scheme's procedures are still being designed and computer systems built. 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 IBB; and
- representations and appeals against barring decisions.

7. Impact

7.1 At Annex A 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 annexed to the memoranda which accompany a future batch of S.Is under the Act, between now and the announced go-live date of October 2009. That updated Assessment will be attached, where relevant, to each E.M; 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@dcsf.gsi.gov.uk tel: 020 7783 8253 or 7273 1203.

DCSF, xxth October 2008.

Annexes

A Written Ministerial Statement by the Parliamentary Under Secretary of State for Identity (Meg Hillier), Tuesday 1 April 2008.

B 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 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 B
Reference from 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.