

# PROTECTION OF FREEDOMS ACT 2012

---

## EXPLANATORY NOTES

### THE ACT

#### *Commentary on Sections*

#### **Part 5: Safeguarding vulnerable groups, criminal records etc.**

#### *Chapter 3 of Part 5: The Disclosure and Barring Service*

#### *Section 87: Formation and constitution of DBS*

347. *Subsections (1) and (2)* establish a new body, called the Disclosure and Barring Service (“DBS”). The DBS is intended to combine the current functions of the ISA, in respect of safeguarding vulnerable groups, and of the CRB in respect of providing criminal record certificates. *Subsection (3)* gives effect to Schedule 8, which makes further provision about the constitution and governance of the DBS.

#### *Schedule 8: Disclosure and Barring Service*

348. *Paragraph 1* provides that the DBS shall consist of a chair and other members appointed by the Secretary of State, some of whom are expected to have relevant knowledge or experience of child protection or the protection of vulnerable adults. Before appointing the chair or members of the DBS, the Secretary of State is required to consult the Welsh Ministers and a Northern Ireland Minister. *Paragraph 2* provides that an appointment of a member of DBS may not be for more than five years, although reappointment is possible, and sets out the procedures by which an appointed member may resign or may be removed from office. *Paragraph 3* makes provision for the remuneration of members.
349. *Paragraphs 4 and 5* deal with the appointment and remuneration of the chief executive and other staff to the DBS. By virtue of *paragraph 20* the Secretary of State may appoint the first chief executive of the organisation.
350. *Paragraphs 6 to 8* enable the DBS to delegate any of its functions to its members, staff, or a committee of members and/or staff and to delegate non-core functions to a person who is neither an appointed member nor a member of staff. For these purposes, ‘core function’ is defined as: decisions about whether somebody should be included in or removed from a barred list; consideration of representations made by an individual under Schedule 3 to the SVGA relating to a decision to include them in a barred list; or any function falling under Part 5 of the 1997 Act which is specified in an order by the Secretary of State. Such an order is subject to the negative resolution procedure.
351. *Paragraph 9* requires the DBS, following consultation with the Secretary of State, to publish a business plan at the beginning of each financial year, and *paragraph 10* requires it to publish an annual report on the exercise of its functions.

352. *Paragraph 11* allows for the Secretary of State to make payments to the DBS and *paragraph 12* makes provisions about the annual accounts of the DBS including in respect of the auditing of such accounts by the Comptroller and Auditor General.
353. *Paragraph 13* allows the Secretary of State to issue written guidance to the DBS on the exercise of its functions, to which DBS must have regard. *Paragraph 14* allows the Secretary of State to issue, vary or revoke written directions to the DBS, to which the DBS must comply in relation to any of its functions, except for decisions about including a person in or removing a person from a barred list, or consideration of representations from a person about their inclusion in such a list.
354. *Paragraphs 15 to 19* make supplementary provisions covering the status of DBS as a non-Crown body; its ability to use information obtained in relation to one of its functions for others of its functions; payments made in connection with maladministration; incidental powers; and the authentication of documents to be submitted in evidence.

### ***Section 88: Transfer of functions to DBS and dissolution of ISA***

355. *Subsection (1)* of section 88 provides that the Secretary of State may, by order, transfer any function of the ISA to the DBS. *Subsection (2)* provides that the Secretary of State may by order transfer to the DBS any function of the Secretary of State in connection with Part 5 of the 1997 Act (the criminal record certificate functions of the CRB); the SVGA (the CRB's functions in connection with the safeguarding of vulnerable groups); and the SVGO (under which the CRB has equivalent functions to those under the SVGA). *Subsection (3)* allows the Secretary of State by order to dissolve the ISA.

### ***Section 89: Orders under section 88***

356. *Subsection (1)* specifies that orders made under section 88 transferring functions to the DBS or abolishing the ISA must be made by statutory instrument. Such an order may make consequential amendments to any enactment; for example, the dissolution of the ISA would require the replacement of legislative references to 'ISA' with 'DBS'. By virtue of *subsections (2) and (3)* an order made under section 88 is subject to the affirmative resolution procedure where it amends or repeals provisions in primary legislation, but is otherwise subject to the negative resolution procedure. *Subsection (4)* disapplies the hybridity procedure should such procedure apply to an order made under section 88. The hybridity procedure is explained in paragraph 154.

### ***Section 90: Transfer schemes in connection with orders under section 88***

357. *Section 90* sets out that the Secretary of State, in connection with an order made under section 88, may make a scheme for the transfer of property, rights or liabilities of the ISA or the Secretary of State (in practice, the CRB). *Subsection (3)* lists supplementary, incidental and transitional provision that may be made by a transfer scheme. These include making provision the same as, or similar to, the TUPE regulations (the Transfer of Undertakings (Protection of Employment) Regulations 2006 (S.I. 2006/246 as amended)). *Subsection (8)* specifies that a transfer scheme may provide for an employee of the ISA or an individual employed in the civil service (in practice, the CRB) to become an employee of the DBS; and that such a scheme may provide that an individual's contract of employment with the ISA or their terms of employment in the civil service will have effect, subject to any necessary modifications, as the terms of that person's contract of employment with the DBS.
358. *Subsection (6)* provides that a transfer scheme may either be included in an order made under section 86 or be a standalone document; in the latter case the scheme must be laid before Parliament.

***Section 91: Tax in connection with transfer schemes***

359. **Section 91** provides a power for the Treasury to make an order (subject to the negative resolution procedure in the House of Commons) providing for the tax consequences of the transfer scheme set out in section 90.