Response from the Northern Ireland Commissioner for Children and Young People to the Northern Ireland Criminal Records Regime Review, 31 May 2011

1.0 Introduction

The office of the Commissioner for Children and Young People (NICCY) was created in accordance with ‘The Commissioner for Children and Young People (Northern Ireland) Order’ (2003) to safeguard and promote the rights and best interests of children and young people in Northern Ireland.

Under articles 7(2)(3) of this legislation, NICCY has a mandate to keep under review the adequacy and effectiveness of law, practice and services relating to the rights and best interests of children and young people by relevant authorities. The remit of our office is children and young people from birth up to 18 years, or 21 years of age where a young person is care experienced or has a disability.

In determining how to carry out her functions, the Commissioner’s paramount consideration is the rights of the child and NICCY is required to base all its work on the United Nations Convention on the Rights of the Child (UNCRC).

2.0 International Law

2.1 Children’s Rights

The UK Government, including Northern Ireland, is a signatory to the UNCRC and has agreed to uphold the rights of children and young people based on the Convention.

NICCY appreciates that there are often complexities when reconciling the rights of children and young people with their welfare and best interests. We recommend that the following relevant articles of the UNCRC are incorporated as underlying principles in the Review to ensure that the rights and best interests of children are protected:

- Article 2: Children shall not be discriminated against and shall have equal access to all articles in the UNCRC.
- Article 3: All decisions taken which affect children’s lives should be taken in the child’s best interests.
- Article 6: All children have the right to life and to the fullest level of development.
• Article 12: Children have the right to have their voices heard in all matters concerning them.

The following articles are also relevant and require special consideration within the Review:

• Article 19: Children have the right to be protected against all forms of violence, abuse, maltreatment or exploitation.
• Article 34: Children should be protected from all forms of sexual exploitation and abuse.
• Article 36: Children should be protected from all other forms of exploitation prejudicial to the welfare of the child.
• Article 37: Children should not be subject to cruel, inhuman or degrading treatment or punishment.

NICCY encourages the Department to take all possible steps to ensure that the outcome of the Review is compatible with the UNCRC. We draw particular attention to the obligation placed on government under article 19 of the Convention to take all legislative, administrative, social and educational measures to protect children and young people from all forms of violence, abuse, maltreatment or exploitation. The Northern Ireland Criminal Records Regime Review offers an important opportunity to fulfill this commitment in relation to vetting and barring arrangements.

3.0 Research

The protection of children and young people has been a key priority for NICCY since it was established. In 2005 the office published research in relation to vetting and barring which highlighted for example, the need for consistency in defining which posts should be vetted, the importance of integrating the management of vetting across government departments and advocating for compatible arrangements to be put in place with the Republic of Ireland. The 2007 follow up report to this made further recommendations, such as, the Ministerial sub group completing an annual report on progress and an EU wide system for vetting and barring being developed. Copies of this research were provided to Sunita Mason as part of her meeting with the Commissioner on 20 April 2011.

NICCY has also contributed to the 2009 Roger Singleton and 2010 Home Office reviews of the Vetting and Barring Scheme. In February this year in our ‘Protecting Children’ policy briefing, which was also provided on 20 April 2011, we again noted the importance of vetting and barring arrangements in protecting children and young people.
4.0 Consultation with Children and Young People

NICCY has regularly expressed concern that the Section 75 statutory duty to consult on and equality impact assess policies has not been adequately enforced in respect of the age criterion. This has meant public authorities are consistently failing in their duty to meaningfully consult with children and young people on issues that have direct relevance to their lives. Article 12 of the UNCRC also states that children have the right to express their opinion in matters directly impacting upon them and to have those views given due weight in accordance with their age and maturity.

We are keen to hear how the Department has sought to include the views of children and young people as part of this Review.

5.0 Comments for the Review

Introduction

NICCY has closely monitored the progress of the Protection of Freedoms Bill and have enclosed a copy of our submission to the Public Bill Committee in Westminster setting out our concerns about the provisions of the Bill that have territorial extent to Northern Ireland. We have also followed Sunita Mason’s review of the criminal records regime in England and Wales, phase one of which has been published in the 2011 report ‘A Common Sense Approach’. As no detailed proposals have been circulated as part of this consultation, our response draws on the provisions of the Protection of Freedoms Bill and the recommendations of the Mason report. While some of our comments may refer to areas within the remit of the Protection of Freedoms Bill rather than the Review, we would highlight that the criminal records regime cannot be fully considered without reference to the wider context of vetting and barring.

Vetting and barring plays a key part in the arrangements to protect children and young people from abuse by providing safeguards where individuals are placed in positions of trust with children who they may seek to harm. Research tells us that where children and young people are subject to abuse this is most likely to be perpetrated by those known to them, such as family members and adults in positions of trust.1 The Northern Ireland Review of the Criminal Records Regime together with the Protection of Freedoms Bill will have a critical role in ensuring that standards for the recruitment of paid staff and volunteers

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entrusted to work with children and young people provide high levels of protection in Northern Ireland.

Terms of reference

We note that the Terms of Reference for the Review are drawn from those developed for the work undertaken in England and Wales although some areas, such as the integration of overseas data are not included. We are disappointed that the Terms of Reference do not reflect the particular circumstances of Northern Ireland. For example, no reference is made to the land border between Northern Ireland and the Republic of Ireland and the importance of sharing vetting and barring information across this. There is also no reference to the legacy of the conflict and the need to consider how to respond to conflict related offences.

Restrictions of the scope of regulated activity

The provisions of the Protection of Freedoms Bill will directly affect this Review, including by defining the scope of regulated activity and identifying which roles should be subject to full enhanced criminal records checks. NICCY must express concern that the restricted definition of regulated activity given in the Bill excludes a number of positions which involve frequent and ongoing contact with children or contact with children when they are particularly vulnerable. The definition excludes roles such as supervised teaching, training, instruction and care provision and encompasses posts like volunteers in schools and helpers in faith and sporting organisations.  

These excluded roles represent trusted positions in which adults can build close relationships with children who they may seek to harm and so these positions should be within the scope of regulated activity and subject to enhanced criminal records checks. Where the legislation understands supervised roles as not presenting the same level of risk to children or requiring the same level of disclosure, the definition of supervision must be robustly defined. For instance, this should reflect calls from organisations working in this area for supervision to be ‘close and constant’ and ‘regular and direct’ rather than ‘day to day’.

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3 Memorandum from the NSPCC to the Public Bill Committee available at: http://www.publications.parliament.uk/pa/cm201011/cmpublic/protection/memo/pf60.htm
Memorandum from the Sports and Recreation Alliance to the Public Bill Committee available at: http://www.publications.parliament.uk/pa/cm201011/cmpublic/protection/memo/pf61.htm
This Review should ensure that the provisions of Bill do not in practice lead to decisions about the level of disclosure required for a post simply being made on whether a position is in paid or unpaid work. This would result in volunteers being subject to less rigorous vetting and barring arrangements and we are not aware of evidence which demonstrates that children and young people are less likely to be at risk from volunteers than paid staff.

NICCY is of the view that decisions about which roles require criminal records checks must be made on the basis of assessed risk of the post placing individuals in positions where they have access to children and can develop relationships of trust which may then be abused. As the Review considers whether vetting and barring can be ‘scaled back’ or made ‘more proportionate’ as set out in the Terms of Reference, it is important that this does not take precedence over the primary focus of ensuring the criminal records regime provides protection for children and young people.

We would also like to note on a related point, that research shows high levels of support among volunteers for making sure those working in unpaid positions with children are vetted and that criminal records checks are not identified as a disincentive to volunteering.\(^4\)

**Barring arrangements and decisions**

It is of great concern, as noted by the NSPCC, that under the Protection of Freedoms proposals criminal records checks for posts outside of regulated activity will provide only limited information and will not disclose if the Independent Safeguarding Authority (ISA) has barred an individual or share information held by ISA but not the police.\(^5\) This may lead to situations where, for example, an individual barred from regulated activity such as teaching could apply to be a volunteer classroom assistance which is an unregulated post without the employer receiving barring or other information of concern from ISA.

If the Protection of Freedoms Bill provisions in this area are not amended, this Review should reflect on how to make sure such gaps do not exist in Northern Ireland’s safeguarding arrangements. The Review must consider how to ensure

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that all relevant information is shared by all agencies, including ISA and the new Disclosure and Barring Service. It is important that such information is made available to employers for all roles where there is an assessed risk of the position allowing individuals to develop relationships of trust with children which may then be abused.

NICCY has further concerns that under the legislative proposals individuals will only be placed on barred lists if they have been, will be, or are likely to be engaged in regulated activity. As posts, such as volunteer assistant sports coaches and teaching assistants, are not within the scope of regulated activity but have substantive and ongoing levels of contact with children we feel that this high threshold is not appropriate. We are also unclear how assessments that individuals are not likely to seek to be engaged in regulated activity at a future point will be conducted.

These provisions may also in effect mean that concerns about those not in regulated activity, who therefore cannot be barred, will not be shared with ISA. This would weaken arrangements to enable early identification of those who pose potential risks to children and we recommend that this Review further explores barring arrangements. The Review should also ensure that it is an offence to employ barred persons, an offence for barred persons to work in regulated positions and that employers must refer concerns about individuals to ISA and the new Disclosure and Barring Service.

Police intelligence and non conviction information

NICCY recognises that the disclosure of non conviction information is a complex and sensitive area. It is however critically important that relevant non conviction information and police intelligence is available as part of the disclosure process to ensure a thorough assessment is made of an individual’s suitability. For example, while many adults who pose a risk to children do not have a conviction in relation to this, non conviction information provided through police intelligence and ISA may provide evidence that the individual should not be in direct contact with children. The Protection of Freedoms proposals will develop a statutory code of practice for the sharing of ‘reasonably relevant’ non conviction information. We welcome this in principle to support consistency in decision making about disclosures and restrict the informal sharing of information.

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6 NSPCC (2010) Submission to the Vetting and Barring Review, (London: NSPCC) states that the majority of adults who pose a significant risk to children do not have a conviction.
In our meeting with Sunita Mason we highlighted the importance of considering how the sharing of conviction and non conviction information across national borders can be progressed. As the only jurisdiction in the UK which has a land border with another EU Member State we are acutely aware of the need to ensure that vetting and barring arrangements operate effectively across national borders. For example, police intelligence is currently not shared between Northern Ireland and the Republic of Ireland. This raises issues not only in relation to paid employment and volunteer opportunities based in Northern Ireland, but also in considering the organisation of sporting and faith groups which operate on an all island basis. This area represents a gap in our system to safeguard children which the Review should address and we are keen to hear how this was pursued following our meeting.

The Mason report for England and Wales discusses a filtering process where old and minor convictions not relevant to the role which is subject to vetting could be excluded from disclosures. Such a mechanism could review for example, the cases of young people with minor Schedule 1 offences and cautions issued to under 18s. We are supportive of this being explored in more detail but note that any assessment process for this must be rigorous and pay special regard to issues such as conflict related offences. We would also caution that some offences will, of course, necessitate a bar from the individual occupying positions of trust with children and would highlight the important role of ISA and the future Disclosure and Barring Services in assessing complex cases and supporting employers.

**Issuing of checks**

Under the Protection of Freedoms Bill criminal records checks will be issued directly to individuals who can review the information included before forwarding this to employers.7 This both provides opportunity for those who may pose a risk to children to challenge or negate the information held while placing an additional administrative responsibility on volunteers. While individuals should be able to challenge the accuracy of information that is provided we have listened with interest to organisations, such as the Scouts Association who have suggested that a delay in employers receiving certificates from disclosure services could resolve some of these concerns.8 We are keen to know if this Review is considering the single issuing of checks directly to

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8 Evidence from the Scouts Association to the Public Bill Committee available at: http://www.publications.parliament.uk/pa/cm201011/cmpublic/protection/110324/pm110324s01.htm
individuals and request that we are provided with information about the number of disclosures in Northern Ireland which have contained inaccurate information.

Portability and updating of checks

We are supportive of moves to ensure that criminal records checks can be portable and therefore transfer with individuals across similar roles and organisations. This is would be a progressive step in simplifying arrangements and making the regime more proportionate by controlling the number of repeat checks required. We are aware of discussions on the potential of sectoral checks, such as across the children’s sector, and are supportive of this principle.

However it is important to note that if limited information only appears on checks for unregulated positions, disclosures for posts across regulated and non regulated activity, even within the same organisation or sector, will not be portable. This arrangement may also lead to a more bureaucratic system where individuals who work or volunteer across both regulated and unregulated posts would require two separate checks.

Administration of criminal records

We are aware of the recent provisions that have been included in the Protection of Freedoms Bill to merge ISA and the Criminal Records Bureau into a new Disclosure and Barring Service structure. Our understanding is that AccessNI will remain constituted as a separate body and that discussions on the operational arrangements of disclosure and barring functions in Northern Ireland are ongoing. We would welcome information which outlines the detail of the proposed arrangements between AccessNI and the Disclosure and Barring Service.

We are supportive of moves to develop an online system but point to the need to ensure the security and integrity of this system. It is also important that employers are provided with relevant new information in a timely manner and that organisations have access to the most current data concerning individuals. Example of this include making sure employers are prompted to request a new check when an individual changes role or new information becomes available.

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⁹ Statement from the Minister for Equalities to the Public Bill Committee available at: http://www.publications.parliament.uk/pa/cm201011/cmpublic/protection/110517/am/110517s01.htm17
We note that it would be unhelpful if volunteers incurred any fee in complying with the vetting and barring arrangements, though either initial registration or annual subscription costs.

**Guidance and information**

The review undertaken in England and Wales recognised the need for improved guidance to employers and registered bodies and we would note that this should include support and training. A recent AccessNI consultation expressed concern about the management of the Registered Body Network which raised issues about the support provided to employers and highlights the need for an effective transition plan so any changes to the records regimes do not compromise the quality of vetting and barring arrangements.\(^\text{10}\)

We understand that AccessNI assess when employers can apply for enhanced criminal records checks and so the concern about inappropriate checks raised in the Mason report for England and Wales may not be applicable to Northern Ireland. NICCY is of the view that the provision of effective guidance and support, rather than the introduction of penalties, is an appropriate response where unnecessary checks are requested by organisations.

### 6.0 Conclusion

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<th><strong>Key Recommendations</strong></th>
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<td>• The Review must maintain a clear focus on the protection of children and young people and not dilute or fragment the safeguards provided by vetting and barring arrangements.</td>
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<td>• The Review should reflect the particular circumstances of Northern Ireland, including the need to share vetting and barring information between Northern Ireland and the Republic of Ireland and manage conflict related offences. These areas should be addressed in detail by the Review.</td>
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<td>• Where the Criminal Records Regime will be affected by the provisions of the Protection of Freedoms Bill the Review should consider any negative implications of this on safeguarding arrangements. For example, restrictions on the definition of regulated activity will exclude a range of positions from full enhanced criminal records checks. Decisions about which roles should</td>
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be subject to criminal records checks must be based on an assessed risk of
the post placing individuals in positions trust with children who they may seek to harm.

- Following from this, the Criminal Records Regime should ensure employers receive all relevant information for all posts where such an assessed risk exists. This includes sharing barring details and information held by ISA but not the police.

- Relevant non conviction information and police intelligence should therefore be shared as part of the disclosure process. The principle of introducing a statutory code of practice for this is welcome as is consideration of a filtering mechanism for old and minor convictions that are not relevant to the role.

- Barring arrangements must apply to all posts where such an assessed risk exists. We are concerned that the threshold of an individual being in regulated activity or being likely to seek a regulated activity post should not have to be met to invoke barring.

- If the Review explores the issuing of criminal records checks to individuals only, a delay in employers also being issued with disclosures should be considered.

- We are supportive of criminal records checks being portable, but note that if they are not portable across regulated and non regulated activity the system may become more burdensome.

- The development of an online system must ensure that employers have access to the most current data concerning individuals. It would be unhelpful if volunteers incurred any fee in complying with vetting and barring arrangements, though either registration or annual subscription.

- The Review should address providing employers and the registered body network with effective guidance and support, rather than introduce penalties.

- As the Department considers Sunita Mason’s Review report it must ensure that any subsequent policy proposals comply with Northern Ireland’s Section 75 consultation duty.