These notes refer to the Protection of Freedoms Act 2012 (c.9) which received Royal Assent on 1 May 2012

PROTECTION OF FREEDOMS ACT 2012

EXPLANATORY NOTES

THE ACT

Commentary on Sections

Part 5: Safeguarding vulnerable groups, criminal records etc.

Chapter 1: Safeguarding of vulnerable groups

Section 64: Restriction of scope of regulated activities: children

273. Section 64 amends the definition of 'regulated activity relating to children' which is set out in Part 1 of Schedule 4 to the Safeguarding Vulnerable Groups Act 2006 ("SVGA"). Part 1 of Schedule 4 to the SVGA specifies what work a person is barred from doing if he or she is included in the children's barred list. A person may be included in that list as a result of committing certain offences or following a decision by the Independent Safeguarding Authority ("ISA") that the individual presents a risk of harm to children. A person can be barred in England and Wales by virtue of being included in a corresponding children's barred list in Northern Ireland or Scotland. The overall effect of section 64 is to reduce the scope of work that barred individuals are prohibited from doing.

274. Broadly speaking, the activities specified in Part 1 of Schedule 4 to the SVGA comprise paid and unpaid work that involves certain close interaction with or (in a specified place) the opportunity for contact with children. It also includes work carried out by individuals occupying certain positions ('office-holders') whose functions relate to services provided for, or in relation to, children. Any work falling within Part 1 of Schedule 4 must not be carried out by an individual who is included in the children's barred list.

275. The amendments made to the SVGA by this section provide that regulated activity relating to children no longer includes the following:

- Any supervised teaching, training or instruction of children, unless any such activity takes place in a specified place such as a school, children's home or a children's centre (with the exception of work in specified settings carried out by supervised volunteers, which is to be removed from the scope of regulated activity);

- The provision of any care or supervision of children by a person where the provision of such care or supervision is being supervised by another unless, once again, it takes place in a specified place (as above). Further exceptions to this are where certain types of personal care or health care are provided to children, in which case not only will such types of care fall within the definition of regulated activity (even if supervised), they will also fall within that definition if such care is provided only on occasion. This is because the requirement in Schedule 4 to the SVGA for any activity mentioned above to be undertaken regularly (for it to be a regulated activity) is removed in relation to the provision of such personal care or health care;

- The provision of any legal advice to a child;
- Any paid work that is carried out in a specified place, which gives the worker the opportunity to have contact with children and which is of an occasional or temporary nature (excluding any teaching, training, instruction, care for or supervision of or advice to children that is carried out on an occasional or temporary basis). This would, for example, mean that work carried out in a school by maintenance or building contractors is no longer a regulated activity relating to children but that any teaching by supply/locum teachers would continue to be a regulated activity;
- The work of officials of the Children and Family Courts Advisory and Support Service (CAFCASS) and their Welsh equivalents and the work of office-holders in various governance-related or senior management roles, for example a school governor, a local authority director of children's services, and the Children's Commissioner for England;
- The work of inspectorates in England, for example inspectors of schools, children's homes and childminding in England;
- Inspection work by the Care Quality Commission;
- The day-to-day management or supervision, on a regular basis, of any type of work referred to above that is removed from regulated activity; and
- Work that is a regulated activity solely because it takes place in a hospital and provides the opportunity for an individual to have contact with children.

276. This section also brings within the meaning of 'health care' for the purposes of Part 1 of Schedule 4 to the SVGA, the provision of first aid to a child by anyone acting on behalf of an organisation established to provide first aid (new paragraph 1(1D) of Schedule 4). This means that the work of organisations such as St John's Ambulance is added to the scope of regulated activity. This would not however encompass a designated first-aider in a workplace.

Section 65: Restriction of definition of vulnerable adults

277. Section 59(1) of the SVGA currently defines vulnerable adults by reference to certain settings or by receipt of certain services and certain specific status. Regulated activity relating to vulnerable adults is currently defined in section 59 of, and Parts 2 and 3 of Schedule 4 to, the SVGA. The definition is widely drafted to cover, for example, "any form of care for or supervision of vulnerable adults" (paragraph 7(1)(b) of Schedule 4) or "any form of assistance, advice or guidance…wholly or mainly for vulnerable adults" (paragraph 7(1)(c)). Regulated activity was also qualified by 'a frequency condition' (paragraph 7(1)).

278. *Subsection (1)* repeals section 59 of the SVGA and *subsection (2)* inserts a new definition into section 60(1) (interpretation) of the SVGA so that 'vulnerable adult' means any person aged 18 or over for whom an activity (that is, a 'regulated activity'), as defined in paragraph 7(1) (read with paragraphs 7(2) to (3E)) of Schedule 4 to the SVGA, is provided. An adult is vulnerable at the time they are being provided an activity specified to be a regulated activity relating to adults. Section 66 (see paragraph 280 below) amend the definition of regulated activity relating to vulnerable adults.

Section 66: Restriction of scope of regulated activities: vulnerable adults

279. Section 66 replaces the definition of 'regulated activity' relating to vulnerable adults (existing paragraphs 7(1) to (3) of Schedule 4 to the SVGA). *Subsection (2)* replaces the paragraphs 7(1) to (3) with new sub-paragraphs (1) to (3E). These new sub-paragraphs redefine regulated activity in relation to vulnerable adults to include:

- the provision of health care treatment in any setting by a health care professional, or by a person acting under the direction or supervision of a health care professional such as a health care assistant in a hospital or care home. This includes first aid provided by organisations such as St John's Ambulance, as is the case for children;
- the provision of relevant personal care in any setting to a person who needs the care because of age, illness or disability. Relevant personal care is defined at new sub-paragraph (3B) as physical care such as assistance with eating, drinking, toileting, washing and dressing; prompting, together with supervision, for those activities, where such prompting and supervision are necessary for their execution; and any training, instruction, advice or guidance in relation to the performance of those activities to a person in need of it by reason of age, illness or disability (for example, a person given training on how to, for example, clean their teeth following a stroke);
- the provision of relevant social work by a social worker to clients or potential clients. Relevant social work is defined at new sub-paragraph (3C) as having the meaning in section 55(4) of the Care Standards Act 2000;
- the provision of assistance, in relation to general household matters, to a person who requires it because of age, illness or disability. This is defined as day to day assistance with managing the person's cash, paying bills, or shopping;
- the provision of assistance to a person where there is a formal arrangement in place which allows a person to make welfare and/or financial decisions on behalf of another person of a kind specified in new sub-paragraph (3E);
- the transportation provided because of a person's age, illness or disability. Regulations will set out the specific circumstances when transportation will be a regulated activity relating to vulnerable adults, and intended to cover various forms of transportation by hospital porters, emergency care staff, and transport for the purpose of a person's health or social care needs arranged by or on behalf of the care provider or voluntary organisation.

280. *Subsection (3)* removes from the definition of regulated activity an activity in a care home provided for vulnerable adults falling within paragraph 7(4) of Schedule 4 to the SVGA. Workers who provide health or personal care or any other regulated activity to care home residents will fall within the revised definition in new paragraph 7(1) of Schedule 4 to the SVGA. Save for a consequential amendment, paragraph 7(5) of Schedule 4 is retained, so line managers with regular day to day management or supervision of a person carrying out a regulated activity as mentioned in new paragraph 7(1) (for example, care home managers) are still within scope.

281. *Subsection (5)* removes the inspection of providers of English local authority social services (other than local authorities) from the definition of regulated activity relating to vulnerable adults. The inspection of providers of Welsh local authority social services continues to fall within that definition.

282. *Subsection (6)* removes from the definition of regulated activity certain inspection functions of the Care Quality Commission.

283. *Subsections (7)* and *(8)* remove persons in specified roles and offices from the definition of regulated activity, including a member of a relevant local government body, local authority chief executives, charity trustees and the proprietors or managers of regulated establishments or agencies.

284. *Subsection (9)* removes the period condition in respect of regulated activity for vulnerable adults. This means that a person providing a regulated activity within the meaning of paragraph 7(1) of Schedule 4 to the SVGA will need only do so once to come within the scope of the revised Scheme.

Section 67: Alteration of test for barring decisions

285. This section amends Schedule 3 to the SVGA which sets out how someone may be referred by the Secretary of State to the ISA and included in the children's barred list (Part 1 of Schedule 3) or the adults' barred list (Part 2 of Schedule 3).

286. *Subsection (1)* relates to the children's barred list and amends the provisions (set out in paragraphs 1(2) and (3) of Schedule 3 to the SVGA) for the automatic barring of persons who meet the prescribed criteria. The prescribed criteria are set out in regulations (the Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009: SI 2009/37 (as amended) and refer to circumstances where individuals have been convicted or cautioned for a serious criminal offence, which give rise to a clear indication of risk to children or vulnerable adults. Subsection (1) substitutes new sub-paragraphs 1(2) and 1(3) for those in Schedule 3 to the SVGA to provide that when the Secretary of State has reason to believe that a person meets the criteria for automatic barring (without representations) by the ISA as prescribed in the Prescribed Criteria Regulations, the Secretary of State must refer that person to the ISA. If the ISA is satisfied that paragraph 1 applies to a person (whether or not that person was referred to them by the Secretary of State), the ISA must include that person in the children's barred list.

287. *Subsection (2)* substitutes new sub-paragraphs (2) to (8) of paragraph 2 of Schedule 3 to the SVGA for the existing sub-paragraphs (2) to (4) which govern "automatic bars with representations". These bars are based on criminal convictions or cautions which, whilst not providing such a clear indication of risk as the criteria falling under paragraph 1 of Schedule 3, are still serious and raise the presumption of a risk of harm to children or vulnerable adults. These offences are also set out in the Prescribed Criteria Regulations. New paragraphs 2(2) to (8) of Schedule 3 amend the arrangements for the referral of these cases to the ISA by the Secretary of State so as to limit the requirement for the Secretary of State to make referrals to the ISA and limiting the ISA bars to those engaged in 'regulated activity' and those who have been or might in the future be engaged in regulated activity. New paragraph 2(4) requires the ISA to seek representations from an individual who has committed such an offence, prior to reaching a decision on whether to place them on the children's barred list. If no such representations are received within the prescribed time period, it requires the ISA to place the person on the barred list. If representations are received, then the ISA must consider whether it is appropriate to include the individual in the barred list. New paragraphs 2(6) and (8) limit the application of such bars to those who are engaged, have been engaged or might in the future be engaged in regulated activity.

288. *Subsections (3)* and *(4)* provide the same limitation of the bar to those who are engaged in, have been engaged in or might in the future be engaged in, regulated activity, in respect of persons referred to the ISA on the grounds of behaviour (paragraph 3 of Schedule 3 to the SVGA) or risk of harm (paragraph 5 of Schedule 3) in relation to children. These provisions ensure that only those who are engaged in regulated activity, have been engaged in regulated activity or might in the future be engaged in such activity can be placed on the children's barred list.

289. *Subsections (5)* to *(8)* make the same changes as subsections (1) to (4) in respect of persons referred to the ISA or placed on the adults barred list (paragraphs 7 to 11 of Schedule 3 to the SVGA).

Section 68: Abolition of controlled activity

290. Section 68 repeals sections 21 and 22 of the SVGA which define 'controlled activity' relating to children and vulnerable adults; it also repeals section 23 of the SVGA which enables regulations to be made governing the steps that employers must take when considering allowing a person to engage in a controlled activity. Under the SVGA 'controlled activity' consists of specified types of activities that are ancillary in nature to work that falls within regulated activity. A person barred from engaging in regulated

activity may do work that is a controlled activity. Regulations made under section 23 of the SVGA require an employer to check if a person is barred from regulated activity before permitting them to engage in a controlled activity. The purpose of this is to ensure that employers are able to assess if the individual in question is suitable for the controlled activity position and, if so, whether any safeguards need to be put in place. This section abolishes the concept of 'controlled activity'.

Section 69: Abolition of monitoring

291. This section repeals sections 24 to 27 of the SVGA which, had they been brought into force, would have made provision for the monitoring by the Secretary of State of persons engaged in regulated activity, broadly those individuals who are working closely with, or applying to work closely with, children or vulnerable adults or whose work otherwise falls within the current definition of 'regulated activity'. The monitoring system would have required the majority of individuals engaged in or seeking to engage in regulated activity to make an application to the Secretary of State to be monitored. Applications to the Secretary of State which revealed any criminality information would have been referred to the ISA for consideration for barring and any person barred could not become or remain "subject to monitoring". Monitoring of applicants would have involved the collation of any updated material (such as new convictions or cautions) in relation to people registered with the Secretary of State for the purpose of being monitored, and referral of any new information to the ISA so that it could consider whether that person should be included on either or both of the barred lists. This section abolishes those requirements and any other requirements relating to the proposed monitoring scheme.

Section 70: Information for purposes of making barring decisions

292. *Subsection (1)* amends paragraph 19 of Schedule 3 to the SVGA which provides the ISA with the power to obtain relevant police information in relation to any individual's case it is considering. As currently drafted, paragraph 19(1) of Schedule 3 requires the police and others to provide the ISA with information about convictions and cautions relating to a person to whom any of paragraphs 1 to 5 or 7 to 11 of Schedule 3 "applies". Subsection (1) alters this test so that the duty to provide ISA with conviction data operates where any of the relevant paragraphs of Schedule 3 "applies or appears to apply". This is because it may not be clear to the ISA at the time of the referral whether the criteria for automatic or discretionary barring have been satisfied. Subsection (1) also introduces a requirement for a "reasonable belief" test to be applied by those holding criminality information in respect of the relevance of information to be provided, consistent with the revised test to be applied in relation to police intelligence information disclosed on enhanced criminal record certificates (see section 82).

293. *Subsection (2)* substitutes a new sub-paragraph (2) of paragraph 20 of Schedule 3 to the SVGA for the existing one. New paragraph 20(2) provides that when the Secretary of State refers a person to the ISA under paragraphs 1, 2, 7 or 8 of Schedule 3 (that is, because the prescribed criteria for the automatic barring provisions is triggered) and (in the case of referrals under paragraphs 2 and 8) the Secretary of State has reason to believe the person is engaging in, has engaged in, or might in the future engage in regulated activity, then the Secretary of State is also obliged to send the ISA certain information. This information will be prescribed details of a relevant matter, that is, prescribed details of convictions or cautions. This is further tempered by the ability for the type of conviction or caution information to be limited by regulations so that not all conviction or caution information will be provided by the Secretary of State to the ISA.

Section 71: Review of barring decisions

294. Section 71 (which inserts a new paragraph 18A into Schedule 3 to the SVGA) enables the ISA to review an individual's inclusion in either of the barred lists and, in certain

circumstances, to remove that person from the list. The circumstances are set out in new paragraph 18A(3).

Section 72: Information about barring decisions

295. *Subsection (1)* replaces sections 30 to 32 of the SVGA with new sections 30A and 30B. Sections 30 and 32 would have enabled employers and others registering a legitimate interest in a person who was subject to monitoring under section 24 of the SVGA, to be informed should that person become barred. Section 24 is repealed by section 69.

296. New section 30A introduces arrangements for an interested party to obtain from the Secretary of State, on application, information indicating whether a person is barred from regulated activity. Such information may only be provided with the person's consent. Eligibility to apply for such information is governed by Schedule 7 to the SVGA, and includes, for example, regulated activity providers. New section 30A(5) provides for a fee in respect of such an application, and new section 30A(7) enables the Secretary of State to determine the form, manner and contents of the application. This would result in a reactive notification system where the interested party is told, upon request, whether a particular individual is barred.

297. New section 30B enables persons mentioned in Schedule 7 to the SVGA to register an interest in persons engaged in regulated activity. It requires the Secretary of State to notify the registered person should an individual become barred from regulated activity. Registration requires the consent of the individual engaged in regulated activity and, for this purpose, any consent given by an individual for a barred list check under section 30A suffices for consent for registration under new section 30B. New section 30B(8) provides for a fee to be charged for this service and new section 30B(10) enables the Secretary of State to determine the form, manner and content of any application. This fee will be set at a level necessary to recover the costs of this service. This would result in a proactive notification system whereby the interested person is automatically told when a particular individual is barred.

298. *Subsection (2)* amends section 33(3) of the SVGA to provide for registration to be periodically renewed and for registration to cease if it is not renewed.

299. *Subsections (4)* and *(5)* replace the existing power to add entries to the table in paragraph 1 of Schedule 7 to the SVGA with a power to amend or repeal entries in that table, or add new entries to it.

300. *Subsection (6)* repeals the provision set out in paragraph 3(1)(b) of Schedule 7 to the SVGA, which enables the Ministry of Defence to carry out barred list checks on those supervising persons aged under 18 working for the armed forces.

Section 73: Duty to check whether person barred

301. This section inserts new section 34ZA into the SVGA. New section 34ZA(1) places a duty on a 'regulated activity provider' to ascertain whether a person is barred before permitting that person to engage in regulated activity.

302. New section 34ZA(2) places a similar duty on a personnel supplier who provides persons to work in regulated activity (for example, a provider of agency teachers or care home workers) to ensure that any personnel they provide, knowing that they will be engaging in regulated activity, are not barred.

303. New sections 34ZA(3) to (6) provide that the duties to check are met in particular where the provider has obtained information under new section 30A; obtained an enhanced criminal record certificate (under Part 5 of the Police Act 1997) in respect of regulated activity (which will indicate whether the person is barred); or checked such a certificate and received up-date information in relation to that certificate as provided for under section 83.

304. New section 34ZA(7) enables the Secretary of State by regulations (subject to the negative resolution procedure) to disapply the duties in subsections (1) and (2) in respect of persons of a prescribed description.

Section 74: Restrictions on duplication with Scottish and Northern Ireland barred lists

305. Section 74 prevents duplication between the barred lists held in respect of England and Wales, Northern Ireland, and Scotland. It provides that the ISA must not include a person in the barred lists (which apply in England and Wales) if it knows that the person is included in a corresponding list. A corresponding list is one which is maintained under the law of Scotland or Northern Ireland, and which is specified by order of the Secretary of State as corresponding to either the children's barred list or the adults' barred list maintained by the ISA.

306. This section also enables the ISA to remove a person from the barred lists if they know that a person is included in a corresponding list maintained in Northern Ireland or Scotland.

Section 75: Professional bodies

307. This section amends the duties on professional bodies by combining the effects of sections 43 and 44 of the SVGA.

308. Section 41 of the SVGA places an obligation upon professional bodies (also known as keepers of registers), for example the General Medical Council, to provide the ISA with information (of a prescribed sort) about a person whom it may be appropriate to include in a barred list, if certain conditions are met. *Subsection (1)* replaces the obligation to provide this information with a power to do so and removes the requirement that the information must be of a prescribed sort. This means that the professional body can provide any relevant information to the ISA, if the referral criteria are met.

309. The changes made by *subsection (3)* ensure that the ISA is under an obligation to inform a professional body that someone on their register is on a barred list. The ISA must also provide the keeper of a register with any information upon which it relied in coming to that decision and which the ISA considers both to be relevant to the functions of the professional body and appropriate to disclose to that body. The amendments to the SVGA also enable a professional body to apply to the ISA for barred list information on an *ad hoc* basis. The ISA may provide to the professional body any information that is relevant to them; this does not have to be in relation to a barred person. The amendments further provide for a professional body to apply to the Secretary of State to be proactively notified if anyone on their register becomes barred.

310. The provisions ensure that neither the ISA nor the Secretary of State is under any obligation to provide information if the ISA (or the Secretary of State, as the case may be) is satisfied that the professional body already has that information.

Section 76: Supervisory authorities

311. Section 76 makes similar amendments to the provision of information to supervisory authorities (for example Her Majesty's Chief Inspector of Schools in England). *Subsection (1)* replaces the duty on a supervisory authority to provide information to the ISA that may be relevant to a barring decision with a power to do so. This subsection and *subsection (2)* also make several amendments to section 47 of the SVGA which are consequential upon the abolition of monitoring. *Subsection (3)* ensures that any obligation to provide children's barred list information to any supervisory authority does not apply if the Secretary of State is satisfied that the supervisory authority already has that information. *Subsection (4)* makes similar amendments in respect of individuals on the adults' barred list. *Subsection (5)* alters the obligation on the ISA to provide the supervisory authority with information to a power to do so and limits the supervisory

authority's ability to request information under section 50 of the SVGA to a situation in which the information is required in connection with one of their functions.

Section 77: Minor amendments

312. *Subsection (1)* repeals uncommenced amendments to the SVGA made by the Policing and Crime Act 2009 ("the 2009 Act"). *Paragraph (a)* omits section 87(2) of the 2009 Act, which would have required the notification to employers of an intention by the ISA to bar an individual, prior to the receipt of representations and a final decision as to whether to place a person on the barred lists. *Paragraph (b)* omits section 89(6) of the 2009 Act which amended the power of the Secretary of State to examine convictions or cautions in connection with criteria for the referral of individuals to the ISA under Schedule 3 to the SVGA; such referrals will now be governed by the revised arrangements in section 67.

313. *Subsection (2)* amends section 39(1) of the SVGA so as to replace the duty on a local authority to provide information to the ISA which may be relevant to a barring decision with a power to do so.

314. *Subsection (3)* amends section 50A(1) of the SVGA which governs the provision of information to the police by the ISA. The amendment enables the ISA to provide police forces with information for the purposes of recruitment to the police service and for other reasons which may be prescribed (in addition to the existing grounds of the prevention, detection and investigation of crime, or the apprehension and prosecution of offenders).

315. *Subsection (4)* places on the ISA a duty to provide, on request to any chief officer of police, information as to whether a person is on a barred list and either or both of the entire barred lists. This applies for any of the reasons for which information can be provided to the police, including the new reasons introduced by subsection (3).

316. Subsection (4) also provides the ISA with a power to inform the Secretary of State, in their capacity as being responsible for Her Majesty's Prison Service, or the Probation Service, about information which the ISA reasonably believes to be relevant, provided that it is for the purpose of protecting children or vulnerable adults. This subsection also places on the ISA a duty to provide to the Secretary of State (in practice, the Prison Service) or the Probation Service, on request, information about whether a person is on a barred list, provided that it is for the purpose of protecting children or vulnerable adults.

317. Section 64 (see paragraphs 274 to 277) specifies that certain activities that would generally constitute regulated activity relating to children will no longer be within the scope of regulated activity if the person carrying out that activity is subject to regular, day to day supervision by another person who is carrying out regulated activity. *Subsection (6)* of section 77 inserts new paragraph 5A of Schedule 4 to the SVGA, which provides that the Secretary of State must publish guidance to assist regulated activity providers and personnel suppliers in deciding whether supervision is of such a kind that the person being supervised would not be engaging in regulated activity relating to children. New paragraph 5A(2) provides that the Secretary of State must consult the Welsh Ministers before issuing that guidance; and new paragraph 5A(4) requires that regulated activity providers and personnel suppliers must, in exercising any of their functions under the SVGA, have regard to that guidance.

Section 78: Corresponding amendments in relation to Northern Ireland

318. Section 78 introduces Schedule 7, which amends the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007 ("SVGO"). The SVGO provides the framework for the vetting and barring scheme in Northern Ireland.

Schedule 7: Safeguarding of vulnerable groups: Northern Ireland

319. *Paragraph 1* replicates the provisions in section 64, which limit the scope of regulated activity in relation to children. However, unlike in England and Wales, the following activities are retained within the scope of regulated activity:

- the work of education, health, social care and justice inspectorates;
- the activities of Guardians Ad Litem; and
- the function of a controller appointed in respect of a child under Article 101 of the Mental Health (NI) Order 1986.

320. A children's hospital is also being retained as a specified establishment (there is only one dedicated children's hospital in Northern Ireland) and accordingly persons working in such an establishment would come within the scope of regulated activity.

321. *Paragraph 2* replicates the changes to the definition of vulnerable adults as provided for in section 65.

322. *Paragraph 3* replicates the provisions in section 66, which limit the scope of regulated activity in relation to vulnerable adults, with some adjustment to reflect differences in Northern Ireland legislation. *Paragraph 4* replicates the provisions in section 67 (alteration of test for barring decisions) so that decision-making by the ISA will be conducted consistently across England, Wales and Northern Ireland.

323. *Paragraph 5* abolishes controlled activity in Northern Ireland in line with the position in England and Wales provided for in section 68 and *paragraph 6* replicates section 69 by abolishing monitoring under the vetting and barring scheme in Northern Ireland.

324. *Paragraphs 7* and *8* replicate the provisions of sections 70 and 71, which will alter the way barring decision-making by the ISA will be undertaken and reviewed. *Paragraph 9* replicates section 72 (information about barring decisions) by inserting new Articles 32A and 32B into the SVGO. These new Articles make statutory provision for the introduction of new reactive and proactive barred list notification mechanisms in Northern Ireland.

325. *Paragraph 10* places a statutory duty on employers, volunteer managers and personnel suppliers to check whether an individual is barred prior to being permitted to engage in regulated activity with children or vulnerable adults in Northern Ireland, as is set out in section 73.

326. *Paragraph 11* makes reciprocal provision to section 74 by preventing duplicate inclusion in Northern Ireland, England and Wales, and Scotland barred lists and enabling the ISA to remove a person from a barred list if it knows that a person is included in a corresponding barred list.

327. *Paragraphs 12* and *13* replicate the provisions of sections 75 and 76 respectively. These paragraphs provide for information flows between the ISA and professional bodies and regulation and inspection bodies in Northern Ireland. The requirement for professional bodies and regulation and inspection bodies to refer matters to the ISA is also replaced with a power to refer.

328. *Paragraph 14* replicates section 77 by making equivalent minor amendments to the SVGO and omitting section 90(2) of the 2009 Act. Included in the minor amendments is provision for the police, prisons and Probation Board for Northern Ireland to obtain barred list information from the ISA.

Chapter 2 of Part 5: Criminal Records

Section 79: Restriction on information provided to certain persons

329. *Subsection (1)* repeals section 93 of the 2009 Act which, if commenced, would have inserted a new section 112(2A) into the 1997 Act. That section would have required the Secretary of State to send a copy of a criminal conviction certificate (which includes only any unspent convictions) to any named employer in the application. This change is in line with the changes made in *subsection (2)*.

330. Subsection (2) repeals sections 113A(4) and 113B(5) and (6) of the 1997 Act. When a person applies for a standard certificate or an enhanced certificate, the Criminal Records Bureau ("CRB") issues the relevant certificate not only to the applicant but also, by virtue of sections 113A(4) and 113B(6) of the 1997 Act, sends a copy of the certificate to the registered body which countersigned the application. A registered body will normally be the applicant's employer or prospective employer or other organisation acting on behalf of an employer. The simultaneous issue of the certificate to an applicant and a registered body does not afford the applicant the opportunity to review and, if necessary, challenge the information contained in a certificate before it is released to an employer. The repeal of sections 113A(4) and 113B(6) removes the provisions that require a copy of a certificate to be sent to the registered body so that the certificate is issued to the applicant only, allowing the applicant to make appropriate representations to the CRB regarding the information released without the disputed information already having been seen by the employer.

331. Section 113B(5) of the 1997 Act enables sensitive (non-conviction) information which might be relevant to an employer to be provided to a registered body without it being copied to the applicant. Such a procedure is adopted, for example, where the police are engaged in an ongoing criminal investigation and the premature release of the relevant information to an applicant for an enhanced criminal record certificate might compromise that investigation. The repeal of section 113B(5) removes the statutory obligation to disclose the relevant information to the registered body in these circumstances. However, it would remain open to the police, using their common law powers to prevent crime and protect the public, to pass such information to a potential employer where they considered it justified and proportionate.

332. *Subsection (3)* inserts a new section 120AC into the 1997 Act that will allow registered bodies to continue to be able to track online the progress of an application for a criminal record certificate or an enhanced criminal record certificate, including whether it has been issued and for the registered body to be informed that the certificate does not contain any relevant information when that is the case (in effect, that the certificate is 'clear').

333. Subsection (3) also inserts a new section 120AD into the 1997 Act to provide that the CRB must in certain circumstances send a copy of the certificate to the registered body. Those circumstances are when the new updating service has advised that a new certificate should be applied for, such a certificate has been applied for, and the applicant has not, within the prescribed period, sent a copy of it to the relevant person. A copy would be sent to the registered body only if a request is made within the prescribed period and none of the prescribed circumstances apply.

Section 80: Minimum age for applicants for certificates or to be registered

334. Under sections 112(1), 113A(1), 113B(1), 114(1) and 116(1) of the 1997 Act, the Secretary of State is required to issue a criminal conviction certificate, criminal record certificate, enhanced criminal record certificate, criminal record certificate (Crown employment) and enhanced criminal record certificate (judicial appointments and Crown employment) respectively to any individual who makes an application in the prescribed manner and form and pays the prescribed fee - that is, the Secretary of State has no discretion to refuse an application submitted by a person below a certain age.

Subsection (1) amends the provisions of the 1997 Act so that the duty on the Secretary of State to issue the relevant certificate only applies where the applicant is aged 16 years or over.

335. *Subsection (2)* amends section 120(4) of the 1997 Act so that registered persons who countersign applications for criminal record certificates and enhanced criminal record certificates must be aged 18 years or over.

Section 81: Additional grounds for refusing an application to be registered

336. Section 81 amends the arrangements governing the CRB to extend the provision determining the grounds on which the CRB can refuse to register an organisation as a "Registered Body" (that is, a body responsible for the processing and the counter-signature of applications for criminal record certificates) to include the power to refuse to register an organisation that has previously been removed from the register as a result of a breach of the CRB Conditions of Registration.

Section 82: Enhanced criminal record certificates: additional safeguards

337. Under section 113B(4) of the 1997 Act an enhanced criminal record certificate may include, in addition to details of any convictions or cautions, other information which, in the opinion of a relevant chief officer of police might be relevant to an employer's decision on whether the applicant is suitable for the role concerned. *Subsection (1)* of section 82 (taken together with *subsection (3)*) makes two material changes to section 113B(4). First, it amends the test to be applied by a chief officer when determining whether additional, non-conviction information should be included in an enhanced criminal record certificate. In place of the current test of information which, in the opinion of the chief officer 'might be relevant' and ought to be included in the certificate, subsection (1) substitutes a higher test of information which the chief officer 'reasonably believes to be relevant' and which in the chief officer's opinion ought to be included in the certificate.

338. The second change to section 113B(4) affected by subsection (3) relates to the chief officer of police whom the Secretary of State is required to approach to ascertain whether he or she holds any relevant non-conviction information on the applicant for a certificate. At present, such an approach must be made to the chief officer of every relevant police force. A 'relevant police force' is defined in Regulation 10 of the Police Act 1997 (Criminal Records) Regulations 2002 (SI 2002 233 as amended) as any police force which holds information about the applicant (whether conviction or non-conviction information); there may be two or more such police forces which will independently come to a decision about what, if any, non-conviction information about the applicant might be relevant and ought to be included in the enhanced criminal records certificate. By virtue of the amendments to section 113B(4) and (9) made by *subsection (1)(a)* and subsection (3) the Secretary of State will be able to approach any 'relevant chief officer'; in this way one chief officer can be assigned to take a decision on the disclosure of non-conviction information held by any number of police forces. It would be open to the Secretary of State to appoint one chief officer to act as the relevant chief officer in respect of all applications for enhanced criminal record certificates or to appoint a small number of chief officers, for example, one per region, to undertake the role on behalf of all forces.

339. *Subsection (2)* inserts a new subsection (4A) into section 113B of the 1997 Act. New section 113B(4A) enables the Secretary of State to issue guidance to relevant chief officers about the discharge of their functions under section 113B(4) to provide relevant non-conviction information about an applicant for an enhanced criminal record certificate; a relevant chief officer is required to have regard to any such guidance.

340. Under section 117 of the 1997 Act, an applicant in receipt of a criminal conviction certificate, criminal record certificate or enhanced criminal record certificate who disputes the accuracy of the information contained in such a certificate may make an

application in writing to the Secretary of State for a new certificate. The Secretary of State may consider the application and, if of the opinion that the information is inaccurate, will issue a new certificate. *Subsection (4)* of section 82 inserts new subsection (1A) into section 117, which allows parties other than the applicant to make such an application, which must also be in writing.

341. *Subsection (5)* inserts new section 117A into the 1997 Act, which provides that a dispute can be raised in relation to an enhanced criminal record certificate in relation to the non-conviction information supplied by a relevant chief officer. The person may apply to the independent monitor (appointed under section 119B of the 1997 Act) to determine whether that information is relevant or ought to be included in the certificate. The independent monitor must ask an appropriate chief officer of police to review whether the information concerned is relevant and ought to be included on the certificate. If, following that review, the independent monitor decides that the information either is not relevant or should not be included in the certificate, the independent monitor must inform the Secretary of State, who must issue a new certificate which excludes that information. In exercising their review functions, both the chief officer and the independent monitor must have regard to the guidance published by the Secretary of State under section 113B(4A) of the 1997 Act.

Section 83: Up-dating certificates

342. This section inserts new section 116A into the 1997 Act. One of the main features of the current CRB system is that a criminal record certificate or an enhanced criminal record certificate is a snapshot in time showing only what conviction and other relevant information was recorded on police and law enforcement databases as of the date a certificate was issued. This means that the reliance an employer can place on the information contained in a certificate diminishes with the lapse of time following the issue of a certificate, which impedes the 'portability' of a certificate between roles (that is, the ability of an employee or volunteer to present a certificate obtained for one job or voluntary position to a second employer or voluntary organisation).

343. New section 116A of the 1997 Act introduces a procedure for updating certificates on a continuous basis. An applicant for a criminal conviction certificate, criminal record certificate or enhanced criminal record certificate may subscribe to the updating arrangements at the time an application for a certificate is submitted and thereafter re-subscribe to those arrangements on an annual basis. The update arrangements will only be put in place in respect of an applicant for a certificate and thereafter renewed on payment of an initial fee and subsequently of an annual fee to be prescribed by regulations made under new section 116A(4) and (5) (by virtue of section 125 of the 1997 Act such regulations are subject to the negative resolution procedure). The annual fee will be set at a level necessary to recover the costs of the service and will be offset by the removal of the need to make repeat applications for a criminal record certificate. Under the update arrangements the CRB will not, as such, provide any new conviction or other relevant information to the subscriber to the updating arrangements. Instead, by virtue of the definition of 'up-date information' in new section 116A(8), in response to a request for update information, the CRB will advise the person making the request (which can be the applicant, or any person authorised by the applicant who is entitled to see that information) either that there is no new information that would be included on a new certificate or that a new certificate should be applied for (which would imply that a new certificate would contain new information).

Section 84: Criminal conviction certificates: conditional cautions

344. Section 84 amends section 112(2) of the 1997 Act which details the content of a criminal conviction certificate. Such a certificate includes the details of any convictions unspent under the terms of the Rehabilitation of Offenders Act 1974. The amendment to section 112(2) provides that a criminal conviction certificate must also include details of any unspent conditional cautions. A conditional caution is an out of court disposal

whereby an offender avoids being prosecuted for an offence by admitting his or her guilt and agreeing to comply with certain conditions designed to rehabilitate the offender or provide reparation to the victim; under the Rehabilitation of Offenders Act 1974 a conditional caution becomes spent after three months. Section 112 of the 1997 Act is not in force in England and Wales.

Section 85: Inclusion of cautions etc. in national police records

345. Section 85 amends section 27 of the Police and Criminal Evidence Act 1984 ("PACE") so that cautions, reprimands and warnings are recorded on the Police National Computer ("PNC") in exactly the same way as convictions. The PNC needs to hold all relevant records when applications for criminal record certificates and enhanced criminal record certificates are made so that relevant matters can be disclosed. This section will give the same statutory authority for putting cautions etc on the PNC as already exists for convictions

Section 86: Out of date references to certificates of criminal records

346. Section 86 amends section 75 of the Data Protection Act 1998, which provides that section 56 of that Act, which in turn would make it an offence for an employer or prospective employer to require a person to supply details of any convictions or cautions in respect of that person held by the police (otherwise known as 'enforced subject access'), cannot be commenced until criminal conviction certificates, criminal record certificates and enhanced criminal record certificates are all available under the 1997 Act. The amendments to section 75 replace out of date references to sections 113 and 115 of the 1997 Act (which were repealed by the Serious Organised Crime and Police Act 2005). The replacement provisions for sections 113 and 115 are now sections 113A and 113B which provide for criminal record certificates and enhanced criminal record certificates respectively.

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 (Protections 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.

Chapter 4 of Part 5: Disregarding certain convictions for buggery etc.

Section 92: Power of Secretary of State to disregard convictions or cautions

360. *Subsection (1)* provides that a person convicted of, or cautioned for, an offence under:

- section 12 of the Sexual Offences Act 1956 Act ("the 1956 Act") for the offence of buggery,
- section 13 of the 1956 Act for the offence of gross indecency between men, or
- section 61 of the Offences against the Person Act 1861 or section 11 of the Criminal Law Amendment Act 1885 (which contained the corresponding pre-1956 offences).

may apply to the Secretary of State (in practice, the Home Secretary) to have the conviction or caution disregarded.

361. By virtue of section 101(3) to (7), these provisions also cover persons with a conviction for a corresponding offence under military service law, or for the inchoate offences of attempting, loitering with intent, conspiring to commit, or inciting the commission of, an offence of buggery or gross indecency; or aiding, abetting, counselling or procuring the commission of an offence of buggery or gross indecency.

362. *Subsection (2)* provides that a caution or conviction can only be disregarded if the conditions set out in *subsections (3)* and *(4)* are both met.

363. Subsection (3) sets out the first condition, which is that it appears to the Secretary of State that the other person involved in the conduct which amounted to the original offence consented to it and was aged at least 16 years old at the time. The offence must also be one which would not fall within the provisions of section 71 of the Sexual Offenders Act 2003 (that is, sexual activity in a public lavatory) as the intention is that these provisions should only apply to behaviour that is no longer criminal. (As well as consensual gay sex with a person over the age of consent, the offence in section 12 of the 1956 Act also encompasses non-consensual buggery, bestiality and under-age buggery, and the section 13 offence also includes gross indecency with somebody under the age of consent, all of which remains criminal behaviour today.)

364. Subsection (4) sets out the second condition, namely that the Secretary of State has given notice to the applicant of the decision to disregard the conviction or caution; such notice takes effect 14 days after that notice has been given.

365. The effect of a relevant conviction or caution being designated as a disregarded conviction or caution is explained in sections 95 to 98 *(subsection (5)*).

Section 93: Applications to the Secretary of State

366. *Subsection (1)* provides that an application under section 92 has to be made in writing.

367. *Subsection (2)* sets out the information that must be contained in an application.

368. *Subsection (3)* provides that an applicant may supply additional information to evidence that his conviction satisfies the first condition in section 92, namely that the relevant offence involved consensual gay sex with another person over the age of 16.

Section 94: Procedure for decisions by the Secretary of State

369. *Subsection (1)* requires the Secretary of State in coming to a decision on an application to consider the evidence supplied by the applicant, together with any available relevant police, prosecution or court records of the investigation and prosecution of the offence in question.

370. *Subsection (2)* provides that oral hearings will not be held when deciding whether or not to accept an application; in effect the Secretary of State will come to a decision on the basis of the written information available (subject to section 92).

371. *Subsections (3)* and *(4)* require the Secretary of State to record in writing the decision on an application and to notify the applicant of that decision in writing.

Section 95: Effect of disregard on police and other records

372. *Subsection (1)* provides that where a conviction or caution is disregarded, the Secretary of State must direct the relevant data controller to delete the details of the disregarded caution or conviction from all official records. The term 'relevant data controller' is defined in *subsection (5)* augmented by an order made under that subsection; in most cases this will be the chief officer of police of the force which investigated the offence.

373. *Subsection (2)* provides that notice of deletion can be given at any time once the Secretary of State has made a decision to disregard a conviction or caution, but that deletion will not be effective until the applicant has been informed and 14 days have elapsed since that notification.

374. *Subsection (3)* requires that, subject to subsection (2), the data controller must delete the relevant records as soon as reasonably practicable.

375. *Subsection (4)* provides that the data controller must notify the applicant in writing that deletion has taken place.

Section 96: Effect of disregard for disclosure and other purposes

376. *Subsection (1)* provides that a person with a disregarded conviction or caution is to be treated in law as if he had not committed the offence or been subject to any legal proceedings in respect of the offence (that is, he had not been charged with or prosecuted for the offence or convicted, cautioned or sentenced for the offence) .

377. *Subsection (2)* provides that details of disregarded cautions and convictions cannot be used in any judicial proceedings (as defined in section 98) nor, in any such proceedings, can the individual be asked about or be required to answer questions about any disregarded conviction or caution or any circumstances ancillary to it (see section 98).

378. *Subsection (3)* provides that questions put to a person in any other context (for example, by a prospective employer) asking about that person's past convictions or cautions are not to be treated as including any reference to a disregarded conviction or caution and that failure to provide details of such a disregarded matter will not lead to any liability on the part of the individual.

379. *Subsection (4)* provides that any obligation under any law or other agreement to disclose offences will not apply to such disregarded convictions or cautions.

380. *Subsection (5)* provides that a disregarded caution or conviction is not grounds for dismissal from any office, employment, occupation or profession, nor can it prejudice an individual in any such connection.

Section 97: Saving for Royal pardons etc.

381. This section preserves the power of Her Majesty, under the Royal prerogative, to issue a pardon, commute a sentence or quash a conviction. Accordingly, a person with a disregarded conviction or caution might still receive a Royal pardon in respect of the offence despite the operation of section 96.

Section 98: Section 96: supplementary

382. *Subsection (1)* defines the term 'proceedings before a judicial authority' for the purpose of section 96.

383. *Subsections (2)* and *(3)* define the terms 'circumstances ancillary to a conviction' and 'circumstances ancillary to a caution' respectively for the purpose of section 96.

Section 99: Appeal against refusal to disregard convictions or cautions

384. This section provides for a right of appeal to the High Court against a decision by the Secretary of State not to grant an application for a relevant conviction or caution to become a disregarded conviction or caution (*subsection (1)*). On hearing such an appeal, the High Court cannot hear any new evidence and must reach a decision on the basis of the evidence available to the Secretary of State (*subsection (2)*). If the appeal is granted, the High Court must make an order to the effect that the relevant conviction or caution is to be treated as a disregarded conviction or caution; such an order takes effect after 14 days (*subsections (3)* and *(5)*). There is no further appeal from the High Court's decision (*subsection (6)*).

Section 100: Advisers

385. S*ubsection (1)* enables the Secretary of State to appoint independent advisers to advise on an application from a person under section 93. The advisers can be supplied with such information as is relevant to enable them to undertake their function (*subsection (2)*). The decision on the application will rest with the Secretary of State, who can accept, or not, the advice provided. *Subsection (3)* provides for the payment of expenses and allowances to the advisers.

Section 101: Interpretation: Chapter 4

386. This section defines various terms used in this Chapter.