
Fitness to Practise Committee 26 May 2011

Vetting and barring update

Executive summary and recommendations

Introduction

The Committee considered a paper at its meeting in October 2010, setting out some of the difficulties that had been experienced in relation to operationalising the requirements of the vetting and barring schemes, particularly the English, Welsh and Northern Irish scheme. The Committee were asked to consider a number of points and agree to the proposed approach to referring cases under the scheme.

The attached paper sets out the activities of the Fitness to Practise Department in relation to vetting and barring since the Committee met in October 2010. A further paper will be presented to a future meeting of the Council providing greater detail in relation to the proposed changes to the legislation under the Protection of Freedoms Bill.

The Scottish scheme, which was due to commence on 30 November 2010, was delayed and came into operation on 28 February 2011. This scheme is unaffected by amendments contained within the Protection of Freedoms Bill.

Decision

The Committee is asked to note the paper, no decision is required.

Background information

In 2004, following the murders in Soham, the Government established the Bichard Inquiry to look into how people obtain work with children and vulnerable adults. As a result of the recommendations made, the Government is introducing vetting and barring schemes across the United Kingdom.

The purpose is to register all those who work (whether paid or in a voluntary activity) with children and vulnerable adults, and for lists to be held containing the details of individuals who are 'barred' from working with these groups.

A separate scheme will apply in Scotland from that which applies in the rest of the UK, but a barring decision made under either scheme (preventing a person from working with children and/or vulnerable adults) will apply throughout the United Kingdom.

In July 2010, it was intended that individuals would begin registering with the scheme in England, Wales and Northern Ireland and other elements of the legislation were also due to commence. In June 2010, the Home Office announced they were halting the scheme “*to allow the government to remodel the scheme back to proportionate, common sense levels.*” There has to date been no further information about the scope or timeframes of the review. However, the HPC’s duty to refer cases to the ISA is not affected by the Home Office review and this element of the legislation is still in force.

The government published the Protection of Freedoms Bill in February 2011 which contains amendments to the vetting and barring scheme in England, Wales and Northern Ireland. The bill is currently making its way through parliament and Royal Assent is anticipated in February 2012.

Resource implications

The resource implications for the Fitness to Practise team focus around the assessment of cases for referral under the schemes. To date this has been undertaken by four Case Managers within the Department. The newly appointed Compliance Officer will be taking over responsibility for making referral recommendations to the Director of Fitness to Practise in the near future.

Financial implications

Due to the suggested changes to the scheme the project budget of £30,000 will not be required in 2011-12.

Appendices

Appendix One Vetting and barring update paper
Appendix Two Practice Note – Barring allegations

Date of paper

16 May 2011

Vetting and Barring Update

1. Background

- 1.1. The "barring" legislation – the Safeguarding Vulnerable Groups Act 2006 (SVG Act), the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007 (SVG (NI) Order) and the Protection of Vulnerable Groups (Scotland) Act 2007 (PVG Act) – was enacted in order to implement a key recommendation of the Bichard Report, that:

"new arrangements should be introduced requiring those who wish to work with children, or vulnerable adults, to be registered. The register would confirm that there is no known reason why an individual should not work with these clients."

- 1.2. The legislation introduces a new framework for the vetting and, if necessary, barring of people who work with children and vulnerable adults. There are two separate schemes, one covering England, Wales and Northern Ireland, and one covering Scotland. This paper will firstly focus on the work undertaken relating to the English, Welsh and Northern Irish scheme, followed by that undertaken in relation to the Scottish Scheme. It sets out the progress made since October 2011, the measures put in place to ensure HPC's compliance with the legislation and the likely impact of the Government review and subsequent amendments to the scheme contained in the Protection of Freedoms Bill.

2. English, Welsh and Northern Irish scheme

2.1. HPC's operational process

- 2.1.1. Operational guidance has been drafted for the Fitness to Practise team and came into effect in November 2011. The guidance sets out the process for making referrals to the ISA and assists Case Managers in the identification of cases.
- 2.1.2. In summary, the process adopted is that each Case Manager completes basic checklist in all relevant cases, which is designed to highlight cases that may fall within the scope of the scheme. This process identifies those cases which need to be escalated for further consideration. Each of the four case teams has a designated Case Manager (who has received additional training) who further considers the case in detail in line with the detailed guidance. That Case Manager makes a decision as to whether to refer the case to a case conference. In such cases a recommendation form is completed setting out how the case meets the referral criteria. During the case conference the recommendations are discussed and the Director of Fitness to Practise

decides whether to make the referral to the ISA as the final decision lies with her.

- 2.1.3. Case conferences have been held on a monthly basis since December 2010 (two weekly in the initial stages of the process) and are attended by the Director of Fitness to Practise, the Head of Case Management and the designated Case Managers. This has provided a learning opportunity for all involved and has ensured consistency in decision making and the approach taken by individual Case Managers in making recommendations to the Director for referral. In depth training was provided to all designated Case Managers in November 2010. Further, broader, training was provided to all Case Managers in November 2010.
- 2.1.4. The role currently undertaken by the designated Case Managers will be transferred to the newly appointed Compliance Officer shortly, which will further ensure consistency in the recommendations and referrals that are made. Furthermore it will allow the Case Managers involved to resume a normal case load which as this has been slightly reduced to allow for the additional work.

2.2. Referrals to the ISA

- 2.2.1. Eighty four cases were considered at case conferences between December 2010 and April 2011. This includes the historic cases which have been assessed where the individual was struck off the HPC's register. In the cases referred to the ISA, HPC has been linked to the case as having a legitimate interest and therefore the outcome of the ISA process has been notified to the HPC. Of those cases, 71 were referred to the ISA, and 30 decisions have been received. Twenty one individuals have been barred from working with vulnerable adults and/or children and 9 were not barred from working with either group.
- 2.2.2. In addition to the cases referred to the ISA, HPC has initiated investigations into four registrants who have been included on a barred list. HPC were already investigating the individuals under other grounds, such as a conviction, and have also been able to pursue an allegation under the barring provisions. It has been indicated by the ISA that the fact an individual has been barred cannot be disclosed in a public hearing, however the HPC has a statutory ground of allegation of being included on a barring list and therefore must allege a case as such. Legal advice has been received on this point and HPC should continue to allege the statutory ground and this can be disclosed. Not all regulators have had similar provisions enacted.
- 2.2.3. The HPC is keeping a record of the cases referred and those where barring decisions are and are not made. As the data builds this will inform future referrals decisions as it will hopefully become clearer as to which cases the ISA consider sufficiently serious to bar. There is an issue in this area however, as the HPC is not made aware of the information upon which an individual is barred, and whether the ISA

decision is based solely on the information provided by the HPC or additional information provided by another source. The changes to the scheme set out below may assist her in future.

2.3. Government review

2.3.1. The outcome of the review of the vetting barring scheme was incorporated into the Protection of Freedoms Bill which is under consideration by parliament. It is anticipated that the bill will receive Royal Assent in February 2012. The ISA have indicated that they intend to implement the changes immediately afterwards. A summary of the key recommendations from the review are as follows:

- The CRB and ISA should be merged and should undertake the barring of individuals who are unsuitable from working with children and/or vulnerable adults.
- The new barring regime should cover only those who may have regular or close contact with vulnerable groups.
- Barring should continue to apply to both paid and unpaid roles.
- Automatic barring should apply for those serious offences which provide a clear and direct indication of risk.
- Controlled activity should be removed.
- There should be no requirement for people to register with the scheme and there will be no ongoing monitoring.
- The information used by to make a barring decision should be serious in nature.
- The new regime should retain current arrangements for referrals to the state barring body (currently the ISA) by employers and certain regulatory bodies, in circumstances where individuals have demonstrated a risk of harm to children or vulnerable adults. The 'harm test' should be removed.
- The current appeals arrangements should be retained.
- The state barring body should be given a power to vary review periods in appropriate circumstances.
- The new system will retain two offences; it will continue to be an offence for a barred person to work with vulnerable groups in regulated activity roles. It will also be an offence for an employer or voluntary organisation knowingly to employ a barred person in a regulated activity role.

2.3.2. The impact of these changes on the HPC is expected to be as follows:

- Referrals will still be made to the ISA, or its replacement although under a power to refer rather than a duty. This will apply to relevant offences and relevant conduct and the 'harm test' will no longer apply.
- Being barred will remain a ground for fitness to practise impairment.
- Individuals won't need to register with the scheme and so there will be no need to capture ISA registration numbers. Application forms can be amended to remove the capture of this information and no technology changes will be required.
- The ISA (or replacement) will be under an obligation to inform HPC that someone on the register is on a barred list and provide any information upon which relied in coming to that decision which is considered to be relevant to HPC's functions and appropriate to disclose.
- HPC employees will not have to register with the scheme. Under the previous definition of controlled activity (which will be removed) a number of employees, particularly those in the FTP department, would have been required to register.

2.3.3. A number of meetings have taken place between the regulators, the ISA and the Department of Health in recent months to understand the practical effect of the changes. At a meeting which took place on 11 April 2011, the ISA informed the regulators that a workshop will be arranged to further explain the ISA decision making process and discuss the content of future MoU's between regulators and the ISA as these have to date yet to be agreed. The ISA is also in the process of producing guidance on the changes and their practical effect. Furthermore, a referral form for regulators has been drafted to assist organisations in making referrals to the ISA.

2.3.4. The ISA are looking at whether the statutory powers that some regulators, including the HPC, have to demand information is sufficient to allow disclosure of material that led to a barring decision. Regulators had previously been informed that no information could be disclosed under any circumstances, but it appears that the ISA may now be prepared to take a more pragmatic approach.

2.3.5. As the Bill progresses through parliament and amendments are made the HPC will have a clearer idea of the operational impact of the changes and will be able to make the necessary amendments to the processes in place. In the meantime the current legislation applies and HPC is ensuring that it complies.

3. Scottish scheme

3.1. The Scottish scheme is known as Protecting Vulnerable Groups Scheme (PVGS) and is being implemented by Disclosure Scotland. The scheme went live on 28 February 2011. There is no requirement for individuals to register with the scheme and registration is not therefore mandatory. Furthermore, HPC does not have a duty to refer cases, but a power.

3.2. HPC's operational process

3.2.1. The operational process for referring cases to the PVGS will be the same as that set out for referrals to the ISA. However, a slightly different referral recommendation form will be used as the referral criteria for Scotland differs.

3.2.2. The operation guidance is in the process of being updated to include further details on the Scottish scheme and the difference approach that should be taken to these cases, taking account of the guidance material that is now available for the PVGS.

3.2.3. HPC has yet to make any referrals to the Scottish scheme, but is in the process of preparing two cases for referral.

3.3. Referrals to PVGS

- HPC has the power to refer cases which meet the criteria to the PVGS, but does not have a duty to refer cases.
- Broadly speaking, the criteria are that: (a) an individual doing regulated work has done something to harm a child or protected adult and (b) the impact is so serious that the organisation has (or would) permanently remove the individual from regulated work.
- Referrals can be made where it is believed that the referral criteria are met and that another body has not yet made the referral. HPC can refer cases which relate to conduct both before and after November 2010.
- It had previously been advised that only refer cases where the final outcome was to strike the registrant off the Register should be referred. However, there is ongoing discussion as to whether voluntary removals should be included as well.

4. Cross-border protocols

4.1. As there are two schemes, cross-border protocols have been designed to ensure that there is consistent decision making across the schemes and that information is shared appropriately. Schemes will respect each other's decisions so that individuals who are barred in one scheme are barred in both. Action will be taken against individuals by the appropriate administration. This will be based either on where the individual works, or, if that is not possible, where the incident happened.

5. Conclusion and on-going work

- 5.1. Considerable time and effort was committed to implementing the requirements of the scheme and integrating this into the current processes of the FTP Department. Although some of the difficulties set out in the paper considered by the Committee in October 2010 remain, the HPC has worked to implement a process that ensures that it is complying with its duties under the Act. The process has now been in operation for a number of months and is working well. The handover of responsibilities to the Compliance Officer will further streamline the process.
- 5.2. The requirements of the Scottish scheme are in the process of being implemented and will sit alongside the existing process for referrals to the ISA.
- 5.3. Once the final drafting of the Protection of Freedoms Bill is known, a further assessment of the process in place at HPC will be undertaken and any necessary changes made.
- 5.4. The HPC will attend the workshop to be arranged by the ISA to further understand the impact of the changes, the ISA's decision making process and the content of a MoU.
- 5.5. The HPC will await the ISA's assessment to determine whether Article 25 powers to demand information are sufficient to obtain documentation from the ISA in cases where an individual has been barred.

PRACTICE NOTE

"Barring" Allegations

This Practice Note has been issued by the Council for the guidance of Practice Committee Panels and to assist those appearing before them.

Introduction

Articles 22(1)(a)(vi) and (vii) of the Health Professions Order 2001 (the **Order**) provides that the grounds upon which an allegation may be made is that a registrant's fitness to practise is impaired by reason of:

- "(vi) the Independent Barring Board including the person in a barred list (within the meaning of the Safeguarding Vulnerable Groups Act 2006 or the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007), or
- (vii) the Scottish Ministers including the person in the children's list or the adults' list (within the meaning of the Protection of Vulnerable Groups (Scotland) Act 2007)."

Background

The "barring" legislation – the Safeguarding Vulnerable Groups Act 2006, the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007 and the Protection of Vulnerable Groups (Scotland) Act 2007 – was enacted in order to implement a key recommendation of the Bichard Report¹, that:

"new arrangements should be introduced requiring those who wish to work with children, or vulnerable adults, to be registered. The register would confirm that there is no known reason why an individual should not work with these clients."

The legislation introduces a new framework for the vetting and, if necessary, barring of people who work with children and vulnerable adults². Although the arrangements in Scotland differ in certain respects from those in England and Wales and Northern Ireland, the barring arrangements throughout the UK provide for the maintenance of two separate but aligned lists:³

¹ The Report of the Inquiry conducted by Sir Michael Bichard arising from the murder of Jessica Chapman and Holly Wells ('the Soham Murders'); HC653, 2004

² In Scotland this group is referred to as "protected adults"

³ maintained by the Independent Safeguarding Authority (in England, Wales and Northern Ireland) and Disclosure Scotland.

- a list of people barred from certain types of work with children; and
- a list of people barred from certain types of work with vulnerable (or protected) adults.

Barred individuals can be placed on one or both of these lists. The barring body's decision will be made based upon a range of information, including:

- convictions or cautions for certain offences;
- relevant decisions of regulatory bodies⁴;
- 'soft' intelligence or other evidence of:
 - inappropriate behaviour; and
 - behaviour that is likely to harm a child or vulnerable adult.

In the most serious of cases, where a person is convicted of a sexual or violent offence which indicates that he or she poses a clear risk of harm to children or vulnerable adults and there cannot be any mitigating circumstances that might explain the offence, barring will be automatic. For slightly less serious offences, the person concerned will be given the opportunity to make representations to the barring body.

The effect of barring

A person who is included in a barring list is prohibited from undertaking certain types of work - both paid and unpaid - with children and/or vulnerable or protected adults (as the case may be). Breach of such a prohibition is punishable as a criminal offence.

In England, Wales and Northern Ireland the prohibited work falls into two categories:

"regulated activity" – frequent, intensive or overnight contact with children or vulnerable adults for the purposes of providing health or social care, teaching, training etc. or in certain specified places such as schools and care homes;

"controlled activity" - frequent or intensive support work in health, social care or education settings or where there is access to sensitive personal records (this category of activity extends to cleaners, receptionists, catering staff etc.). A barred individual cannot undertake a regulated activity but may be permitted to undertake a controlled activity subject to safeguards being put in place.

For these purposes "frequent" means once a month or more or "intensive" means three or more days in any 30-day period.

⁴ The HPC has a duty to inform the barring bodies of relevant decisions taken in respect of registrants. That task is undertaken by the Director of Fitness to Practise, normally after a case has concluded.

In Scotland, broadly similar constraints apply but under a single category of "regulated work".

Children and Vulnerable Adults

The legislation defines a child as a person under 18 years of age and "vulnerable adults" (in Scotland "protected adults") form a very broad categories which includes adults:

- in residential accommodation or sheltered housing;
- detained in prison or other lawful custody;
- receiving prescribed welfare services;
- receiving any form of health care (which includes treatment, therapy or palliative care of any description).

The latter category means that there will be only a limited number of registrants whose daily work does not bring them into contact with vulnerable adults.

Procedure

Many matters which may lead to a barring decision being made against a registrant are likely to come to the HPC's attention in the form of allegations relating to misconduct or conviction for a criminal offence rather than as "barring allegations".

Where a barring allegation is made, Panels must be careful not to "go behind" decision of the relevant barring body. The Panel's task is to determine whether the registrant's fitness to practise is impaired, based upon his or her inclusion in a barring list, and if so, whether any sanction needs to be imposed.

Although the full range of sanctions under Part V of the Order is available in barring cases, Panels need to recognise that inclusion in a barring list will prevent many registrants from exercising their profession in any form.

In cases where a registrant is included in one list but not both (for example, prevented from working with children but not adults) and some form of practice restriction is being considered, Panels need to take account of:

- the likelihood of the registrant complying with any such conditions, given that barring list have arisen because of an abuse of trust; and
- public protection in its broadest sense, including whether permitting the registrant to remain in practice would bring the profession into disrepute or undermine public confidence in that profession or the regulatory process.

Inclusion in a barring list is intended to secure public protection from those who pose a significant risk to children and/or vulnerable or protected adults. Generally, Panels should regard it as incompatible with HPC's obligation to protect the public to allow a person to maintain unrestricted registration whilst they are on a barring list.