

# ILPA information sheet

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## Children – New Statutory Duty

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Section 55 of the Borders, Citizenship and Immigration Act 2009 introduces a duty regarding the safety and welfare of children. The new duty will apply to the UK Border Agency and to its private contractors.

This information sheet provides information about the new duty. Further background information is available from the December 2008 “Children’s Welfare” information sheet.

### **When will the duty be in force?**

The duty is not yet in force. During the passage of the Borders, Citizenship and Immigration Bill, the Government gave the following assurance as to when the new duty will be brought into force:

*“We will bring [section 55] into force around three months after Royal Assent. That means that if the Bill gains Royal Assent before the Summer Recess, we expect the provision to be in force in the early autumn.” (Hansard HL, Committee 10 Mar 2009 : Column 1162 per Lord West of Spithead)*

The Bill received Royal Assent on 21 July 2009, immediately prior to the summer recess. Accordingly, the new duty should be brought into force around October 2009. The reason given for this delay was to allow the UK Border Agency to draft and consult on guidance (see below) and to train staff to be ready for when it is brought into force.

### **The new duty**

Section 55 requires the Home Office to make arrangements so that the UK Border Agency and its private contractors shall, when carrying out their functions, have regard to:

*“...the need to safeguard and promote the welfare of children who are in the United Kingdom”*

The wording in section 55 has been deliberately chosen to reflect the duty in section 11 of the Children Act 2004, under which agencies such as the police and local authorities are required to safeguard and promote the welfare of children. The key difference in the wording is the inclusion in section 55 of the words “*who are in the United Kingdom*”. This difference is discussed further below.

## **Guidance**

Section 55 requires the UK Border Agency and its private contractors to have regard to guidance issued by the Home Office. During the passage of the Bill, the Government made clear that guidance would be issued; and that this guidance would take the same form as the guidance that has been issued for other agencies under section 11 of the Children Act 2004, and would be updated in line with any updating of that guidance. The Government also stated that the section 55 guidance would be produced and issued jointly by the Home Office and the Department for Children, Schools and Families (DCSF). It is the DCSF that issues guidance under section 11.

The guidance issued under section 11 of the Children Act 2004 contains important statements explaining what is meant by ‘safeguarding and promoting the welfare of children’. These make clear that welfare includes children’s:

- physical and mental health
- physical, intellectual, emotional, social and behavioural development

And make clear that safeguarding and promoting welfare includes:

- protecting children from maltreatment
- preventing impairment of children’s health or development
- ensuring that children are growing up in circumstances consistent with the provision of safe and effective care
- enabling children to have optimum life chances to enter adulthood successfully

The UK Border Agency has conducted a short consultation on draft guidance. ILPA, and others, have responded by observing that the draft guidance did not satisfactorily reflect the section 11 guidance as had been promised by the Government. However, the response also highlighted the need for the UK Border Agency to review its other operational guidance in order to ensure that its policies and practices satisfy the new duty. ILPA’s response can be viewed in the ‘Submissions’ section of the ILPA website at [www.ilpa.org.uk](http://www.ilpa.org.uk)

## **Children who are outside the UK**

The new duty will only apply to children “*who are in the United Kingdom*”. This is inadequate because the UK Border Agency carries out immigration (and other) functions which relate to, and can cause or contribute to harm towards, children who are not in the UK. One example relates to the trafficking of children. Some children who are trafficked to the UK come here on a visa granted by the UK Border Agency. When the UK Border Agency is dealing with a visa application to enter the UK, which is made on behalf of a child, it would be appropriate for it to be bound by the new duty.

During the passage of the Bill, the Government said that it could not extend the new duty to children outside the UK because this would interfere with the jurisdiction of other countries. This explanation is not satisfactory. Many officials, including UK Border Agency staff, who work overseas on behalf of the UK will be required to have regard to duties and guidance issued by the UK Government. They must carry out their functions having regard to these duties and guidance. Of course, there would be a problem if UK guidance were to require an official to act in a way that was contrary to the law of the country in which they worked. However, since section 55 expressly states officials of the UK Border Agency must “*have regard to*” the new duty, it is difficult to understand how this could ever require an official to act contrary to the laws of another country.