

EXPLANATORY MEMORANDUM TO
THE SAFEGUARDING VULNERABLE GROUPS ACT 2006 (PRESCRIBED
CRITERIA) (TRANSITIONAL PROVISIONS) REGULATIONS 2008
2008 No.

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

2. Description

2.1. These draft Regulations set out criteria needed for the purposes of the Safeguarding Vulnerable Groups Act (Transitional Provisions) Order 2008, S.I. 2008/473 (“the TPO”). The Regulations will enable the Independent Barring Board (“IBB”) to identify people who are not to have the right to make representations as to their inclusion in the barred lists maintained by IBB under section 2 of the Safeguarding Vulnerable Groups Act 2006 (“the Act”). These Regulations will apply only to certain people whom IBB are required to include in those lists under the TPO.

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

3.1. These Regulations are subject to the affirmative resolution procedure.

4. Legislative Background

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

4.2. The Act creates the IBB to maintain a list of persons barred from work with significant access to each group, and to decide whether to include persons in one or both lists. Under the TPO, IBB will be required to include or consider including in these new lists people who are subject to disqualifications under the existing regime (i.e. who are included in the lists maintained under section 1 of the Protection of Children Act 1999 or section 81 of the Care Standards Act 2000, who are subject to a disqualification order under section 28, 29 or 29A of the Criminal Justice and Court Services Act 2000, or who are subject to a direction made under section 142(1) of the Education Act 2002). The effect of articles 2(7) and 4(7) of the TPO is that anyone to whom those articles apply and who meets criteria prescribed for the purposes of those paragraphs is not to have the right to make representations as to their inclusion in the new barred lists. These Regulations prescribe those criteria.

4.3. These criteria are intended to be very similar to those which will in future (once the Act is implemented fully) determine whether a person will be

included in the new barred lists automatically without the right to make representations (see paragraphs 7.2 to 7.5 below). In relation to those criteria (which will be prescribed in a future set of regulations), the Government gave a commitment during the course of the Safeguarding Vulnerable Groups Bill to debate these prescribed criteria in draft. Lord Adonis said in the House of Lords “We will use the affirmative resolution procedure for agreeing the order necessary to specify the offences in question. The will of Ministers in a unilateral way will not hold sway in this matter, rather it will be the will of Parliament arrived at in a considered way after consultation”, in response to which, Baroness Walmsley said “I am very glad that we are to have the affirmative resolution concerning the offences that are to be included. That, at least, will provide another opportunity to talk about these matters” (Hansard, 2 May 2006: Column GC186 and GC189). In the House of Commons, Parmjit Dhanda MP said “The criteria that may be prescribed are set out in paragraph 19 of Schedule 2 and include cautions and convictions for certain offences, inclusion on an overseas list or being subject to an overseas order or direction. Following consultation, the offences will be included in regulations subject to the affirmative resolution procedure, as I believe was made clear in another place” (Hansard, Standing Committee B, Tuesday 11 July 2006; Column 42).

- 4.4. The Safeguarding Vulnerable Groups Act 2006 (Barring Procedure) Regulations 2008, S.I. 2008/474, which make provision relating to matters such as the time an individual is to be allowed in which to make representations and the time that must elapse before they are allowed to apply for permission to apply for a review of their inclusion in a barred list, will also apply for the purposes of the TPO.
- 4.5. Further detail on the legislative background to the Act is set out in an overarching explanatory memorandum on the implementation of the Act, at Annex 1 below.
- 4.6. These Regulations are the first to be made under paragraphs 1(1), 7(1), and 24(1) to (3) of Schedule 3 to, the Act.

5. **Extent**

- 5.1. This instrument extends to England and Wales.

6. **European Convention on Human Rights**

- 6.1. Kevin Brennan, 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) (Transitional Provisions) Regulations 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 over-arching explanatory memorandum (see Annex 1 below). In relation to these Regulations, two aspects of policy are particularly relevant.
- 7.2. Firstly, the intention is that anyone who is subject to a restriction or disqualification under the current regime (i.e. that 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) should either be considered for inclusion in the new barred lists provided for under the Act, or should be included as soon as they are referred to IBB. This is provided for under the TPO. In most cases, individuals will be given the right to make representations as to why they should not be included, or continue to be included, in the new lists. In some cases, however, they will not have this right.
- 7.3. Secondly, there is the question of how people will be included in the new lists once the Act is implemented fully. This may happen in one of four ways. They may be included:
- automatically, without the right to make representations as to why they should be removed from the list;
 - automatically, but with the right to make representations as to why they should be removed from the list;
 - on the basis that they have behaved in a way that has endangered a vulnerable person; or
 - on the basis that IBB feels that they may behave in a way that would harm a vulnerable person or put that person at risk of harm etc..
- (In either of the last two situations, the person under consideration by IBB would have the right to make representations as to why they should not be included in one or both barred lists.)
- 7.4. People will only be included in the lists automatically where they meet criteria prescribed under the Act. The intention is that these criteria will catch people who have committed offences which, of themselves, create a presumption that the offender poses a risk of harm to children or vulnerable adults. In cases where the nature of the offence indicates that any offender would pose such a high risk to the vulnerable that they simply could not put a case as to why they should not be barred from working with one or both vulnerable groups, that person will be barred automatically without the right to make representations.
- 7.5. The intention is that the basis on which a person who is included in the new lists under the TPO will be denied the right to make representations will be as close as possible to that on which people in future cases will be included in the barred lists automatically without having that right. These regulations therefore lay the ground for the future regulations which will prescribe the criteria for automatic inclusion in the barred lists.

7.6. The Government formally consulted on the key aspects of its policy proposals behind regulations made under Schedule 3 to the Act. This included the criteria to be prescribed for the purposes of automatic barring. The title of the consultation document was “*Barring consultation: implementing the Safeguarding Vulnerable Groups Act 2006 and the Northern Ireland Order 2007*” and the consultation ran from 22 June to 14 September 2007

7.7. There were 182 responses to the consultation. These came from bodies including Local Authorities, Local Safeguarding Children Boards, voluntary sector organisations, unions, national and professional associations, and health and care sector organisations, as well as parents. Respondents broadly agreed with all the proposals put forward in the consultation document. No substantive points were raised on the Prescribed Criteria.

8. Impact

8.1. The impact assessment on the Act was published previously – see over-arching text, annexed. An updated assessment, giving the latest cost figures and other details, will be annexed behind the over-arching memorandum to accompany future S.Is in this group, after a related announcement by Home Office Ministers, at a date to be confirmed.

9. Contact

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DCSF, 27th February 2008

Annex: over-arching explanatory memorandum

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 over-arching explanatory memorandum explains the context to the first set of Statutory Instruments to be laid before Parliament under the Safeguarding Vulnerable Groups Act 2006¹ (“the Act”). These are:

- 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.

These instruments are described in their respective explanatory memoranda.

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

- 3.1 As noted in the explanatory memorandum relating to that Instrument, the draft Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria) (Transitional Provisions) Regulations 2008 are subject to the affirmative resolution procedure.

4. Legislative background

Introduction

- 4.1 The Act provides for a new scheme to replace the existing 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. 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

¹ 2006 c.47.

of Children Act 1999, the Care Standards Act 2000, the Criminal Justice and Court Services Act 2000 and the Education Act 2002.

- 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 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 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. 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 meet other prescribed criteria (such as being subject to an order, foreign order or direction of a prescribed description, or being included in a specified foreign barred list) that indicate, of themselves, that any offender would pose such a high risk to vulnerable groups that they simply could not make a case as to why they should be allowed to engage in regulated activity;

(ii) automatic inclusion in one or both of the barred lists with the right to make representations as to why the person in question should be removed and a subsequent right of appeal following inclusion.

Inclusion in the lists on this basis will happen where a person has been convicted of, or received a caution in relation to, one of a further list of specified offences or as a result of having met some other prescribed criteria (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 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 Care Standards 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 Government will shortly be making a set of regulations governing the procedure to be followed by the Tribunal in considering appeals under the Act (these regulations will be subject to the negative resolution procedure).
- 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.

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 appropriate. 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 from 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 below);
- 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 provided for under the Act. During the period leading up to the full implementation of the Act, this will have 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. This will happen in accordance with The Safeguarding Vulnerable Groups Act 2006 (Transitional Provisions) Order 2008, by reference to the criteria set out in The Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria) (Transitional Provisions) Regulations 2008, and subject also to the provisions of The Safeguarding Vulnerable Groups Act 2006 (Barring Procedure) Regulations 2008. Secondly, IBB will have to give the Secretary of State advice, on request, in relation to outstanding cases under the existing arrangements (see paragraph 1 of Schedule 8).

4.6 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

4.7 The Government proposes two main groups of secondary legislation:

- 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 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 a “go-live” date (i.e. the date from which inclusion in a barred list will take effect to bar individuals from engaging in regulated activity).

4.8 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 a formal consultation document in summer 2007 – details below.

4.9 The Statutory Instruments for the first group will be as follows:

- 4.9.1 The Safeguarding Vulnerable Groups Act 2006 (Commencement No.1) Order 2007, S.I. 2007/3545, which was made on 17th December 2007, and The Safeguarding Vulnerable Groups Act 2006 (Barred List Prescribed Information) Regulations 2008, which were made on 8th January 2008 (these specify information which IBB must keep about people included in the barred lists);
- 4.9.2 The Safeguarding Vulnerable Groups Act 2006 (Transitional Provisions) Order 2008 (“the TPO”), which is to be made and laid subject to the negative resolution procedure and, as described above, will require IBB to transfer, or consider transferring, all those subject to existing restrictions to the new barred lists. Cases considered under this Order will be handled in accordance with the procedural regulations referred to at paragraph 4.9.3 (and which are referred to in, and applied by, the Order) and by reference to the regulations referred to at paragraph 4.9.4;
- 4.9.3 The Safeguarding Vulnerable Groups Act 2006 (Barring Procedure) Regulations 2008, which are also to be made and laid subject to the negative resolution procedure and will 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;
- 4.9.4 The Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria) (Transitional Provisions) Regulations, and which will specify the criteria which will enable IBB to identify which of the people it considers in accordance with the TPO will not have the right to make representations as to their inclusion in the new lists.

4.9.5 In addition, a further set of regulations will be made, subject to the negative resolution procedure, which will set out the procedure to be followed by the Care Standards Tribunal when considering appeals against decisions taken by IBB.

4.10 The intention is that the S.I.s referred to in paragraphs 4.9.2 to 4.9.4 should come into force in early April 2008.

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 is now consulting on its implementation. The explanatory memorandum for each Instrument made under the Act will set out the Instrument's extent or application.

6. Policy background

6.1 The Bichard Inquiry Report (2004), at <http://www.bichardinquiry.org.uk>, identified systemic failures in current vetting and barring systems. These included the following factors:

6.1.1 inconsistent decisions were being made by employers on the basis of CRB disclosure information;

6.1.2 CRB disclosure information is only certain to be accurate on the day of issue;

6.1.3 there are inconsistencies between List 99, and the POCA and POVA lists, which operate under different legislative procedures;

6.1.4 the current barring system is reactive to harmful behaviour rather than preventive;

6.1.5 there are inconsistencies between police authorities in the disclosure of police information.

6.2 The aspects of policy most relevant to each of the Instruments referred to at paragraph 2.1 are described in those Instruments' respective Explanatory Memoranda. Looking at the broader policy behind the Act, the intention is to address the failings identified at paragraph 6.1 and 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. As from a "go-live" date, inclusion on those lists will take effect to bar the relevant individuals from engaging in regulated activity with children and/ or vulnerable adults (there is no current intention to prevent a barred individual from 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 It is anticipated that the current restrictions will fall away at that point (subject to any savings that may be necessary), though the timing of this aspect of implementation is still under review. In relation to people who had been on List 99 and had 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 supplementary over-arching memorandum will be submitted once further substantive details have been finalised. Home Office Ministers hope to make an announcement on costs and the timing of the implementation of the Act in the coming weeks. 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. Some key points in the guidance will depend on the outcome of current public consultation, see below.
- 6.6 **Public Consultation:** The Government consulted publicly in summer 2007. The results were published on 14 November 2007 at: <http://www.dfes.gov.uk/consultations/conResults.cfm?consultationId=1476> . The explanatory memorandum with each Statutory Instrument will, where relevant, give further detail on any consultation responses relevant to that SI.
- 6.7 In February 2007 we began a series of stakeholder information events in major cities around England, Wales and Northern Ireland. These events are ongoing – further information is 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 IBB scheme.
- 6.8 We have also recently concluded a second, wide-ranging, formal consultation on implementation of the scheme. This is online at: <http://www.dcsf.gov.uk/consultations/conDetails.cfm?consultationId=1516> . This consultation sets out in detail how it is intended that IBB scheme will operate. The scheme is still being designed and systems built. This consultation invites views on a range of issues that are fundamental to implementing IBB scheme. It covers:
- the definitions of children and of vulnerable adults;
 - further defining the scope of regulated activity and controlled activity;
 - eligibility to make checks on 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.
This second consultation closed on 20th February 2008.

7. Impact

- 7.1 See updated Impact Assessment which will (after a Home Office Ministerial announcement expected in the coming weeks) be attached, where relevant, to each E.M; or the published Assessment for the overall Vetting and Barring scheme, signed by a Minister in July 2006, at:
www.dfes.gov.uk/ria/index.cfm?action=assessments.view&i_assessmentID=73.

8. Contact

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DCSF, 27th February 2008.