EXPLANATORY MEMORANDUM TO

THE SAFEGUARDING VULNERABLE GROUPS ACT 2006 (DEVOLUTION ALIGNMENT) ORDER 2009

2009 No. 265

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

2. Purpose of the instrument

2.1 This Order will have the effect that anyone included by the Independent Barring Board (IBB)[1] in either of the lists barring them from working with vulnerable groups in Northern Ireland ("the Northern Ireland barred lists") will be subject to similar bars in England and Wales. The Northern Ireland barred lists are maintained under the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007[2] and from the 13th of March 2009, people will be included in those lists under the provisions of the Safeguarding Vulnerable Groups (Transitory Provisions) Order (Northern Ireland) 2009[3] ("the Northern Ireland Transitory Order"). This Order is intended to come into force on the same date.

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

3.1 None.

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 will replace those under the Protection of Children Act 1999 ("PoCA"), Care Standards Act 2000 ("PoVA"), Criminal Justice and Court Services Act 2000, and Education Act 2002 ("List 99").

4.2 The Act created the IBB and placed a duty on it to establish and maintain a children's barred list and an adults' barred list. The IBB must include a person in the lists in accordance with Schedule 3 of the Act (namely where a person is considered to be unsuitable to engage in "regulated activity" relating to children and/or vulnerable adults). Inclusion in a barred list will have the effect of barring the person concerned from engaging in regulated activity in England and Wales with the vulnerable group to which the list relates. Regulated activity is defined in the Act and, in general terms, is work which involves a person having significant access to children or vulnerable adults. The provisions of the Act establishing the IBB extend

[1] While "Independent Safeguarding Authority" (ISA) has been the working name of the Independent Barring Board (IBB) established under Section 1 of the Act, clause 62 of the Policing and Crime Bill (introduced in the House of Commons in December 2008) proposes to change the name of the IBB in law to ISA, to match its working name.
[2] S.I. 2007/1351 (N.I. 11).
[3] S.R. 2009 No.38.

to Northern Ireland. For the most part, however, the Act extends only to England and Wales and equivalent provision is made in respect of Northern Ireland under the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007.

4.3 The Safeguarding Vulnerable Groups Act 2006 (Transitory Provisions) Order 2009[4] ("the Transitory Provisions Order") requires the IBB to take barring decisions under the law of England and Wales on persons referred to the IBB, by employers or others, under the current barring schemes referred to at para 4.1 above. This Order, which is made exercising the powers under section 54(1) of the Act for the first time, amends the Transitory Provisions Order so that "Northern Ireland" bars by the IBB (i.e. bars under the equivalent Northern Ireland Transitory Order) are recognised in England and Wales. This forms part of transition to a new Vetting and Barring Scheme ("VBS") under the Act.

4.4 Further details on the legislative background to the Act are 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 .

The supplement to the over-arching explanatory memorandum 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 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: http://www.opsi.gov.uk/si/si2009/em/uksiem_20090037_en.pdf .

[4] SI 2009/12.

The supplement is now updated with the numbers for Statutory Instruments made to date.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 The broader policy objectives of the Act are set out in the over-arching memorandum referred to in paragraph 4.4 above and in the supplement to it (appended to this memorandum). The IBB began taking barring decisions on new cases in England and Wales from 20th January 2009 (i.e. cases referred on or after that date under the barring schemes referred to at para 4.1 above).

7.2 As part of continual improvement in protection for children and vulnerable adults from harm or the risk of harm, the Government proposes by this Order to recognise Northern Ireland bars in England and Wales (and by the Northern Ireland Transitory Order, to mirror that provision in the opposite direction), from the point when the IBB starts taking barring decisions on new cases in Northern Ireland (i.e. cases referred on or after 13th March 2009 under the barring schemes ultimately to be replaced by the arrangements provided for under the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007). From that point, the same body will be taking the barring decisions on new cases both in England and Wales, and in Northern Ireland.

7.3 The problem resolved by this Order is that, at present, Northern Ireland bars are not recognised in England and Wales, so employers in England and Wales might unwittingly employ a person barred in Northern Ireland. The number of persons barred in Northern Ireland is relatively low compared to the numbers of persons barred in England and Wales, but the change is important because it streamlines the barring regimes, and will lead to a more coherent system.

7.4 In no more than a small number of cases, during the transitory period until go-live of the new VBS planned for October 2009, the law may require the IBB to double-bar a person – that is, to add the same person to the IBB's barred list under England and Wales law, and to the IBB's barred list under Northern Ireland law. This only arises from the transitory provisions and during the transitory period; from the point of VBS go-live, each person will be barred on only one list. Although double-barring only lasts a few months and would only affect at most a small number of persons, the Government intends to enable the IBB to minimise double barring. This Order and the Northern Ireland Transitory Order will make it possible for the IBB to inform any person double-barred in the transitory period, and who has a right to make representations as to why they should be removed from the IBB's list under England and Wales law, that representations are likely to lead to the IBB removing the individual from that list, on the grounds that he is on the list under Northern Ireland

law, which is recognised under England and Wales law.

8. Consultation outcome

8.1 While DCSF consulted in November 2007 on a range of policy issues related to this phase of transition to the new VBS, on which the Government response is at the website www.dcsf.gov.uk/consultations/conResults.cfm?consultationId=1516 , DCSF did not consult further specifically on this Order because the policy to recognise Northern Ireland bars in England and Wales was in the Act as passed in 2006. The report on the pre-Bill consultation in 2005 said: "there was widespread support for the model proposed for a centralised vetting scheme. Respondents were happy there would be a single point of reference where they could check the suitability of employees for positions working with children and adults." The Regulatory Impact Assessment which the then DfES Minister signed in 2006 said at para 67: "The project team is working closely with colleagues in Northern Ireland with the intention that in practice the scheme will extend to Northern Ireland".

8.2 DCSF believes that this policy will be well received by employers in England and Wales. Of all those employers in England and Wales whose work involves vulnerable groups, only a tiny proportion will receive an application for work from one of the small number of persons whom the IBB will have placed on a Northern Ireland barred list. We expect that when any of that very small number of employers find from the Criminal Records Bureau criminal record certificate that the person is barred (because of a decision by the IBB to include the person in one of the Northern Ireland barred lists), they will welcome that such a person is now also barred in England and Wales.

9. Guidance

9.1 DCSF published key messages to stakeholders about the IBB taking barring decisions on new cases under current barring schemes (List 99, PoCA and PoVA), well in advance of the start of IBB decisions on 20th January 2009, and will update those messages by 13th March 2009 to take account of the effect of this Order.

9.2 The main guidance documents are as follows:

- on the start of IBB decision-making overall: www.everychildmatters.gov.uk/socialcare/safeguarding/independentsafeguardingauthority
- on List 99: www.teachernet.gov.uk/management/staffingandprofessionaldevelopment/barringprocedures
- on PoCA: www.teachernet.gov.uk/wholeschool/familyandcommunity/childprotection/poca ;
- on POVA: www.dh.gov.uk/pova.

A single easy-to-use section at the beginning of each guidance document on the current schemes shows the key changes.

9.3 Guidance on this Order will also form part of the overall guidance and broader publicity for the Vetting and Barring Scheme under the Act, to be published by spring

2009. In addition, the Home Office, in cooperation with colleagues from this Department, the Department for Health, the IBB and the Criminal Records Bureau will host consultation and information sessions with affected stakeholder groups.

10. Impact

10.1. The impact on business, charities or voluntary bodies will be that from 13th March 2009 they cannot employ a person in England and Wales in work from which persons are barred under the List 99, PoCA and PoVA schemes if that person is barred by the IBB from equivalent areas of work in Northern Ireland.

10.2 The impact on the public sector is as for business, charities and voluntary bodies.

10.3 An Impact Assessment has not been prepared for this instrument; however, an overall Impact Assessment prepared in July 2006 for the VBS under the Act is at: www.dcsf.gov.uk/ria/index.cfm?action=assessments.view&i_assessmentID=73 . An updated Impact Assessment will be annexed to the memoranda accompanying a future batch of S.Is under the Act, between now and the planned VBS go-live in October 2009. That updated Assessment will be attached, where relevant, to each E.M.

11. Regulating small business

11.1. The legislation applies to small business.

11.2 To minimise the impact of the requirements 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 IBB 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 engage in regulated activity as part of work experience, 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;
- 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 IBB, with the assurance that an individual who is so registered is not barred;
- that 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 10.2 above) will include a fully updated cost / benefit analysis, which will also take account of the revised costs announced by Home Office Ministers on 1 April 2008 (see Annex A to the attached overarching explanatory memorandum).

12.2 The IBB 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 IBB, 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 IBB 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

13.1. Matthew Tagney at the Department for Children, Schools, and Families.
Telephone: 020 7273 1203. Email: matthew.tagney@dcsf.gsi.gov.uk .

DCSF, [12th] February 2009

Annex: over-arching supplement.

Annex
to Explanatory Memorandum on Safeguarding Vulnerable Groups Act 2006 (Devolution Alignment) 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 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[5] ("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, 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.

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

[5] 2006 c.47.

3.1 None outstanding. As noted in the explanatory memoranda relating to those Instruments, the Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria) (Foreign Offences) Order 2008; Safeguarding Vulnerable Groups Act 2006 (Transitory Provisions) Order 2009; and Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria) Regulations 2009 were 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[6] 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[7]: 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

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[6] 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.

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

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) 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"): the IBB[8] 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[9]. 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

[8] While "Independent Safeguarding Authority" (ISA) has been the working name of the Independent Barring Board (IBB), clause 62 of the Policing and Crime Bill (introduced in the House of Commons in December 2008) proposes to change the name of the IBB in law to ISA, to match its working name.

[9] 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).

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 (which may be any of those described above);

(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 the 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 the IBB receives information on an individual, it must consider whether it is relevant to the IBB's consideration of whether to include the individual 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 the IBB. On informing the barred person of the IBB's decision, the Government expects that the 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 Transfer of Tribunal Functions Order 2008[10]. The Tribunal Procedure Committee consulted publicly on its Upper Tribunal rules, agreed by the Ministry of Justice[11], 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.

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.

[10] The S.I. is at: http://www.opsi.gov.uk/si/si2008/pdf/uksi_20082833_en.pdf . See also para 4.9.5 below.
[11] The rules are at: http://www.opsi.gov.uk/si/si2008/pdf/uksi_20082698_en.pdf .

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 the IBB. The 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 the 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, the 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, the 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 under the Statutory Instruments listed above at paragraph 2.2, Ministers from 20th January 2009 ceased to take barring decisions on new referrals under the current arrangements, and the law instead requires the 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 proposes three main groups of secondary legislation:

- the first created the IBB 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 IBB has started to take barring decisions in accordance with the Act and also provided for the commencement of automatic barring, on the basis of criteria prescribed in Regulations.

- the third will provide for the full commencement of the Act, repeal of legislation underpinning the existing arrangements, and phasing-in of duties and offences under the Act in relation to different groups of employees who are seeking or engaged in regulated activity or controlled activity, to start to take effect from the VBS "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, in force 4th February 2008. These Regulations specify information which the 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, in force 7th April 2008. As described above, it requires the 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 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 the 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, in force 2nd July 2008, set out the procedure to be followed by the Tribunal when considering appeals against decisions taken by the IBB under the Order at 4.9.2 above. Under the Transfer of Tribunal Functions Order 2008 (see footnote 4), from 3rd November 2008, the role of the Care Standards Tribunal in such appeals passed to the new First-tier Tribunal[12].

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 IBB may demand from employers and others as well as the information that anyone must provide to the IBB 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 IBB 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 IBB 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.

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 the 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)

[12] Schedule 1, table 1 of the Order.

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 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 and 2.2 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 to 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 were on List 99 but not 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 later stages of implementation, a further supplementary over-arching memorandum will be submitted once further substantive details are 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.

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.