

## Chapter 6: Referrals by Organisations

1 This chapter deals with the making of referrals by organisations, personnel suppliers, regulatory bodies and the NHS Tribunal. Court referrals are briefly mentioned in chapter 8.

2 The PVG Act aims to provide a robust system by which unsuitable people are prevented from doing regulated work with children or protected adults, and by which people who become unsuitable are identified. For it to work effectively, it is necessary for organisations to pass on information to Disclosure Scotland that indicates an individual may be unsuitable to do regulated work so that it can be properly evaluated and appropriate action taken.

3 The process of providing such information to Disclosure Scotland is called 'making a referral'. The PVG Act places a duty on organisations and personnel suppliers to make a referral when certain criteria are met. 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. The first of these criteria is known as the referral ground.

4 The PVG Act gives organisations and personnel suppliers a power to make referrals where the criteria were met before the PVG Act comes into force.

5 Regulatory bodies and the NHS Tribunal have the power to make referrals, not least to cover circumstances where an organisation or personnel supplier could not, or negligently did not, make such a referral.

6 Making a referral is very important. Failure to refer an individual may mean that an individual who is unsuitable to do regulated work does not get barred from doing that type of work and can go on and harm other vulnerable people in other settings.

7 Personal employers cannot make referrals. If they have concerns about someone who is working for them, or who has worked for them, then they should raise the issue with the service provider or the police.

### 6.1 –Referral grounds

8. The PVG Scheme seeks to prevent vulnerable groups being harmed by those people who work with them. Sometimes an individual doing regulated work can become unsuitable to continue to do this work and this may be indicated by their conduct at work or outside of work. This should trigger a referral.

9. A prerequisite for any body to make a referral is that at least one of the referral grounds set out at section 2 of the PVG Act has been met. First of all, the individual must:

- o be doing regulated work;
- o have been doing regulated work; or
- o have been offered or supplied for regulated work.

10. Then the individual must have done something harmful or inappropriate in respect of a child or protected adult. But note that the harmful or inappropriate behaviour must correspond with the type of regulated work the individual does. For example, a schoolteacher (doing regulated work with children) who harms a protected adult does not meet the referral grounds. After a referral is made, Disclosure Scotland may place the individual under consideration for listing for either or both lists, irrespective of how the referral grounds are met<sup>55</sup>. Therefore, it is not for organisations to “recommend” consideration for listing on one or other list as part of the referral process.

11. The harmful or inappropriate behaviour does not have to have taken place in the workplace, or be connected with that person’s work in any way. For example, someone who has taken inappropriate pictures of children on a beach or has stolen from an elderly and frail neighbour would meet the grounds for referral if the individual was doing regulated work with children or regulated work with adults, respectively.

12. The referral grounds for those doing regulated work with children and referral grounds for those doing regulated work with adults mirror each other. The subject of the referral must have done one or more of the following:

- o Harmed a child or protected adult.
- o Placed a child or protected adult at risk of harm.
- o Engaged in inappropriate conduct involving pornography.
- o Engaged in inappropriate conduct of a sexual nature involving a child or protected adult.
- o Given inappropriate medical treatment to a child or protected adult.

13. Concerns about a person’s professional competence, which do not constitute a referral ground, should be addressed by the relevant professional regulatory body. The regulatory body will decide whether the person is fit to continue doing that specific type of work with a particular client group. For example, a teacher who is not good at teaching is a matter for the General Teaching Council for Scotland and has no relevance in this context.

14. Where an organisation has concerns about an individual but cannot make a referral, they should consider involving the police, a regulatory body or inspectorate as appropriate. For example, a cinema might dismiss an usherette because of inappropriate behaviour involving children they come into contact with. The cinema cannot make a referral (as the individual was not doing regulated work with children) but should consider referring the matter to the police. In the case where the concerns were serious enough and sufficiently reliable (e.g. other employers had also reported concerns), the information may be disclosed as non-conviction information if the individual ever applied to join the PVG Scheme.



### Meaning of 'harm'

15. The meaning of the word harm<sup>56</sup> is key to the first two grounds for referral. Harm includes:

- o physical harm;
- o psychological harm (for example: causing fear, alarm or distress); and
- o unlawful conduct which appropriates or adversely affects another person's property, rights or interests (for example: theft, fraud, embezzlement or extortion).

16. The Act also provides a meaning for 'risk of harm' which includes:

- o attempting to harm another;
- o trying to get someone else to harm another;
- o encouraging someone to harm themselves; or
- o conduct otherwise causing, or likely to cause, another to be harmed.

17. When considering the terms 'harm' and 'risk of harm' , it is important for individuals and employers to develop an understanding of what sort of actions might result in someone being harmed, or placed at risk of harm. Examples of harmful behaviours include:

- o Emotional abuse, perhaps by controlling a child with extreme verbal threats.
- o Neglecting a person's needs, for example by inappropriate feeding or failing to provide appropriate sanitation.
- o Inappropriate physical restraint.
- o Failing to attend to whatever health and safety requirements may be in force.
- o Supplying illegal or unauthorised drugs.

18. While some of these examples might in the first instance lead to questions of professional competence being raised, they could lead to disciplinary action

<sup>56</sup>"Harm" is defined at section 93 of the PVG Act.

being taken. The outcome from that action might require a referral to be made to Disclosure Scotland.

19. This is not an exhaustive list of things that may cause harm or place someone at risk of harm. Organisations may wish to consider how harmful behaviour may be guarded against in their own workplace policies and procedures. This can be done, for example, by making awareness of child and adult protection policies part of the induction of new staff to your organisation.

## **6.2 – Duties on organisations and personnel suppliers to refer**

20. If, as a result of any of the referral grounds being met, an organisation dismisses an individual who was doing regulated work or transfers them to other duties that do not involve that type of regulated work, the organisation must make a referral. If the individual concerned has stopped doing regulated work for some other reason, the organisation must make a referral if it would or might have dismissed or transferred the individual on the referral ground. The duty to make a referral in these circumstances applies whether or not the individual is a member of the PVG Scheme.

21. The same duty applies if the individual stops doing regulated work and the organisation subsequently becomes aware of information which it was unaware of when the individual stopped doing regulated work. If the organisation considers that, if it had been aware of that information at the time and the individual had not stopped doing regulated work, it would or might have dismissed the individual on the referral ground, then it must make a referral.

22. The referral process to Disclosure Scotland is entirely separate from any dispute with the individual as to whether the dismissal was fair or otherwise. Even if a dismissal is challenged by the individual, the referral must still be made to Disclosure Scotland. Any findings of fact by an employment tribunal cannot be disputed as part of a consideration for listing. Sometimes it will be necessary for a consideration for listing case to be held pending the outcome of such proceedings.

23. The conjunction of both the referral ground being met and the action by the organisation to remove permanently the individual from regulated work ensure that trivial matters cannot be the subject of a referral. Harm covers such a broad range of incidents from flicking food at somebody to a serious violent assault. But the only harm which can lead to a referral is that which the organisation considers to be so serious that they have dismissed (or would dismiss) the individual on that basis.

24. The intention is that a referral should be triggered by an organisation permanently removing an individual from regulated work. Provision is made to accommodate referral grounds being identified after the individual has otherwise stopped doing regulated work. A temporary removal, such a suspension or temporary transfer, should not lead to a referral.

25. An employment agency is under a duty to make a referral in relation to an individual who is or has been doing regulated work if it has, on the referral ground, decided not to do further business with the individual, or not to find the individual further regulated work, or offer or supply the individual for such work.

26. An employment business is under a duty to make a referral in relation to an individual whom it has offered or supplied for regulated work if it has dismissed the individual on the referral ground, the individual has otherwise stopped doing regulated work in circumstances in which it would or might have dismissed the individual, or it has, on the referral ground, decided not to offer or supply the individual for further regulated work.

27. Organisations must make referrals when the criteria are met after the introduction of the PVG Scheme. But it does not oblige them to make a referral when the criteria were met before the introduction of the PVG Scheme. However, it does give organisations the power to make a referral about a historical incident if they wish to do so. For example, employers may be aware of situations they dealt with historically, before it was possible to make referrals to the children's or adults' list, which, if such an incident happened now, would result in the employer making a referral to Disclosure Scotland. If an employer decides to make such a referral, the employer would need to provide as much information as possible. There is no requirement that they inform the individual but it may be courteous to do so. The employer will not commit an offence for failing to refer an individual who was subject to disciplinary action before the PVG Scheme started.

28. It is for organisations to decide who within the organisation should be responsible for compiling a referral and being the point of contact with Disclosure Scotland throughout the process. In cases where the organisation is a registered body, the contact person could be the lead signatory or a countersignatory but it does not have to be. It could be another senior official in the organisation.

29. Making a referral does not in any way take away the need to involve the police if criminal behaviour is suspected. That could happen well in advance of the referral to Disclosure Scotland being made.

## **Failure to refer**

30. It is an offence not to make a referral within 3 months of the criteria for referral being met. Failure to refer can result in a fine and a prison sentence of up to five years. Individuals within organisations may be prosecuted, alongside the organisation itself, if it can be demonstrated that the offence was committed with their consent, connivance or through their negligence.

## **6.3 – Powers for the regulatory bodies and NHS Tribunal to refer**

31. Certain other persons have a power under section 8 of the PVG Act (as opposed to a duty) to make a referral about an individual who is doing or has done regulated work if they obtain information on the basis of which the body thinks that the referral grounds are met and a referral has not yet been made to Disclosure Scotland. The referral can be made about conduct which took place either before or after the PVG Scheme starts.

32. The bodies which can make a referral under section 8 of the PVG Act are:

- o The General Chiropractic Council
- o The General Dental Council
- o The General Medical Council
- o The General Optical Council
- o The General Osteopathic Council
- o The General Teaching Council for Scotland
- o The Health Professions Council
- o The Nursing and Midwifery Council
- o The Royal Pharmaceutical Society of Great Britain
- o The Scottish Commission for the Regulation of Care
- o The Scottish Social Services Council
- o The NHS Tribunal

33. These bodies should consider making a referral if they know that for some reason a relevant organisation, employment agency or employment business has not done so. They should not make a referral if they know that one has already been made, or is in the process of being made.

34. If Disclosure Scotland receives more than one referral over the same incident about the same individual, for example, if one of the regulatory bodies makes a referral when an employer has already done so, then it will combine all the information and consider it as a single case.

35. It is for the body making the referral to decide who within the organisation should be responsible for compiling a referral and being the point of contact

with Disclosure Scotland throughout the process. That person could be the registered person or a countersignatory but it does not have to be. It could be another senior official in the organisation.

## 6.4 – Referral information

36. The information which must be submitted to make a referral is set out in regulations<sup>57</sup>. Organisations or bodies making referrals are only required to supply the required information which they hold; they do not have to make further enquiries to find the information if they do not already hold it. Disclosure Scotland provides a standard referral form, along with guidelines for its completion, to assist organisations in ensuring they include all necessary information when making a referral. It is not mandatory to use this form although it will make the referral process easier for both the organisation and Disclosure Scotland if it is used.

37. The referral form includes space for all the prescribed information (which organisations must provide if they hold it) and space for other information (which is entirely discretionary). Providing this latter information is likely to help with the consideration process and reduce the need to request additional information from the referring organisation.

38. As they contain sensitive personal information, referrals should not be sent to the generic Disclosure Scotland postal address. Instead, referrals should be sent to a dedicated address (details of which will be available on the Disclosure Scotland website).

39. In brief, the information which must be submitted with any referral includes identity details relating to the individual; details about the referral ground; contact details for the referring organisation; details of the regulated work done by the individual; details of any relationship between the child or protected adult involved; and details of any action taken by the referring organisation.

40. Section 41 of the PVG Act provides protection from actions for damages for any organisation providing referral information to Disclosure Scotland in good faith. This means, for example, that a teacher who loses their job after being listed cannot sue any organisation who made a referral or provided supporting information for the consideration for listing process. It does not matter whether or not the decision to list is upheld on appeal. However, an organisation who,

<sup>57</sup>

The Protection of Vulnerable Groups (Scotland) Act 2007 (Referrals by Organisations and Other Bodies) (Prescribed Information) Regulations 2010 (SSI 2010/181). Schedule 1 to these Regulations sets out the information required for referrals by organisations, employment agencies and employment businesses and schedule 2 sets out the information required from the regulatory bodies or the NHS Tribunal when they make a referral.