EXPLANATORY MEMORANDUM TO

THE UK BORDERS ACT 2007 (CODE OF PRACTICE ON CHILDREN) ORDER 2008

2008 No. 3158

1. This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This Order brings into force the UK Border Agency Code of Practice on Children. This code of practice is designed to ensure that UKBA takes appropriate steps to ensure that children in the UK are safe from harm. UKBA staff are required to have regard to the code in the exercise of UKBA functions.

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

3.1 None.

4. Legislative Context

4.1 This fulfils a duty in s.21 (1) of the UK Borders Act 2007 for the Secretary of State for the Home Department to issue a Code of Practice designed to ensure that in exercising functions in the UK the Border and Immigration Agency (now the UK Border Agency) takes appropriate steps to ensure that while children are in the UK they are safe from harm.

4.2 Section 21 of the UK Borders Act requires the Code to come into force through an order made by statutory instrument which is the purpose of this instrument.

4.3 The UK Borders Act 2007 (Commencement No. 5) Order 2008 will also come into force at the same time as the Code of Practice on the 6 January 2009.

4.4 Both Houses accepted that a Code of Practice provided a way in which the UKBA could discharge a duty towards children that contributed to their safety and protection whilst in the UK.

4.5 The Government has subsequently agreed to introduce a duty equivalent to that in s.11 of the Children Act 2004, in the next immigration bill. This is a duty requiring specified public bodies to make arrangements to ensure that their functions are discharged having regard to the need to safeguard and promote the welfare of children.

4.6 The Code of Practice seeks to pave the way by anticipating as much as possible the forthcoming children's duty. That duty will be contained in primary legislation and there will be an accompanying duty to have regard to guidance issued by the Secretary of State.

4.7 When the forthcoming children's duty comes into force, section 21 of the UK Borders Act 2007 will be repealed. The new duty will be different to the duty in section 21 of the UK Borders Act 2007 to have regard to the code of practice on children. The code of practice itself will cease to have effect.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

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

- ***What is being done and why***

7.1 The policy objective of the Code of Practice is to create a framework within which UKBA can safeguard children in the UK with whom it comes into contact. Safeguarding children is an overall Government policy although the way that it applies to each government body will depend upon the particular functions of that body.

7.2 The role of UKBA in this regard is alongside and complementary to that of other agencies but it is an organisation that has key points of contact with children from overseas when they enter the UK, when they seek to remain here, and at times of enforcing the immigration laws. The nature of the problem being addressed is that following the report of Lord Laming into the death of Victoria Climbie, safeguarding children is regarded as a duty to be discharged by requiring public bodies which have contact with children to have formal safeguarding strategies in place. It is therefore appropriate for the UKBA to have a particular duty for safeguarding them, not least because children from overseas may not have as many points of contact with public bodies as UK born children, particularly if they are below school age. Precise figures on the number of children from overseas present in the UK are not available.

7.3 The level of public interest in the policy is significant. Without this code, the perception that a lower standard of safeguarding is being extended to children from overseas would remain unaddressed.

7.4 This change does not have any major political implications but it carries the legal implication that failure to have regard to the code where it is a relevant to a decision being made creates the possibility of legal challenge to that decision by way of judicial review.

7.5 The Government considered whether the same end could be achieved by administrative arrangements. This would not have met the objective of providing reassurance that its overall policy on safeguarding children was also being applied to children from overseas during their time in the UK in a way comparable to all other children in the UK. This is because many other bodies that have contact with children have a safeguarding duty that flows from legislation and the Government is seeking parity of treatment.

8. Consultation outcome

8.1 The Government held a public consultation on the content of the Code of Practice between 31 January and 25 April this year. In total, 381 responses were received from a range of groups including Local Authorities, children's charities, the children's commissioners for England, Scotland, Wales and Northern Ireland, groups that work with refugee and asylum seeking families, and members of the public. In addition, a number of seminars were held with national and local representatives of Local Authorities and children's charities.

8.2 All respondents who addressed the questions were in favour of UKBA having a Code of Practice in this area and many made significant comments about the style and content that have been taken up and incorporated into the Code that is being laid. For instance, a section on principles and values in working with children was regarded as highly important by the children's commissioner for England and by many of the national children's charities, and was therefore adopted. There were some concerns that the Code was not equivalent to the duty contained in primary legislation, namely the Children Act 2004, which includes a duty to make arrangements to promote the welfare of children, and the Government is seeking to address these in the next immigration bill.

8.3 Following the consultation, the Code of Practice in its present form has been circulated to a small reference group made up of the children's commissioner for England and representatives of the children's charities who are supportive of it.

8.4 More information about the consultation and the responses received can be found on the Home Office website at http://www.homeoffice.gov.uk/about-us/haveyoursay/closed-consultations/2008-cons-closed/

9. Guidance

9.1 The duty to have regard to the Code applies to UKBA (formerly BIA) which is defined to include immigration officers and other officials of the SSHD. Staff will be made aware of its requirements through training courses, guidance notes and other internal communication channels.

10. Impact

10.1 There is no identifiable impact on business, charities or voluntary bodies.

10.2 The impact on the public sector is likely to be on Local Authorities who may experience more referrals relating to children in need or at risk, although these have not been identified as significant or requiring extra measures.

10.3 An impact assessment has not been prepared for this instrument. This is because no impact on the private or voluntary sector is foreseen.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 The Code provides for UKBA's handling of children to be inspected by the Chief Inspector of the Border and Immigration Agency. The Code will be reviewed by an internal board of the UKBA, who will monitor its effectiveness in improving the handling of children and their applications by the Agency. Breaches of the Code will be reported by individuals themselves on a self-reporting basis and will contribute to monitoring the effectiveness of the Code. Section 21 of the UK Borders Act 2007 is expected to be repealed and replaced by the new children's duty in the forthcoming immigration bill. This bill is expected to gain royal assent in summer 2009. Therefore we do no currently envisage an annual review mechanism for the code.

13. Contact

Mike Gallagher at the UK Border Agency Tel: 0208 604 6876 or email: mike.gallagher@homeoffice.gsi.gov.uk can answer any queries regarding the instrument.