EXECUTIVE NOTE

DRAFT SSI: THE PROTECTION OF VULNERABLE GROUPS (SCOTLAND) ACT 2007 (MISCELLANEOUS PROVISIONS) ORDER 2010

Powers under which Instrument is made

1. The Protection of Vulnerable Groups (Scotland) Act 2007 (Miscellaneous Provisions) Order 2010 ("the Miscellaneous Provisions Order") will be made by Scottish Ministers in exercise of powers conferred by sections 87(1), (2) and (3) and 98(1) and (2) of, and paragraph 28 of schedule 2 and paragraph 13 of schedule 3 to, the Protection of Vulnerable Groups (Scotland) Act 2007 ("the PVG Act").

Parliamentary procedure

2. This Scottish Statutory Instrument is a class 1 instrument subject to the affirmative resolution procedure at the Scottish Parliament.

Summary of policy proposals

The Protection of Vulnerable Groups (Scotland) Act 2007

3. Under Part 5 of the Police Act 1997 ("the 1997 Act"), the Scottish Ministers may carry out criminal record checks. There are currently three levels of checks: the criminal conviction certificate (basic disclosure); the criminal record certificate (standard disclosure); and the enhanced criminal record certificate (enhanced disclosure). Most enhanced checks are carried out for the purpose of assessing the suitability of a person for working with vulnerable groups. Around 700,000 people in Scotland work with vulnerable groups, either through their paid employment or as volunteers. Since April 2002, the Scottish Government and BT have worked in partnership as Disclosure Scotland to provide criminal record checks for Scotland. Since then, over 5 million applications have been made for basic, standard and enhanced disclosures. In the 2008/09 financial year[1], 360,000 enhanced disclosures were processed for the purposes of working with vulnerable groups.

4. Since 10 January 2005, Scottish Ministers have kept a list of individuals who are considered unsuitable to work with children - the Disqualified from Working with Children List - introduced by the Protection of Children (Scotland) Act 2003 ("POCSA"). It is an offence for anyone on the list to work in a child care position in Scotland. In the first five years of operation, 393 individuals have been listed on DWCL.

5. The PVG Act (when fully commenced) will provide for a new vetting and barring scheme. This means that the use of disclosure checks under the 1997 Act for work with children and protected adults will end. They will be replaced by new types of disclosure requests under the PVG Act. For ease of reference, the Scottish Government is referring to this as the PVG Scheme. The PVG Scheme will ensure

[1] This is the financial year on which the RIA is based. The figure for the 2009/10 financial year is 350,000 enhanced disclosures.

that those who either have regular contact with vulnerable groups through the workplace, or who are otherwise in regulated work, do not have a history of abusive behaviour. It will exclude people who are known to be unsuitable, on the basis of past behaviour, from working with children and/or protected adults and detect those who become unsuitable while in the workplace. The Scottish Ministers will continue to keep a list of individuals who are considered to be unsuitable to work with children ("the PVG children's list"). Under the PVG Act, the Scottish Ministers will, for the first time in Scotland, keep a list of those who are barred from working with protected adults ("the PVG adults' list"). The PVG children's list and PVG adults' list are collectively referred to as the "PVG barred lists".

6. The PVG Scheme will be managed and delivered by Disclosure Scotland as an executive agency, which will also continue to deliver the other types of disclosure (which will still be available under the 1997 Act for checks which are not for the purposes of work with children or protected adults). A new team within Disclosure Scotland will receive and consider referrals and take decisions, on behalf of Scottish Ministers, about those people who may be unsuitable to work with children or protected adults. The team will gather and assess all relevant information to make listing decisions.

7. For more information about how the PVG Scheme will work, see the guidance document[2] and training materials published on the Disclosure Scotland website which can be accessed through:
www.infoscotland.com/pvgscheme

The Miscellaneous Provisions Order

Introduction

Vetting and barring in the rest of the UK

8. The Safeguarding Vulnerable Groups Act 2006 ("the SVG Act") and the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007 ("the SVG NI Order") establish a similar vetting and barring scheme ("the VBS") for England, Wales and Northern Ireland. The SVG Act establishes the Independent Safeguarding Authority ("the ISA") which makes decisions to bar individuals from working with children or vulnerable adults for England and Wales and Northern Ireland. It also establishes the SVG children's barred list and SVG adults' barred list for England and Wales. The SVG NI Order establishes the SVG NI children's barred list and SVG NI adults' barred list for Northern Ireland.

Powers under the PVG Act

9. Section 87 of the PVG Act enables the Scottish Ministers by order to give effect to corresponding legislation elsewhere in the UK. The power provided in section 87(1) can be used to make provision, including amendments to devolved legislation, to ensure that the VBS for England and Wales functions properly. It was anticipated

[2] *Protecting Vulnerable Groups Scheme: Guidance for Individuals, Organisations and Personal Employers*, The Scottish Government, June 2010.

that, given the complexities of the PVG Act and the SVG Act, it would be necessary to make some provision as the schemes developed.

10. The power included in section 87(2) provides the Scottish Ministers with a similar power in respect of any legislation establishing a similar scheme in Northern Ireland. The Scottish Ministers are able to make provision responding to any legislation in Northern Ireland, that corresponds with the PVG Act, in the same way that they can in respect of the SVG Act. The SVG NI Order is such legislation for Northern Ireland.

11. Section 98 provides the Scottish Ministers with the power to make supplementary, incidental, consequential, transitional, transitory or saving provision for the purposes of, or in connection with, or for the purposes of giving full effect to, any provision of this Act. This may include modifying any enactment, instrument or document.

12. The Miscellaneous Provisions Order is made under the powers at sections 87 and 98 of the PVG Act (and powers at schedules 2 and 3 for the purposes of articles 12 and 13, see below).

Instruments providing for cross-border information exchange

13. For the PVG Act to have full effect, it is necessary for reserved provision to be made at Westminster. Although section 54 of the SVG Act and article 56 of the SVG NI Order provide devolution alignment powers broadly mirroring section 87 of the PVG Act, for various reasons the requisite provision is to be made through two orders under section 104 of the Scotland Act 1998:
    (a.) the Protection of Vulnerable Groups (Scotland) Act 2007 (Consequential Provisions) Order 2010 ("the Consequential Provisions Order"), which makes provision for information sharing with the ISA and is affirmative because it amends the SVG Act and Data Protection Act 1998; and
    (b.) the Protection of Vulnerable Groups (Scotland) Act 2007 (Consequential Provisions) (No. 2) Order 2010 ("the Consequential Provisions No. 2 Order"), which makes provision for information sharing with the ISA, non-Scottish police forces, regulated activity providers etc for England, Wales and Northern Ireland and other miscellaneous provisions.

Cross border protocol

14. The vast majority of individuals in Scotland work entirely within Scotland and so will have no need to be concerned about the VBS established by the SVG Act and SVG NI Order, unless they are included in an SVG barred list, in which case they cannot do the corresponding type of regulated work in Scotland. But some individuals may have a cross-border dimension to their work (or offending behaviour), in which case the interactions between the VBS and PVG Scheme are relevant. In particular, there may be instances where an individual's conduct comes to the attention of both the ISA and Disclosure Scotland, in which case a so-called cross border protocol is needed to determine which jurisdiction should lead on the case.

15. Normally, an individual will be listed by either Disclosure Scotland or the ISA (i.e. not both) but will then be barred across the UK. Disclosure Scotland will continue to

have access to the other UK barred lists[3] and will check them in respect of PVG Scheme applications and members. This means that an individual cannot be a PVG Scheme member in respect of a type of regulated work for which they are listed anywhere in the UK.

16. In 2008, the Scottish Government and UK Government agreed in principle the circumstances in which Disclosure Scotland should lead on a listing case and the circumstances in which the ISA should lead on a listing case (i.e. the cross border protocol), in order to avoid:
    (a.) double jeopardy – where an individual has the same information considered twice (may be years apart);
    (b.) double consideration - where an individual is actively under consideration for listing by both jurisdictions at the same time; and
    (c.) double barring - where an individual is included on two corresponding lists, for example, included on both the SVG adults' barred list and the PVG adults' list.

17. These issues are most likely to arise in respect of individuals who are members of both the PVG Scheme and VBS. For example, where an individual joins the VBS and the ISA consider the vetting information and decide that the individual can join the VBS, that same information should not lead to the person being considered for listing under the PVG Scheme if he or she applies to join the PVG Scheme at a later date. The PVG Scheme should only consider new vetting information or vetting information that did not come to light when the VBS application was made.

18. However, the Home Secretary announced[4] on 15 June 2010 that the commencement of voluntary registration with the new vetting and barring scheme (VBS) in England, Wales and Northern Ireland, which was due to begin on 26 July, would be brought to a halt pending the outcome of remodelling work "to bring the criminal records and vetting and barring regimes back to common-sense levels". Until the remodelling has taken place, the UK Government have decided to maintain those aspects of the VBS which are already in place, but not to introduce further elements. The Home Secretary indicated in her statement that the terms of reference for the remodelling of the VBS and of the criminal records regime were being considered and that a further announcement would be made in due course.

19. Orders are required to be made under paragraphs 6 and 12 of Schedule 3 to the SVG Act and paragraphs 6 and 12 of Schedule 1 to the SVG NI Order to implement the cross-border protocol in full. These will not be in place for 30 November, as it may be necessary to modify the protocol to take account of the remodelling of the VBS. However, sections 39 and 40 of the PVG Act allow the Scottish Ministers to determine how to apply the protocol to each case administratively (i.e. it does not require to be set out in secondary legislation). Therefore, the Miscellaneous Provisions Order makes the amendments required to allow for future implementation of the Scottish side of the protocol (or any variant of it). The powers conferred on the Scottish Ministers by the PVG Act (as amended by the Miscellaneous Provisions Order) will be elaborated administratively through a cross-border protocol document

[3] See section 92 of the PVG Act and the Protection of Vulnerable Groups (Scotland) Act 2007 (Corresponding Disqualifications) Order 2010 (SSI 2010/346).
[4] Written Ministerial Statement to the House of Commons by Secretary of State for the Home Department (Theresa May) on the Vetting and Barring Scheme, 15 June 2010.

to be agreed with the UK Government and the ISA once the outcome of the remodelling of the VBS is known.

ISA "referrals" leading to PVG consideration cases

20. Section 10 of the PVG Act makes provision for the Scottish Ministers to place an individual under consideration for listing following receipt of an organisational referral. Article 4 amends section 10(1) of the PVG Act so that the Scottish Ministers can place an individual under consideration for listing on the basis of information received from the ISA. As with referrals from other organisations, a "referral" from the ISA can lead to consideration for listing on either or both lists, where the Scottish Ministers consider it may be appropriate for the individual to be included on the list(s).

21. The primary purpose of this provision is to allow the Scottish Ministers to consider a case which the ISA defers to them as a result of applying the cross-border protocol. The ISA currently have no powers to defer consideration to Disclosure Scotland but the Consequential Provisions Orders will provide for the ISA to provide information to the Scottish Ministers, either at its own instigation or on request. Paragraphs 6 and 12 to Schedule 3 of the SVG Act provide powers for the Secretary of State to prescribe criteria in which the ISA should defer to the Scottish Ministers. These criteria would need to be set out in an order to be made by the UK Government before any cases can be transferred to Disclosure Scotland from the ISA.

22. The Protection of Vulnerable Groups (Scotland) Act 2007 (Consideration for Listing) Regulations 2010 (SSI 2010/183) require to be amended to make provision for receipt of ISA referrals and these amendments are made at article 22.

Information exchange with police forces and law enforcement agencies

Relevant police forces

23. The Miscellaneous Provisions Order extends the provision in the PVG Act for the sharing of PVG Scheme membership and barred lists with police forces and other law enforcement agencies. The policy is that information exchanges with the police in the PVG Act should extend to the police forces and law enforcement agencies identified as so called "relevant police forces", as defined by section 113B(9) of the Police Act 1997 and regulation 8(1) of the Police Act 1997 (Criminal Records) (Scotland) Regulations 2010 (SSI 2010/168) for the purposes of enhanced disclosure under the Police Act 1997. The relevant police forces are:
    (a.) Scottish police forces;
    (b.) English and Welsh police forces;
    (c.) the Police Service of Northern Ireland ("the PSNI");
    (d.) the Island police forces:
        - States of Jersey Police Force
        - the salaried police force of the Island of Guernsey
        - the Isle of Man Constabulary;
    (e.) the Service Police:
        - Royal Navy Police
        - Royal Military Police

- Royal Air Force Police

(f.) the specialist police forces:
- Ministry of Defence Police
- British Transport Police
- Civil Nuclear Constabulary

(g.) the following crime prevention agencies:
- Scottish Crime and Drug Enforcement Agency ("the SCDEA")
- Serious Organised Crime Agency
- Child Exploitation and Online Protection Centre; and

(h.) the Garda Síochána (being the police force for the Republic of Ireland).

24. This policy is delivered to the extent that it is devolved by the PVG Act and the amendments to it in the Miscellaneous Provisions Order (explained below). The requisite reserved provision is made through the Consequential Provisions Orders.

25. Additionally, provision is also made for sharing certain information with the Scottish Police Services Authority ("the SPSA") and the National Police Improvement Agency ("the NPIA"), since information is sometimes held centrally by them for the use of police forces.

Access to police information for consideration for listing cases

26. Where an individual who is a PVG Scheme member is placed under consideration for listing, for whatever reason, the vetting information contained on the individual's scheme record will be available for the purposes of determining whether or not to list the individual. However, in some cases, the individual under consideration for listing will not be a PVG Scheme member and vetting information will need to be retrieved for them at the time they are put under consideration for listing. The vetting information gathered from the police will be exactly the same as if the individual had applied to become a PVG Scheme member in respect of the type(s) of regulated work for which they are under consideration for listing. Section 18 makes provision *requiring* Scottish police forces to provide such information to the Scottish Ministers for this purpose.

27. Article 5 amends section 18 of the PVG Act to place the SCDEA under the same duty. Provision for obtaining information from other relevant police forces will be made in the Consequential Provisions No. 2 Order.

Police access to barred lists

28. Section 38 of the PVG Act gives Scottish police forces access to the PVG barred lists and any other information, contained in the list, which the Scottish Ministers consider should be disclosed. Information that is likely to be disclosed is information which helps confirm the identity of the individual included on the lists. Arrangements have been made for the Scottish police forces to have access to this information in a searchable format through a secure database sitting alongside the Criminal History System, hosted by the SPSA. Article 6 amends section 38 of the PVG Act to extend access to the PVG barred lists to the SPSA and the SCDEA. This is to allow the SPSA to host the database and to allow the SCDEA to access this information for the purposes of its own investigations. The PVG Act makes clear that the only purposes

for which the PVG barred list information may be used is: for the prevention or detection of crime; or the apprehension or prosecution of offenders.

29. Article 16 gives the Scottish Ministers the *power* to provide access to the PVG barred lists to the other relevant police forces and to the NPIA. This allows the Scottish Government to work with these bodies to put in place arrangements for automated secure access to these lists. The Scottish Government believes this access is important in preventing harm to vulnerable groups across the UK and elsewhere.

30. Provision for Scottish police forces to have access to the SVG barred lists is made in the SVG Act. Section 88 of the Policing and Crime Act 2009 amended the SVG Act to insert a new section 50A which makes provision for the ISA to provide information to "a chief officer of police" (broadly meaning English and Welsh forces) under the SVG Act. Article 12 of the Safeguarding Vulnerable Groups Act 2006 (Regulated Activity, Devolution Alignment and Miscellaneous Provisions) Order 2010 (SI 2010/1154) amended section 50A to extend the provision to include the PSNI and "the chief constable of a police force in Scotland". Similarly, section 91 of the Policing and Crime Act 2009 amended the SVG NI Order to insert a new article 52A which makes provision for the ISA to provide information to the PSNI under the SVG NI Order. Article 12 of the Safeguarding Vulnerable Groups (Regulated Activity, Devolution Alignment and Miscellaneous Provisions) Order (Northern Ireland) 2010 (SR 2010/30) amends article 52A to extend the provision to include "the chief constable of a police force in England, Wales or Scotland".

Access to police information as vetting information for PVG Scheme membership

31. Section 75(1) of the PVG Act has the effect of requiring the SPSA to give the Scottish Ministers access to the Criminal History System. Subsection (2) requires Scottish police forces to provide other relevant information as requested. Subsection (3) prevents vetting information (under section 49) from the police including information which should not be disclosed to the PVG Scheme member because it would be contrary to the interests of the prevention or detection of crime. Subsection (4) obliges the Scottish Ministers to pay police authorities for information. Section 75(5) ensures that the Scottish Ministers are not liable for erroneous information provided to them by the police.

32. Article 10 amends section 75 of the PVG Act to extend the duty provide to the Scottish Ministers other relevant information as vetting information to the SCDEA. The duty is extended to non-Scottish relevant police forces by the Consequential Provisions No. 2 Order. Article 10(5) extends the provision at section 75(5) of the PVG Act protecting the Scottish Ministers from proceedings against them by reason of inaccuracy in information provided to them by police forces etc to encompass information from non-Scottish relevant police forces etc provided by virtue of the Consequential Provisions No. 2 Order.

Police access to PVG Scheme membership information

33. Section 76 of the PVG Act requires the Scottish Ministers to share certain details relating to those individuals who have joined the scheme with Scottish police forces and the SPSA. Only scheme membership information which assists the police or

Scottish Police Services Authority in identifying individuals will be passed on (i.e. not normally vetting information from other sources). Section 76 restricts use of PVG Scheme membership information by the police to: the exercise of their functions under Part 2 in passing vetting information to Disclosure Scotland; preventing and detecting crime; or apprehending or prosecuting offenders. Article 11 amends section 76 of the PVG Act to extend the right of access to PVG Scheme membership information to the SCDEA. Article 17 gives the Scottish Ministers the *power* to share PVG Scheme membership information with all the other relevant police forces and the NPIA. This allows for arrangements to be made for automated secure access to PVG Scheme membership information for these bodies as part of ongoing technological enhancements. Such access would enable these bodies to streamline arrangements for providing vetting information to Disclosure Scotland in respect of PVG Scheme members which would enhance the protection of vulnerable groups in Scotland by helping to identify and remove unsuitable individuals from the workforce more quickly.

Scottish information for disclosure and protocol purposes

34. Article 14 gives the Scottish Ministers the power to provide sufficient personal information about individuals included in, or removed from, the PVG barred lists, and individuals placed under consideration for listing, together with the fact of their listing, consideration or cessation of the same, to allow them to be identified by other UK bodies for disclosure purposes and for the ISA to apply the cross border protocol.

35. Article 14(2)(a) allows the Scottish Ministers to give this information to the ISA for the purposes of applying the cross-border protocol. Article 14(2)(b) allows the Scottish Ministers to provide this information to the Criminal Records Bureau for the purposes of including it on enhanced disclosure for England and Wales (14(2)(b)(i)) and processing VBS applications for England and Wales (14(2)(b)(ii)) and Northern Ireland (14(2)(b)(iii)). Article 14(2)(c) would allow the Scottish Ministers to provide this information to AccessNI for the purposes of including it on enhanced disclosures for Northern Ireland.

36. Article 14(3) limits the information accompanying the personal information to the listing status of the individual only; i.e. there is no authority for providing further details such as reasons for listing or other information about the scheme record or consideration case. Article 14(3(e) limits the Scottish Ministers providing only information which they consider would enable the ISA, the Criminal Records Bureau or AccessNI to be satisfied as to the identity of the individual in question.

Scottish information for SVG consideration cases

37. Article 15 of the Miscellaneous Provisions Order gives the Scottish Ministers the power to provide information to the ISA to assist with SVG consideration cases and applications for removal. In such cases, the information supplements an *extant* SVG consideration or removal case with further information from Scotland. The need to do this might arise where, for example, an individual has been placed under consideration by both jurisdictions simultaneously as a result of separate triggers and a decision is made that the ISA should deal with the case.

38. Article 15 also allows the Scottish Ministers to provide information to the ISA where the ISA do *not* have an extant case, but receipt of the information would trigger a new case for the ISA . This might happen where the Scottish Ministers receive information about an individual but determine, in accordance with the powers at sections 39 and 40 of the PVG Act (as amended by articles 7 and 8), that the case would be more appropriately dealt with by the ISA.

39. Article 15 provides a much wider power to provide information which the Scottish Ministers hold or have obtained by virtue of performing their functions under the PVG Act or POCSA than allowed by article 14. It extends to providing historic case information to the ISA and information about PVG Scheme membership status, both of which may be important in applying the cross border protocol.

40. Note that the Consequential Provisions No. 2 Order gives the ISA a power to require information from Scottish police forces, public bodies and regulated work providers to assist with their consideration cases.

Information for PVG consideration cases

41. The Consequential Provisions Orders complement article 15 by allowing the ISA to provide information to the Scottish Ministers, either at its own instigation or on request. These powers supplement the duty to notify the Scottish Ministers if an individual is included in an SVG barred list, at paragraph 22 of Schedule 3 to the SVG Act and paragraph 22 of Schedule 1 to the SVG NI Order. This will enable the ISA to provide information to Disclosure Scotland in support of PVG consideration cases and would allow the ISA to provide Disclosure Scotland with information about live ISA cases (e.g. so that Disclosure Scotland could decide to defer to the ISA in case of conflict) or previously considered ISA cases (so that Disclosure Scotland did not reconsider the same information).

42. The Consequential Provisions No. 2 Order makes provision for non-Scottish relevant police forces and regulated activity providers etc to provide information to the Scottish Ministers to assist with PVG consideration cases. Section 41(1)(c) of the PVG Act protects the Scottish Ministers from proceedings in respect of any loss or damage incurred by any person because of information provided in organisational referrals or as part of the consideration for listing process, where the information is provided in pursuance of provision in the PVG Act. Article 9 extends the scope of this provision to cover information provided as part of the consideration for listing process in pursuance of provision in the Consequential Provisions No. 2 Order (or elsewhere).

Restrictions on listing in Scotland

The PVG children's list and SVG children's barred lists

43. Section 39 covers the cross-border interaction with the ISA established by the SVG Act where an individual would, in the absence of the SVG Act, be considered for listing or listed in children's list in Scotland. This section gives the Scottish Ministers the discretion not to consider for listing or not to list an individual in certain circumstances. Detailed rules for exercising this discretion will be set out

administratively by Disclosure Scotland in consultation with the ISA, initially as a form of interim cross-border protocol. Paragraph 6 of Schedule 3 to the SVG Act allows the Secretary of State to make provision mirroring section 39; no such order has yet been made. As the SVG NI Order did not exist at the time that the PVG Act was completing its parliamentary passage, the PVG Act could not make reference to it. Article 7 amends section 39 of the Act: to extend coverage to the SVG NI Order; to handle the legacy barred lists; and to handle all the possible permutations of consideration and automatic listing cases under the PVG Scheme and VBS.

44. Section 39(1) currently allows the Scottish Ministers not to include an individual in the children's list where an individual is already barred by virtue of being included on the SVG children's barred list (for England and Wales). Article 7(2) amends section 39(1) so that this section now covers the cross border interaction in relation to all individuals who are barred from doing regulated work with children (as defined in section 92 of the Act), whether under the SVG Act or otherwise.

45. In some cases, it will be more appropriate for the individual be considered for listing by the ISA rather than by Disclosure Scotland. For example, where the individual does regulated work both in Scotland and elsewhere in the UK and the incident which triggers consideration for listing occurs outside Scotland. In these circumstances, section 39(2) allows the Scottish Ministers not to consider an individual for inclusion on the children's list (but section 39(4) ensures the necessary notifications are made to organisational employers and regulatory bodies when the ISA deals with the case).

46. Article 7(3) of the Miscellaneous Provisions Order amends these provisions to extend the Scottish Ministers' discretion not to consider cases to those cases where the ISA has dealt with the case by including an individual on the corresponding SVG barred list automatically, with or without representations. This allows the protocol to work for cases which would in Scotland lead to consideration for listing but which in England and Wales or Northern Ireland would lead to a type of automatic listing. For example, this amendment allows the Scottish Ministers to let the ISA deal with case of an individual doing regulated activity in England and Wales but convicted for a schedule 1 offence (a "relevant offence") in Scotland even if it leads to automatic listing with representations in England and Wales (i.e. the ISA does not *consider* the case, at least initially).

47. In other cases, the ISA may have already considered whether the individual should be included in the children's list under the SVG Act, and decided not to include the individual. In such cases, it only makes sense for the Scottish Ministers to consider the individual for listing if there is new information available which was not available to the ISA at the time the ISA considered whether to list the individual. Section 39(3) allows the Scottish Ministers not to consider an individual for listing in the children's list where the ISA has already considered the case in respect of the SVG children's list. Articles 7(4) and (7) of the Miscellaneous Provisions Order extends the Scottish Ministers' power not to consider an individual for listing in the children's list to cases where the information was already dealt with by the ISA in respect of the SVG NI children's barred list or the Secretary of State in respect of the legacy children's

barred lists for England and Wales or Northern Ireland[5]. The provision is sufficiently broad to include cases where, for example, an individual has been listed in a corresponding list and a court has subsequently directed that the individual be removed from that list.

48. Finally, there may be instances where an individual meets the automatic listing criteria under the PVG Act and the SVG Act or SVG NI Order at more or less the same time. For example, conviction for a very serious offence, whether or not the individual is a scheme member in any of these jurisdictions. Again, it makes sense for the individual to be listed by one jurisdiction only, since that has the desired effect of barring the individual from regulated work across the UK. Section 39(5) allows the Scottish Ministers not to list an individual who meets the criteria prescribed by order under section 14 for automatic listing where the ISA will automatically list that individual.

49. Section 39(5) of the PVG Act gives the Scottish Ministers the discretion not to list an individual under section 14 of the PVG Act (automatic listing) where: the ISA is required to list that individual; and the Scottish Ministers consider it would be more appropriate for the individual to be listed under the SVG Act. Article 7(6) of the Miscellaneous Provisions Order amends section 39(5) to extend the Scottish Ministers' discretion not to list automatically an individual in the children's list under section 14 of the PVG Act if the individual's case has been dealt with by the ISA. The amendment extends coverage to all other cases where the ISA is required to, or may, consider a case. Specifically, these other cases are where the ISA is required to include an individual on the corresponding SVG barred list automatically but with the right to make representations or the ISA is considering whether to include the individual on the corresponding list. This amendment allows for differences in the criteria for automatic listing in Scotland compared with the criteria elsewhere in the UK.

50. Article 7(5), and the new section 39(6) inserted by article 7(7), make consequential provision to ensure that notices are properly issued under section 30 of the PVG Act to organisational employers and regulatory bodies when the ISA deals with the case.

The PVG adults' list and SVG adults' barred lists

51. Section 40 makes similar provision to section 39, except in respect of the adults' list. Paragraph 12 of Schedule 3 to the SVG Act allows the Secretary of State to make provision mirroring section 40; no such order has yet been made. Article 8 makes similar amendments to section 40, the only substantive difference being the provision made at article 8(7) in respect of relevant corresponding legislation which, in this case, refers to legislation establishing the legacy adults' barred lists for England and Wales and Northern Ireland.

[5] For more information about the legacy children's barred lists and adults' barred lists for England and Wales and Northern Ireland, see the Executive Note for the Protection of Vulnerable Groups (Scotland) Act 2007 (Corresponding Disqualifications) Order 2010 (SSI 2010/346).

Regulated work done outside Scotland

Regulated work with children

52. Schedule 2 to the PVG Act defines the scope of regulated work with children. Paragraph 28 of schedule 2 gives the Scottish Ministers the power to modify schedule 2. Schedule 2 has been modified by the Protection of Vulnerable Groups (Scotland) Act 2007 (Modification of Regulated Work with Children) Order 2010 (SSI 2010/240).

53. Article 12 amends paragraph 1 of schedule 2 to put beyond doubt that regulated work is work done in Scotland only. By definition, most, if not all, work in an establishment mentioned in Part 3 or a position mentioned in Part 4 can only be done in Scotland. However, there is a potential ambiguity over whether the activities mentioned in Part 2, which could be done anywhere in the world, mean that an individual performing such activities outside Scotland is doing regulated work with children for the purposes of the PVG Act.

54. The policy intention has always been that the PVG Scheme can only be used in respect of regulated work in Scotland; it is an offence to use disclosure records for other purposes. The VBS should be used for regulated activity (which is the VBS equivalent of regulated work in England, Wales and Northern Ireland). Normally, the most appropriate check for any particular post will be determined by the employing organisation. This will mean that, in some cases, an individual will require to be a member of both the PVG Scheme and VBS.

Regulated work with adults

55. Schedule 3 to the PVG Act defines the scope of regulated work with adults. Paragraph 12 of schedule 3 give the Scottish Ministers the power to modify schedule 3. Schedule 3 has been modified by the Protection of Vulnerable Groups (Scotland) Act 2007 (Modification of Regulated Work with Adults) Order 2010 (SSI 2010/245). Article 13 makes the same change to paragraph 1 of schedule 3 as article 12 does to schedule 2. It should be noted that the potential ambiguity over whether the activities mentioned in Part 2 of schedule 3 mean that an individual performing such activities outside Scotland is doing regulated work with adults is much reduced c.f. children by the service-based definition of protected adult. This means that most adults receiving equivalent services outside of Scotland would not be protected adults for the purposes of the PVG Act.

Regulated work outside the United Kingdom

56. The Scottish Government intends to make explicit provision allowing organisations access to disclosure records for the purposes of work done outside the United Kingdom by regulation under section 73. This will have the effect of making disclosure records available for work which, had it been done in Scotland would have been regulated work, without any of the offences in Part 1 of the PVG Act applying. That is to say, the use of such disclosure records would be entirely discretionary.

Undoing double barring

57. Some individuals will be included on the PVG children's list or PVG adults' list and a corresponding list held by the ISA. An individual included on more than one list that prevents them from doing one or both types of regulated work in Scotland is said to be "double barred". Double barring is not necessary for Scotland because inclusion on either a PVG list or a corresponding list is sufficient to bar the individual from doing regulated work in Scotland. Furthermore, legislation made under the SVG Act[6] and SVG NI Order[7] continues arrangements whereby an individual listed in Scotland is barred in the rest of the UK[8] which means that double barring is not necessary for safeguarding in the rest of the UK.

58. Where an individual is already included on a corresponding children's barred list, they are barred from undertaking regulated work with children in Scotland by virtue of section 92 and the Protection of Vulnerable Groups (Scotland) Act 2007 (Corresponding Disqualifications) Order 2010 (SSI 2010/346). Section 39(1) allows the Scottish Ministers not to include an individual in the children's list where that individual is already barred. Listing an individual who is already barred has no benefit in terms of protection but means that an individual needs to apply for removal from the list and/or appeal against listing in both jurisdictions in order for the bar to be completely removed and to do regulated work lawfully. The full implementation of the cross-border protocol would prevent double barring.

59. Currently, POCSA is the only barred list maintained in Scotland. On 30 November 2010, this will be superseded by the PVG children's list and supplemented by the PVG adults' list. As there is no adult's barred list in Scotland prior to the PVG adults' list, there will be no cases of double barring on the adults' lists at 30 November. But POCSA and the SVG children's barred list and SVG NI children's barred list, and their predecessors, have been operating in parallel for some time. So it is likely that there are already individuals who are double barred in respect of work with children. Furthermore, it is possible that double barring may occur in respect of both workforces after 30 November as the provision under VBS to support the cross border protocol will not be in place.

60. The PVG Act makes provision at section 29(1)(b) for an individual to be removed from a list administratively where the Scottish Ministers are satisfied that an individual should not have been listed. The purpose of this provision is primarily to undo cases of mistaken identity, where the wrong "John Smith" is added to the list. However, in double barring cases, the individual was not wrongly listed at the time of listing. So article 18 makes provision for the Scottish Ministers to remove an individual from the PVG children's list or PVG adults' list where the individual is included on the corresponding SVG barred list by the ISA and the Scottish Ministers consider that it is more appropriate for the individual to be included on the

[6] Safeguarding Vulnerable Groups Act 2006 (Specified Lists: Scotland) Order 2010 (SI 2010/2342).

[7] Safeguarding Vulnerable Groups (Barred Lists: Scotland) Order (Northern Ireland) 2010 (SR 2010/336).

[8] POCSA is recognised by the Disqualification from Working with Children (Scotland) Order 2005 (SI 2005/267) as corresponding to disqualification by the means mentioned in section 35(4) of the Criminal Justice and Court Services Act 2000 from working with children for England and Wales and by article 6 of the Safeguarding Vulnerable Groups (Miscellaneous Provisions) Order (Northern Ireland) 2009 (SR 2009/305) as corresponding to the SVG NI children's barred list.

corresponding SVG barred list than on the PVG list. Article 19 makes similar provision for the SVG NI barred lists.

61. The powers conferred by articles 18 and 19 will be used to undo double barring cases as they come to light. All double barring cases would need to be resolved as part of the implementation of the full cross-border protocol. Disclosure Scotland and the ISA would liaise to determine in which jurisdiction's lists the individual should more properly be included. It is likely that this would be achieved through retrospective application of the protocol.

Amendment to the Teaching Council (Scotland) Act 1965

62. Paragraph 2 of schedule 4 to the PVG Act amends the Teaching Council (Scotland) Act 1965 so that individuals included on the PVG children's list are disqualified from being registered teachers. However, an individual may be barred from doing regulated work with children by virtue of being included on a list which corresponds to the PVG children's list, as defined at section 92 of the PVG Act and modified by the Protection of Vulnerable Groups (Scotland) Act 2007 (Corresponding Disqualifications) Order 2010 (SSI 2010/346). Article 20 of the Miscellaneous Provisions Order makes an alternative amendment to the 1965 Act so that any individual who is barred from doing regulated work with children (whether or not this is a result of being included on the PVG children's list) is disqualified from being a registered teacher. Article 21 of the Miscellaneous Provisions Order repeals paragraph 2 of schedule 4 to the PVG Act, which is now superseded by article 20.

Consultation

63. A Scottish Government consultation "*Protection of Vulnerable Groups (Scotland) Act 2007 Scottish Vetting and Barring Scheme -Consultation on Policy Proposals for Secondary Legislation*" took place between 1 November 2007 and 12 February 2008. The purpose of the written consultation was to allow respondents to inform the detail of policy proposals for secondary legislation. It set out a number of options for each major issue as well as seeking general comments on the proposals. The Scottish Government received 199 responses to the consultation.

64. The consultation was supported by seven PVG consultation events in cities across Scotland attended by 875 people and nine events provided by the Central Registered Body in Scotland (CRBS) attended by 176 people from November 2007 through to January 2008. The CRBS events were not formal consultation events, but were supported by the Scottish Government and intended to complement the PVG consultation events. The CRBS events reached rural communities and delegates were primarily from the voluntary sector.

65. The analysis of the consultation was published in the "*Protection of Vulnerable Groups (Scotland) Act 2007, Scottish Vetting and Barring Scheme, Analysis of consultation on policy proposals for secondary legislation*" on 27 June 2008 and the Scottish Government's response was published in the "*Scottish Government response to the analysis of consultation on policy proposals for secondary legislation*" on 6 October 2008.

66. In June 2009, the Scottish Government hosted a series of eight information events to bring organisations up to speed with implementation activities and provide an opportunity to consider and discuss aspects of the PVG Scheme. The events were attended by around 1300 people from organisations that are registered with Disclosure Scotland, have a regulatory role, or that represent groups and/or organisations that work with vulnerable groups. Although not part of a formal consultation exercise, the opportunity was taken to seek feedback on policy developments around regulated work and the structure of the guidance.

Issues specific to the Miscellaneous Provisions Order

67. The Miscellaneous Provisions Order has not been subject to direct public consultation. This is because the provision is effectively determined by the need to give full effect to the PVG Act and the policy objectives of effective cross border information sharing and appropriate handling of consideration and automatic listing cases by Disclosure Scotland and the ISA. The need for subsequent provision to do this was established during the instruction and Parliamentary passage of the PVG Act and section 87 included for this express purpose. Chapter 6 of the 2007 consultation paper elaborated on the proposals for cross border information sharing and case allocation between jurisdictions and respondents who commented were broadly supportive of the approach outlined.

Financial effects and Regulatory Impact Assessment

68. The *Protection of Vulnerable Groups (Scotland) Act 2007 - Secondary Legislation - Partial Regulatory Impact Assessment (RIA No. 2007/40)* was published on 15 November 2007 to accompany the consultation on secondary legislation. Although comments were invited, no specific comments were made in respect of the RIA. A revised draft RIA (RIA No. 2009/03) was published to accompany the significant draft SSIs published for consultation on 10 November 2009. Responses to the consultation exercise have been taken into account in finalising the RIA. The final RIA (also RIA No. 2009/03) can be found at: www.scotland.gov.uk/pvglegislation.

Scottish Government
Children, Young People and Social Care Directorate