

EXPLANATORY MEMORANDUM TO
THE SAFEGUARDING VULNERABLE GROUPS (PRESCRIBED CRITERIA
AND MISCELLANEOUS PROVISIONS) (AMENDMENT) REGULATIONS
(NORTHERN IRELAND) 2010

2010 No. 31

1. This explanatory memorandum has been prepared by the Department of Health, Social Services and Public Safety and is laid before Parliament by Command of Her Majesty.
2. **Purpose of the instrument**
 - 2.1. These Regulations make amendments to the criteria for automatic barring under the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007 (the Order): first, to include offences under the law of any of the Channel Islands and the Isle of Man which would amount to an equivalent specified offence; and second, detailed changes in relation to four groups of sexual offences.
3. **Matters of special interest to the Select Committee on Statutory Instruments**
 - 3.1. These Regulations are subject to the negative resolution procedure.
4. **Legislative Context**
 - 4.1. The Order 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 include barring and referral arrangements which, from October 2009, broadly replaced those provided for under the Protection of Children and Vulnerable Adults (Northern Ireland) Order 2002, and the Education (Prohibition from Teaching and Working with Children) Regulations (Northern Ireland) 2007.
 - 4.2. Article 61 provides that the power to make subordinate legislation under the Order includes power to make supplementary, incidental or consequential provision which may amend, repeal, revoke or otherwise modify any enactment including the Order itself.
 - 4.3. Paragraphs 1, 2, 7, 8 and 24 of Schedule 1 to the Order make provision in relation to automatic inclusion on the children's barred list and the adults' barred list (whether with, or without, the right to make representations).
 - 4.4. Further detail on the legislative background to the Order is set out in a supplement at Annex 1 below. This is a supplement to the overarching memorandum on the implementation of the Order which was submitted to Parliament in February 2008. The supplement itself contains a number of Annexes, A to D. Annex D lists, in groups, all previous Statutory Rules under the Order. Group 1 Rules had an overarching memorandum, which described the

Order in totality. Each Order in subsequent groups was accompanied by a supplement, which was an updated version of the original overarching memorandum.

5. **Territorial Extent and Application**

5.1 This Rule applies to Northern Ireland.

6. **European Convention on Human Rights**

6.1. We consider that the provisions of these Regulations are compatible with the Convention rights as defined in section 1 of the Human Rights Act 1998.

7. **Policy Background**

7.1. The prescribed criteria provisions will improve the working of automatic barring under the Scheme.

7.2 Regulation 3 amends the criteria for automatic barring prescribed in the Safeguarding Vulnerable Groups (Prescribed Criteria and Miscellaneous Provisions) Regulations (Northern Ireland) 2010¹ in the following respects:

- offences under the law of the Channel Islands and the Isle of Man that are equivalent to automatic barring offences in Northern Ireland are added alongside foreign offences as criteria for automatic barring; and
- detailed changes in relation to four groups of sexual offences: remove automatic barring in relation to vulnerable adults for non-contact offences against a victim aged 16 or over, and broaden the existing automatic bar for rape.

8. **Consultation outcome**

8.1. There was a public consultation on various aspects of the Vetting and Barring Scheme, in November 2007. The Government's response, which extended to Northern Ireland, was published in May 2008 and can be viewed at www.dcsf.gov.uk/consultations. The consultation invited views on issues, specifically:

- the extent of regulated activity;
- who is eligible to make checks of a person's ISA status;
- controlled activity;
- applying to the scheme; and
- the phased introduction of the scheme.

There were 326 responses to the consultation. These came from bodies including Local Authorities, Local Safeguarding Children Boards, voluntary sector organisations, unions, national and professional organisations, and health and

¹ SR 2009/39 .

social care sector organisations, as well as parents. The opportunity to comment on the scheme in advance of implementation was welcomed, and most proposals in the consultation were met with overwhelming levels of agreement.

9. Guidance

9.1. Comprehensive guidance about the operation of the Scheme, focusing on those parts of the Scheme that commenced in 2009, was published in October 2009 and is available at www.isa-gov.org.uk/default.aspx?page=402 . The guidance issued widely across Northern Ireland, England and Wales to ensure that those to whom the Vetting and Barring Scheme will apply [estimated at nine million individuals in paid and unpaid work], and their employers, are aware of the requirements of the scheme, including registration to work in regulated activity, checking applicants for posts and the implications of being included in a barred list. Guidance was developed in consultation with stakeholders, including Northern Ireland stakeholders. At the same time, marketing and communications campaigns are publicising the scheme to stakeholders, by means of direct mailing, a programme of roadshows (more of which are to take place in spring 2010, with details advertised at www.isa-gov.org.uk) and various other methods including paid advertising in national and regional daily newspapers (the first of which appeared in Northern Ireland newspapers on 28 January 2010).

9.2. The Government has also publicised a wide-ranging list of examples of when the Scheme will not require an individual to be “ISA-registered” (that is, subject to monitoring), which the Secretary of State for Children, Schools and Families sent to all Westminster MPs. The Minister of Health, Social Services and Public Safety has written in similar terms to all MLAs in Northern Ireland. The list is published at:

www.dcsf.gov.uk/news/content.cfm?landing=vetting_and_barring_myth_buster&type=3 ..

9.3. The 2009 guidance mentioned at paragraph 9.1 above comprises:

- an overview of the Vetting and Barring Scheme;
- the scope of the Vetting and Barring Scheme; and
- barring arrangements.

9.4. In addition, the ISA in 2009 published guidance for organisations which have a duty to refer individuals to the ISA for barring consideration. The ISA referral guidance is available at www.isa-gov.org.uk/Default.aspx?page=397. Further, more detailed generic guidance is being published early in 2010. It will be made available widely in Northern Ireland and will provide more detail on the parts of the Scheme which will commence in July and November 2010 for new entrants to the workforce, and from 2011 for existing members of the workforce. In addition to the above, the 2010 generic guidance will cover:

- how the Vetting and Barring Scheme will affect employees and volunteers;
- how the Vetting and Barring Scheme will affect regulated activity providers;
- key implementation dates; and
- transitional arrangements.

Work with stakeholders on sector-specific guidance is continuing.

10. **Impact**

10.1 A Regulatory Impact Assessment has not been prepared for this Rule as it has no impact on business, charities or voluntary bodies. However, an overall Impact Assessment was prepared in July 2006 with respect to the Vetting and Barring Scheme under the Act and this can be found at:
www.dfes.gov.uk/ria/index.cfm?action=assessments.view&i_assessmentID=73

10.2 In Northern Ireland we have determined that there was no reason to conclude that the impacts would be any different in Northern Ireland, given the similarities between the implementation of the Scheme in England, Wales and Northern Ireland. The Home Office is reviewing the 2006 Impact Assessment and we will make a further assessment of impacts in Northern Ireland following the Home Office review.

11. **Regulating small businesses**

11.1. The legislation applies to small business.

11.2. Small businesses will benefit from the reduced impact of the VBS arising from the Government's recent decision to reduce the stringency of the "frequent" and "intensive" criteria. In addition, to minimise the impact of the requirements of the new Scheme 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 Order will apply to some small businesses that work with vulnerable groups, such as residential care homes for vulnerable adults. Employees of such businesses will have to register with the ISA 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, the Government has agreed that:

- in relation to those working with under-16 year olds who are employed or engaged as part of work experience or otherwise in workplace settings, there will be no requirement for the employee 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;
- once registration starts under the Scheme, 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). The on-line check will confirm whether the individual is registered with the ISA, which of itself will provide the assurance that a registered individual is not barred;

- employers of small and other businesses alike will be encouraged to register an interest (under article 34 of the Order) in an individual whom they allow to engage in regulated activity. An employer who registers an interest in a registered individual will be notified if there is any change in the registration 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 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 10.1 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 B to the attached overarching explanatory memorandum).

12.2. The ISA will produce statutory annual reports, and any additional reports that the Home Secretary may direct, on any aspect of the exercise of its functions. The ISA's first annual report, published in 2009, is available at www.isa.gov.org.uk/Default.aspx?page=321 .

12.3. The ISA, as a non-departmental public body, sponsored by 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, including Northern Ireland Government Departments. The ISA 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. Eilis McDaniel at the Department of Health, Social Services and Public Safety. Telephone: 028 90 528223. Email: eilis.mcdaniel@dhsspsni.gov.uk

DHSSPS, 15 February 2010

Annex: over-arching supplement

Annex

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

1. This explanatory memorandum has been prepared by the Department of Health, Social Services and Public Safety (DHSSPS) and is laid before Parliament by Command of her Majesty.

2. Description

2.1 This is the third supplement to DHSSPS' over-arching explanatory memorandum dated May 2008 which explained the context to the first set of Statutory Rules laid before Parliament under the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007² ("the 2007 Order"). These (see details at 4.9 below) were:

- The Safeguarding Vulnerable Groups (Transitional Provisions) Order (Northern Ireland) 2008;
- The Safeguarding Vulnerable Groups (Barred Lists Prescribed Information) Regulations (Northern Ireland) 2008;
- The Safeguarding Vulnerable Groups (Barring Procedure) Regulations (Northern Ireland) 2008; and
- The Safeguarding Vulnerable Groups (Prescribed Criteria) (Transitional Provisions) Regulations (Northern Ireland) 2008.

2.2 The first supplement explained the context to the second set of Statutory Rules laid before Parliament under the 2007 Order. These were:

- The Safeguarding Vulnerable Groups (Prescribed Criteria) (Foreign Offences) Order (Northern Ireland) 2009;
- The Safeguarding Vulnerable Groups (Transitory Provisions) Order (Northern Ireland) 2009;
- The Safeguarding Vulnerable Groups (Prescribed Information) Regulations (Northern Ireland) 2009; and
- The Safeguarding Vulnerable Groups (Prescribed Criteria and Miscellaneous Provisions) Regulations (Northern Ireland) 2009.

These rules are described in their respective explanatory memoranda, to each of which the first supplement is appended.

2.3 The second supplement explained the context to the third set of Statutory Rules laid before Parliament under the 2007 Order. These were:

- The Safeguarding Vulnerable Groups (Miscellaneous Provisions) Order (Northern Ireland) 2009;
- The Safeguarding Vulnerable Groups (Miscellaneous Provisions) Regulations (Northern Ireland) 2009;;

² S.I. 2007 No. 1351 (N.I. 11)

- The Safeguarding Vulnerable Groups (Regulated Activity, Transitional Provisions and Commencement No. 4) Order (Northern Ireland) 2009,
- The Safeguarding Vulnerable Groups (2007 Order) (Commencement No. 5) Order (Northern Ireland) 2009, to be made by DHSSPS in September 2009.

These Rules (except the Commencement Order) are described in their respective explanatory memoranda, to each of which the second supplement was appended.

2.4 This third supplement explains the context to the fourth set of Statutory Rules to be laid before Parliament under the 2007 Order. These are:

- The Safeguarding Vulnerable Groups (Regulated Activity, Devolution Alignment and Miscellaneous Provisions) Order (Northern Ireland) 2010;
- The Safeguarding Vulnerable Groups (Prescribed Criteria and Miscellaneous Provisions) (Amendment) Regulations (Northern Ireland) 2010.

These Rules are described in their respective explanatory memoranda, to each of which this third supplement will be appended.

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

3.1 All of the Statutory Rules are subject to the negative resolution procedure.

4. Legislative background

Introduction

4.1. The 2007 Order provides for a new Vetting and Barring Scheme (VBS) to replace the existing arrangements for safeguarding children and vulnerable adults³ 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*

³ Vulnerable adult is defined at Article 3(1) of the 2007 Order as follows: "3 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 probation officer;

(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 paragraph (9),

(i) payments are made to him (or to another on his behalf) in pursuance of arrangements under section 8 of the Carers and Direct Payments Act (Northern Ireland) 2002(c.6); 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.

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 2007 Order have already begun to replace the existing arrangements provided for under the Protection of Children and Vulnerable Adults (Northern Ireland) Order 2003 (POCVA)⁴ and the Education (Prohibition from Teaching or Working with Children) Regulations (Northern Ireland) 2007⁵ (“the Unsuitable Persons Regulations). The Government has announced that barring under the new Scheme will “go live” on 12th October 2009⁶. 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 enhanced criminal record certificates issued by AccessNI (“ANI disclosures”) for new job applicants. ANI disclosures give employers information about an individual's criminal records or police intelligence information, which informs their assessment 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 lists, maintained by government departments, of persons barred from working with children or vulnerable adults. In Northern Ireland there are three barred lists, which are governed by different legislation, criteria and procedures. They are: the Unsuitable Persons List (kept under regulation 8 of the Unsuitable Persons Regulations), the Disqualification from Working with Children (DWC) List (kept under Article 3 of POCVA) and the Disqualification from Working with Vulnerable Adults (DWVA) List (kept under Article 35 of POCVA). Disqualification orders made by a court (under Article 23 or 24 of POCVA) also disqualify individuals from working with children. A reference to an ‘existing restriction’ in the Explanatory Memorandum should be read as a reference to being on one of these lists or subject to a disqualification order.

Key features of the 2007 Order

- 4.4. When implemented fully, the 2007 Order will replace the existing arrangements with a Scheme with the following key features:

⁴ S.I. 2003 No. 417 (N.I. 4).

⁵ S.R. 2007/288

⁶ Written Ministerial Statement on 1st April 2009 by Meg Hillier MP, Parliamentary Under Secretary of State, Home Office; see copy at Annex B, below.

- 4.4.1 an **Independent Safeguarding Authority** ("ISA")⁷ was established on 2nd January 2008 and has taken all barring decisions on new referrals under existing Northern Ireland barring schemes since 13th March 2009. 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 appeal⁸. Inclusion in the lists on this basis will happen only where a person has been convicted of, or received a caution in relation to, one of a list of specified offences, or meets other prescribed criteria (such as being subject to an order, foreign order or direction of a prescribed description, or being included in a specified foreign barred list) that indicate, of themselves, that any offender would pose such a high risk to vulnerable groups that they simply could not make a case as to why they should be allowed to engage in regulated activity;
 - (ii) automatic inclusion in one or both of the barred lists with the right to make representations as to why the person in question should be removed and a subsequent right of appeal following inclusion. Inclusion in the lists on this basis will happen where a person has been convicted of, or received a caution in relation to, one of a further list of specified offences or as a result of having met some other prescribed criteria;
 - (iii) inclusion at the ISA's discretion, 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 at the ISA's discretion, on the basis that it appears to the ISA that the person in question poses a risk of harm to children or vulnerable adults. Again, in this case the relevant individual will have

⁷ "Independent Safeguarding Authority" (ISA) is the working name, and is now proposed as the legal name, of the body which the Safeguarding Vulnerable Groups Act 2006 called the Independent Barring Board (IBB). The Policing and Crime Bill proposes to rename IBB as ISA, at clause 79 in the Bill as published 21 May 2009 after Lords First Reading on 20 May 2009.

⁸ See at Annex C, 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).

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 ISA receives any information, it must consider whether it is relevant to the ISA's consideration of whether the individual to which it relates should be included in either list.
- 4.4.5 **Appeals:** there is a right of appeal to the Care Tribunal (against inclusion in a barred list) with the leave of the Care Tribunal, on a point of law or on a finding of fact made by the ISA. When the ISA is minded to bar an individual, they write to that person seeking representations, and outline in their letter the reasons behind their intention to bar, and outline the evidence they have used to reach this decision.
- 4.4.6 **Regulated activity:** this is defined in Schedule 2 to the 2007 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 residential care or nursing homes which provide an opportunity for contact, and key positions of responsibility such as the Commissioner for Children and Young People for Northern Ireland and a school governor. The definition of regulated activity will be fully commenced at 12th October 2009.
- 4.4.7 **Controlled activity:** this is defined in Articles 25 and 26 of the 2007 Order. Broadly, it covers support work in general health settings, further education settings and adult social care settings, which provide the opportunity for contact with children or vulnerable adults. It also covers work which gives a person the opportunity for access to sensitive records about children and vulnerable adults, i.e. health, educational or personal 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. The definition of controlled activity will be fully commenced at 12th October 2009. In Northern Ireland, employers will be able to obtain ANI disclosures on individuals working in controlled activity from the 12th October. ANI disclosures for work in controlled activity will be made possible as a result of amendment to the Rehabilitation of Offenders (Exceptions) Order (Northern Ireland) 1979 and the Police Act 1997 (Criminal Records) (Disclosure) Regulations (Northern Ireland) 2009, which will take effect from 12th October 2009. We plan to bring forward full Regulations for the end of the period of phasing-in of requirements to become subject to monitoring (see next paragraph). A detailed timetable for the phasing period will be announced well in advance. In advance of phasing in of controlled activity requirements, we may consider introducing interim controlled activity Regulations if it can be established that there is a need to require enhanced disclosures on those working 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 (ANI). ANI will check for any information relating to the individual and pass any that it

discovers to the ISA. The ISA will then consider whether the person should be barred from working with children and/ or vulnerable adults. The Criminal Records Bureau (CRB), acting on behalf of England, Wales and Northern Ireland, 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 ISA. Monitoring will be phased in, starting with new entrants and job movers into regulated activity. For those groups, monitoring can start from July 2010, and must start from November 2010, see Annex A.

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 6 to the 2007 Order makes provision for the transition from the current system to the new arrangements under the 2007 Order. During the period leading up to the full implementation of the 2007 Order, 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 2007 Order, in accordance with the Statutory Rules listed at paragraph 2.1 above, which are now in operation. Secondly, from 13th March 2009, the ISA must make barring decisions on new referrals made under the current Unsuitable Persons List, DWC List and DWVA List legislation (as listed at paragraph 4.3 above).
- 4.6. Further detail on how the new Scheme will work is in Explanatory Notes to the 2007 Order at http://www.opsi.gov.uk/si/si2007/em/uksiem_20071351_en.pdf (12 pages).

Grouping of implementation of secondary legislation

- 4.7. The Government proposes three main groups of secondary legislation in the lead-up to go-live of the new Vetting and Barring Scheme:
- The first created the ISA 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 ISA started to take barring decisions in accordance with the 2007 Order, and provided for the commencement of automatic barring, both in relation to work with children and vulnerable adults, on the basis of criteria prescribed in Regulations;
 - the third provides for full commencement of barring under the 2007 Order, the repeal of the legislation underpinning the existing arrangements, and the phasing-in of the duties and offences under the 2007 Order in relation to different groups of employees who are seeking or engaged in regulated activity, all to start to take effect from the “go-live” date (see 4.2 above);
 - After go-live of VBS barring, a further commencement order will cover aspects of monitoring which will start from 2010. Controlled activity will be fully covered at a later stage of the phasing-in period.
 - Forthcoming secondary legislation in 2010 is planned to phase in provisions under the Order in relation to different groups of employees who are seeking or engaged in regulated activity, to start to take effect from July 2010.
- 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 SRs included two formal consultation documents, one in summer and one in autumn 2007 – details are set out below.
- 4.9 Details of all previous Statutory Rules under the Order are at Annex D below.

5. Extent

- 5.1 The 2007 Order extends to Northern Ireland. The 2007 Order essentially mirrors those provisions in the Safeguarding Vulnerable Groups Act 2006 (“the Act”) which do not extend to Northern Ireland. 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 ISA. The Scottish Executive passed its own legislation, the Protection of Vulnerable Groups (Scotland) Act 2007, and has consulted on its implementation. The explanatory memorandum for each Statutory Rule made under the 2007 Order will set out the Rule’s extent or application.

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 inconsistencies between current 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 inconsistencies between police authorities in the disclosure of police information.
- 6.2 The aspects of policy most relevant to each of the Rules referred to at paragraph 2.1 are described in the respective Explanatory Memoranda for each Rule. In terms of the broader policy behind the 2007 Order, the intention is to address the failings identified at paragraph 6.1 and – as implemented in March 2009 - 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 being included or considered for inclusion in the new barred lists. From 12 October 2009, 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 intention is that it will seek to commence repeal (as provided for in the 2007 Order) of the current restrictions at 12 October 2009 (subject to savings for any cases referred to DHSSPS or DE which remain unfinished at that date). In relation to people who had been on Unsuitable Persons List and whom the ISA has decided not to transfer to the new barred lists, DE will (where relevant) have to make a decision as to individuals' suitability to be teachers.
- 6.5 Monitoring for new workers will be possible from July 2010, and compulsory from November 2010. By June 2010, the Government will have published a suite of guidance documents to help intermediary bodies, employers, employees and volunteers understand clearly their rights and responsibilities under the new scheme. This guidance will include advice on phasing of existing workers from April 2011 onwards. The guidance will also 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 Rule, where relevant, gives further detail on any consultation responses relevant to that SR.

- 6.7 In 2007, 2008 and 2009, we undertook a series of stakeholder information events in Northern Ireland. Further events are planned for Spring 2010; dates and locations are at: www.isa-gov.org.uk. That website also contains a number of fact sheets and background documents on the new Scheme. Also, a Vetting and Barring Scheme contact centre is now live for queries about the Scheme on 0300 123 1111 (Lo-call) available Monday to Friday between 8am and 5.30pm, to help support stakeholders, including employers and employees, with their understanding of the new Scheme.
- 6.8 The second formal consultation on implementation of the Scheme, undertaken when details of the Scheme's procedures and computer systems were still to be designed or built, set out in detail how it is intended that the Scheme will operate. 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 the ISA; and
 - representations and appeals against barring decisions.

7. Impact

- 7.1 At Annex B 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 made available by the Home Office. 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. 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, Department of Health, Social Services and Public Safety, telephone: 028 90 526429 or email Eilis.mcdaniel@dhsspsni.gov.uk can answer any queries.

DHSSPS, February 2010.

Annexes

- A** Written Ministerial Statement by the Parliamentary Under Secretary of State for Identity (Meg Hillier), Thursday 19 March 2009
- B** Written Ministerial Statement by the Parliamentary Under Secretary of State for Identity (Meg Hillier), Tuesday 1 April 2008.
- C** DCSF memorandum to the House of Lords Merits Committee, published in the 15th Report of Session 2007-08, 19th March 2008.
- D** Previous Statutory Rules, and how they relate to the over-arching explanatory memorandum, and supplements to it.

Annex A

Reference from Supplement to Explanatory Memorandum, paragraph 4.4.8

WRITTEN MINISTERIAL STATEMENT

Thursday, 19 March 2009

HOME OFFICE

Vetting and Barring Scheme

The Parliamentary Under-Secretary of State for the Home Department (Meg Hillier): Since January this year, the new Independent Safeguarding Authority (ISA) has been taking all barring decisions on new cases referred to it under the current barring provisions of POVA, POCA and List 99. This has replaced barring decisions by Ministers with independent decision making in relation to those persons considered unsuitable to work with children or vulnerable adults.

From 12 October this year, we will bring into force the barring provisions under the Safeguarding Vulnerable Groups Act 2006, significantly extending the range of activities and workplaces from which individuals may be barred to include all regulated activities, as defined by the Act. In particular, a wider range of posts and workplaces which provide for vulnerable adults will now be covered by the barring arrangements. The ISA will make independent barring decisions on cases referred to it, and bars will apply to paid employment and voluntary work in regulated activities. From this date, those barred under current arrangements, who have been transferred to the new barred lists by the ISA will also be barred from the wider scope of regulated activities. It will be an offence for any barred person to work in regulated activities, and for any employer to employ someone he knows to be barred, in either a paid or voluntary capacity. Requirements will also come into force for employers to refer relevant cases to the ISA in instances of harm to the vulnerable groups.

With effect from July 2010, the final element of the new scheme will be phased in. Those wishing to work with children or vulnerable adults will be able to apply for registration with the new scheme; the ISA will consider all cases referred to it and will be able to bar those considered unsuitable for such work; and continuous monitoring of those registered with the scheme will commence. New entrants to the workforce and those changing posts will apply to the scheme first under plans to phase in the workforce gradually. In order not to disrupt normal recruitment processes over the summer period, relevant criminal offences will not be brought into force until November 2010. At this point registration with the new scheme and the requirement for employers to check registered status will become mandatory for the phased-in groups.

Annex B

Reference from Supplement to Explanatory Memorandum, paragraph 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 the 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 C

Reference from Supplement to Explanatory Memorandum, paragraph 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.

[Ends]

Annex D

Supplement to Explanatory Memorandum [referred to at paragraph 4.9]

Previous Statutory Rules under the Order, and how they relate to the over-arching explanatory memorandum and supplements to it

1. The lists below describe the previous Statutory Rules laid before Parliament under the Order, and relate them to both the original over-arching explanatory memorandum by the Department of Health, Social Services and public safety, and to subsequent supplements to that memorandum. The most recent set of Rules are described at paragraph 4 below, and the earlier sets at paragraphs 2 to 3..
2. The first set of Statutory Rules under the Order (mentioned above at Annex 1, paragraph 2.1) were as follows, made in 2007 and 2008. The original over-arching explanatory memorandum by the Department of Health, Social Services and Public Safety is available with each Statutory Rule (except the Commencement Orders) on the OPSI website, at the link shown below.
<http://www.opsi.gov.uk/legislation/northernireland/ni-srni>
 - a. The Safeguarding Vulnerable Groups (2007 Order) (Commencement No.1) Order (Northern Ireland) 2008, S.R. 2008/127 (C.5), made on 14th March 2008, and (Commencement No. 2) Order (Northern Ireland) 2008, SR 2008/233 (C.11) made on 29th May 2008;
 - b. The Safeguarding Vulnerable Groups (Barred List Prescribed Information) Regulations (Northern Ireland) 2008, SR 2008/201, made on 6th May 2008, which came into operation 16th June 2008 and specifies information which the ISA must keep about people included in the barred lists;
 - c. The Safeguarding Vulnerable Groups (Transitional Provisions) Order (Northern Ireland) 2008, SR 2008/200, made on 6th May 2008, came into operation on 16th June 2008 and, as described above, requires ISA to transfer, or consider transferring, all those subject to existing restrictions to the new barred lists. Cases considered under this Order are handled in accordance with the procedural regulations referred to at paragraph 4.9.4 (and which are referred to in, and applied by, the Order) and by reference to the Regulations referred to at paragraph 4.9.5;
 - d. The Safeguarding Vulnerable Groups (Barring Procedure) Regulations (Northern Ireland) 2008, SR 2008/203 made on 6th May 2008 and came into operation on 16th June 2008. They make provision in relation to the making of representations to the ISA, 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;

- e. The Safeguarding Vulnerable Groups (Prescribed Criteria) (Transitional Provisions) Regulations (Northern Ireland) 2008, SR 2008/201 made on 6th May 2008 and came into operation on 16th June 2008. They specify the criteria which enable the ISA 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
- f. The Care Tribunal (Amendment) Regulations (Northern Ireland) 2008, SR 2008/249, made on 10th June 2008 at the Northern Ireland Assembly and came into operation on 21st July 2008. They set out the procedure to be followed by the Care Tribunal when considering appeals against decisions taken by the ISA under the 2007 Order at 4.9.3 above.

3. The Statutory Rules for the second group are as follows:

- a. The Safeguarding Vulnerable Groups (Prescribed Criteria) (Foreign Offences) Order (Northern Ireland) 2009, SR 2009/021, made on 22nd January 2009 and came into operation on 27th February 2009. This Order amends Schedule 1 to the 2007 Order 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;
- b. The Safeguarding Vulnerable Groups (Prescribed Information) Regulations (Northern Ireland) 2009, SR 2009/040, made on 6th February 2009, some provisions of which came into operation on 13th March 2009 and the rest of which will come into operation on 12th October 2009. They prescribe the information that the ISA may demand from employers and others as well as the information that anyone must provide to the ISA when making a referral pursuant to a requirement under the 2007 Order;
- c. The Safeguarding Vulnerable Groups (Transitory Provisions) Order (Northern Ireland) 2009, SR 2009/038, made on 6th February 2009 and came into operation on 13th March 2009. This Order provides for referrals under the existing arrangements referred to at paragraph 4.2 above to be made to the ISA rather than the Secretary of State and for the ISA to take barring decisions in relation to them in accordance with the provisions of the 2007 Order;
- d. The Safeguarding Vulnerable Groups (Prescribed Criteria and Miscellaneous Provisions) Regulations (Northern Ireland) 2009, SR 2009/039, made on 6th February 2009 and came into operation on 13th March 2009. 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 ISA being required to include the person in one or both of the barred lists maintained under the 2007 Order.

- e. The Safeguarding Vulnerable Groups (2007 Order) (Commencement No.3) Order (Northern Ireland) 2009, SR 2009/41 (C.2), made on 6th February 2009, commenced the provisions necessary for the above instruments to have effect.

4. The Statutory Rules for the third group are as follows:

- a. The Safeguarding Vulnerable Groups (Regulated Activity, Transitional Provisions and Commencement No.4) Order (Northern Ireland) 2009, made 1st September 2009 and came into operation on 12th October 2009. The Order contains provisions that are necessary for to the commencement of the barring provisions under the 2007 Order. It amends the definition of regulated activity in Schedule 2 to the Order, brings into force amendments to, and the repeal of provisions of the Police Act 1997 [in its application to Northern Ireland] and makes transitional provision relating to the issuing of enhanced disclosure certificates and to the provision of information by and to the IBB.
- b. The Safeguarding Vulnerable Groups (Miscellaneous Provisions) Order (Northern Ireland) 2009, made on 1st September 2009, came into operation on 12th October 2009. The Order specifies sets of circumstances in which regulated activity is not to be treated as regulated activity; the first set of circumstances applies to both children and vulnerable adults and relates to the provision of first aid; the second set of circumstances to fostering by an individual included on the children's barred list. The Order also provides that individuals, who have one or more specified learning difficulties, are not to be treated as vulnerable adults. It specifies that individuals included on the children's barred list or the adults' barred list established under the Safeguarding Vulnerable Groups Act 2006 and those included, other than provisionally on the list, established under the Protection of Children (Scotland) Act 2003, will be barred from regulated activity in Northern Ireland. Finally, it adds the Charity Commission for Northern Ireland, to the list of supervisory authorities under the Order.
- c. The Safeguarding Vulnerable Groups (Miscellaneous Provisions) Regulations (Northern Ireland) 2009 made on 1st September 2009, came into operation on 12th October 2009. The regulations: prescribe the circumstances in which driving a vehicle will be a regulated activity both in relation to children and vulnerable adults under the Order; provide that support, assistance or advice provided for the purpose of developing an individual's capacity to live independently is to be treated as a welfare service under Article 3 of the Order; and amends the criteria for automatic barring under the Scheme, by adding a number of offences omitted from the original criteria.
- d. The Safeguarding Vulnerable Groups (2007 Order) (Commencement No.5, Transitional Provisions and Savings) Order (Northern Ireland)

2009, made and came into operation on 12th October 2009. The Order brings into operation the main barring and referral provisions of the new Scheme, commences repeals of provisions relating to previous barring schemes and makes transitional and savings provisions in relation to those schemes.