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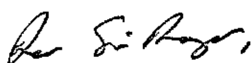
18 November 2009



INDPENDENT SAFEGUARDING AUTHORITY REVIEW

We understand that you have been asked by Ed Balls, the Secretary of State for Education, to undertake a review of the operation of the Independent Safeguarding Authority (ISA). Liberty wishes to take this opportunity to set out some of our concerns with the remit of the ISA and, in particular, our concern that the parallel system of enhanced criminal record checks (Enhanced Disclosure) will continue to operate - even once the ISA is fully operational.

It is important to state at the outset that we broadly supported the creation of an independent body whose remit is to determine the suitability of individuals to work with children and the vulnerable.

The ISA's creation was recommended by Sir Michael Bichard in his Inquiry into the murders of Jessica Chapman and Holly Wells by Soham school caretaker Ian Huntley. At the heart of his recommendations was the creation of "*a very different system*"[1] to the present system of Enhanced Disclosure. It was to be an effective vetting system that could ensure those not suitable for working with children or the vulnerable are barred, while ensuring that potential employers remained unaware of unfair, malicious or spurious allegations.

It is undeniable that details of allegations (as well as convictions) might be relevant in determining suitability to work with children and the vulnerable. However, it is also an unfortunate truth that many careers have been blighted by unfounded accusations of impropriety.

It was because of this that we believed that the ISA could prove an effective new body. Instead of Enhanced Disclosure records being passed directly to employers they would go to the ISA instead to allow vetting. This independent vetting would allow those against whom allegations had been made (usually referred to by the police as 'intelligence information') the opportunity to make representations to the

[1] See paragraph 62 of the Introduction and Summary by Sir Michael Bichard, *The Bichard Inquiry Report*, June 2004.

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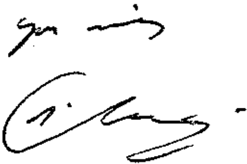
ISA if barring was being considered. It would also mean that an employer would not be aware of those allegations if the person was deemed suitable for work.

However, we are concerned that under the current legislative framework the ISA is not able to perform this vital and effective role. Instead, the current system of Enhanced Disclosure will operate in conjunction with the ISA. We believe this duplication is unnecessary and a likely interference with human rights. We set out our concerns in detail in the attached Annexure.

We are also concerned by the breadth of the operation of the ISA which will, it is estimated, regulate approximately 11.3 million people, once fully operational. This is a significant increase to the numbers currently regulated. The increase in numbers can be traced to the interpretation given to those that require regulation by the ISA – namely individuals deemed to have 'frequent' or 'intensive' contact with children or vulnerable adults, and individuals deemed to be involved in 'regulated' or 'controlled' activities. We understand that your review will focus on these definitions in particular and we welcome this move for further consideration of the ISA's scope. We set out some of our particular concerns on remit and scope in the attached Annexure.

Finally we would stress that we support a robust and well-coordinated safeguarding system that protects children and the vulnerable from risk. We are merely seeking adherence to a system that is fair and which deals with the problems identified by Sir Michael Bichard. The ISA, as currently framed, does not meet these objectives and we believe there is an urgent need for a full-scale review, public consultation and amendments to the legislation underpinning it. We hope that the matters we have raised in this letter will be considered in your review of the ISA's remit.



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ANNEXURE

Enhanced Disclosure and the ISA

The Bichard Report clearly envisaged the current system of sending Enhanced Disclosure to employers continuing until the ISA came into operation. We agreed that this was the logical short term approach. However, the presumption from Bichard was that once the ISA began work Enhanced Disclosure need no longer be sent to employers. Certainly the language used indicated that the new system would replace the passing of Enhanced Disclosure certificates to employers. In the introduction to the Report, Bichard stated that this new system "*would also avoid information about past convictions being released to prospective employers without reference first to the individual concerned*". Later, when setting out plans for the ISA model Bichard identified the problem of unfairness stating:

> *At present Enhanced Disclosure results are normally provided at the same time to the individual applicant and to the employer or voluntary body (Police Act 1997). Any objections by the job applicant to the provision of certain information could not, therefore, undo any damage done to his/ her prospects with that particular employer... This raises important issues about the fair treatment of individuals. There is a risk that careers may be blighted and job prospects lost.*[2]

The Bichard Report therefore proposed vetting though the ISA model saying:

> *The central body would take a decision on the basis of the information above and notify the applicant. At that stage, no other employer, individual or institution would be informed. Under this system, employers would still decide whether or not a job required the postholder to be registered with the central body...Employers would also retain the ultimate decision about whether or not to employ someone, using references and interviews.*[3] .

It is of course understandable that an employer would still need to interview and take up references. However, it is a reasonable presumption that Sir Michael Bichard did not envisage the need for Enhanced Disclosure to continue once the ISA came into operation. Otherwise this would also have been mentioned.

However, the *Safeguarding Vulnerable Groups Act 2006* (SVG Act), in setting up the ISA, continued to allow employers to obtain Enhanced Disclosure checks, directly from the Criminal Record Bureau (CRB). One possible justification for the presumed need to continue with Enhanced Disclosure is that the ISA will not provide all relevant details. Indeed when Liberty enquired with the Home Office about the need for continuing Enhanced Disclosure from the CRB, it was informed of possible reasons why employers might need access to CRB records. The example given was of the employment of a school bus driver. It would be necessary to show not only that they had ISA clearance but also that they did not have, for example, a conviction for dangerous driving which would make them unsuitable for such employment.

The ISA website explains the perceived need for the parallel system in a similar way, saying that the ISA:

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[2] See paragraphs 4.107 and 4.109 of *The Bichard Inquiry Report*.
[3] See paragraphs 4.117 and 4.118 of *The Bichard Inquiry Report*

[D]oes not check for malpractice or all criminal convictions, and therefore registration with the ISA does not guarantee that a person has no criminal history. A CRB check provides a fuller picture of a person's criminal history and allows employers to make informed decisions as to whether that person is suitable for a particular role or position.[4]

These arguments were also made by the Government Minister, Lord Brett, when this issue was discussed recently in the House of Lords. Lord Brett said:

While a status check will tell the employers whether the applicant is registered with the ISA under the new vetting and barring scheme, it will not tell them details of the individual's criminal record. In the case of enhanced disclosures, the details may include any information considered relevant by the police, in addition to convictions and cautions. There will be cases where that is still relevant to a prospective employer with the decision on whether to employ. For example, when an individual first applies to register with the ISA, the employer should be able to consider and act on any police information as soon as that becomes available—in parallel with the ISA considering it—and not have to wait until the ISA decides whether it is minded to bar...

If an individual is already registered and new information comes to light, that may not be enough to require a barring, but it may be enough to cause concern—and it would be right to take those concerns on board. For example, allegations of fraud—not a particular fraud, but one in several different circumstances—might set alarm bells ringing.[5]

We agree that extra disclosure might be necessary to determine suitability in this type of situation. However, this information would be available through an application by the employer for Standard Disclosure. Standard Disclosure shows current and spent convictions, cautions, reprimands and warnings held on the Police National Computer. What it will not show is any record of *allegations*. We cannot think of a situation where information not available through Standard Disclosure might be relevant to the employment of someone who has already been cleared by ISA vetting.

It might be suggested that weeding of intelligence information by the police to ensure that Enhanced Disclosure certificates do not contain inappropriate information could provide an alternative mechanism for ensuring fairness. However, concerns over the ability of the police to operate an effective and consistent weeding policy were a significant issue identified in the Bichard Report. It concluded:

The current regime also leaves the police to make some very difficult judgements, for which they may not be best placed...There was a clear consensus in the evidence, including that from ACPO, in favour of taking the decision about what information should, and should not, be disclosed out of police hands. That consensus is, in my view, supported by a range of compelling arguments.[6]

[4] See Frequently Asked Questions on ISA website: http://www.isa-gov.org.uk/default.aspx?page=327

[5] See Committee Stage of the House of Lords, Hansard, 20 Oct 2009, Column 662-663.

[6] See paragraphs 4.102 and 4.105 of *The Bichard Inquiry Report*.

Bichard stated that his recommendations for a new vetting system would *"relieve the police of the responsibility of deciding what information should be released to employers and would simplify arrangements for employers"*.[7]

Liberty opposes employers continuing to have direct access to Enhanced Disclosure once the ISA begins its work. We believe a dual system like this is open to challenge under Article 8 of the *Human Rights Act 1998* (the right to respect for privacy and family life).[8] There are a range of judgments from the European Court of Human Rights that establish that the release of information held on police registers engages Article 8.

Article 8 is, of course, not an absolute right. Article 8(2) allows for limitations if they are 1) prescribed by law, 2) serve a legitimate purpose, and 3) are proportionate (or 'necessary in a democratic society'). Enhanced Disclosure is prescribed by law through the *Police Act 1997*. The legitimate purposes set out in Article 8 include *"the prevention of disorder or crime"* and the *"protection of the rights and freedoms of others"*. The first two conditions do not therefore appear to raise any issues. We would however dispute that the continuation of Enhanced Disclosure alongside the ISA is proportionate. The need to be *"necessary in democratic society"* implies the existence of a *"pressing social need"* for the interference with Article 8 (see *Dudgeon v UK* (1981) 4 E.H.R.R. 39). With the ISA in operation we cannot see how there can be a pressing social need for Enhanced Disclosure to continue.

We believe the SVG Act must be amended to ensure that the Enhanced Disclosure scheme cannot continue side-by-side with ISA registration. If it is not, we consider that a legal challenge could be brought to challenge the compatibility of the legislation with Article 8 of the *Human Rights Act 1998*.

We would emphasise that we are not taking issue with the use of Enhanced Disclosure in other areas of employment. It is only where there is cross-over with those professions identified as needing ISA vetting where we cannot see justification for continuation with the 'belt and braces' approach.

We are also very concerned by very recent amendments made to the SVG Act by section 87 of the *Policing and Crime Act 2009*, which introduced new sections 34A, 34B and 34C to the SVG Act.[9] These new sections require the ISA to notify an employer (or other registered person, i.e. a voluntary agency) that it is proposing to include a person on the barred list but has not yet taken a final decision – because it is awaiting the making of representations. This means that although the ISA has not made any decision, and although it may ultimately decide the person should not be included on the barred list, the employer would be made aware of this fact. This seems to entirely defeat the purpose of the creation of an independent body and indeed the process of allowing a person to make representations. Indeed, on introducing this clause in Committee in the House of Commons the Government even endorsed a hypothetical example whereby an employer might, on receiving information that barring is being considered, *"suspend the person"*, despite no decision having been made, and on the basis of 'soft' intelligence (i.e. unproven allegations).[10] We receive

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[7] See paragraph 63 of the Introduction and summary by Sir Michael Bichard, *The Bichard Inquiry Report.*

[8] Article 8 of the European Convention on Human Rights as incorporated into the *Human Rights Act 1998.*

[9] Note also section 90 of the *Policing and Crime Act 2009* which introduced new sections 36A, 36B and 36C to the *Safeguarding Vulnerable Groups (Northern Ireland) Order 2007.*

[10] Public Bill Committee, 14th sitting, 24 February 2009, column 544.

communications from many people who have been barred from working with children or the vulnerable. While some bars are of course justified, it is clear that there are many people whose careers have been blighted by an unjustified, possibly malicious allegation that has been dismissed by the police but has not been weeded out from the vetting process. We are very disappointed that these provisions were so recently introduced and urge you in your review to consider the importance of ensuring the effectiveness of the system of representations. Once these provisions are in force it is likely that people's lives and careers will being damaged even before the ISA has made any determination as to whether to include the person on a barred list or not. This damage will most likely be lasting as employers who have been notified about the possibility of barring may well act cautiously and refuse employment even after ISA approval is granted.

Operation of the ISA

We also have a number of concerns with the regulating scope of the ISA. In particular, we are concerned by the number of individuals who will now be required to be vetted under the SVG Act – namely those involved in a 'regulated' activity as well as potentially those involved in 'controlled' activities. While many of those who fall under the 'regulated' activity umbrella are likely to already be subject to the current criminal record check system, the ambit is now much wider. This is due to the introduction of new and undefined concepts of having contact with children and vulnerable adults 'frequently' or on more than two occasions in 30 days. It also appears that those who will be regulated under the 'controlled' activity umbrella extends well beyond those already regulated as many more jobs not previously subject to vetting will now be regulated (for example, a hospital cleaner or a car park attendant will now, for the first time, be regulated).

A person who is required to be ISA registered does not benefit from the provisions of the *Rehabilitation of Offenders Act 1974* (ROA) which allows certain convictions to be spent after a particular period of time has elapsed.[11] Under the Act orders can be made to exclude certain professions from the spent-conviction provisions. We note that the senior judiciary has expressed concern about the amount of professions that have been excluded by order since the Act was passed. Just last month, Lord Justice Hughes in the Court of Appeal suggested that it may now be time to review the categories of people who do not benefit from the spent-conviction provisions:

> *I would respectfully agree that the time may well have come to review the accretions which there have been to the Rehabilitation of Offenders Act 1974 (Exceptions) Order. It currently includes amongst the exceedingly long list of those who must answer questions relating to spent convictions persons as diverse as those who wish to hold a National Lottery licence, or to be a doctor's receptionist, dental nurse, steward at a football ground, or traffic officer designated under the Traffic Management Act 2000 as having the power to direct traffic.*[12]

Far from rowing back on the categories exempted from the ROA, the expanded number of people soon to require ISA vetting will have the opposite effect.

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[11] See paragraphs 12A and 14A of Part 2 of Schedule 1 of the *Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975.*

[12] *Chief Constable of Humberside Police and others v the Information Commissioner* [2009] EWCA Civ 1079 at [112].

Under the new vetting and barring system a person will need ISA clearance to work in a regulated activity if they have contact with children or vulnerable adults 'frequently' or 'intensively'. The term 'frequently' is not defined in the SVG Act, but the ISA website currently states that an activity will be considered to be frequent if it occurs once a month or more. The term 'intensively' is not used in the Act itself , but this refers to the 'period condition' in the SVG Act which will apply if an activity takes place more than twice in a 30-day period, or in certain cases, if it is carried out between 2am and 6am.[13] This is likely to cover (as already indicated by extensive media reporting) a large number of people who would not immediately consider themselves subject to the vetting system. We believe this interpretation must be tightened and clarified to ensure that only those people who have regular unsupervised contact with children are covered. So, we do not believe, for example, that a children's author who gives book talks to school groups on three or more occasions in a 30-day period should require vetting by the ISA. We believe that an interpretation of 'frequent' and 'intensive' should take into account the irregularity or otherwise of the contact and, most importantly, the context of the contact. If other approved adults, such as teachers, are present when a person infrequently comes into contact with children, there seems little or no need for the person to be subject to the vetting process. We believe that this needs to be addressed so that people are not forced unnecessarily to go through the vetting process, as this may have an adverse impact on the level of people volunteering and unnecessarily affect careers.

We also have concerns with the interpretation of a 'controlled' activity. Under the SVG Act, and once regulations are introduced to this effect, certain employers will need to check the ISA registration status of their employees, and if they are ISA barred the person can still be employed but only if the employer introduces safeguards. Many people who will now come under the 'controlled' activity umbrella may not previously have required vetting. Examples of jobs that may now require vetting include cleaners, caretakers, shop workers, catering staff, car park attendants and receptionists who provide frequent or intensive support work in general health settings and the NHS; further education; or adult social care settings as well as individuals who have frequent access to sensitive records about children and vulnerable adults.[14] The SVG Act provides that regulations will set out the steps an employer must take in order to permit a barred individual to work in a 'controlled' activity.[15] ISA factsheets says that this will require the employer to put 'sufficient safeguards' in place.[16] We believe the regulations need to adequately set out in detail what would be regarded as a 'sufficient safeguard' and not leave it up to the employer. We are concerned that putting the responsibility on an employer with little guidance will mean that employers are likely to err on the side of caution and not employ a barred individual even though that person has no contact with a child or vulnerable adult. This will effectively exclude people who have certain convictions or cautions from a wide variety of jobs despite there being no risk to children or vulnerable adults.

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[13] See SVG Act, Schedule 4, paragraph 10 and ISA Fact Sheet: *Regulated and Controlled Activities* available on the ISA website at:
http://www.isa-gov.org.uk/PDF/283896_ISA_A4_FactSheetNo3.pdf

[14] With more and more databases like ContactPoint containing a large amount of information about children being available to more and more categories of workers, this becomes an even more pressing issue.

[15] Section 23 of the SVG Act. To date no regulations have been made under this power.

[16] See ISA Fact Sheet: *Regulated and Controlled Activities* available on the ISA website at:
http://www.isa-gov.org.uk/PDF/283896_ISA_A4_FactSheetNo3.pdf

We are also concerned by the current guidance provided to ISA caseworkers, known as the Structured Judgement Procedure (SJP). The ISA's Decision-Making Process Guidance states that the SJP is to be used for consideration of individual cases and is focused on risk factors linked to potential future harm. Risk factors are divided into four broad areas and include harm-related interests/intrinsic drives; thinking, attitudes and beliefs; relationships; and self management and lifestyle.

While caseworkers may refer particularly difficult cases to a specialist for their opinion, the majority of assessments using the SJP will be undertaken by caseworkers with no speciality in the area. We find this particularly concerning. Especially given that the risk factors listed (which are not exhaustive) are largely subjective and risk stereotyping and victimising individuals who do not fit within mainstream or recognised social norms. Examples of SJP factors which can be taken into account in a decision to bar include a person having a "*strong sense of emotional congruence with children*", the "*presence of severe emotional loneliness and/or the inability to manage/sustain emotionally intimate relationships with age appropriate adults*" and an "*inability to meet personal needs responsibly within the context of interpersonal relationships*". These are extremely broad and could apply to any number of people who pose no threat whatsoever to children. There is a risk that non-specialist caseworkers using such subjective factors to assess a person will recommend barring anyone who fits within a clumsy stereotype. Such difficult psychological judgments should only be undertaken by professionals with experience in the field, not by generalist caseworkers using a manual setting out subjectively broad factors.

In summary, we are pleased that this Review is currently being undertaken and hope our concerns about the continued use of Enhanced Disclosure and the problems with the breadth and operation of the vetting regime can be addressed in the Review. We understand that you have been tasked specifically with examining the interpretation of when an activity may be considered to be 'frequent', but ask that you consider recommending a wider review of the operation of the ISA and the legislation underpinning it.