

EXPLANATORY MEMORANDUM TO
THE EDUCATION (MISCELLANEOUS AMENDMENTS RELATING TO
SAFEGUARDING CHILDREN) (ENGLAND) REGULATIONS 2009

2009 No. 1924

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

2. Purpose of the instrument

2.1. These Regulations, made under four Education Acts, 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”), or the Protection of Children Act 1999 (PoCA). From 12 October 2009, schemes under those two Acts will broadly be repealed, and barred lists under current schemes will be replaced by a children’s barred list, for England and Wales, maintained by the Independent Safeguarding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 or substitute references to ISA barred lists where there are now references to current barred lists; and make a couple of other similar consequential amendments. Similar regulations are being laid in parallel to make the same sorts of amendments to sets of regulations for social care or health establishments or agencies for children or vulnerable adults, such as fostering services or care homes.

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 Criminal Justice and Court Services Act 2000 and the Education Act 2002.
- 4.2. Activities that fall within the definition of a “regulated activity” relating to children are specified in Schedule 4 of the Act. Broadly, this includes a range of activities that provide an opportunity for close contact with children, other activities in key settings such as schools which provide an opportunity for contact with children, 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 Regulations do not increase the burdens on schools and others to check if a person is barred. 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 do work in relation to an organisation which works with children:

- the requirement to check whether the individual is on a children's barred list currently depends on information to which the person is entitled, for specified purposes, by the Police Act 1997, section 113C. That section refers to barred lists under current schemes. The 2006 Act included amendments to the Police Act 1997 which will repeal that section and insert equivalent new section 113BA referring to the new ISA children's barred list³, with regulations⁴ to specify cases where a person is entitled to that information. Therefore these amendment Regulations replace each reference to the information provisions now being repealed, by a reference to the equivalent new information provisions;
- a reference to the ISA children's barred list is added alongside each existing reference to current barred lists, in requirements to keep records of having checked whether an individual is on a barred list, and in regulations specifying disqualifications from certain posts e.g. a school governor;
- three regulations which disqualify a person who refuses a CRB check are amended, two from a standard to an enhanced check and one to add an enhanced check where applicable, to bring them into line with current entitlements, guidance and practice; and in one regulation, the effect of work from which an individual is barred is maintained by inserting the full definition of that work, in place of a cross-reference to a definition elsewhere which is to be repealed.

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 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. Regulations 2 to 13 make the above amendments to sets of regulations under:

- the Education Act 1996;
- the Teaching and Higher Education Act 1998;
- the School Standards and Framework Act 1998; and
- the Education Act 2002.

The sets of regulations relate to (in order of appearance in these Regulations):

- non-maintained special schools;
- the General Teaching Council for England;
- school companies & Private Finance Initiative companies;
- independent schools;

³ 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.

⁴ Recently laid before Parliament by the Home Office: SI 2009/1882.

- staffing of maintained schools;
- further education providers;
- school governance;
- foundation schools; and
- pupil referral units.

8. Consultation outcome

- 8.1. While these Regulations comprise only consequential 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.

There will also be sector-specific guidance. All the generic guidance and some sector-specific chapters 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 do work in relation to organisations that work with children will continue, but will refer to the new ISA barred lists, instead of the current barred lists relating to List 99 or PoCA. (As mentioned at 7.2 above, for a transitional period the reference will be to 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.
- 10.3. For the reason above, there will in particular be no new burden on schools.

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 new Scheme's requirements on firms employing up to 20 people, the approach taken is to consider how far it is necessary that such firms comply with duties applying to larger firms. Generally, Scheme requirements will apply to small businesses that work with children, such as any independent school with a small number of staff and pupils. Employees of such businesses who regularly e.g. care for or supervise children, or work in a place such as a school where their work involves contact with children, will have to register with the ISA in order to engage in regulated activity, and employers will be strongly encouraged to register their interest in such staff. In response to concerns raised by people operating small businesses, we 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 a quick and free on-line check (with safety measures to preserve confidentiality) which will confirm whether an individual is registered with the ISA. An individual who is 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 the exercise of its functions. The Home Office will exercise its responsibility, as sponsor of the ISA as a non-departmental public body, in consultation with Government Departments with policy responsibility for the workforces and vulnerable groups covered by the Scheme. 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. Matthew Tagney at the Department of Children, Schools and Families.
Telephone: 020 7783 8253. Email: matthew.tagney@dcsf.gsi.gov.uk .

DCSF, 15th July 2009