

EXPLANATORY MEMORANDUM TO
THE MENTAL HEALTH AND MENTAL CAPACITY (ADVOCACY)
AMENDMENT REGULATIONS 2009

2009 No. 2376

1. This explanatory memorandum has been prepared by 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 Mental Health Act 1983 and the Mental Capacity Act 2005, amend the Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (General) Regulations 2006 (S.I. 2006/1832) (“the 2006 Regulations”) and the Mental Health Act 1983 (Independent Mental Health Advocates) (England) Regulations 2008 (“the 2008 Regulations”).
 - 2.2 From 12th October 2009, it is the Government’s intention to commence the barring provisions of the Safeguarding Vulnerable Groups Act 2006 (“the 2006 Act”) and the new provisions in Part V of Police Act 1997¹ that are inserted by the 2006 Act. The amendments to the 2006 and the 2008 Regulations made by these Regulations are consequential on the coming into force of the relevant provisions of the 2006 Act and of the Police Act 1997.
 - 2.3 The effect of the amendments is that an enhanced criminal record certificate with adult suitability information will be required in order to assess whether a person satisfies the requirement of integrity and good character in connection with their appointment as an Independent Mental Capacity Advocate (IMCA) or an Independent Mental Health Advocate (IMHA). Where an IMHA is to be appointed in respect of a person who has not attained the age of 18, the enhanced criminal record certificate check must include suitability information relating to children.
 - 2.4 Suitability information is information that must be included in an enhanced criminal record certificate in prescribed cases (these cases will include assessing person’s suitability to engage in a regulated activity relating to vulnerable adults or children)². From 12th October, suitability information will include whether a person is barred by the Independent Safeguarding Authority (ISA)³ from engaging in a regulated activity relating to vulnerable adults or children. Until the repeal by the 2006 Act of the current safeguarding schemes under the Care Standards Act 2000 (PoVA), the Protection of Children Act 1996 (PoCA), and the Education Act 2002 (List 99), suitability information will also show whether a person is included in the

¹ Part V of the Police Act 1997 provides for the issuing of criminal conviction, criminal record and enhanced criminal record certificates.

² The Police Act 1997 (Criminal Records) Regulations 2009 will amend the Police Act 1997 (Criminal Record) Regulations 2002 to prescribe the cases in which an enhanced criminal record certificate must contain suitability information.

³ “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.

PoVA or PoCA lists or whether they are subject to a direction under section 142 of the Education Act 2002 (List 99).

- 2.5 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 if they are included by the ISA in the adults’ or children’s barred list.

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

- 3.1 None.

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.
- 4.2 Amendments to the Rehabilitation of Offenders Act (Exceptions) Order and the amendments to the Police Act 1997 (Criminal Records) Regulations 2002 by the Police Act 1997 (Criminal Records) Regulations 2009 mean that a registered person under section 113B(2)(b) of the Police Act can obtain an enhanced criminal record certificate check with adult suitability information or suitability information relating to children for the purposes of assessing an applicant's suitability to engage in a regulated activity relating to vulnerable adults or children.
- 4.3 Schedule 4 to the 2006 Act defines the term “Regulated Activity”. Broadly, it covers a range of specified activities that provide an opportunity for close contact with children or vulnerable adults, other activities in key settings such as schools and care homes which provide an opportunity for contact, and key positions of responsibility.
- 4.4 A person in carrying out their duties as an IMHA or an IMCA will engage in regulated activity relating to vulnerable adults and children as they will be providing assistance, advice and guidance wholly or mainly for vulnerable adults and children under the 2006 Act.
- 4.5 Under section 130A of the Mental Health Act 1983, an IMHA is to be made available to help "qualifying patients". Qualifying patients are vulnerable adults as defined by the 2006 Act by virtue of the fact that they receive health care. An IMHA can be appointed in respect of a qualifying patient who has not attained the age of 18, therefore, the qualifying patient will be a child for 2006 Act purposes.

- 4.6 The 2006 Act provides that a person in respect of whom an IMCA is or is to be appointed is vulnerable adult⁴. An IMCA can also be appointed in respect of a person who has not yet attained the age of 18 years. When an IMCA or an IMHA is appointed for a child, an enhanced criminal record certificate containing suitability information relating to children must be obtained.

5. Territorial Extent and Application

- 5.1 This instrument applies to England.

6. European Convention on Human Rights

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

7. Policy background

- 7.1 The provisions in these Regulations support the commencement of regulated activity and the barring provisions of the new Vetting and Barring Scheme, (VBS) introduced by the 2006 Act, which the Government intends to come into force on 12th October 2009.
- 7.2 From that date, before a person can be appointed as an IMCA, or an IMHA, an enhanced criminal record certificate with suitability information must be obtained for that person. If the suitability information shows that a person is on the ISA's adult's barred list, then the applicant cannot be appointed as an advocate for an adult who is in need of such a service. Similarly, if a person is on the children's barred list, then that person cannot be appointed as an advocate for a child.
- 7.3 A person who requires an IMCA or IMHA by virtue of loss of capacity or by virtue of their mental health problems has need of an independent person to advocate on their behalf on a range of matters including decisions about personal health, well being and financial matters. Therefore, in order to satisfy requirements as to integrity and good character under the 2006 and the 2008 Regulations, persons must not be included in the ISA's barred lists i.e. considered by the ISA to be unsuitable to work with children or vulnerable adults. Obtaining an enhanced criminal record certificate containing suitability information is also necessary to ensure that the person who appoints an IMCA or an IMHA does not commit an offence under the 2006 Act of knowingly permitting a person to engage in a regulated activity from which he is barred or where they had reason to believe the person was barred. The person who engages in the regulated activity when barred will also commit a criminal offence under the 2006 Act.

⁴ See section 59(1)(j) and (10)(d) of the 2006 Act.

8. Consultation outcome

- 8.1 These Regulations comprise consequential amendments to existing requirements to require criminal record certificates . There was a public consultation on barring generally under the VBS 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 VBS will be published during 2009. It is essential that both the 11 million strong workforce to whom the VBS 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.

- 9.3 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 criminal records certificates on individuals seeking to work as advocates with children or vulnerable adults

will continue but will now include suitability information on the certificates. The costs for voluntary bodies will remain free.

- 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 business

- 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 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.
- 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 .

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.
- 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

13.1 Veronica Monks at the Department of Health Tel: 0207 972 4501 or email: veronica.monks@dh.gsi.gov.uk can answer any queries regarding the instrument.