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Official Report

EDUCATION, LIFELONG LEARNING AND CULTURE COMMITTEE

Wednesday 26 May 2010

Session 3

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EDUCATION, LIFELONG LEARNING AND CULTURE COMMITTEE
16th Meeting 2010, Session 3

CONVENER

*Karen Whitefield (Airdrie and Shotts) (Lab)

DEPUTY CONVENER

*Kenneth Gibson (Cunninghame North) (SNP)

COMMITTEE MEMBERS

*Alasdair Allan (Western Isles) (SNP)
Claire Baker (Mid Scotland and Fife) (Lab)
*Ken Macintosh (Eastwood) (Lab)
*Christina McKelvie (Central Scotland) (SNP)
*Elizabeth Smith (Mid Scotland and Fife) (Con)
*Margaret Smith (Edinburgh West) (LD)

COMMITTEE SUBSTITUTES

Ted Brocklebank (Mid Scotland and Fife) (Con)
Hugh O'Donnell (Central Scotland) (LD)
Cathy Peattie (Falkirk East) (Lab)
Dave Thompson (Highlands and Islands) (SNP)

*attended

THE FOLLOWING GAVE EVIDENCE:

Ailsa Heine (Scottish Government Legal Directorate)
Andrew Mott (Scottish Government Children, Young People and Social Care Directorate)

CLERK TO THE COMMITTEE

Eugene Windsor

LOCATION

Committee Room 5

Scottish Parliament

Education, Lifelong Learning and Culture Committee

Wednesday 26 May 2010

[The Convener *opened the meeting at 10:01*]

Interests

The Convener (Karen Whitefield): Good morning. I open the 16th meeting of the Education, Lifelong Learning and Culture Committee this year. I remind all those present that mobile phones, BlackBerrys and any other electronic devices should be switched off for the duration of the meeting.

We have apologies from Claire Baker, who is unable to join the committee this morning.

Item 1 is a declaration of interests. We have lost a committee member, Aileen Campbell, who has gone to the Rural Affairs and Environment Committee. I am sure that all committee members wish her well.

The new member of our committee is Alasdair Allan. I welcome him, and I hope that he finds our work interesting and stimulating. I invite him to declare any interests that he may have.

Alasdair Allan (Western Isles) (SNP): Thank you for your welcome, convener. The only interests that I have to declare are mentioned in my entry in the register of interests. They relate to my membership of various cultural organisations, none of which involves any financial gain for me, although I should mention that I got tickets to the Hebridean Celtic festival in Stornoway, and the National Trust for Scotland found a way of getting me to the remoter parts of my constituency in St Kilda by helicopter.

The Convener: Thank you for that declaration.

Subordinate Legislation

Protection of Vulnerable Groups (Scotland) Act 2007 (Power to Refer) (Information Relevant to Listing Decisions) Order 2010 (SSI 2010/178)

Protection of Vulnerable Groups (Scotland) Act 2007 (Applications for Removal from List and Late Representations) Regulations 2010 (SSI 2010/179)

Protection of Vulnerable Groups (Scotland) Act 2007 (Savings and Transitional Provisions) Order 2010 (SSI 2010/180)

Protection of Vulnerable Groups (Scotland) Act 2007 (Referrals by Organisations and Other Bodies) (Prescribed Information) Regulations 2010 (SSI 2010/181)

Protection of Vulnerable Groups (Scotland) Act 2007 (Referrals by Courts) (Prescribed Information) Regulations 2010 (SSI 2010/182)

Protection of Vulnerable Groups (Scotland) Act 2007 (Consideration for Listings) Regulations 2010 (SSI 2010/183)

10:02

The Convener: Item 2 is the committee's continued deliberation on subordinate legislation that relates to the Protection of Vulnerable Groups (Scotland) Act 2007. This batch of subordinate legislation comprises six negative instruments.

The committee has been joined by officials from the Scottish Government. Andrew Mott is the protection of vulnerable groups legislation implementation manager; he is a well-known face at committee, as he is here almost as often as committee members. He is joined by Ailsa Heine, who is a senior principal legal officer at the Scottish Government.

I understand that Mr Mott wishes to make an opening statement.

Andrew Mott (Scottish Government Children, Young People and Social Care Directorate): I thank the committee for the opportunity to make an opening statement on the instruments. This is the third batch of instruments that has come

before the committee in respect of the protection of vulnerable groups scheme.

Members will recall the minister's brief introduction to the scheme when the first batch was laid, so I turn immediately to the instruments that are before the committee today. As the convener said, this batch comprises six negative resolution instruments, which all relate to part 1 of the 2007 act and deal with referrals and listing. Three of the instruments deal with making referrals; a competent referral will lead to a consideration for listing.

The Protection of Vulnerable Groups (Scotland) Act 2007 (Referrals by Organisations and Other Bodies) (Prescribed Information) Regulations 2010 set out the information that employing organisations and professional regulatory bodies are to provide when they refer an individual to Disclosure Scotland. Employing organisations are required to provide that information within three months of the duty to refer being triggered by, for example, the dismissal of an individual from regulated work.

The Protection of Vulnerable Groups (Scotland) Act 2007 (Referrals by Courts) (Prescribed Information) Regulations 2010 set out the information that courts are to provide when they make referrals to Disclosure Scotland. The courts must refer an individual who is convicted of the offences that are set out in schedule 1 to the 2007 act as amended and they have a discretionary power to refer for other convictions.

The Protection of Vulnerable Groups (Scotland) Act 2007 (Power to Refer) (Information Relevant to Listing Decisions) Order 2010 provides for the national health service tribunal to refer individuals to Disclosure Scotland in a similar way to that of professional regulatory bodies. The order closes a potential loophole whereby family health service practitioners with no employer could not be referred unless or until the relevant regulator made a referral. The Scottish Government has accepted that the order has defects in identifying relevant functions of the tribunal, as the Subordinate Legislation Committee's comments highlight. We will therefore lay an amending order in the autumn, before this order comes into force.

The other three instruments deal with getting on or off the lists in one way or another. The Protection of Vulnerable Groups (Scotland) Act 2007 (Consideration for Listing) Regulations 2010 set out the procedure that is to be followed when a consideration for listing results from one of four triggers: an organisational referral, a court referral, vetting information or being named in a relevant inquiry report. The regulations also provide for the appointment of expert advisers and suitably qualified individuals to assist Disclosure Scotland in reaching a listing decision.

The Protection of Vulnerable Groups (Scotland) Act 2007 (Applications for Removal from List and Late Representations) Regulations 2010 set out the time limits for making applications for removal from the lists and the procedure that is to be followed. It should be noted that an application for removal may be made at any time if the individual's circumstances have changed. The regulations also provide for handling late representations by an individual because they were, for example, out of the country when they were listed and were unable to make their case.

The Protection of Vulnerable Groups (Scotland) Act 2007 (Savings and Transitional Provisions) Order 2010 provides for handling live Protection of Children (Scotland) Act 2003 cases when the PVG scheme comes into effect. Section 43 of the 2007 act provides for the transfer of individuals who are on the disqualified from working with children list to the PVG children's list. The order is necessary to ensure that live referrals, consideration cases, appeals and applications for removal are handled appropriately.

That concludes my introduction. I am happy to take questions on the instruments from the committee.

Ken Macintosh (Eastwood) (Lab): I will ask about two subjects—the appeal process for listing and the broader issue of what is held on disclosure records in general, on which I would welcome information.

As I am sure that the officials and committee members know, several organisations are concerned that an oral hearing will not be part of an appeal on whether somebody should be listed. I understand that cost is one of the main reasons for not holding oral hearings. What are the figures? How many people are on lists in Scotland? How many appeals are made per year?

Andrew Mott: You raise several points. I think that 421 individuals are barred from working with children in Scotland by being included on the disqualified from working with children list, or the DWCL, and that another 100 or so cases—I would have to check the exact number—are in progress, so the listing of those people is under consideration.

On appeals, since 2005, I think that there has been—

Ailsa Heine (Scottish Government Legal Directorate): Just one.

Andrew Mott: Just one appeal has been made.

As for oral hearings, we must distinguish several processes. When an individual is included on a PVG barred list, they have a right of appeal to a sheriff, and the hearing before the sheriff can be oral.

If someone is listed automatically, they do not have a right of appeal because the Protection of Vulnerable Groups (Scotland) Act 2007 (Automatic Listing) (Specified Criteria) Order 2010, on which the committee took evidence a couple of weeks ago, sets out specific conditions that lead to listing and there is no point in appealing against conditions that are set out in statute.

The consideration for listing process concerns how someone gets on to the list in the first place. We are aware that some people think that there should be a right to an oral hearing. I will explain a little about how the process works, as set out in the regulations, give you some background and then explain why we did not make provision for oral hearings.

Using the example of an organisational referral, the first thing that would happen is that Disclosure Scotland would look at the referral to see whether it was competent. Currently, a third of organisational referrals received by the DWCL team do not lead to consideration because the matter is too trivial or does not make the grade in one sense or another. So there is a significant filter before we even get to consideration-case stage. If the tests that are set out in the 2007 act are met, a referral will lead to a consideration case. The individual concerned will be provided with a full copy of all the information that Disclosure Scotland has that has led to the consideration case. It is an iterative process, whereby the individual can comment on the information. It might be that Disclosure Scotland goes out to other bodies to collect other bits of information. Suppose, for example, that the individual says, “Yes, this incident happened but it happened because I was suffering from a mental disorder at the time, which is now under control.” It might be necessary to go out to other bodies to get further information or the individual might want to provide a medical report. So the individual has the opportunity to comment and organisations may also provide further information. Before a final decision is made, the individual has seen and had the opportunity to comment on all the information at which the listing team has looked. We feel that it is a fairly transparent process that affords the individual those opportunities.

The primary reason for not providing for an oral hearing is that the individual will have nothing to say that would change the minds of the listing team, so the oral hearing would not have achieved anything. If the individual were to introduce a new fact at the oral hearing, it is hard to see how the proceedings could continue. There would have to be an adjournment so that the team could research the new fact. It is not like a court situation where the prosecutor and defendant are in the room; it is the state performing a risk assessment on the basis of the facts before it. If the person was present and introduced something new, it would be hard to work out how to proceed. You would probably have to adjourn to investigate the new fact.

Ken Macintosh: On that last point, if you want an oral hearing and the individual wants to introduce new evidence, they can say so in advance and avoid the need for an adjournment. Surely it would still be possible to have an oral hearing for the purposes of discussion. The whole point is that an oral hearing would be more iterative and allow an opportunity to cross-examine, as it were, or to be cross-examined, on the process. Is that not the advantage of an oral hearing?

10:15

Andrew Mott: There might be some advantages to an oral hearing, but the Government has taken the view that there are also numerous disadvantages. In most cases, the listing team will be looking at facts that have been established in other settings. For example, if there is to be an organisational referral, the 2007 act has two tests that must be met: the individual must have harmed a vulnerable person, and the harm must have been serious enough that the organisation permanently removed the individual from regulated work. In such cases, the individual would have been not suspended, but dismissed, and the organisation would have carried out an assessment of the individual, which the individual could challenge through an employment tribunal or other channel. If information was being challenged in that way, the listing team would hold the referral until the outcome of the proceedings was known.

The listing team will normally look at the facts that have been established, for example through the employer’s investigation or through an employment tribunal or regulatory body’s consideration, so the individual will have had an opportunity to put their case. Indeed, if the listing team is making a decision on the basis of a conviction, the individual will have been in court to defend their case. Therefore, the information that the listing team considers will normally be second hand, because it has been established by another body. I hope that that provides some reassurance.

Ken Macintosh: I am not sure that it does. I have a lot of concern about the issue. There is no fair comparison between inclusion on the list and use of a risk-management tool. A decision to include someone on the list will have serious long-term consequences for the person. I imagine that it will impact on the person’s human rights.

It might be a fact that someone has been dismissed by their organisation, but the fairness of the decision to dismiss them is not a fact. The

individual might challenge but not succeed in overturning the decision to dismiss them. A person should not automatically go on the list just because they were dismissed. Another decision must be taken by the listing team, which will be based on many other factors.

Andrew Mott: That is absolutely right. A number of points arise in that regard. An employer might dismiss someone on unfair grounds, in which case it would be appropriate for the individual to challenge the dismissal through an employment tribunal. That is one issue; another is that the employer might have quite reasonably dismissed the person. Let us suppose that there is an incompetent geography teacher in a school. There might have been some very mild harm, but the employer's main reason for dismissing the person was that they were a useless teacher. A referral might be made, because some harm had been alleged and there had been a dismissal, but such cases would get filtered out.

I repeat that the test in the 2007 act is that ministers consider that

"it may be appropriate for the individual to be included in"

one of the lists. If the harm is not sufficiently serious, the "may be appropriate" test will not be met. In the POCSA regime, in which a similar test is applied, a third of organisational referrals do not make it to consideration and a further third are dismissed at the decision point. In establishing the procedures for Disclosure Scotland and setting appropriate thresholds, we are drawing on a lot of experience that has been gained from running the current lists.

The minister invited the Royal College of Nursing, the Association of Teachers and Lecturers and Unison to a meeting to discuss the issue, which the organisations had flagged up in their consultation responses as being of particular concern. A useful result of that meeting was that those unions were invited to join a working group on the structured decision-making process that has been set up at Disclosure Scotland. The structured decision-making process is to do with how the listing team will assess all the risk factors, and it is being developed with support from Lorraine Johnstone, who is an expert on risk assessment. The RCN and the ATL accepted their invitation to join that group, on which there are a number of stakeholders. I hope that that will have two benefits: it might be quite reassuring for them to see the detail of what we are doing, and they can be a critical friend. They could say, "Actually, we think you need to toughen up that part of your procedure."

I stress that Ken Macintosh is right. Listing somebody is a serious intervention. We are therefore putting in place every tool possible to ensure that decisions are made properly. In the worst-case scenario, the fallback is that there can be an appeal to the sheriff about a listing decision. A person will have a full right of appeal on the whole case. Ailsa Heine will correct me if I am wrong about that. A decision that has been wrongly made can therefore be overturned.

Ailsa Heine: That is right. A full appeal on the merits of the case could be made, and the sheriff could reconsider all the facts.

Ken Macintosh: I take the point that the process has various steps in place, but, as with all processes, there are chances that it could go wrong and that a person could go through the process unfairly.

If there are only 420 cases of individuals being barred from working with children and 100 cases in progress—there are therefore 500 cases in total—and there has been only one appeal, why has the Government said that costs would be involved in holding oral hearings? It is clear that no or very few costs would be involved.

Andrew Mott: To be clear, if there was a right to an oral hearing, one might have expected not only the 400 or so listed people, but a good number of people who have been involved in cases that have been considered and dismissed to have taken up that right. I would have to confirm the numbers, but there might have been 600 or 700 oral hearings for those cases. I am sorry—the number would be fewer than that, because a number of people have been listed under POCSA through court referrals. That is the current equivalent of automatic listing. However, there would be a good number of hearings.

Obviously, some individuals might feel that they would have had a fairer hearing if they had been able to make their case orally, but I think that that is a perception rather than the reality. There are downside risks. Some people cannot present themselves well orally and, conversely, some people are slick at oral presentation. To be blunt, some of the more devious paedophiles are extremely presentable and nice and they come across extremely well, so there is the potential for false reassurance.

For people who find it difficult to make their case in a written presentation, it must be stressed that there is nothing to prevent anybody from engaging any other person, whether that person is a solicitor or someone who is more eloquent than they are, to help to make their case. I think that the regulations say that there are 28 days to respond to information that is provided to the individual by Disclosure Scotland. We hope that there will be sufficient time in those 28 days to get whatever assistance is necessary in making their case.

The other point to make is that the volume of consideration cases will be significantly higher than it is now, because there is now an adults' list and there is a new channel into a consideration case. If there is something alarming on the criminal record of a person who makes a disclosure application that will lead to a consideration case. I will get you the numbers on that.

Ken Macintosh: The key point is that the numbers on the lists are not huge. I am just surprised that the Government uses cost as an argument against oral hearings.

The regulations provide a mechanism for appealing against inclusion on the list. Will you describe to the committee the process for challenging information that is held generally? In other words, a small number of people are held on the list, but huge numbers of people will apply for a disclosure. There is greater concern about the information that might be held and revealed through a disclosure check, and I also worry about how that is challenged. Are such challenges a matter for regulation, and will there be regulations on that?

Andrew Mott: To be clear, it is necessary for Disclosure Scotland to retain case information on people on the lists and for consideration cases, in case it is challenged later. An individual will see all that information, so Disclosure Scotland holds nothing on the list that an individual does not already know about.

For scheme members, section 51 of the 2007 act sets out how an individual can go about correcting scheme record information that they disagree with. A regulation that will be introduced next week will set a time limit of three months for someone to ask for their information to be corrected. I would be more than happy to go into that next week. I can talk about it now, but it might be better to deal with it next week.

Ken Macintosh: The rights of people to appeal against their inclusion on a list are quite detailed, even if there are worries about whether they should have an oral hearing or not. Someone's right to question what is on their disclosure check is less clear to me, which is why I am looking for a description of the process by which that information can be challenged or shared with individuals. At what point can it be challenged?

Andrew Mott: If I may, as I know that that is an issue, I suggest that when the committee looks at the next batch of regulations, which I believe is coming on Wednesday 9 June, I will come ready to talk through those points. Would that be okay?

Ken Macintosh: Yes, that would be useful.

A couple of points might refer to that today. If someone is referred to Disclosure Scotland, are they referred for disclosure on the list? Is that the only reason for referring them, or do you refer people to Disclosure Scotland for minor issues that might be cumulatively important? I will take the bad geography teacher as an example. I do not want to pick on geography teachers, but they were mentioned earlier.

Andrew Mott: Referrals are made only for consideration for listing purposes. As I said, a referral that does not meet the grounds for a consideration case is not considered, and that is that. The fact that someone has been referred or previously considered is not disclosable. If someone is barred, listing and disclosure interact and they are kept out of the scheme. If they are under active consideration at the time of the disclosure, that will be revealed. People who have previously been referred or considered, but not barred, are completely invisible—those referrals and considerations are not disclosed.

10:30

Ken Macintosh: Let us consider an organisational referral, such as a teacher who is struck off. That will automatically be referred to Disclosure Scotland. Some cases will not meet the criteria for further consideration, but while the case is being considered, will that be on the person's disclosure record?

Andrew Mott: There are two phases, if you like. There is a period when the referral has been received and the case team is considering whether it meets the grounds for going to consideration for listing. That period is invisible, so a disclosure that was made during that time would not show anything.

Ken Macintosh: It would not show that the teacher had been struck off, for example.

Andrew Mott: Yes—that would not show up. What will show up is when the person is put under consideration. If the Disclosure Scotland team has made the assessment that the referral meets the statutory tests, that it might be appropriate for the person to be listed, that the harm was significant and that the organisation had done the right things and provided the right information, that would lead to a formal consideration and "under consideration" status. That is disclosable if someone makes a disclosure request during that time.

There could be a number of interested parties. Suppose somebody works for four organisations because they are a locum teacher or whatever: if one of the organisations dismisses that person and makes a referral that leads to a consideration case, the other three organisations would be

notified that the individual was under consideration because that allows them to put in place whatever measures they believe are appropriate in terms of risk management. If the person is a teacher, the organisations might say, "We won't send them on the school trip while the case is being reviewed."

Ken Macintosh: Am I right to think that there is a six-month limit on that?

Andrew Mott: There is a six-month limit unless, or until, an application is made to the sheriff for the period to be extended. It is important to be clear that a consideration case takes as long as it takes, but it is only disclosable for six months, unless a sheriff agrees that the period can be extended. There is a check in terms of the proportionality of what happens.

Ken Macintosh: Who would apply to the sheriff? Would it be Disclosure Scotland?

Andrew Mott: Yes.

Ken Macintosh: After a person has been considered for listing and it has been decided that they will not be listed, even though they had been under consideration for six months, that will be removed and will not be on their record.

Andrew Mott: Anyone who had been told that they had been put under consideration would also be told that they were no longer under consideration. Their status would disappear from their record, so if a disclosure was made a month after that, that prior status would be gone.

Ken Macintosh: Would the reasons why they had been referred be kept on their record?

Andrew Mott: Disclosure Scotland would need to keep the case file in case something is challenged later. For example, maybe something awful transpires later and there is a review of whether the person should have been listed. There are all sorts of reasons why one might need to go back to the case file and ask whether the right decision had been made, so the case information has to be retained, but the key points are that it will not be disclosed to anyone else and the individual will know all the information because they received it at the time.

Ken Macintosh: I am thinking of the example of a teacher who is on a school trip and accusations of improper conduct are made against them. They are suspended by the school and removed to other duties, but no case is brought and they are not struck off. A referral is made to Disclosure Scotland—

Andrew Mott: The first point to make is that the fact that somebody has been suspended is not a ground for making a referral. They have to have been permanently removed from regulated work.

Ken Macintosh: What would happen if they were retained as a teacher but no longer trusted to go on supervised trips abroad or overnight stays with children?

Andrew Mott: Again, that is not a ground for referral. An organisation has to have assessed that the individual has harmed a child—or vulnerable adult, but let us stick with children—and that the harm was so serious that it decided to remove the individual permanently from regulated work. Normally, that would mean dismissing them, but the way the legislation is drafted prevents the loophole whereby the individual just disappears before the organisation has taken action. If the individual has left through retirement or has just disappeared, that does not mean that a referral cannot be made. In the most normal circumstances, the organisation will have removed the individual. Frequently, they will have been sacked, but in large organisations, the person might have been permanently removed to other duties, such as carrying out a central-office function, as opposed to front-line teaching.

Ken Macintosh: Let us say that a teacher or another person who works with children is accused of something and then decides to leave their job because of the pressure of defending themselves against the accusations. The organisation then refers them, because the person has been removed or has removed himself. If that case was then looked at to see whether the person should go on the list, but he was not included on the list, would the information—the original accusation—be kept on the disclosure record? Would it be kept on file and would it be disclosed in any future application?

Andrew Mott: The referral might have been dismissed before it even got to consideration. A second scenario could be that it went to consideration and was dismissed at the end of the consideration process. In the latter case, the information would certainly need to be kept. I think that in both cases it would have to be kept, because there might be instances in which the processes that Disclosure Scotland has followed are challenged, so for audit purposes people need to be able to go back and say, "We made this decision on these grounds." There are other, secondary reasons for keeping the information, such as for training staff. The best way of training staff is to look at a series of cases.

I cannot stress enough that only the individual and Disclosure Scotland have that information; it is not disclosed to anyone else.

Ken Macintosh: I just want to clarify what is disclosed. Say the person applies for another job and has to go through a disclosure check. When the disclosure check is made, the fact that the person was considered will not be disclosed, but

will the referral information that was given by the original employer and the fact that they left be disclosed?

Andrew Mott: No, that will not be disclosed.

Ken Macintosh: The fact that an accusation was made against the person—

Andrew Mott: Will not be disclosed.

Ken Macintosh: The fact that an accusation was made and the person left that job will not be disclosed.

Andrew Mott: No. The important thing to remember with PVG—if you zoom out, if you like—is that it is one part of safer recruitment. If you are recruiting somebody, you might want to follow up references with old employers. Those employers may or may not decide to endorse the individual. On what the disclosure scheme will do, the fact that the person has been referred for whatever reason is not disclosed. Live, under-consideration cases are disclosed. If the reason why somebody was considered was a serious conviction, obviously that conviction is on their record. If someone has been convicted of a sex offence and that led to a consideration and, in the end, they were not listed, obviously the fact that they were considered is not disclosed, but the sex offence is still on their disclosure record. Does that make sense?

Ken Macintosh: Yes. It is about where there are matters of judgment. A proven case that went to court would be on the person's criminal record and would be disclosed—if it was something that is automatically disclosed. I believe that courts also have a power to refer cases for consideration for listing. As part of that, according to the regulations, the court does not need to consider whether there is a risk of reoffending. Why have you decided that courts should not do that?

Andrew Mott: We are trying to ensure that the risk assessment is done by the people who are best placed to do it—the people at Disclosure Scotland who are skilled in that.

The court needs to act more as a gateway. There are some offences that the court must refer, which are set out in the schedule and in the Protection of Vulnerable Groups (Scotland) Act 2007 (Relevant Offences) (Modification) Order 2010, which the committee considered a couple of weeks ago. Scottish ministers must consider the individuals concerned for listing on the children's list and may consider them for listing on the adults' list, if certain tests are met.

We have also given the courts a discretionary power to refer, which we expect them to exercise in cases in which the sheriff, after hearing all the evidence, decides that he or she would be concerned about a person doing regulated work. For example, convictions for theft are not normally relevant, but if a person's modus operandi in all instances of theft is to break into a care home and steal from an old, vulnerable person, to steal from people in wheelchairs or to steal from minors, the background information may suggest to the sheriff that the person is picking on vulnerable people. In that instance, they may say that they do not know whether the person should be listed but that Scottish ministers should look at the case. Once the sheriff has made a referral, the various tests will be applied. That may or may not lead to a consideration and to listing, depending on the risks. If, when listening to a case, a sheriff thinks, "I wouldn't want them working with my children or relatives", they can refer it.

Whether there is a risk of reoffending may be a factor in determining whether someone is sent to prison or how they are sentenced, but in PVG all that matters is risk assessment—whether a person's past conduct indicates that they pose such a risk that they are unsuitable to work with vulnerable people in the future.

Ken Macintosh: Will discretionary referral by a sheriff following an offence be a disclosable fact under the scheme?

Andrew Mott: The fact that someone has been referred by a sheriff is not disclosable.

Ken Macintosh: Will the original offence of theft from a minor be disclosed?

Andrew Mott: All convictions on someone's record are disclosable.

Ken Macintosh: So, all convictions—not just those involving children and vulnerable persons—are disclosable.

Andrew Mott: Yes. The scheme record disclosure is rather like the current enhanced disclosure, so it will reveal unspent and spent convictions and relevant police information. For example, the fact that someone has four convictions for theft will be recorded on their scheme record disclosure. The sheriff may or may not decide to refer the case. That will be invisible unless it leads to a consideration case, in which case the fact that the individual has four convictions and is under consideration for listing will be included in the disclosure. However, the route by which that happened, or the fact that the sheriff referred the case, will not be disclosed.

Ken Macintosh: If a conviction for theft relates to theft from a vulnerable person, will that be highlighted in the disclosure check?

Andrew Mott: I will have to look into that. The disclosure will include the description of the offence and conviction as recorded in the criminal history system.

Ken Macintosh: I thought that soft information would also be included.

Andrew Mott: Yes—the police can include other relevant information.

Ken Macintosh: Will the judge's comments or concerns and the fact that there was a discretionary referral be disclosed?

Andrew Mott: No. I understand that normally other relevant information relates to matters prior to a case going to court. Sometimes there is ORI that later becomes a court case; sometimes a case does not proceed to prosecution, for various reasons. Once someone has been convicted of an offence, that is the definitive statement on the incident.

10:45

The Convener: I do not believe that any other member wishes to ask you anything, Mr Mott. You have had extensive questioning from Mr Macintosh. That concludes our questions.

We now move to the third item on our agenda, which is an opportunity for members to comment on the instruments. I advise members that no motions to annul the statutory instruments have been lodged. Members will also be interested to learn that the Subordinate Legislation Committee highlighted a number of issues in relation to the instruments. It did not raise anything in relation to SSI 2010/183 when it considered the instrument on 18 May; it considered the remaining instruments at its meeting yesterday. I understand that a summary of the committee's deliberations is available for members.

If members have no further comments, we will move to the question. Does the committee agree that it has no recommendations to make on SSI 2010/178, SSI 2010/179, SSI 2010/180, SSI 2010/181, SSI 2010/182 and SSI 2010/183?

Members *indicated agreement.*

The Convener: That concludes our consideration of agenda item 3. We will suspend briefly to allow the witnesses to leave.

10:47

Meeting suspended.

10:48

On resuming—

Adoption Agencies (Scotland) Amendment Regulations 2010 (SSI 2010/172)

Adoptions with a Foreign Element (Scotland) Amendment Regulations 2010 (SSI 2010/173)

The Convener: Agenda item 4 is also consideration of subordinate legislation. Both sets of regulations are negative instruments. No motions to annul have been lodged, and the Subordinate Legislation Committee considered both instruments at its meeting on 11 May and did not find anything to report. If no member has any comment, we will move straight to the question. Does the committee agree that it has no recommendation to make on SSI 2010/172 and SSI 2010/173?

Members *indicated agreement.*

The Convener: That concludes the public part of our meeting.

10:49

Meeting continued in private until 12:34.

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