EXECUTIVE NOTE

THE NATIONAL HEALTH SERVICE (GENERAL OPHTHALMIC SERVICES AND GENERAL DENTAL SERVICES) (SCOTLAND) AMENDMENT REGULATIONS 2010

SSI 2010/378

Powers under which Instrument is made

1. The National Health Service (General Ophthalmic Services and General Dental Services) (Scotland) Amendment Regulations 2010 ("the GOS/GDS Amendment Regulations") are made by Scottish Ministers in exercise of powers conferred by sections 25(2), (2A), 26(2), (2A), 105(7) and 108(1) of the National Health Service (Scotland) Act 1978 ("the 1978 Act").

Parliamentary procedure

2. This Scottish Statutory Instrument is a class 5 instrument subject to the negative 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 Protection of Vulnerable Groups (Scotland) Act 2007 ("the 2007 Act"), when it is fully commenced, will provide for a new vetting and barring scheme. This means that

[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.

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 2007 Act. For ease of reference, the Scottish Government is referring to this as the PVG Scheme. The PVG Scheme will ensure 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 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 adults' list").

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 GOS/GDS Amendment Regulations

Access to disclosure records

8. The Protection of Vulnerable Groups (Scotland) Act 2007 (Health Professionals) (Health Service Lists) Regulations 2010 (SSI 2010/191) prescribe the circumstances in which disclosure records under the PVG Scheme can be obtained by Health Boards. Regulation 2 of SSI 2010/191 made provision to allow Health Boards access to disclosure records for the purposes of assessing the suitability of individuals for inclusion on health service lists prepared by virtue of section 17P or for the purposes of Part II of the 1978 Act.

9. Provision for health service lists extends to the following health practitioners:
   (a.) medical practitioners who perform primary medical services under the 1978 Act;
   (b.) dentists;
   (c.) optometrists and ophthalmic medical practitioners; and
   (d.) community pharmacists.

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

10. A person may not provide, or assist with the provision of, family health services (primary medical services, general dental services, general ophthalmic services and pharmaceutical services) in a Health Board unless included on the health service list of the relevant Board.

11. SSI 2010/191 provides a power for Health Boards to access disclosure records but does not oblige them to do so. Furthermore, permissive provision in respect of directors of bodies corporate or partners of partnerships seeking inclusion in any list to continue to receive enhanced disclosures is made in the Police Act 1997 (Criminal Records) (Scotland) Regulations 2010 (SSI 2010/168).

12. The 2007 Act does not impose any legal requirement to undertake any particular form of disclosure check but it does make it a criminal offence to appoint a barred person to do regulated work. So the legal requirement is to ensure that the person is not barred at the time of appointment, normally by being satisfied that the individual is a PVG Scheme member. Note that health practitioners would normally be regarded as doing regulated work but directors of body corporate would not, unless any of the directors was also a health practitioner.

13. The GOS/GDS Amendment Regulations place requirements on Health Boards and ophthalmic medical practitioners, opticians and dentists seeking inclusion on Health Board lists to make appropriate use of the PVG Scheme and disclosure records.

General Ophthalmic Services

14. The National Health Service (General Ophthalmic Services) (Scotland) Regulations 2006 (SSI 2006/135) ("the Ophthalmic Regulations") set out the requirements for ophthalmic medical practitioners ("OMPs") and opticians to provide NHS services and be included on Health Board lists. Opticians include:
    (a.) optometrists; and
    (b.) ophthalmic bodies corporate ("OBCs").

15. The Ophthalmic Regulations were amended by the National Health Service (General Ophthalmic Services) (Scotland) Amendment Regulations 2010 (SSI 2010/86) to make changes to the ophthalmic list application process, amongst other things[3].

Application for inclusion in ophthalmic list

16. Currently, the Ophthalmic Regulations place all opticians and OMPs under a duty to provide enhanced disclosure. The high-level policy requirement is that an applicant OMP or optometrist should be required to:
    (a.) provide the Health Board with proof that they are a PVG Scheme member;
    (b.) provide the Health Board with access to scheme membership and vetting information held by Disclosure Scotland; and
    (c.) remain a PVG Scheme member for the duration of their inclusion on the Health Board ophthalmic list.

[3] For more information about SSI 2006/135 and SSI 2010/86 see the Executive Notes which accompanied them.

17. As regards OBC applicants, the directors or partners of these OBCs remain under a duty to provide enhanced criminal record certificates to Health Boards as part of the application process.

18. Two types of PVG disclosure record may be appropriate: the Scheme Record[4] or Scheme Record Update[5], depending on the circumstances. There are two types of regulated work: regulated work with children and regulated work with adults. An individual can participate in the PVG Scheme in respect of one or both types of regulated work. In the GOS/GDS Amendment Regulations, PVG Scheme participation extends to both types of regulated work (see regulation 2(2)) and this naturally extends to the disclosure records obtained.

19. The appropriate combination of Scheme Record and/or Scheme Record Update depends on the circumstances. There are several permutations so the Ophthalmic Regulations leave it to the Health Boards to determine the appropriate disclosure record(s) required in the circumstances. For example, the applicant OMP or optometrist may or may not already be a PVG Scheme member and may or may not have any new vetting information since their last Scheme Record was disclosed. The PVG Scheme Guidance (see paragraph 7 above) explains how to use the PVG disclosure records to best effect in each circumstance. For example, where the applicant OMP or optometrist has a Scheme Record with no vetting information on it, the Health Board should ask the applicant OMP or optometrist to provide a completed application to obtain a Scheme Record Update from Disclosure Scotland (because it is cheaper). The Health Board does not need to see the extant Scheme Record because the Scheme Record Update will confirm that there is no information on it (as will be the case in over 90% of cases).

20. Unlike the former arrangements where an applicant could provide an existing enhanced disclosure certificate (as long as it was less that 28 days old), there is no provision allowing Health Boards to elect to see a disclosure record which is less than 28 days old instead of making a disclosure request. This is because failure to make a request for a Scheme Record or Scheme Record Update will mean that Disclosure Scotland will not know that the Health Board has an interest in the individual and they will not necessarily be notified of consideration for listing or barring.

21. An individual may be both a partner or director of an OBC and at the same time practise as an OMP or optometrist. In such cases:
    (a.) where an individual who is a partner or director of an OBC applying to join the ophthalmic list of a Health Board also intends to provide or assist with the provision of general ophthalmic services in that area, that individual will be required to join the ophthalmic list of that Health Board and consequently should be treated like any other OMP or optometrist applicant as outlined above.
    (b.) where an individual who is a partner or director of an OBC applying to join the ophthalmic list of a Health Board is not already on the ophthalmic list of that Board nor intends to provide or assist with the provision ophthalmic services in

[4] The Scheme Record (the term used in guidance) is the disclosure of the scheme record under section 52 of the 2007 Act.
[5] The Scheme Record Update (the term used in guidance) is the disclosure of the short scheme record under section 53 of the 2007 Act.

that Board area, the Health Board should require the individual to obtain an enhanced criminal record certificate.

22. To provide for this regulation 2(3) of the GOS/GDS Amendment Regulations amends regulation 7 of the Ophthalmic Regulations to include references to disclosure requests and disclosure records. Regulations 2(8) and (9) of the GOS/GDS Amendment Regulations make corresponding amendments to Parts A and B of Schedule 2 of the Ophthalmic Regulations.

23. An individual OMP or optometrist applicant who is not on a barred list but will not provide the relevant disclosure record(s), nor provide a completed application form to enable the Health Board to obtain the relevant disclosure record(s) as part of the application process, will not have his/her application processed by the Health Board.

S*ubsequent applicants for inclusion on other Health Board ophthalmic lists*

24. Where the applicant OMP or optometrist is an individual who is already named on the ophthalmic list of another Health Board, the Health Board in receipt of the application has the power to accept such individuals onto their ophthalmic lists without further enquiry, see regulations 5(10) and 7(11) of the Ophthalmic Regulations. This means that they may require a disclosure request from the applicant but need not do so. Where a Health Board (HB1) waives its power to require a disclosure request, it should satisfy itself that the individual is a PVG Scheme member by other means, for example through information provided to them by another Health Board (HB2).

25. HB1 will also need to be satisfied that it will be made aware of any disciplinary action taken by HB2 as a result of being notified by Disclosure Scotland that the individual is under consideration for listing or has been barred from one or other or both types of regulated work so that it can take the appropriate action. This is because Health Boards (HB2+) who have not made disclosure requests, but relied on information provided to them by HB1, may not be notified directly by Disclosure Scotland (because their interest may be unknown).

Notification of changes

26. Regulation 2(3)(c) provides for persons on ophthalmic lists to inform the Health Board or Boards on whose ophthalmic lists their names appear within 7 days if the information they have already provided changes. Where relevant, such persons must also provide any accompanying declarations, undertakings, disclosure records etc to the Health Board or, where the person's name appears on the ophthalmic list of more than one Board, to the Board in whose area the person derives most NHS income, copying the information to all other Boards in whose ophthalmic lists the person is included.

Grounds for refusal of application

27. Regulation 2(4) of the GOS/GDS Amendment Regulations amends regulation 8(1) of the Ophthalmic Regulations to extend the grounds for refusal of an application by OMPs or optometrists to include not being a PVG Scheme member or being barred

from regulated work with children or regulated work with adults (as defined by section 92 of the 2007 Act).

Deferment of a decision on application

28. A Scheme Record or Scheme Record Update will identify whether an individual is under consideration for listing. Regulation 2(5) of the GOS/GDS Amendment Regulations amends regulation 9 of the Ophthalmic Regulations to give Health Boards the power to defer an application by an OMP or optometrist on the grounds that he or she is currently under consideration for listing by Disclosure Scotland and it is necessary to do so for the protection of members of the public. This is a power which Health Boards must exercise on a case-by-case basis as an individual is *not* barred from doing regulated work whilst under consideration.

29. The deferment may persist until the consideration for listing comes to an end. Once a determination is made at the end of a consideration case, the individual will either be barred (in which case they will be refused entry to the ophthalmic list under regulation 8 of the Ophthalmic Regulations) or the case will be dismissed, in which case the fact they were under consideration must be disregarded.

Suspension

30. A request for a Scheme Record or Scheme Record Update made by a Health Board results in Disclosure Scotland noting that the Health Board has an interest in that individual. This means that if the individual is later placed under consideration for listing or barred, that Health Board will be notified of this fact.

31. Regulation 2(6) of the GOS/GDS Amendment Regulations amends regulation 11 of the Ophthalmic Regulations to give Health Boards the power to suspend an OMP or optometrist on the grounds that he or she is currently under consideration for listing by Disclosure Scotland and it is necessary to do so for the protection of members of the public or is otherwise in the public interest (see regulation 11(1)). Again, this is a power which Health Boards must exercise on a case-by-case basis as an individual is *not* barred from doing regulated work whilst under consideration.

32. As with deferment, the suspension may persist until the consideration for listing comes to an end.

Removal from ophthalmic list

33. An individual can only leave the PVG Scheme if they are no longer doing regulated work. A request to leave the PVG Scheme will result in confirmation of that being sought from interested parties (which will include any Health Board which had requested a Scheme Record or Scheme Record Update). This means that a Health Board which has previously made a disclosure request can be confident that the individual continues to be a PVG Scheme member.

34. Regulation 2(7) of the GOS/GDS Amendment Regulations amends regulation 12 of the Ophthalmic Regulations so that it is a ground for removal if the individual ceases to be a PVG Scheme member. Regulations 2(8)(c) and (9)(d) amend paragraph 4 in

Parts A and B of Schedule 2 of the Ophthalmic Regulations so that OMPs and optometrist applicants must give an undertaking that they will continue to be a PVG Scheme member throughout their inclusion on the ophthalmic list.

35. OMPs and optometrists whose names are already included on the ophthalmic list at PVG scheme go-live are not be obliged to become members of the PVG Scheme from the outset. They continue, however, to be under a duty to notify the Health Board within 7 days where any of the information already provided to the Health Board, including information in an enhanced criminal record certificate, changes. The Scottish Government is considering what arrangements to make to bring these OMPs and optometrists onto the PVG Scheme as part of the programme of so-called retrospective checking which begins one year after to live and terminates four years after. Once the policy is confirmed, there will be a need for a further set of amendment regulations.

36. Regulation 2(7) of the GOS/GDS Amendment Regulations also amends regulation 12 of the Ophthalmic Regulations so that any individual who becomes barred from either type of regulated work is removed from the ophthalmic list at that point. Once the rollout of the PVG Scheme to OMPs and optometrists who are already included in ophthalmic lists is complete, this provision will be nugatory because barring would automatically terminate the individual's scheme membership, triggering provision at regulation 12(1)(h). But it is important in the four year period of retrospective checking where many OMPs and optometrists will not be PVG Scheme members.

Correction of typographical error

37. Regulation 2(9)(b) of the GOS/GDS Amendment Regulations rectifies a typographical error in regulation 3(11)(a)(viii) of SSI 2010/86 which amended Schedule 2, Part B, paragraph 1 of the Ophthalmic Regulations. This was brought to the Scottish Government's attention by the Subordinate Legislation Committee on 12 March 2010 and the Scottish Government undertook to correct the error later in 2010 when preparing a further set of Amendment Regulations.

Definitions

38. Regulation 2(2) of the GOS/GDS Amendment Regulations amends regulation 2(1) of the Ophthalmic Regulations to include relevant definitions from the 2007 Act relied upon in the above amendments.

General Dental Services

39. The National Health Service (General Dental Services) (Scotland) Regulations 2010 (SSI 2010/208) came into force on 2 July 2010 and provided, for the first time, for the inclusion on health service lists of dental bodies corporate and of dentists who assist with the provision of general dental services. SSI 2010/208 consolidated the National Health Service (General Dental Services) (Scotland) Regulations 1996 (SI 1996/177) and subsequent amending Regulations[6].

[6] For more information, see the Executive Note which accompanied SSI 2010/208.

40. The amendments made by the GOS/GDS Amendment Regulations to SSI 2010/208 mirror those made to the Ophthalmic Regulations (with the exception of the correction of the typographical error described in paragraph 37 above).

Transitional provisions

41. Regulation 4 of the GOS/GDS Amendment Regulations applies to both dental services and ophthalmic services. It requires the Health Board to get PVG disclosure records where it has not received an enhanced disclosure by requiring the applicant to make a disclosure request or to provide an extant disclosure record. If the enhanced disclosure application has not been submitted in time for Disclosure Scotland to receive it prior to PVG Scheme go-live, the Board will have to ask the applicant to provide a PVG disclosure request. Regulation 4 also requires the applicant to provide any existing disclosure record but it is highly unlikely that they would have one unless the Health Board took a long time to consider their application.

Consultation

42. 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.

43. 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.

44. 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.

45. 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 GOS/GDS Amendment Regulations

46. The GOS/GDS Amendment Regulations have not been subject to public consultation. The way the PVG Scheme and disclosure records work has been the subject of extensive consultation and the GOS/GDS Amendment Regulations merely require the Health Boards to follow what would be best practice for any "employer". The BDA and Optometry Scotland have been consulted and understand the need for these amendments to be made.

Financial effects and Regulatory Impact Assessment

47. 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