

**EXPLANATORY MEMORANDUM TO
THE SAFEGUARDING VULNERABLE GROUPS (TRANSITIONAL
PROVISIONS) ORDER (NORTHERN IRELAND) 2008**

SR 2008 No. 200

1. This explanatory memorandum was prepared by the Department of Health, Social Services and Public Safety and is laid before Parliament by Command of Her Majesty.

2. Description

- 2.1 This Order made under the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007¹ (“the 2007 Order”) requires the Independent Barring Board (IBB)² established by section 1 of the Safeguarding Vulnerable Groups Act 2006³ (“the 2006 Act”) to include, or consider including, persons, who are subject to existing restrictions relating to working with children or adults, in the new barred lists maintained by the IBB under Article 6 of the 2007 Order. This is necessary for the purposes of transition in order to bring together on the children’s barred list or the adults’ barred list all those unsuitable to work with children or vulnerable adults, and because the existing restrictions will be repealed (subject to any savings which may be necessary) on full implementation of the 2007 Order.

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

- 3.1 None

4. Legislative background

- 4.1 The 2006 Act and 2007 Order reform 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. These arrangements will replace those provided for under the Education and Libraries (Northern Ireland) Order 1986 (“the 1986 Order”) and the Protection of Children and Vulnerable Adults (Northern Ireland) Order 2003 (“the 2003 Order”).
- 4.2 The 2006 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.
- 4.3 Persons who are included in the list kept under Article 3 of the 2003 Order (DWC List) or Article 35 of the 2003 Order (DWVA List) or included in the list kept for the purposes of the Education (Prohibition from Teaching or Working with Children) Regulations 2007 (“the 2007 Regulations”) (UP List) or subject to a disqualification order under the 2003 Order are to be included or considered

¹ 2007 No. 1351 (N.I. 11)

² The IBB will work under the name “Independent Safeguarding Authority” (ISA).

³ 2006 c.47

for inclusion by IBB in the children's barred list or the adults' barred list. This Order provides for this. The key provisions are as follows.

- 4.4 **Article 3** requires IBB to include in the new children's barred list an individual who is included in the DWC List, in the UP List or subject to a disqualification order. The IBB must give the individual the opportunity to make representations as to why he should be removed from the barred list unless he is a person who satisfies the criteria prescribed for the purposes of paragraph 1 of Schedule 1 to the 2007 Order and this Article in which case there is no right to make representations. The effect of inclusion in the new lists will be to impose a bar whose scope is wider than the effect of the current restrictions; the right to make representations is limited to that new wider scope. An individual has a right of appeal against the decision of IBB not to remove him from the children's barred list under Article 3.
- 4.5 **Article 4** requires IBB to consider including in the children's barred list, an individual who is included in the DWC List having been transferred to that list from the Pre-Employment Consultancy Service Register under Article 10 of the 2003 Order (unless subject to a disqualification order or if any of conditions C to F of the 2007 Regulations is met). IBB must consider whether to include such an individual in the children's barred list in accordance with paragraphs 3 to 5 of Schedule 1 to the 2007 Order. There is a right of appeal to the Care Tribunal against IBB's decision under Article 8 of the 2007 Order.
- 4.6 **Article 5** makes similar provision to Article 3 in relation to those included in the DWVA List i.e. those considered unsuitable to work with vulnerable adults. Individuals who satisfy the criteria prescribed for the purposes of paragraph 7 of Schedule 1 to the 2007 Order and this Article will have no right to make representations as to why they should be removed from the adults' list.
- 4.7 **Article 6** makes similar provision to Article 4 in relation to those included in the DWVA List, having been transferred from the Pre-employment Consultancy Service Register under Article 41 of the 2003 Order (unless subject to a disqualification order or if any of conditions C to F of the 2007 Regulations is met). IBB must consider whether to include such an individual in the adults' barred list in accordance with paragraphs 9 to 11 of Schedule 1 to the 2007 Order. There is a right of appeal to the Care Tribunal against IBB's decision under Article 8 of the 2007 Order.
- 4.8 The overall legislative background to the 2007 Order is set out in the overarching explanatory memorandum on the implementation of the Order, at Annex 1 below. This statutory rule is one of a series to implement the 2007 Order – further details at Annex 1.

5. **Extent**

- 5.1 This statutory rule extends to Northern Ireland.

6. **European Convention on Human Rights**

- 6.1 As the rule 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 2007 Order are set out in the accompanying over-arching memorandum (see Annex 1 below).
- 7.2 The policy is that anyone who is subject to a restriction or disqualification under the current regimes (that provided for under the 1986 Order or the 2003 Order) should either be included in the new lists or, in certain cases, considered for inclusion. This is for the purpose of enabling the smooth transition from the current barring schemes to the new barred lists. The policy objective of the 2007 Order is to minimise risk of harm to children or vulnerable adults, by improving vetting and barring of people who work with them. Individuals are included in the current barred lists or subject to a disqualification order because they have been convicted of or cautioned for offences involving harm to vulnerable groups, or following a referral from an employer. The issue of safeguarding vulnerable groups from harm is a matter of great public importance. The provision made by this Order when taken together with the rest of this group of Statutory Rules, provide for a smooth transition from the current barring arrangements with no loss of protection to vulnerable groups.
- 7.3 Those individuals who have no right to make representations under Articles 3 and 5 of this Order are those who meet the criteria prescribed for the purposes of paragraph 1 or, as the case may be, paragraph 7 of Schedule 1 to the 2007 Order and those Articles. These criteria specify the most serious and high risk offences. We consulted in relation to the prescribed criteria and the criteria reflect the consultation responses.
- 7.4 Where IBB decides under Article 4 or 6 not to include a person who is on the DWC List, or the DWVA List, having been transferred from the Pre-employment Consultancy Service Register, in the children's barred list, then the intention is that that person will remain on the DWC List, or DWVA List, until the relevant provisions are repealed when the vetting and barring scheme goes live.
- 7.5 The right to make representations under Articles 3 and 5 is limited to the impact of the wider bar. These individuals are already subject to the existing restrictions and it is therefore considered appropriate that the right to make representations is limited.
8. **Impact**
- 8.1 A Regulatory Impact Assessment has not been prepared for this Order as it has no impact on business, charities or voluntary bodies.
- 8.2 There is no adverse impact on those listed under Section 75 of the Northern Ireland Act 1998 therefore a full Equality Impact Assessment is not required.

9. Public consultation

9.1 A summary of public consultation and responses is in the overarching memorandum at Annex 1.

10. Contact

10.1 **Eilís McDaniel** at the Department of Health, Social Services and Public Safety, Tel: 028 9052 6429 or email: eilis.mcdaniel@dhsspsni.gov.uk, can answer any queries regarding the Rule.

DHSSPS, May 2008

Annex: over-arching explanatory memorandum

**EXPLANATORY MEMORANDUM ON THE IMPLEMENTATION OF THE
SAFEGUARDING VULNERABLE GROUPS (NORTHERN IRELAND)
ORDER 2007**

1. The Department of Health, Social Services and Public Safety prepared this memorandum and submitted it voluntarily to Parliament.
2. **Description**
 - 2.1 This over-arching explanatory memorandum explains the context to the first set of Statutory Rules to be laid before Parliament under the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007⁴ (“the Order”). These are:
 - The Safeguarding Vulnerable Groups (Transitional Provisions) Order (Northern Ireland) 2008,
 - The Safeguarding Vulnerable Groups (Barring Procedure) Regulations (Northern Ireland) 2008,
 - The Safeguarding Vulnerable Groups (Prescribed Criteria) (Transitional Provisions) Regulations (Northern Ireland) 2008, and
 - The Safeguarding Vulnerable Groups (Barred List Prescribed Information) Regulations (Northern Ireland) 2008.

These rules are described in their respective explanatory memoranda.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**
 - 3.1 None
4. **Legislative background**

Introduction

- 4.1 The Order and the Safeguarding Vulnerable Groups Act 2006 (“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. In 2005, the Department for Education and Skills ran a public consultation for the new scheme, “*Making Safeguarding Everybody’s Business: A Post-Bichard Vetting Scheme*”. 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 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

⁴ S.I. 2007 No. 1351 (N.I. 11)

vulnerable adults will have to go through. The new arrangements introduced by the Order will replace the existing arrangements provided for under the Education and Libraries (Northern Ireland) Order 1986 (“the 1986 Order”) and the Protection of Children and Vulnerable Adults (Northern Ireland) Order 2003 (“the 2003 Order”).

- 4.3 The current system for vetting people who wish to work with children or vulnerable adults operates through AccessNI, which issues criminal record disclosure certificates to employers who request them on new job applicants. The disclosure certificates issued by AccessNI give employers information about an individual’s criminal record 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 lists maintained by government departments of persons barred from working with children or vulnerable adults. These lists, which are subject to different legislation, criteria and procedures, are: the Unsuitable Persons List (kept for the purposes of the Education (Prohibition from Teaching or Working with Children) Regulations (Northern Ireland) 2007), the Disqualification from Working with Children (DWC) List (kept under Article 3 of the 2003 Order), the Disqualification from Working with Vulnerable Adults (DWVA) List (kept under Article 35 of the 2003 Order) and equivalent lists held in England, Wales and Scotland. Disqualification Orders made by a court (under Article 23 or 24 of the 2003 Order) also bar individuals from working with children. Being on one of these lists or subject to a disqualification order is referred to below as being subject to an existing restriction.

Key features of the Order

- 4.4 When implemented fully, the Order 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 public body sponsored by the Home Office. In relation to Northern Ireland, 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** on 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 for, 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 that an offender would pose such a high risk to vulnerable groups that he simply could not make a case for being permitted to engage in regulated activity;

- ii. automatic inclusion on 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 for, 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. that he has behaved in a way that that has harmed, or could have harmed, a child or vulnerable adult, or engaged in behaviour involving child pornography or of an inappropriate sexual nature. 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 the individual to whom 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 Tribunal. Appeals will only be heard with the permission of the Tribunal, and only on the basis that a mistake has been made on a point of law or on a finding of fact made by IBB. On informing the barred person of IBB's decision, we expect that IBB will follow current practice of informing the barred individual by way of a decision letter of the factors taken into account in arriving at the decision to bar. We will shortly be making a set of regulations governing the procedure to be followed by the Care Tribunal in considering appeals under the Order.

4.4.6 **Regulated activity:** this is defined in Schedule 2 to the Order. 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 Commissioner for Children and Young People in Northern Ireland and the Director of Social Services of a Health and Social Services Board.

4.4.7 **Controlled activity:** this is defined in Articles 25 and 26 of the Order. 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, in certain settings. 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 AccessNI. AccessNI will check 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 Criminal Records Bureau (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 6 to the Order makes provision for the transition from the existing arrangements to the new arrangements provided for under the Order. During the transition period, all those who are subject to an existing restriction must be included, or considered for inclusion, in the new barred lists kept under the Order. This will happen in accordance with the Safeguarding Vulnerable Groups (Transitional Provisions) Order (Northern Ireland) 2008 and subject also to the provisions of the Safeguarding Vulnerable Groups (Barring Procedure) Regulations (Northern Ireland) 2008.

4.6 Further detail on how the new scheme will work is in the Explanatory Notes to the Order at http://www.opsi.gov.uk/si/si2007/pdf/uksi_20071351_en.pdf.

Grouping of implementation of secondary legislation

4.7 We propose three main groups of secondary legislation:

- the first, providing for people subject to existing restrictions, to be included or considered for inclusion in the new barred lists;

- the second, to allow IBB to include, or consider for inclusion, in the new barred lists new cases of referral under existing arrangements; and
- the third, providing for the full commencement of the Order, the repeal of the legislation underpinning the existing arrangements, and the phasing-in of the duties under the Order 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 Rule, we will submit an individual explanatory memorandum setting out the detail of the SR. Government consultation on policy issues in these S.R.s included a formal consultation document in summer 2007 – details below.

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

- 4.9.1 The Safeguarding Vulnerable Groups (2007 Order) (Commencement No. 1) Order (Northern Ireland) 2008, S.R 2008 No. 127, which was made on 14th March 2008;
- 4.9.2 The Safeguarding Vulnerable Groups (Transitional Provisions) Order (Northern Ireland) 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 (which are referred to in, and applied by, the TPO) and by reference to the regulations referred to at paragraph 4.9.4;
- 4.9.3 The Safeguarding Vulnerable Groups (Barring Procedure) Regulations (Northern Ireland) 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 make an application for permission to apply for a review of their inclusion in one of the barred lists;
- 4.9.4 The Safeguarding Vulnerable Groups (Prescribed Criteria) (Transitional Provisions) Regulations (Northern Ireland) 2008, which are also to be made and laid subject to the negative resolution procedure and which will specify the criteria which will enable IBB to identify individuals it considers in accordance with the TPO who will not have the right to make representations as to their inclusion in the new lists;
- 4.9.5 The Safeguarding Vulnerable Groups (Barred List Prescribed Information) Regulations (Northern Ireland) 2008, again to be made and laid subject to the negative resolution procedure and will set out the information which must be retained by IBB in respect of those persons who are placed on the new barred lists.

- 4.9.6 In addition, a further set of regulations will be made which will set out the procedure to be followed by the Care Tribunal when considering appeals against decisions taken by IBB. These regulations will be made at the Northern Ireland Assembly under the Health and Personal Social Services (Quality, Improvement and Regulations) (Northern Ireland) Order 2003.
- 4.10 The intention is that the S.R.s referred to in paragraphs 4.9.2 to 4.9.5 should come into operation on 16th June 2008.

5. Extent

5.1 The Order extends to Northern Ireland only. The provisions of the Order are mirrored in the Safeguarding Vulnerable Groups Act 2006 (“the Act”) which extends to England and Wales. Section 1 of, and Schedule 1 to, the Act which provide for the establishment of IBB, also extend to Northern Ireland. The Scottish Executive passed its own legislation, the Protection of Vulnerable Groups (Scotland) Act 2007, and is now consulting on its implementation.

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 inconsistencies between current lists, which operate under different legislative procedures;
- 6.1.4 an existing barring system which is reactive to harmful behaviour rather than preventive;
- 6.1.5 inconsistencies between police authorities in the disclosure of police information.
- 6.2 The aspects of policy most relevant to each of the Statutory Rules referred to at paragraph 2.1 are described in those Rules’ respective Explanatory Memoranda. Looking at the broader policy behind the Order, 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 a “go-live” date, inclusion on those lists will 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).
- 6.5 Because we are still finalising details about the later stages of implementation, a supplementary over-arching memorandum will be provided once further substantive details have been finalised. In addition, we will publish a suite of guidance documents to help intermediary bodies, employers, employees and volunteers clearly understand their rights and responsibilities under the new scheme. This will be published well in advance of the go-live date, now set at October 2009. 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 Rule will, where relevant, give further detail on any consultation responses relevant to that SR.
- 6.7 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 set out in detail how it is intended that the IBB scheme will operate. The scheme is still being designed and systems built. This consultation invited views on a range of issues that are fundamental to implementing the 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 the IBB; and
 - representations and appeals against barring decisions.

This second consultation closed on 20th February 2008.

7. Impact

- 7.1 England and Wales have already carried out a Regulatory Impact Assessment and after consideration it was concluded that the benefits outweigh the costs. The published Assessment for the overall Vetting and Barring scheme, signed by a Minister in July 2006, is available at: www.dfes.gov.uk/ria/index.cfm?action=assessments.view&i_assessmentID=73 . We are of the view, given the similarities of the Northern Ireland scheme, that we have no reason to conclude that the impacts would be any different in Northern Ireland.

8. Contact

- 8.1 Eilís McDaniel at the Department of Health, Social Services and Public Safety, Tel: 028 9052 6429 or email eilis.mcdaniel@dhsspsni.gov.uk can answer any queries.

DHSSPS, May 2008.