EXECUTIVE NOTE

THE PROTECTION OF VULNERABLE GROUPS (SCOTLAND) ACT 2007 (POWER TO REFER) (INFORMATION HELD BY PUBLIC BODIES ETC.) ORDER 2010

SSI 2010/380

Powers under which Instrument is made

1. The Protection of Vulnerable Groups (Scotland) Act 2007 (Power to Refer) (Information Held by Public Bodies etc.) Order 2010 ("the Referral and Information Order") are made by Scottish Ministers in exercise of powers conferred by sections 8(2) and 3(d) and 19(3) of the Protection of Vulnerable Groups (Scotland) Act 2007 ("the 2007 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 2007 Act, when it is 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

[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.

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 2007 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 Referral and Information Order

Information from the Scottish Court Service

8. From go-live, the courts will provide information about *contemporary* convictions which will, in most cases, trigger a consideration case. Section 7(1) requires that, where a court convicts an individual of a relevant offence (as set out in schedule 1 to the 2007 Act[3]), the court must give the Scottish Ministers any prescribed information that it holds in relation to the convicted individual. Sections 7(2) and (3) give the courts a power to refer an individual for consideration for listing where that individual commits any offence other than a relevant offence. Section 7 of the 2007 Act allows the Scottish Ministers to prescribe by regulations the information which should be included in such court referrals and this has been done in the Protection of Vulnerable Groups (Scotland) Act 2007 (Referrals by Courts) (Prescribed Information) Regulations 2010 (SSI 2010/182). The prescribed information to be provided by the court will be used for the purposes of consideration for listing by the Scottish Ministers.

[2] *Protecting Vulnerable Groups Scheme: Guidance for Individuals, Organisations and Personal Employers*, The Scottish Government, June 2010.
[3] Schedule 1 has been modified by the Protection of Vulnerable Groups (Scotland) Act 2007 (Relevant Offences) (Modification) Order 2010 (SSI 2010/ 246).

9. However, there will be instances where an individual is placed under consideration for listing on the basis of a *historic* conviction. This is most likely to occur when an individual with conviction(s) relevant to working with vulnerable groups applies to join the PVG Scheme. The fact of the conviction will be picked up from the Criminal History System ("CHS"), held by the Scottish Police Services Authority and accessed by Disclosure Scotland, but the record on CHS may not contain sufficient information to allow the consideration case to be concluded.

10. Section 19 of the 2007 Act gives the Scottish Ministers the power to obtain information from public bodies when deciding whether to list an individual. For example, a referral about a doctor from a Health Board might cause the Scottish Ministers to require further information from the General Medical Council. Section 19(3) gives the Scottish Ministers power to specify additional public bodies who may be required to provide information on request from the Scottish Ministers. Article 2 of the Referral and Information Order specifies the Scottish Court Service as such a person. This will facilitate the retrieval of information about historic convictions from the Scottish Court Service by the Scottish Ministers in order to assist in determining whether to list an individual.

11. Not all information held by the Scottish Court Service will be relevant or useful to the Scottish Ministers in a consideration case. The type of information and records which the Scottish Ministers may require will be set out in a memorandum of understanding between Disclosure Scotland and the Scottish Court Service, together with the charges for the reproduction of the same. The information is likely to include, for example, a copy of the complaint or indictment to show the details of the charge not available on CHS. But the information needed in respect of historic convictions is unlikely to be exactly the same as the information for contemporary convictions prescribed in SSI 2010/182.

Provision for the NHS Tribunal

12. Section 8 of the 2007 Act provides the power for certain other persons to make referrals to the Scottish Ministers in order that the individual might be considered for listing. These persons are specified at section 8(2) and include the General Teaching Council for Scotland, the Scottish Social Services Council and the Scottish Commission for the Regulation of Care as well as eight health professional regulatory bodies. Section 8(2) provides a power for the Scottish Ministers to prescribe additional persons to have the power to make referrals. Article 2 of the Protection of Vulnerable Groups (Scotland) Act 2007 (Power to Refer) (Information Relevant to Listing Decisions) Order 2010 (SSI 2010/178) prescribed the NHS Tribunal[4] as such a person.

13. The Subordinate Legislation Committee ("the SLC") considered SSI 2010/178 at its meeting of 25 May 2010[5] and found the drafting to be defective in the respect that it did not specify "relevant functions" of the NHS Tribunal, as required by section

[4] The NHS Tribunal is established by the National Health Service (Scotland) Act 1978 and is governed by the National Health Service (Tribunal) (Scotland) Regulations 2004 (SSI 2004/38, since amended). It is the ultimate disciplinary body to which family health service practitioners may be referred. For more information, see the Executive Note accompanying SSI 2010/178.

[5] 17th Meeting, 2010 (Session 3).

8(3)(d) of the 2007 Act. It was the intention of the Scottish Government that all the functions of the NHS Tribunal as constituted in accordance with schedule 8 of the National Health Service (Scotland) Act 1978 would be "relevant functions" in terms of section 8(1)(a) of the 2007 Act. When this was challenged by the SLC, the Scottish Government accepted that this should have been specified explicitly in instrument and undertook to bring forward an amendment order to make this explicit before SSI 2010/178 came into force. Article 3 of the Referral and Information Order amends SSI 2010/178 accordingly.

Consultation

14. 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.

15. 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.

16. 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.

17. 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 Referral and Information Order

18. The Referral and Information Order has not been subject to public consultation. The amendment to SSI 2010/178 is necessary to make the instrument effective. Provision for the Scottish Court Service has been made with the agreement of the Scottish Court Service and is necessary to enable the retrieval of information about historic

convictions from the Scottish Court Service by the Scottish Ministers in order to assist them in determining whether to list an individual.

Financial effects and Regulatory Impact Assessment

19. 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
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