

EXECUTIVE NOTE

THE PROTECTION OF VULNERABLE GROUPS (SCOTLAND) ACT 2007 (PRESCRIBED PURPOSES FOR CONSIDERATION OF SUITABILITY) REGULATIONS 2010

SSI 2010/381

Powers under which Instrument is made

1. The Protection of Vulnerable Groups (Scotland) Act 2007 (Prescribed Purposes for the Consideration of Suitability) Regulations 2010 (“the Suitability Regulations”) are made by Scottish Ministers in exercise of powers conferred by sections 73(g) and 97(1) of the Protection of Vulnerable Groups (Scotland) Act 2007 (“the 2007 Act”).

Parliamentary procedure

2. This Scottish Statutory Instrument is a class 5 instrument subject to the negative resolution procedure at the Scottish Parliament.

Summary of policy proposals

The Protection of Vulnerable Groups (Scotland) Act 2007

3. Under Part 5 of the Police Act 1997 (“the 1997 Act”), the Scottish Ministers may carry out criminal record checks. There are currently three levels of checks: the criminal conviction certificate (basic disclosure); the criminal record certificate (standard disclosure); and the enhanced criminal record certificate (enhanced disclosure). Most enhanced checks are carried out for the purpose of assessing the suitability of a person for working with vulnerable groups. Around 700,000 people in Scotland work with vulnerable groups, either through their paid employment or as volunteers. Since April 2002, the Scottish Government and BT have worked in partnership as Disclosure Scotland to provide criminal record checks for Scotland. Since then, over 5 million applications have been made for basic, standard and enhanced disclosures. In the 2008/09 financial year¹, 360,000 enhanced disclosures were processed for the purposes of working with vulnerable groups.
4. Since 10 January 2005, Scottish Ministers have kept a list of individuals who are considered unsuitable to work with children - the Disqualified from Working with Children List - introduced by the Protection of Children (Scotland) Act 2003 (“POCSA”). It is an offence for anyone on the list to work in a child care position in Scotland. In the first five years of operation, 393 individuals have been listed on DWCL.
5. The 2007 Act, when it is fully commenced, will provide for a new vetting and barring scheme. This means that the use of disclosure checks under the 1997 Act for work with children and protected adults will end. They will be replaced by new types of

¹ This is the financial year on which the RIA is based. The figure for the 2009/10 financial year is 350,000 enhanced disclosures.

disclosure requests under the 2007 Act. For ease of reference, the Scottish Government is referring to this as the PVG Scheme. The PVG Scheme will ensure that those who either have regular contact with vulnerable groups through the workplace, or who are otherwise in regulated work, do not have a history of abusive behaviour. It will exclude people who are known to be unsuitable, on the basis of past behaviour, from working with children and/or protected adults and detect those who become unsuitable while in the workplace. The Scottish Ministers will continue to keep a list of individuals who are considered to be unsuitable to work with children (“the children’s list”). Under the 2007 Act, the Scottish Ministers will, for the first time in Scotland, keep a list of those who are barred from working with protected adults (“the adults’ list”).

6. The PVG Scheme will be managed and delivered by Disclosure Scotland as an executive agency, which will also continue to deliver the other types of disclosure (which will still be available under the 1997 Act for checks which are not for the purposes of work with children or protected adults). A new team within Disclosure Scotland will receive and consider referrals and take decisions, on behalf of Scottish Ministers, about those people who may be unsuitable to work with children or protected adults. The team will gather and assess all relevant information to make listing decisions.
7. For more information about how the PVG Scheme will work, see the guidance document² and training materials published on the Disclosure Scotland website which can be accessed through:
www.infoscotland.com/pvgscheme

The Suitability Regulations

Powers in the 2007 Act

8. Section 73 of the 2007 Act makes explicit what constitutes considering an individual’s suitability to do, or to be offered or supplied for, any type of regulated work. In particular, this consideration goes beyond employment and employment agencies and businesses. Section 73(e) makes provision allowing the Scottish Social Services Council (“the SSSC”), established by the Regulation of Care (Scotland) Act 2001 (“ROCA”), to request disclosure records for registration purposes. The Suitability Regulations are made under the power at section 73(g) which gives the Scottish Ministers the power to prescribe further circumstances in which disclosure records can be obtained. The Suitability Regulations make further provision for SSSC access to disclosure records and also for any organisation recruiting individuals to do certain types of activity outside the United Kingdom.

Further provision for SSSC access to disclosure records

9. Regulation 2(a) of the Suitability Regulations makes provision to allow access to disclosure records in respect of:
 - (a.) the convener or members of the Council itself; or

² *Protecting Vulnerable Groups Scheme: Guidance for Individuals, Organisations and Personal Employers*, The Scottish Government, June 2010.

- (b.) the convener or members of a committee or sub-committee of the SSSC which is concerned with the registration or conduct of social workers or social services workers.
10. The Suitability Regulations means that disclosure records may be sought in respect of the lay members of the Council or these (sub-)committees in the same way as section 73 already provides for registrant members.

Convener and members of the Council

11. The policy intention in setting up the SSSC was to regulate the social service workforce, to strengthen and support the professionalism of the workforce, raise service standards and practice and protect the users of social services.
12. The convener and members of the Council are appointed by the Scottish Ministers and have corporate responsibility for ensuring that the SSSC fulfils the aims and objectives set by the Scottish Ministers. The convener is directly responsible to the Scottish Ministers. The Council: provides strategic leadership and direction for the SSSC within the agreed policy, planning and resources; ensures implementation of Council decisions; and performance manages the CEO.
13. Some Council members will also be members of the registration and conduct committees. The registration and conduct committees deal with issues that call into question an applicant or registrant's suitability to be, or remain, registered.

Registration (sub-)committees

14. Applications for registration and re-registration must meet certain criteria. All decisions made must be in accordance with SSSC registration rules. Registration can be granted unconditionally, with conditions or refused. Registrants can also be removed from the register. In all cases, the applicant is notified of the decision and has the right to make representations. If the applicant refuses to accept the decision, their representations will be referred to the registration committees for consideration. This could include a public hearing with evidence from the applicant and witnesses. Once a final decisions has been made, the applicant has the right to appeal to the sheriff court.

Conduct (sub-)committees

15. Where SSSC receives a complaint about a social worker or social service worker, conduct case officers will investigate the complaint and make recommendations to senior officers on further action. As with decisions on registration, the registrant has the right to make representations and referrals can be made to the conduct committee which may result in a public hearing. The SSSC has the power to impose an Interim Suspension Order on a registrant where the complaint is so serious it presents a risk to the public (service users), this is referred to Conduct committee for approval. Again final decisions made, the registrant has the right of appeal to the sheriff court.

Other committees

16. Note that the provision does not extend to other committees of the SSSC: the audit committee, finance and resources committee and the remuneration committee. These committees are oversee the work of the CEO and staff of the NDPB, ensure objectives etc are being met. This is because their work is not directly related to the protection of vulnerable groups.

Disqualification through being barred from regulated work

17. Whilst the Suitability Regulations merely allow access to disclosure records, the Scottish Social Services Council (Appointments, Procedure and Access to the Register) Amendment (No. 2) Regulations 2010, made under ROCA, provide that, where a person is barred from regulated work with children or adults under the 2007 Act, they are disqualified from appointment as convener or member of the Council itself.

Activities outside the United Kingdom

18. Regulation 2(b) makes provision for organisations to access disclosure records for the purposes of work done outside the United Kingdom for *activities* which would have been regulated work had they been done in Scotland. This has the effect of making disclosure records available without any of the offences in Part 1 of the 2007 Act applying. That is to say, the use of such disclosure records is *entirely discretionary*.
19. Schedule 2 to the 2007 Act defines the scope of regulated work with children. In particular, it defines regulated work with children by reference to:
 - (a.) carrying out particular activities (set out in Part 2 of schedule 2);
 - (b.) working in particular establishments (set out in Part 3 of schedule 2);
 - (c.) having a particular position of trust or responsibility (set out in Part 4 of schedule 2); or
 - (d.) having responsibility for the day-to-day supervision or management of individuals carrying out the activities mentioned in Part 2 of schedule 2 or working in the establishments mentioned in Part 3 of schedule 2.
20. The provision at regulation 2(b)(i) extends only to carrying out particular activities mentioned in Part 2 of schedule 2. By definition, most, if not all, work in an establishment mentioned in Part 3 of schedule 2 or a position mentioned in Part 4 of schedule 2 can only be done in Scotland.
21. The reason for making this provision is to ensure that Scottish organisations recruiting Scottish individuals to do these activities abroad can continue to access disclosure records for this purpose (they do currently access enhanced disclosure). This might be, for example, a Scottish company recruiting an individual to provide ski instruction to children on the Italian Alps or Scottish charity recruiting an individual to teach children in Africa.
22. Rules governing the protection of children in any foreign jurisdiction is a matter for the foreign government. Whether or not any form of criminal record check is required for any type of work is matter for them to determine and the Scottish

Government cannot set out these requirements. However, there are two reasons for making this enabling provision. The first is that Disclosure Scotland is best placed to undertake disclosure checks for individuals being posted abroad, as any previous criminal history will be recorded in Scotland and not their host country. The second is that, in many cases, it may be a case of protecting *Scottish* children abroad.

23. Article 12 of the Protection of Vulnerable Groups (Scotland) Act 2007 (Miscellaneous Provisions) Order 2010³ (“the Miscellaneous Provisions Order”) amends schedule 2 to put beyond doubt that regulated work is work done in *Scotland* only. Regulation 2(b) makes provision for organisations to access disclosure records for the purposes of work done outside the *United Kingdom*. Regulation 2(b) is the exception to the general rule that the PVG Scheme can only be used in respect of regulated work in Scotland; it is an offence to use disclosure records for other purposes. The Vetting and Barring Scheme⁴ should be used to assess suitability to do work with vulnerable groups in England, Wales and Northern Ireland.
24. Schedule 3 to the 2007 Act defines the scope of regulated work with adults. Regulation 2(b)(ii) has the same effect in respect of schedule 3 as regulation 2(b)(i) has in respect of schedule 2. It should be noted, however, that the service-based definition of protected adult means most adults receiving equivalent services outside of Scotland are not protected adults for the purposes of the 2007 Act. This means that it will be relatively unusual for an individual performing the activities defined in Part 2 of Schedule 3 outside Scotland to be doing regulated work with adults.

Consultation

25. A Scottish Government consultation "*Protection of Vulnerable Groups (Scotland) Act 2007 Scottish Vetting and Barring Scheme -Consultation on Policy Proposals for Secondary Legislation*" took place between 1 November 2007 and 12 February 2008. The purpose of the written consultation was to allow respondents to inform the detail of policy proposals for secondary legislation. It set out a number of options for each major issue as well as seeking general comments on the proposals. The Scottish Government received 199 responses to the consultation.
26. The consultation was supported by seven PVG consultation events in cities across Scotland attended by 875 people and nine events provided by the Central Registered Body in Scotland (CRBS) attended by 176 people from November 2007 through to January 2008. The CRBS events were not formal consultation events, but were supported by the Scottish Government and intended to complement the PVG consultation events. The CRBS events reached rural communities and delegates were primarily from the voluntary sector.
27. The analysis of the consultation was published in the "*Protection of Vulnerable Groups (Scotland) Act 2007, Scottish Vetting and Barring Scheme, Analysis of consultation on policy proposals for secondary legislation*" on 27 June 2008 and the Scottish Government's response was published in the "*Scottish Government response*

³ Laid before the Scottish Parliament on 5 October and re-laid on 14 October 2010.

⁴ The Safeguarding Vulnerable Groups Act 2006 and the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007 establish the Vetting and Barring Scheme for England, Wales and Northern Ireland, which corresponds to the PVG Scheme in Scotland.

to the analysis of consultation on policy proposals for secondary legislation" on 6 October 2008.

28. In June 2009, the Scottish Government hosted a series of eight information events to bring organisations up to speed with implementation activities and provide an opportunity to consider and discuss aspects of the PVG Scheme. The events were attended by around 1300 people from organisations that are registered with Disclosure Scotland, have a regulatory role, or that represent groups and/or organisations that work with vulnerable groups. Although not part of a formal consultation exercise, the opportunity was taken to seek feedback on policy developments around regulated work and the structure of the guidance.
29. During consideration of the Protection of Vulnerable Groups (Scotland) Bill at the Scottish Parliament, the previous administration gave commitments to consult on a number of the more significant SSIs in draft. The current administration reaffirmed this commitment in the consultation paper published in November 2007. The more significant SSIs were published for consultation in draft from 10 November 2009 to 2 February 2010 and some 108 responses were received to the consultation, including comments desiring to know the revised fees for registration. The Scottish Government's response to the 2009 consultation was published in the "*Scottish Government response to the consultation on significant draft SSIs, RIA and guidance*".

Issues specific to the Suitability Regulations

30. The Suitability Regulations have not been subject to direct public consultation. In respect of provision for the SSSC at regulation 2(a), the Suitability Regulations have been made at the request of the SSSC and the Scottish Government has consulted the SSSC on the Suitability Regulations and they are content. As regards provision for working abroad at regulation 2(b), the Suitability Regulations deliver the policy proposals set out in paragraph 102 of the Scottish Government's response to the 2009 consultation, in response to concerns raised by stakeholders. In particular, Scottish organisations did not want to recruit and "export" unsuitable people to do harm abroad.

Financial effects and Regulatory Impact Assessment

31. The *Protection of Vulnerable Groups (Scotland) Act 2007 - Secondary Legislation - Partial Regulatory Impact Assessment (RIA No. 2007/40)* was published on 15 November 2007 to accompany the consultation on secondary legislation. Although comments were invited, no specific comments were made in respect of the RIA. A revised draft RIA (RIA No. 2009/03) was published to accompany the significant draft SSIs published for consultation on 10 November 2009. Responses to the consultation exercise have been taken into account in finalising the RIA. The final RIA (also RIA No. 2009/03) can be found at: www.scotland.gov.uk/pvglegislation

Scottish Government
Children, Young People and Social Care Directorate