

EXPLANATORY MEMORANDUM TO
THE CARE STANDARDS AND ADOPTION (REGULATION OF
ESTABLISHMENTS, AGENCIES AND ADULT PLACEMENT SCHEMES)
(AMENDMENT) REGULATIONS 2009

2009 No. 1895

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

2. Purpose of the instrument

2.1. These Regulations, made under the Care Standards Act 2000 and the Adoption and Children Act 2002, broadly make consequential amendments to existing sets of regulations under those Acts in order to reflect the transition from current schemes for barring persons from working with children, to lists of persons barred from working with children under the new Vetting and Barring Scheme (VBS).

2.2. Specifically, these Regulations update requirements in the sets of regulations being amended, to make vetting checks on a person being considered for a post working with children or vulnerable adults. The existing sets of regulations require relevant bodies to obtain information about whether a person is barred under existing barring schemes under Section 142 of the Education Act 2002 (known as “List 99”), the Protection of Children Act 1999 (PoCA) or the Protection of Vulnerable Adults (PoVA) Scheme under the Care Standards Act 2000. From 12 October 2009, schemes under those three Acts will broadly be repealed, and barred lists under current schemes will be replaced by a children’s barred list and an adults’ barred list, for England and Wales, maintained by the Independent Safeguarding Authority (ISA)¹ under the Safeguarding Vulnerable Groups Act 2006² (“the 2006 Act”). These Regulations add references to ISA barred lists where there are now references to current barred lists; make other similar consequential amendments; and make a few minor amendments to remove technical anomalies.

2.3. The Government proposes to commence these Regulations at the same time as the commencement of barring provisions of the 2006 Act, which are intended to come into force on 12 October 2009. Those provisions will bar persons from “regulated activity” with children or with vulnerable adults.

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

3.1. None.

¹ “Independent Safeguarding Authority” (ISA) is the working name, and is now proposed as the legal name, of the body which the 2006 Act 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.

² 2006 c.47.

4. Legislative Context

- 4.1. The 2006 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. Activities that fall within the definition of a “regulated activity” are specified in Schedule 4 of the Act. Broadly, this includes a range of 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 with vulnerable groups, and key positions of responsibility.
- 4.3. Further detail on the legislative background to the Act, and in particular its barring provisions, is in the Explanatory Memorandum to the Safeguarding Vulnerable Groups Act 2006 (Barring Procedure) Regulations 2008, at: www.opsi.gov.uk/si/si2008/em/uksiem_20080474_en.pdf. Annexed to that Memorandum is an overarching memorandum on the implementation of the 2006 Act. Supplements to that overarching memorandum, which repeat its content where relevant, have been annexed to the explanatory memorandum on each subsequent instrument under the 2006 Act. The most recent is the supplement annexed to the Explanatory Memorandum to The Safeguarding Vulnerable Groups Act 2006 (Miscellaneous Provisions) Regulations 2009, SI 2009/1548, at: www.opsi.gov.uk/si/si2009/em/uksiem_20091548_en.pdf. That supplement is updated with the numbers for Statutory Instruments made to date under the 2006 Act, and details of more recent steps in transition to the VBS which are not directly relevant to the Regulations that are the subject of this Memorandum.

5. Territorial Extent and Application

- 5.1. This instrument extends to England.

6. European Convention on Human Rights

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

7. Policy Background

- 7.1. The provisions in these Regulations make consequential amendments which support the commencement of the full range of barring provisions under the new Scheme, which will bring about a further milestone in transition to the full implementation of that Scheme. The need for consequential amendments arises directly from the Government’s intention to commence from 12th October 2009:

- the barring provisions in the 2006 Act; and
- new provisions and related repeals in the Police Act 1997, both provided for by the 2006 Act.

7.2. These regulations amend requirements on certain persons, in the existing regulations, to do vetting checks on an individual seeking to run or work in an organisation which works with children or vulnerable adults:

- the requirement to obtain information as to whether the individual is on a barred list currently defines that information as the information to which the person is entitled in the Police Act 1997. The 2006 Act included amendments to the Police Act 1997 which will repeal the entitling provision (which specified barred lists under current schemes) and will insert new sections 113BA and 113BB which (among other things) provide for an equivalent entitling provision in secondary legislation. The Home Office plans shortly to lay regulations before Parliament containing that equivalent provision, which will specify the new ISA barred lists. (For a transitional period until all relevant individuals on current barred lists have been considered for barring on ISA lists, it will also specify current barred lists.) Therefore these amendment regulations replace each reference to information to which the Police Act 1997 entitles the person, by a reference to the equivalent provision in secondary legislation;
- the requirement to obtain an enhanced disclosure (criminal record certificate) is expressed by a reference to a section of the Police Act 1997 that is now out of date. The amendment brings that reference up to date;
- a requirement in all but one of the sets of regulations is removed as a consequence of the fact that it would anyway become ineffective at 12th October 2009 due to changes, brought about by the 2006 Act, to the Police Act 1997.

After 1st November 2010, the duty under the Act to check that anyone entering regulated activity with children or vulnerable adults is ISA registered, which will apply to entrants to most posts covered in these regulations, will completely fulfil for those posts the purpose now fulfilled by a barred list check (obtained with an enhanced disclosure) on entrants. The May 2008 report on the second VBS consultation (see para 11.3 below) stated that the Government would review requirements for enhanced disclosures, once ISA registration is phased in.

7.3. Finally, for mostly technical reasons, these regulations also:

- bring one requirement into line with practice and entitlement: those arranging fostering under the Children Act 1989 must obtain an enhanced disclosure and barred list check on other adult members of a prospective foster parent's household; and
- remove a superfluous requirement in one of the regulations for a standard as well as an enhanced disclosure, both on the same person.

Regulations relating to work with children

7.4. Regulations 2 to 7 make the above amendments to sets of regulations which cover establishments and agencies (that provide services to, or in relation to,

children) in respect of which specified persons must register under part II of the Care Standards Act 2000. The sets of regulations relate to (in alphabetical order):

- adoption agencies;
- adoption support agencies;
- children's homes;
- fostering services;
- Local Authority adoption services; and
- residential family centres.

7.5. The requirements (see 7.2 – 7.3 above) are to check persons who carry on, manage, or work at or for the agency or establishment. In the case of the regulations for adoption agencies and fostering services, the requirements are also to check a prospective adopter or foster parent and any other members of his or her household aged 18 or over.

Regulations relating to work with vulnerable adults

7.6. Regulations 8 to 12 make the above amendments to sets of regulations which cover establishments and agencies (in the adult social care sector and the health sector) in respect of which specified persons must register under part II of the Care Standards Act 2000. The sets of regulations relate to (in alphabetical order):

- adult placement schemes;
- care homes;
- domiciliary care agencies;
- nurses agencies; and
- private and voluntary health care establishments.

7.7. In each case, the requirements (see 7.2 – 7.3 above) are to check persons who provide, carry on, manage, or work at or for, or are supplied by, the scheme, agency or establishment.

Regulation relating to common registration requirements

7.8. Regulation 13 makes the above amendments to common requirements in relation to any establishment or agency with respect to which registration is required under part II of the Care Standards Act 2000, whether in relation to work with children or with vulnerable adults. The requirements (see 7.2 – 7.3 above) are to check the “responsible person” for the establishment or agency, the manager, and staff who would work with vulnerable groups. The responsible person is an individual applicant; or all partners in a partnership; or (in an organisation) a director, manager, secretary or other officer of that organisation who is responsible for supervising the management of the establishment or agency.

8. Consultation outcome

8.1. While these Regulations comprise only consequential (and a few minor technical) amendments to existing requirements to check barred lists, there was a public consultation on barring generally under the Vetting and Barring Scheme from 22 June to 14 September 2007, with the Government's response being

published on 14 November 2007. The response can be viewed at:
www.dcsf.gov.uk/consultations/index.cfm?action=conResults&external=no&consultationId=1476&menu=1.

9. Guidance

9.1. Comprehensive guidance about the operation of the Scheme will be published during 2009. It is essential that both the 11 million strong workforce to whom the Vetting and Barring Scheme will apply and their employers are aware of the requirements of the scheme in relation to registration to work in regulated activity, checking applicants for posts and the implications of the bar. Guidance is under development in consultation with stakeholders. At the same time, marketing and communications campaigns are publicising the scheme to stakeholders, by means of direct mailing, a programme of roadshows and various other methods.

9.2. The House of Lords Merits of Statutory Instruments Committee, in its 22nd report of Session 2008-09, while not drawing special attention to an earlier instrument under the 2006 Act, commented that “the House may wish to seek assurance that the arrangements for producing clear and accessible guidance are satisfactory, as the effectiveness of the scheme will be dependent on this”. Officials are working on ten chapters of generic guidance:

- Overview
- Transitional arrangements
- Overview of the application process
- The ISA checking system
- Rollout and phasing
- Coverage of the VBS
- Decision-making process and employee rights
- Rights, disputes, appeals, penalties: individuals and employers
- Employers and other Regulated Activity Providers (RAP.s)
- VBS definitions.

In addition, there will be several sets of sector-specific guidance. All of the generic guidance and some of the sector-specific chapters now exist in draft, recently shared with external stakeholders.

10. Impact

10.1. There will be no impact on business, charities or voluntary bodies, because existing requirements or practice on barred list checks on individuals seeking to work regularly with children will continue, but will refer to the new ISA barred lists, instead of the current barred lists relating to List 99, PoCA or PoVA. (For a transitional period, as mentioned at 7.2 above, the reference will be to the current and new lists.)

10.2. There will be no impact on the public sector, for the same reason as above for business, charities and voluntary bodies.

11. Regulating small businesses

11.1. The Act and any secondary legislation made under it, or in consequence of provisions of the Act (such as in this case), applies to small businesses.

11.2. 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 Act and any secondary legislation relating to its provisions will apply to some small businesses that work with vulnerable groups, such as care homes for vulnerable adults. Employees of such businesses will have to register with the ISA (i.e. be subject to monitoring) in order to engage in regulated activity, and employers will be strongly encouraged to register their interest in such staff. In response to concerns raised by people operating small businesses, we have agreed that:

- in relation to those working with under-16 year olds who are employed or engaged as part of work experience or otherwise in workplace settings, there will be no requirement to register under the VBS or for an employer to check such workers. This does not reduce safeguarding for children in the workplace, but simply maintains current arrangements (namely that a barred person is not permitted to take up certain posts that involve work with children or vulnerable adults), including the employer retaining the discretion and the responsibility to decide what checks to make and who to check;
- once monitoring 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) which will confirm whether the individual is registered with the ISA, with the assurance that an individual who is so registered is not barred;
- employers of small and other businesses alike will be encouraged to register an interest (under section 32 of the Act) in an individual that they allow to engage in regulated activity, leading to any such employer being notified if there is any change in the monitored status of the individual.

11.3. The Government balanced its final decision on what action to take to help small businesses with its commitment to have in place appropriate safeguards for children and vulnerable adults. While these Regulations only make consequential amendments to existing requirements, small business issues were covered in the second DCSF consultation in 2007, see the report published in May 2008 at: www.dcsf.gov.uk/consultations/index.cfm?action=conResults&external=no&consultationId=1516&menu=1 . 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 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 contain details of monitoring and review of the VBS as a whole. The Home Office is reviewing the Impact Assessment, and an updated version will be published once this review is completed. The proposed revised impact assessment 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 overarching explanatory memorandum mentioned above).

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.

12.3. The ISA, as a non-departmental public body, is under the sponsorship of the Home Office, which will exercise its responsibility as sponsor in consultation with the Government Departments which have policy responsibility for the workforces and vulnerable groups covered by the Scheme.

12.4. The 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

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DCSF, 13th July 2009