

Guidance on making referrals to Disclosure Scotland

Introduction

- 1 This document provides guidance on our power to refer information to Disclosure Scotland (DS) when certain referral grounds are met. The guidance explains the relevant legislative framework and the practical steps to be followed. This is a living document which may be revised periodically.
- 2 The power to refer information to DS applies in cases where the incident took place in Scotland, or where the doctor's registered address is in Scotland (see paragraph 17 below).
- 3 A separate scheme has been established in England, Wales and Northern Ireland and this is known as the Vetting and Barring Scheme, under which referrals are made to the Disclosure and Barring Service (DBS). Separate guidance covers referrals to the DBS.

The Protection of Vulnerable Groups (Scotland) Act 2007

- 4 The Protection of Vulnerable Groups (Scotland) Act 2007 ('PVG Act') established the Protecting Vulnerable Groups Scheme ('PVG Scheme'), following the recommendations made by the Bichard Inquiry. The primary objective of the PVG Scheme is to help ensure that those who have regular contact with children and protected adults, through paid or unpaid work, do not have a history of harmful behaviour.
- 5 The PVG Scheme is administered by DS on behalf of Scottish ministers. The scheme commenced on 28 February 2011 with the purpose of issuing disclosures to those carrying out (or seeking) 'regulated work'^{*}, their employers and prospective employers, and certain regulatory bodies. In broad terms, the provision of healthcare to children or protected adults is deemed to be "regulated work" under the PVG Scheme. After scheme membership commences, DS actively monitors an individual's criminal record to ensure there is no new information which might adversely affect their assessment of whether it is appropriate for that individual to work with protected adults or children.

^{*} As defined in Schedule 2 (Regulated work with children) and Schedule 3 (Regulated work with adults) of the PVG Act

- 6 DS also receives referrals from employers, regulatory bodies and other organisations specified in the PVG Act. Based on that information it will make decisions on whether to bar (prevent) individuals from working with children and/or protected adults.
- 7 Section 8 of the PVG Act enables us to refer information to DS when certain referral grounds are met.
- 8 Section 19 of the PVG Act requires us to provide DS with information when they request it from us.
- 9 Unlike the DBS, the referral grounds in the PVG Scheme are based solely on past conduct (although there is no equivalent to the autobar provisions). The PVG Scheme does not contain an equivalent to the prospective *harm test* applied by the DBS, and therefore there is no scope for decision makers to consider cases and assess whether there is a risk of safeguarding concerns materialising in the future. To make a referral under the Act, we must believe that a ground of referral specified in s.2 of the PVG legislation is met, as summarised at paragraph 21 of this guidance.
- 10 The Scottish government recommends that people doing regulated work in Scotland become members of the PVG Scheme, although it is not mandatory to do so. It is an offence to offer regulated work to an individual who is barred from that work. It is intended that the employer check the status of potential employees by obtaining a PVG disclosure. It is an offence for an individual to do (or seek or agree to do) regulated work from which they are barred.

Application of the PVG Act to the medical profession

- 11 We have a power under s.8 of the PVG Act to refer individuals to Scottish ministers if, in the exercise of our relevant functions, we consider that a referral ground specified in s.2 of the PVG Act is met. However, if we are aware that an employer, employment agency or employment business has referred the same conduct, this power does not apply.
- 12 Similar to the DBS, regulated work in relation to children and protected adults under the PVG Scheme includes the provision of public and private healthcare services.
- 13 A protected adult is an individual, aged 16 or over, who is provided with a prescribed service, which includes health services provided by an NHS body or independent clinic or hospital. This means that all doctors who work with patients (children or adults) in independent or NHS healthcare services will be carrying out regulated work under the legislation as they are providing vulnerable groups with prescribed services. This means that we can use our power under s.8 to refer information to DS about doctors when we consider that the grounds for referral are met.

When will we consider referring a doctor to DS?

- 14 This section of the guidance deals with whether or not DS is the appropriate body for the information to be passed to (we have provided policy guidance later in this document to assist with the decision as to whether the nature of the alleged conduct makes a referral necessary.)

- 15** A scheme which is similar to the PVG Scheme has been commenced in England, Wales and Northern Ireland. This scheme is established under separate legislation and will require a separate process for making referrals to the DBS, the body responsible for making barring decisions in England, Wales and Northern Ireland. Separate guidance has been issued covering our referral discretion in relation to the DBS scheme.
- 16** If a doctor is barred under the Scottish PVG Scheme, he/she will be barred for the same group(s) in England, Wales and Northern Ireland, and vice versa. This means that, despite there being two separate schemes to cover all four jurisdictions, we will not need to make dual referrals to the DBS and DS.
- 17** In deciding to assess whether a referral should be made to DS or the DBS, decision makers will apply the criteria below:
- a** The most important factor to consider is where the conduct took place. If the alleged conduct took place in Scotland, assess whether a referral should be made to DS. If the alleged conduct happened in England, Wales or Northern Ireland, assess whether a referral should be made to the DBS.
 - b** If the conduct occurred outside of the UK, we will look at the doctor's registered address at the time of assessing the case. If it is in Scotland, assess whether a referral should be made to DS. If it is in England, Wales or Northern Ireland, assess whether a referral should be made to the DBS.
- 18** DS and the DBS have an agreement that facilitates their joint working in cases where jurisdiction is unclear.

Determining whether it is appropriate to make a referral

- 19** It will only be appropriate to refer a doctor under the PVG Act if each of the following are satisfied:
- a** The doctor meets at least one of the criteria at paragraph 17(a)-(b) above.
 - b** The doctor and the conduct in question meet the test for a referral.
 - c** We are not aware that the same conduct has already been referred by an employer, employment body or employment agency, although this will be rare. We will contact DS directly by e-mail to establish whether they are already aware of the same issues and are considering whether to bar the doctor.
- 20** A prerequisite for making a referral is that the individual must:
- be doing regulated work or
 - have been doing regulated work or
 - have been offered or supplied for regulated work.

The definition of “regulated work” in the legislation is very lengthy^{*}. In brief, however, it is work with children or protected adults, which includes the provision of healthcare to those groups. A protected adult is defined as an individual over the age of 16 and a child is any individual under 16.

21 If the prerequisite at paragraph 20 above is satisfied, then, it is necessary to assess whether (during the course of that work or otherwise) the individual has met one of the five referral grounds set out in s.2 of the PVG Act by:

- causing harm* to a child or protected adult
- placing a child or protected adult at risk of harm
- engaging in inappropriate conduct involving pornography
- engaging in inappropriate conduct of a sexual nature involving a child or protected adult
- giving inappropriate medical treatment to a child or protected adult.

* See paragraph 25 below on *harm*.

^{*} As defined in Schedule 2 (Regulated work with children) and Schedule 3 (Regulated work with adults) of the PVG Act

Distinguishing between material safeguarding concerns and professional competence concerns

- 22** We will only use our power to refer when we consider that concerns amount to more than concerns about professional competence that could be addressed by restricting or removing a doctor's registration in the UK.
- 23** The purpose of the scheme is to identify those individuals with a real capacity to cause harm to vulnerable groups. We must therefore consider whether the doctor has done something (by way of act or omission) to raise *safeguarding* concerns. For example, a doctor's behaviour can raise safeguarding concerns if he or she:
- a** through gross carelessness or negligence causes a patient to be harmed or exposed to a risk of harm
 - b** has developed inappropriate relationships with patients that could credibly give rise to harm or risk of harm
 - c** has engaged in inappropriate conduct with patients that calls into question whether the risk of harm would extend beyond their role as a doctor and into any other area where they might be doing regulated work, for instance helping at a volunteer group with children or disabled adults
 - d** has demonstrated a sexual interest in children or other sexual exploitation of persons who are vulnerable
 - e** has behaved in a violent way towards children or protected adults.
- 24** Whilst in some cases more than one of these features may be present, it is only necessary for one of the five referral grounds specified in s.2 of the PVG Act to be met for the referral to be appropriate.
- 25** *Harm* is not defined in the PVG Act. However, referrals must be based on evidence to support a real concern that an individual has either harmed protected adults or children or placed them at risk of harm. This means that the harm the individual caused or placed people at risk of must amount to a significant risk of physical, psychological or emotional injury. Unlawful conduct such as theft, fraud, embezzlement or extortion can also be considered as harm. Similarly, inappropriate conduct must be of such a type that a reasonable person would consider that it was severe enough to justify consideration of whether or not the person is suitable to work with protected adults and children. Inappropriate conduct need not involve awareness of harm – a doctor who, for his own sexual gratification, covertly films other people who did not know he was doing so has engaged in inappropriate conduct even if the people filmed never become aware of the filming.
- 26** The individual's conduct need not be intentional in causing harm. If the conduct is reckless or careless to such an extent that harm could result, then that conduct is likely to be appropriate to refer.

- 27 The material issue when assessing whether this referral ground is met, is determining whether a doctor's action or omission has harmed, or caused risk of harm, to a child or protected adult. There must be a direct link with a child or protected adult for the referral ground to be met.
- 28 For example, someone who has taken inappropriate pictures of children on a beach would meet the grounds for referral if the individual was doing regulated work with children or protected adults. However, if a doctor has behaved in a sexually inappropriate fashion towards a person who is neither a child nor a protected adult, the referral ground is not met.

Inappropriate conduct involving pornography

- 29 The legislation provides that the referral grounds can be met if a doctor engages in inappropriate conduct involving pornography. In this part of the second referral ground there does not need to be a direct link to children or protected adults eg a doctor accessing pornography whilst at work and in the presence of colleagues could be said to be engaging in inappropriate conduct involving pornography. We must simply make a subjective judgement about whether a doctor has engaged in inappropriate conduct which involves pornography.
- 30 Decision makers should note that this referral ground (s.2 of the PVG Act) does not solely address convictions in relation to taking, possessing, distributing, showing or publishing indecent images of children. We may also consider that a doctor's conduct is inappropriate conduct involving pornography in cases where the conduct does not lead to a criminal sanction (including where the Crown case fails, or where the doctor's conduct is inappropriate, but not illegal).
- 31 For example, in the scenario at paragraph 29 above where a doctor accesses pornography at work and in the presence of colleagues, if the material they are viewing is mainstream adult pornography, the fact that no criminal offence has occurred is immaterial. A referral *could* still be made if the conduct is considered inappropriate. If, however, a doctor accesses mainstream adult pornography in a private setting, the conduct is unlikely to be regarded as inappropriate.
- 32 A referral to DS may also be appropriate where a doctor's conduct involves any extreme, sexually explicit images (however produced and whether real or imaginary) depicting violence against human beings (including possession of such material). Such conduct is likely to meet this part of the referral ground regardless of the setting. Similarly if a doctor allows or forces a child to view pornography, whatever the setting, he/she will be engaging in inappropriate conduct involving pornography and the referral ground will be met.
- 33 If a doctor is convicted of a criminal offence which involves pornography, it is likely that the Court Service will have made a referral in relation to the doctor (see paragraphs 46-48 below).

Inappropriate sexual conduct

- 34 This referral ground requires us to consider whether the doctor has engaged in inappropriate conduct of a sexual nature involving a child or protected adult.

- 35** There are a number of scenarios which could result in a doctor being engaged in 'inappropriate conduct of a sexual nature' involving children and/or protected adults. For example, if a doctor undertook an inappropriate examination of a patient that was not clinically indicated, or where a doctor enters a relationship of a sexual nature with a patient.
- 36** Inappropriate conduct of a sexual nature might also include inappropriate touching; coercion to participate in sexually motivated behaviour (for example text messaging, phone calls, inappropriate sexual remarks) as well as any form of sexual activity that involves a child under the age of 16 or a protected adult.
- 37** Decision makers should note that this part of the referral ground may also be met where a doctor is convicted of, or cautioned in relation to a criminal offence, such as rape or sexual assault, or some other criminal offence of a sexual nature.
- 38** We should make a referral to DS when we know an individual has been convicted of an offence that we consider satisfies this ground of referral under the PVG Act. It is possible that even though a doctor is doing regulated work in Scotland they may not be PVG Scheme members and therefore not subject to ongoing monitoring of their criminal records.
- 39** In all of these cases, before considering making a referral to DS the decision maker will also need to consider whether the referral trigger point has been met i.e. either the doctor has been erased by a Medical Practitioners Tribunal (MPT) or the case falls under one of the categories at paragraphs 52-54 below). If a referral is made it is a requirement that we submit with it all of the *prescribed information* that we hold. This is set out in the [PVG Prescribed Information Regulations](#)^{*}, but the DS [referral form](#) provides a helpful guideline as to what to send.

Inappropriate medical treatment

- 40** The legislation gives us a power to make referrals to DS where a doctor has caused harm through providing inappropriate medical treatment. However, this ground is likely to be used only on an exceptional basis, as the Scottish government has advised us that they only wish to receive referrals where the actual harm or risk of harm caused by a doctor's act or omission is over and above harm caused by matters related purely to professional competence.
- 41** For example, if a doctor caused harm to a patient solely through poor surgical skills, we would not need to consider making a referral to DS (even if a referral trigger point is met) as the matter relates to the doctor's competence and it can be managed through our fitness to practise process.

* The Protection of Vulnerable Groups (Scotland) Act 2007 (Referrals by Organisations and Other Bodies) (Prescribed Information) Regulations 2010

42 From time to time cases arise in which, *in addition to the clinical issue*, there is evidence of some kind of intention to cause harm or recklessness as to the possibility of a child or protected adult being harmed. In these cases it is more likely that inappropriate medical treatment (for the purposes of the PVG Act) has been the vehicle for causing harm or risk of harm to children and/or protected adults. In these circumstances, it appears that the issue goes beyond the individual's medical practice and therefore regulatory sanctions could be insufficient to meet the risk. In such cases, a referral to DS should be considered if the referral trigger point has been met.

How do we treat criminal offences under the PVG Act?

- 43 Unlike the criteria for referral to the Disclosure and Barring Service, under the PVG Act, we cannot make a referral solely on the basis of a criminal conviction or other criminal disposal.
- 44 Where a court convicts an individual of a relevant offence,^{*} the court must give DS any prescribed information that it holds in relation to the convicted individual.
- 45 Section 11 requires that DS must consider listing an individual in the children's list where the individual has been referred by a court following a conviction for a [relevant offence](#) (relevant offences are applicable only to the children's list and not the adults list). This duty to consider an individual for listing is referred to as *automatic consideration for listing*.¹
- 46 There is no schedule of relevant offences committed against protected adults which would lead to automatic consideration for listing on the adults list.
- 47 The courts also have a power to refer an individual for consideration for listing where that individual commits any offence other than a relevant offence (a *discretionary referral*). The court is required to be satisfied that it may be appropriate for the individual to be listed in the children's list or in the adults list or both.
- 48 The Scottish government has advised that we need only consider making a referral to DS if we consider that a referral ground is met and the referral trigger point has been reached, and that DS are not already aware of the issue. Where we receive notice of a criminal conviction and no referral has been made by the court, we should assess the conduct that underpins the offence and decide if a referral ground is met under s.2 of the PVG Act.

Trigger point for making a referral

- 49 We will normally only assess cases for referral to DS where we have concluded our fitness to practise process and it has resulted in the doctor being erased by an MPT. This is because a judgement has been made by the GMC in its capacity as regulator that it is not necessary, either for the protection of the public or to maintain public confidence in the profession, for the doctor to be prevented from practising altogether. In these circumstances, DS have

^{*} As set out in schedule 1 to the PVG Act

indicated that it is unlikely they would bar the doctor from working with children and/or protected adults.

50 However, there will be exceptions to this principle. It is not possible to provide an exhaustive list of exceptional categories of case where referral to DS should be considered even though the doctor was not erased. However, referral should be considered if the facts found proven at an MPT or the findings made by the case examiners demonstrate one or more of the following:

- The doctor has shown a deliberate or reckless disregard for patient safety or safeguarding procedures which goes beyond an issue of professional competence
- The doctor has exploited a vulnerable person for personal gain or committed a serious abuse of trust e.g stolen from a patient or placed pressure on them to invest in a company in which the doctor has a personal interest
- The doctor has committed a serious violation of a patient's rights such as performing a procedure without consent
- The doctor has committed a criminal offence of a sexual nature
- The doctor has used their professional position to pursue a sexual or improper emotional relationship with a patient or someone close to them
- The doctor has engaged in predatory behaviour to establish a sexual or inappropriate emotional relationship with a patient e.g by approaching a patient inappropriately via social networking sites, using personal contact details from medical records to approach a patient outside their doctor-patient relationship or visiting a patient's home without an appointment or valid medical reason.
- The doctor has been involved in accessing, downloading or distributing child pornography
- The doctor has been violent towards a patient, child or other vulnerable person
- The doctor has caused harm to a patient or child by discriminating against them on the basis of a protected characteristic

51 In addition to falling into one of the categories above, a non-erasure case should only be assessed for referral to DS if one of the following trigger points are met:

- the issuing of a warning
- the agreement of undertakings
- the imposition of conditions
- suspension

- a decision to refuse an application for restoration
- a decision to refuse to register a doctor

Part heard cases

- 52** DS will assess findings of fact made by the Medical Practitioners Tribunal Service or case examiner decisions to issue a warning or agree undertakings in deciding whether or not to place a doctor on a barred list. They have also indicated that it is unlikely they will bar a doctor unless they have been erased from the Register and, in most circumstances, will defer making a barring decision until our procedures have fully concluded. For this reason we will usually await the outcome of a case before assessing it for referral.
- 53** However if the findings of fact in a part-heard case lead it to fall into one of the categories at paragraph 50, a referral can be made. This would be on an exceptional basis and likely to only occur rarely.

What information will we refer?

- 54** *Prescribed information* refers to information that we must provide if we make a referral under s.8 of the PVG Act. [Schedule 2](#) of the Regulations * specifies what we must provide.

Checking with DS whether they have received a referral

- 54** Once a decision has been made to refer a doctor to DS, we should check directly with them (via email) whether they are already aware of the same issues and are considering whether to bar the doctor. This is an important step as Section 8(1)(b) of the PVG Act is intended to avoid duplicate referrals by stating that organisations should not refer information that has already been provided to DS. If the same issues are already being considered by DS, we will not take any further action apart from recording the outcome.
- 55** If, however, DS confirm that they are not already considering the matter, we will make a referral in the usual way and provide them with the prescribed information.

Updates

- 56** Where we refer cases to DS following erasure there will generally be no need to provide them with updates on the case unless the doctor later applies for restoration and we refuse the application. In these circumstances, we will provide DS with a copy of the decision to refuse the restoration application but will not assess the case again.

* The Protection of Vulnerable Groups (Scotland) Act 2007 (Referrals by Organisations and Other Bodies) (Prescribed Information) Regulations 2010

Restoration cases

- 57** If we have previously assessed a case and decided not to make a referral to DS, we will only assess a decision not to grant a doctor's restoration application if the refusal was based on new information that was not available at the time of our original assessment. We will obtain any available information that relates to the new concerns which led the case examiners or MPT to refuse the doctor's application for restoration.
- 58** If a doctor's application for restoration is refused and we have not previously assessed the erasure sanction, we will assess the decision to refuse restoration to see if the criteria for referral to DS are met.

Requests for information from DS

- 59** DS may exercise their power under s.19 of the PVG Act to request that we provide them with information about a doctor that they are considering placing on a barred list. We must provide the requested information if we have it.
- 60** The power of DS to request information under s.19 is broad. The provision allows them to request any information that they think might be relevant to their decision about whether to place an individual on a barred list. If DS make a request for information under s.19 of the PVG Act it will be for specific information and will not require disclosure of all 'prescribed information', as provided for under the Regulations.
- 61** Where we provide information to DS pursuant to a request made under s.19 of the PVG Act, we will advise the doctor that we have provided the information (unless we have already referred the matter to DS). See paragraphs 62-63 for information on notifying the doctor concerned.

Notifying the doctor

- 62** When we refer a doctor to DS our policy is to notify the doctor that a referral has been made. We will also write to the doctor to inform them that we have provided information about them following a request by DS. This will generally be done through a standard information letter. We will notify the doctor's representative if they are on our records as acting for the doctor.
- 63** Where there are concerns about a doctor's health, which renders them vulnerable and there is a risk that the doctor may commit suicide, we should take reasonable steps to avoid unnecessary stress for the doctor concerned (for more on this topic, refer to the separate guidance document *Guidance on notifying doctors who may be at risk of suicide of a referral to the DBS or DS*).

Disclosing information under section 35B(2) of the Medical Act 1983 (as amended)

- 64** We may hold information about a doctor's behaviour in relation to someone who is not a protected adult or child that we believe if repeated may present a risk of serious harm to

protected adults or children, and we believe there is a likelihood of repetition. In certain circumstances, we may consider sharing this information with DS under our general power to disclose anything about a doctor's fitness to practise to anyone where we consider it to be in the public interest under [Section 35B\(2\) of the Medical Act 1983](#).

- 65** Disclosure will usually only be appropriate where there has been a finding of fact by a court or another regulator or the information has led to action on a doctor's registration or a warning being issued and no referral has been made to DS. Examples of potential matters which it may be appropriate to disclose under section 35B(2) are:
- a** A serious violent or serious sexual offence directed towards someone, other than a child or protected adult and not in the presence of a child
 - b** Indecent exposure involving someone other than a protected adult or child
 - c** Sexual harassment or inappropriate sexually motivated behaviour towards a person other than a protected adult or child, eg a work colleague
 - d** Taking indecent photographs of someone other than a protected adult or child without permission eg voyeurism
 - e** Stalking or harassment of someone other than a protected adult or child, where this involves aggravating factors such as threatening or violent behaviour
- 66** More detailed guidance can be found in the separate document [*Guidance on disclosure to Disclosure Scotland and the Disclosure & Barring Service under the Medical Act 1983 \(Section 35B\(2\)\)*](#)

Annex A – Flow chart for decision makers



