EXPLANATORY MEMORANDUM TO

THE PROTECTION OF VULNERABLE GROUPS (SCOTLAND) ACT 2007 (CONSEQUENTIAL PROVISIONS) ORDER 2010

2010 No. 2660

1. Introduction

1.1 This Explanatory Memorandum has been prepared by the Scotland Office and is laid before Parliament by Command of Her Majesty.

1.2 This Explanatory Memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the Instrument

2.1 The Protection of Vulnerable Groups (Scotland) Act 2007 ("the 2007 Act") will provide for a new vetting and barring scheme for Scotland, when fully commenced – this is referred to as the PVG Scheme and Scottish Ministers have announced that it will be commenced on 30 November 2010. The primary purpose of the Order is to place duties on non-Scottish bodies to provide information to Scottish Ministers for the purposes of their functions under the 2007 Act. It also places duties on Scottish bodies to provide information to the Independent Safeguarding Authority[1] ("the ISA") and makes other miscellaneous provisions.

3. Matters of Special Interest to the Joint Committee on Statutory Instruments

3.1 This Order is to be made in exercise of the powers conferred by Section 104 of the Scotland Act 1998 ("the 1998 Act"). The Order is subject to negative resolution procedure in the UK Parliament. Section 104 of the 1998 Act provides that subordinate legislation may make such provision as the person making it considers to be necessary or expedient in consequence of any Act of the Scottish Parliament; in this case the 2007 Act.

3.2 This Section 104 Order is necessary and expedient in consequence of the 2007 Act.

4. Legislative Context

4.1 This Instrument is being made at the request of the Scottish Executive to enable the implementation of the PVG Scheme in Scotland. 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.

[1] The Independent Safeguarding Authority is the body responsible for maintaining the children's barred lists and the adult's barred lists under the Safeguarding Vulnerable Groups Act 2006 for England and Wales and the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007 for Northern Ireland.

4.2 The Protection of Vulnerable Groups (Scotland) Act 2007 (Consequential Modifications) Order 2010 ("the Consequential Modifications Order"), which was laid on 14 October 2010 and is subject to affirmative resolution procedure in the UK Parliament, also makes provision which is necessary for the implementation of the PVG Scheme. Corresponding devolved provision is made in the Protection of Vulnerable Groups (Scotland) Act 2007 (Miscellaneous Provisions) Order 2010 ("the Miscellaneous Provisions Order") laid before the Scottish Parliament.

5. Territorial Extent and Application

5.1 This Instrument extends to the United Kingdom.

5.2 Articles 3 to 5 and 17 of the Order replicates the effects of provisions in the Police Act 1997 ("the 1997 Act") for PVG Act purposes. Articles 6 to 10 of the Order replicates the effects of provisions in the Safeguarding Vulnerable Groups Act 2006 ("the SVG Act") for PVG Act purposes. Similarly, Articles 11 to 16 of the Order replicate the effect of provisions in the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007 ("the SVG NI Order") for PVG Act purposes. Articles 18 to 20 of the Order replicate the effects of provisions at Sections 18 to 20 of the PVG Act for the benefit of the ISA.

6. European Convention on Human Rights

6.1 As the Order is subject to negative resolution procedure, and does not amend primary legislation, no statement is required.

7. Policy Background

The Protection of Vulnerable Groups (Scotland) Act 2007

7.1 Under Part 5 of the 1997 Act, 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.

7.2 The introduction of the PVG Scheme 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. In addition, Scottish Ministers will maintain lists of individuals who are considered to be unsuitable to work with children or adults. For more information about how the PVG Scheme will work, please refer to the guidance[2].

[2] *Protecting Vulnerable Groups Scheme: Guidance for Individuals, Organisations and Personal Employers*, The Scottish Executive, June 2010, published on the Disclosure Scotland website which can be accessed through: www.infoscotland.com/pvgscheme.

7.3 The provisions in this Instrument are required for the commencement of the PVG Scheme on 30 November 2010.

Provision of Police Information to Scottish Ministers

7.4 In order to make the PVG Scheme fully effective, the UK Government proposes, following a request by Scottish Ministers, to place duties on the same police forces and law enforcement agencies, to provide information to the Scottish Ministers for PVG Scheme purposes, as are found in the 1997 Act for enhanced disclosures. Duties on Scottish police forces and the Scottish Crime and Drug Enforcement Agency ("the SCDEA") are devolved and provision is made for them in the PVG Act or Miscellaneous Provisions Order. Articles 3 to 5 of the Order place duties on the remaining bodies, in a similar manner as in the 1997 Act. Information about convictions, cautions and other relevant information is required for consideration cases for the purposes of determining whether or not to list the individual. It is also required for PVG Scheme members for disclosure purposes.

Provision of Information from English and Welsh Bodies to Scottish Ministers

7.5 Articles 6 to 10 of the Order place duties on English and Welsh regulated activity providers, local authorities, keepers of registers, supervisory authorities, to provide information to Disclosure Scotland to assist them with consideration for listing cases and cases where it is considering applications for removal from the lists.

7.6 An important policy principle agreed between the UK Government and Scottish Executive is that neither jurisdiction will place more onerous duties on the other jurisdictions' bodies than is required for its own scheme[3]. That is why the duties on English and Welsh bodies to provide information to Scottish Ministers mirror provisions in the SVG Act, not the corresponding provisions and Sections 19 and 20 of the PVG Act.

Provision of Information from the ISA in respect of Northern Ireland Cases

7.7 Article 11 of the Order makes provision corresponding to that at Article 2 of the Consequential Modifications Order for information from the ISA in respect of English and Welsh cases (which requires amendment to the SVG Act itself). Article 11, and Article 2 of the Consequential Modifications Order, allows the ISA to provide information to Scottish Ministers, either at its own instigation or on request. These powers supplement the duty to notify 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.

[3] Implementation of the UK Vetting and Barring Scheme for England, Wales and Northern Ireland is currently halted pending the outcome of a review, Terms of Reference for which were announced by the UK Government on 22 October in a Written Ministerial Statement to the House of Commons by Secretary of State for the Home Department on the Vetting and Barring Scheme Remodelling. The way the Schemes interact may be impacted by the outcome of the review and the provisions that this Order makes will be kept under review in this context.

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).

Provision of Information from Northern Ireland Bodies to Scottish Ministers

7.8 Articles 12 to 16 of the Order makes provisions for Northern Ireland mirroring provisions made at Articles 6 to 10 of the Order for England and Wales.

Provision of Information to Verify Identity

7.9 Article 17 of the Order gives the Secretary of State the power to provide information to assist Disclosure Scotland in verifying the identity of an applicant to join the PVG Scheme. This provision is designed to replicate the effect of similar provision in the 1997 Act which will still be used for basic, standard and residual enhanced disclosures processed by Disclosure Scotland. It is important for every type of disclosure that Disclosure Scotland confirms: (a) that identity information provided with the application relates to a real person; and (b) that the applicant is that person.

Information Provision to Assist ISA Consideration Cases

7.10 Sometimes, the ISA will be considering a case for which information from Scottish police forces, public bodies, employers or voluntary organisations might be important in determining the outcome. For example, an English employer may make a referral to the ISA and, on further investigation, it transpires that the individual had worked in Scotland prior to the incident leading to the referral and a Scottish organisation may have information about the individual's conduct which would assist the ISA in their case consideration.

7.11 Article 18 of the Order places a duty on Scottish police forces and the SCDEA to provide information to the ISA to assist with SVG consideration cases on the same basis as they are under a duty to provide information to Disclosure Scotland to assist with PVG consideration cases under section 18 of the PVG Act. Article 19 of the Order places a duty on Scottish public bodies to provide information to the ISA to assist with SVG consideration cases on the same basis as they are under a duty to provide information to Disclosure Scotland to assist with PVG consideration cases under Section 19 of the PVG Act. Article 20 of the Order places a duty on Scottish regulated work providers to provide information to the ISA to assist with SVG consideration cases on the same basis as they are under a duty to provide information to Disclosure Scotland to assist with PVG consideration cases under Section 20 of the PVG Act. The provisions at articles 18 to 20 is framed in the same manner as in the PVG Act and confers functions on the ISA.

7.12 Articles 14 and 15 of the Miscellaneous Provisions Order make corresponding provisions, giving Scottish Ministers the power to provide information to the ISA to assist with SVG consideration cases and applications for removal.

Disclosures for Registration and Licensing of Driving Instructors

7.13 With the commencement of the PVG Scheme in Scotland, the Driving Standards Agency ("DSA") will not be able to obtain Enhanced Criminal Record Certificates for driving instructors in Scotland, whom it regulates under Part Five of the Road Traffic Act 1988. Article 22 of the Order makes provision for the DSA to access PVG disclosure records for the purposes of the licensing and registration of driving instructors in Scotland.

Disclosures for Registration with the General Pharmaceutical Council

7.14 Article 23 of the Order makes provision for the General Pharmaceutical Council ("GPC") to have access to PVG disclosure records for the purposes of considering an individual's suitability to be entered as a pharmacist or a pharmacy technician in Part 1 or 2 of the register established and maintained by the GPC under Article 19 of the Pharmacy Order 2010 (SI 2010/231) ("the register"). Article 24 of the Order amends the General Pharmaceutical Council (Registration) Rules 2010 (which are scheduled to SI 2010/1617) so that the GPC can require applicants for entry to Part 1 or 2 of the register to provide the appropriate disclosure record in support of their application to the registrar appointed by the GPC.

8. Consultation Outcome

8.1 A Scottish Executive policy consultation took place between November 2007 and February 2008 on the policy objectives of the vetting and barring scheme for Scotland. The Scottish Executive received 199 responses to the consultation. 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. In June 2009, the Scottish Executive hosted a series of eight information events around Scotland to bring organisations up to speed with implementation activities and these were attended by around 1300 people. The Scottish Executive received 108 responses to its subsequent consultation in 2009/2010 on significant draft secondary legislation, draft guidance and the draft Regulatory Impact Assessment.

8.2 This Order has not been the subject of a separate consultation exercise; Orders taken forward under the 1998 Act are not usually consulted on as the terms of the Order have previously been the subject of a separate consultation exercise. Further consultation on this Order is not necessary, given that this Order deals with provisions concerning the implementation of the PVG Act, which the Scottish Executive has previously consulted on.

8.3 There has been no public consultation on the particular provisions of this Instrument. 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. Chapter 6 of the 2007 consultation paper elaborated on the proposals for cross-border information sharing and respondents who commented were broadly supportive of the approach outlined.

9. Guidance

9.1 No specific guidance has been prepared relating to this Instrument. However, the Scottish Executive has published guidance[4] on the operation of the PVG Scheme, together with training materials, on the Disclosure Scotland website which can be accessed through: www.infoscotland.com/pvgscheme.

10. Impact

10.1 The Scottish Executive published *The Protection of Vulnerable Groups (Scotland) Act 2007 - Secondary Legislation - Partial Regulatory Impact Assessment (RIA No. 2007/40)* 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 Scottish Statutory Instruments published for consultation on 10 November 2009. Responses to the consultation exercise have been taken into account in finalising the RIA. The Scottish Executive's final RIA (also RIA No. 2009/03) can be found at: www.scotland.gov.uk/pvglegislation. A separate Regulatory Impact Assessment has not been prepared for this Instrument.

11. Regulating Small Business

11.1 Articles 6, 7, 12, 13 and 20 of the Order, in particular, apply to small business to the extent that, as employers, they employ individuals to do regulated work or activity and may be required to provide information to the ISA or Disclosure Scotland. However, these Articles merely extend the effect of existing obligations on small business to ensure that they provide information in support of a case, wherever that case is considered.

12. Monitoring and Review

12.1 Paragraphs 153 to 160 of the published Impact Assessment on the Vetting and Barring Scheme[5] ("VBS") contain details of monitoring and review of the VBS as a whole. The ISA will produce statutory annual reports, and any additional reports that the Home Secretary may direct, on any aspect of the exercise of its functions. The ISA's latest annual report, laid before the UK Parliament in July 2010, can be found at:
www.isa.homeoffice.gov.uk/default.aspx?page=428.

12.2 The Regulatory Impact Assessment of the PVG Act Scheme indicates that post-implementation review (paragraphs 104 to 106) could include:

[4] *Protecting Vulnerable Groups Scheme: Guidance for Individuals, Organisations and Personal Employers*, The Scottish Executive, June 2010.
[5] The VBS Impact Assessment may be found at:
www.dfes.gov.uk/ria/index.cfm?action=assessments.view&i_assessmentID=73

- Time taken to process applications for Scheme membership and Scheme disclosures;
- Volume and nature of complaints received by Disclosure Scotland and appeals against listing decisions;
- Outcome-based indicators to be developed to complement the above, e.g. stakeholder satisfaction (ease of use, fairness, accessibility); and
- An important longer-term indicator to measure the anticipated reduction in harm to vulnerable groups by those who work with them.

13. Contact

13.1 Jennifer Manton at the Scotland Office:
Email: jennifer.manton@scotlandoffice.gsi.gov.uk, can answer any queries regarding the Instrument.