

CARE STANDARDS ACT 2000

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part VII: Protection of Children and Vulnerable Adults

Protection of vulnerable adults

219. **Part VII** introduces provisions by which the Secretary of State will establish and operate, in relation to both England and Wales, a list of persons who are considered unsuitable to work with vulnerable adults. Providers of care services, including care homes, domiciliary care agencies and prescribed services within both NHS and independent healthcare settings will be required to refer individuals for inclusion in the list (*section 82*). Provision is also made for registration authorities to refer individuals for inclusion in both the list kept under section 1 of the Protection of Children Act 1999 (PoCA) and the list kept under this Part (PoVA), (*sections 84 and 95*), and for referrals to be made as a result of certain inquiries. (*Sections 85 and 96*). *Section 89* places a duty on providers of care services to vulnerable adults to check that prospective employees are not on the list, and to refuse employment in that field to any person included on the list. They must also stop employing a person in a care position if they discover they are on the appropriate list. A person who seeks work in a care position while they are confirmed on the list commits an offence.
220. Individuals will have a right of appeal against a decision to include them on the list, and will be able to apply to have their name removed from the list after ten years (five years if aged under 18 at the time their listing was confirmed (*sections 86 - 88*). Provision is also made for cross-referrals between this list and the list of persons considered unsuitable to work with children established under section 1 of PoCA, and *vice versa* (*sections 92 and 97*). Further amendments are made to the Education Act 1986 such that persons who are unsuitable to work with children are disqualified from working in independent schools.

Section 80 Basic definitions

221. This section provides the basic definitions relevant to this Part of the Act. *Subsection (2)* defines care workers. Broadly, these are individuals employed in care homes, private and voluntary hospitals or clinics, independent medical agencies or NHS establishments who have regular contact with vulnerable adults in the course of their normal duties, and individuals who provide personal care to people in their own homes. The approach for healthcare establishments is that these provisions will only apply where individuals are employed in prescribed services. For example, staff on a geriatric ward would be included, but staff on a paediatric ward would not be. *Subsection (3)* defines “care position”.
222. *Subsection (4)* provides that for this Part of the Act, employment is defined as it is in section 12(1) of PoCA:
“employment”-

*These notes refer to the Care Standards Act 2000
(c.14) which received Royal Assent on 20 July 2000*

- (a) means any employment, whether paid or unpaid and whether under a contract of service or apprenticeship, under a contract for services, or otherwise than under a contract; and
- (b) includes an office established by or by virtue of a prescribed enactment, and references to an individual being employed shall be construed accordingly.
223. *Subsection (5)* defines supply workers. These are workers who are found care work through employment agencies or businesses, including those supplied by domiciliary care agencies to provide personal care to people in their own homes. The definition also includes temporary staff supplied by employment agencies or businesses to work in care positions as defined in subsection (3).
224. *Subsection (6)* defines vulnerable adults. Three groups of adults are identified:
- those receiving accommodation and nursing or personal care in a care home;
 - those receiving personal care in their own home through a domiciliary care agency; and
 - those receiving certain services in healthcare settings, including private, voluntary and NHS establishments. (The services included will be set out in regulations under subsection (2) above).
225. *Subsection (7)* defines the providers of services to vulnerable adults. These are any person who is registered as carrying on a care home, a domiciliary care agency, or an independent healthcare establishment, independent medical agency or NHS body which provides prescribed services.
226. *Subsection (8)* The PoVA scheme will be operated by the Secretary of State for both England and Wales, but with the Secretary of State alone having regulation making powers. However, he will be required to consult the National Assembly for Wales before making any such regulations.

Section 81 Duty of Secretary of State to keep list

227. *Section 81* places a duty on the Secretary of State to keep a list of individuals who are considered unsuitable to work with vulnerable adults. The list will be kept by the Secretary of State for Health in relation to both England and Wales. A person can only be included on the list if he has been referred to the Secretary of State in accordance with the provisions of this Part. *Subsection (3)* enables the Secretary of State to remove a person from the list should he be satisfied that they should not have been included on it in the first instance.

Section 82 Persons who provide care for vulnerable adults: duty to refer

228. *Section 82* sets out the duty on providers of care services for vulnerable adults to refer care workers to the Secretary of State for inclusion in the list under certain circumstances. The circumstances, set out in *subsection (2)*, turn on a worker having placed a protected adult at risk of harm, whether or not in the course of his employment. The circumstances include not only that a worker has been dismissed on grounds of misconduct which harmed or risked harm to a vulnerable adult, but that a worker has resigned or retired before the employer has dismissed him; that they have been transferred to other work; that they have been suspended or provisionally transferred to other duties pending a final decision of the employer; or that they have been made redundant in circumstances where the employer would otherwise have considered dismissing them. The definition of “harm” is given in *section 121* (General interpretation *etc*).

229. *Subsection (3)* further provides that if, after a worker has resigned, retired, been dismissed or been transferred to other duties, relevant information comes to light, the employer is still under a duty to refer the person to the Secretary of State for inclusion on the list.
230. *Subsections (4) to (7)* describe the process that the Secretary of State must use to determine whether a referred person should be included on the list. Providing that the Secretary of State considers it may be appropriate to list the person, then the person will be provisionally included in the list while the referral is under consideration. The Secretary of State will invite both the person referred and the provider to make any observations on the information the other submits, and if he thinks appropriate, will subsequently invite each to comment on the other party's observations. The Secretary of State will come to a decision once all the relevant information has been received, and he has been notified that any pending action against the worker has resulted in dismissal or permanent transfer to other duties. If the Secretary of State forms the opinion that it was reasonable for the provider to consider the care worker guilty of misconduct, and that the person is unsuitable to work with vulnerable adults, then the person's name will be confirmed on the list.
231. *Subsection (10)* makes it clear that referrals are not required unless the dismissal, resignation *etc.* occurred after the commencement of this section. This is a similar approach to that adopted under PoCA, section 2(10).

Section 83 Employment agencies and businesses: duty to refer

232. Employment agencies and businesses are similarly required to refer supply workers to the list under appropriate circumstances. Under *subsection (2)*, an employment agency must make a referral where it has decided not to do any further business with the worker on the grounds of misconduct which harmed a vulnerable adult or placed him or her at risk of harm; or where on those grounds has decided not to find them any further employment as a supply worker. An employment business must refer where it has dismissed a supply worker on the grounds of misconduct which harmed, etc, a vulnerable adult; where the supply worker has retired or resigned but otherwise the employment business would have dismissed or considered dismissing him on those grounds; or where on those grounds it has decided not to supply him for further work in a care position (*subsection (3)*). The procedure the Secretary of State must follow after a referral is similar to that set out in section 82. Again, there is no requirement to refer in cases where the dismissal, resignation *etc.*, or decision no longer to provide or supply the worker to fill a care position occurred before this section comes into force.

Section 84 Power of registration authority to refer

233. *Section 84* gives the registration authority (in England the Commission; in Wales the Assembly), the power to refer worker to the Secretary of State that they consider guilty of misconduct. This section enables the registration authorities to make referrals when they come across evidence of misconduct in the course of their inspections that has not been referred to the Secretary of State by the employer. This power would be used in cases where employers have not fulfilled the responsibilities Part VII places on them to refer workers who have caused harm, or risked harm to vulnerable adults. Such circumstances could occur when a care home has been closed and the owner is refusing to co-operate or in small establishments where the owner may be directly involved in care provision, has caused harm himself and has not referred himself.

Section 85 Individuals named in the findings of certain inquiries

234. This section provides for the Secretary of State to be able to consider for inclusion on the list individuals who have been named in the findings of certain inquiries. It also describes the process that the Secretary of State must use to determine whether a person so named should be included on the list. If it appears to the Secretary of State that the

person who held the inquiry found that the individual was guilty of relevant misconduct while employed in a care position and that the individual is unsuitable to work with vulnerable adults then the person will be provisionally included in the list. The Secretary of State will invite observations from the individual on the report, so far as it relates to him, and from the employer of the individual at the time the misconduct took place. If he feels it is appropriate, the Secretary of State will invite each to comment on the other party's observations. The Secretary of State will come to a decision once all the relevant information has been received.

235. *Subsection (6)* defines "relevant employer" and "relevant misconduct". *Subsections (7) to (9)* provide a list of relevant inquiries to which this section may apply, and provides the Secretary of State with an order making power (in consultation with the Assembly), to add other inquiries or hearings to this list.

Section 86 Appeals against inclusion in the list

236. Individuals will have a right to appeal against a decision by Secretary of State to include them on the list, but (subject to *subsection (2)*) not against a provisional inclusion while the referral is being investigated. Appeals will be heard by the Tribunal established under PoCA. Individuals will also be able to apply to the Tribunal to appeal against a decision of the Secretary of State not to remove their name from the list on the grounds that their inclusion was erroneous.
237. If the Tribunal is not satisfied, either that the individual was guilty of misconduct, or that he is unsuitable to work with vulnerable adults, it will allow the appeal and direct that the individual's name should be removed from the list. In considering an appeal where an individual has been convicted of an offence, the Tribunal cannot challenge any fact on which the conviction was based.
238. *Subsection (2)* provides that if an individual's name has provisionally been on the list for more than nine months without a decision being made, he can ask the Tribunal to determine his case instead of the Secretary of State. This will not apply where a criminal or civil case is pending, in which case the individual cannot ask the Tribunal to determine his case until 6 months after the final outcome (or "final determination") of the court case. "Final determination" is defined in *subsection (6)*.

Section 87 Applications for removal from the list

239. Under this section, individuals are given a right to apply to have their name removed from the list once a period of ten years has elapsed. Applications will be made to the Tribunal, as before, and it will be for the Tribunal to determine whether the individual is still unsuitable to work with vulnerable adults.

Section 88 Conditions for application under section 87

240. *Section 88* gives conditions for application for removal from the list. It provides that such applications may only be made with leave of the tribunal. An individual may only apply after he has been permanently listed for at least ten years, and if unsuccessful, at ten yearly intervals after that. Anyone who was aged under 18 at the time of permanent listing can apply to have his name removed after five years (and at five yearly intervals after that). It will be for the Tribunal to determine whether an individual is now suitable to work with vulnerable adults.

Section 89 Effect of inclusion in list

241. This section places a duty on providers of care services to vulnerable adults, including domiciliary care agencies, to check that prospective employees are not on the list before offering them employment in a care position. If they do find the person is on the list, they must not employ them in a care position. Where workers are being supplied by an employment agency or business, the provider may instead obtain written confirmation

from the agency or business to the effect that they have checked that the individual is not on the list within the last twelve months. Should an employer discover that an employee is listed then they are obliged to stop employing them in a care position.

242. *Subsection (5)* makes it an offence for a person confirmed on the list to apply for, accept or do any work in a care position. A person committing an offence under this subsection would be liable on conviction in the Magistrate's Court to imprisonment for up to six months, and a fine of up to £5000 (level five on the standard scale); and in the Crown Court to imprisonment for up to five years and an unlimited fine. It will be a defence for a listed person charged with an offence under this subsection to prove that they did not know, and could not reasonably be expected to know, that they were on the list.

Section 90 Searches of list under Part V of Police Act 1997

243. *Section 90* amends section 113 and 115 of the Police Act 1997. These amendments will, when commenced, enable the Criminal Records Bureau to supply an individual with a criminal record certificate or enhanced criminal record certificate which states whether he is included on the list, and gives any details of the inclusion as may be required in regulations.

Section 91 Access to list before commencement of section 90

244. This section provides that pending such time as the Criminal Records Bureau takes on the function of issuing criminal record certificates, any person who wishes to offer an individual employment in a care position, or an employment agency or domiciliary care agency who wishes to take on an individual, or any other person as may be defined in regulations, is entitled on application to the Secretary of State to the information as to whether the individual is on the list. An application can still be made if the individual is already employed by the person. This means, for example, that an employer can carry out a check in order for a person to change their duties and work in a care position when they had not done so before.

Section 92 Persons referred for inclusion in list under Protection of Children Act 1999

245. This section deals with cross-referrals between this list and the list established under section 1 of PoCA, which lists individuals considered unsuitable to work with children. Where a person is referred under PoCA but it appears from the alleged misconduct that they may be unsuitable to work with vulnerable adults, it provides a mechanism for considering inclusion on the PoVA list. *Subsection (3)* provides, however, that a person can only be provisionally included in, or have his inclusion confirmed in, the PoVA list, if he is also included in the PoCA list.

Section 93 Power to extend Part VII

246. *Section 93* gives the Secretary of State the power to make regulations to make changes to the list in section 80(7) defining persons providing care to vulnerable adults, and to amend the definitions given in section 80 of "care worker", "care position" and "vulnerable adult". Section 93 gives the Secretary of State power to amend the definitions in section 80 so as to bring within the scope of Part VII any social services provided by local authorities or others, and health services outside the NHS.
247. The section allows the Secretary of State to keep the coverage of Part VII up to date, for example, should the scope of services regulated under Part II of the Act be altered in the future. The power to extend will also enable the coverage of Part VII to be kept relevant to changing patterns of service delivery. For example, it is intended that day centres will be brought within the range of services regulated under Part II of this Act in the foreseeable future. This section would enable the Secretary of State to extend the provisions of Part VII to include care workers in day centre services.