EXECUTIVE NOTE

THE PROTECTION OF CHILDREN (SCOTLAND) ACT 2003 (THE MEANING OF DISQUALIFIED FROM WORKING WITH CHILDREN: CORRESPONDING DISQUALIFICATIONS IN NORTHERN IRELAND) ORDER 2009 SSI/2009/39

Powers under which Instrument is made

1. Section 17(2) of the Protection of Children (Scotland) Act 2003 ("the 2003 Act"), enables the Scottish Ministers by order to make provision to give effect to corresponding prohibitions and disqualifications in other jurisdictions, within or outside the United Kingdom, and is the power under which the Protection of Children (Scotland) Act 2003 (The Meaning of Disqualified from Working with Children: Corresponding Disqualifications in Northern Ireland) Order 2009 ("the 2009 Order") is made.

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

Current position in Scotland

3. The 2003 Act establishes a list of individuals considered to be unsuitable to work with children in Scotland, together with a procedure for listing and appeals against listing and a list of child care positions in Scotland from which individuals disqualified from working with children are prohibited from working.

4. Section 11 provides a range of offences in relation to persons who are disqualified from working with children. Under section 11(1) it is an offence for a disqualified individual to work, or to seek to work, in child care position. Furthermore, it is an offence (under section 11(3)(a)) for an organisation to offer work in a child care position to such an individual. However, as currently in force, it is not an offence for an organisation to fail to remove a disqualified individual who is already in their workforce (as section 11(3)(b) has not been commenced). Therefore, to be sure of complying with the 2003 Act, an organisation should seek an enhanced disclosure when appointing an individual to a child care position but it is not strictly necessary for these purposes to undertake checks of workers already in post.

5. Section 17(1) defines "disqualified from working with children" as meaning those persons listed in the list of those considered unsuitable to work with children kept under section 1 of the 2003 Act, as well as persons included in other lists in England and Wales or subject to a court disqualification in England and Wales.

6. Section 17(2) provides an order-making power to recognise other prohibitions or disqualifications which the Scottish Ministers considered correspond to the disqualification as set out in section 17(1).

7. The Protection of Children and Vulnerable Adults (Northern Ireland) Order 2003 (SI 2003/417) ("the POCVA Order") also establishes lists of individuals considered unsuitable to work with children and vulnerable adults in Northern Ireland and provides that listed persons are disqualified from working with children in Northern Ireland. However, no reference is made in section 17(1) of the 2003 Act to the children's list established by the POCVA Order or the disqualification from working with children under that Order, nor has any order been made under section 17(2) prior to the 2009 Order. This means that individuals included on the POCVA children's list and so disqualified from working with children in Northern Ireland are not currently prohibited from working with children in Scotland. However, any such inclusion would be revealed through an enhanced disclosure to work in a child care position and it would be expected that the Scottish employer would deny employment to such a person.

Changes made by the 2009 Order

8. The 2009 Order will provide, for the first time, that the disqualification from working with children under the POCVA Order will be recognised in Scots law so that individuals disqualified under that Order are also prohibited from working in a child care position in Scotland in the same way as individuals listed under the 2003 Act (see paragraphs 3 and 4). This order closes a gap in protection which has persisted since the 2003 Act and POCVA Order came into force. The 2009 Order comes into force on 1 April 2009. This is to allow sufficient time to publicise this change in the law and give any affected individuals time to make any necessary changes to their work.

Future-proofing against imminent changes in Northern Ireland

9. The Scottish Government, UK Government and Northern Ireland Executive are working towards establishing more coherent arrangements for vetting and barring across the UK. The legislative underpinning for these arrangements is provided by the Protection of Vulnerable Groups (Scotland) Act 2007 ("the PVG Act") for Scotland, the Safeguarding Vulnerable Groups Act 2006 ("the SVG Act") for England and Wales (and, to a limited extent, Northern Ireland) and the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007 ("the SVG NI Order") for Northern Ireland.

10. The SVG Act establishes the Independent Barring Board ("the IBB") (aka Independent Safeguarding Authority) to which the responsibility for making decisions to bar individuals from working with children or vulnerable adults in England, Wales and Northern Ireland is being transferred from the Secretary of State in a phased transition. The IBB assumed responsibility for barring decisions for England and Wales on 20 January 2009 and will take responsibility for barring decisions in Northern Ireland on 13 March 2009. From that date, individuals so barred will be added to the barred lists established by the SVG NI Order under arrangements made by the Safeguarding Vulnerable Groups (Transitory Provisions) Order (Northern Ireland) 2009[1].

[1]Made on 6 February 2009.

11. The Safeguarding Vulnerable Groups (Transitory Provisions) Order (Northern Ireland) 2009 makes provision for such individuals to continue to be disqualified from working with children by virtue of article 30 of the POCVA Order. This means that they will be affected in the same way by the 2009 Order as individuals included on the POCVA children's list prior to 13 March 2009.

Consultation

12. The PVG Act (section 92) establishes the principle that an individual found to be unsuitable to work with vulnerable groups in one part of the UK should be barred from such work in Scotland and makes explicit provision to recognise the POCVA lists. The 2009 Order has not been the subject of public consultation because it is a necessary step to improve protection of children in Scotland and consistent with the mutual recognition of barring principle established in the PVG Act, which will be fully implemented when that Act is substantively commenced.

Financial effects and Regulatory Impact Assessment

13. The 2009 Order has no financial implications for the Scottish Government as Disclosure Scotland will continue to disclose information about barring in Northern Ireland as now. Given the relatively small number of individuals currently included on the POCVA children's list, the fact that this would be revealed by an enhanced disclosure now and the fact that most such individuals are likely to be resident in Northern Ireland rather than Scotland, it is most likely that no individuals or organisations will be directly affected. As explained at paragraph 4, there is no requirement on organisations to check to see whether any of their existing workforce are now barred from working in a child care position in Scotland as a result of the 2009 Order. Therefore, no Regulatory Impact Assessment has been prepared for this instrument.

Scottish Government
Children, Young People and Social Care Directorate

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