

PROTECTION OF VULNERABLE GROUPS (SCOTLAND) ACT 2007

EXPLANATORY NOTES

OVERVIEW

Part 6: Interpretation

Section 91. Regulated work

158. [Section 91](#) introduces schedules 2 and 3 which define regulated work with children and regulated work with adults, respectively. Schedule 2 to this Act supercedes schedule 2 to PoCSA; regulated work with children corresponds to “child care position” in that Act, although there are significant differences between the two.

Section 92. Meaning of references to being barred from regulated work

159. There is a difference between being listed and being barred. Being listed means being included in the children’s or adults’ list. Being barred from regulated work in Scotland is a consequence of being listed, included in certain other lists in the UK or subject to a prohibition or disqualification in any other jurisdiction which the Scottish Ministers deem to correspond to being listed.
160. Subsections (1) and (2) mean that being included in the equivalent list in England and Wales or Northern Ireland, will result in being barred from regulated work with children and adults, respectively, in Scotland. Subsections (3) and (4) give the Scottish Ministers an order-making power to regard any other list abroad as being equivalent to a Scottish list and therefore leading to being barred from regulated work in Scotland. Subsections (5) and (6) make allowance for developments in England and Wales or Northern Ireland and enable the lists in subsections (1) and (2) to be updated accordingly.
161. The effect of section 92 is that a teacher working in England who is referred to the IBB (established under the SVG Act) and included on their children’s barred list would be *listed* in England and Wales and *barred* from regulated work with children in Scotland and equivalent work across the UK. Although barred, the individual will not be *listed* in Scotland; it is expected that the IBB will retain that information and provide it to Scottish police forces and the Vetting and Disclosure Unit as necessary.

Section 93. Harm

162. This is discussed in the context of referral grounds under section 2 at paragraph 18 of these Notes.

Section 94. Meaning of “protected adult”

163. [Section 94](#) defines a “protected adult” for the purposes of the Act. A protected adult is defined as an individual aged 16 or over who is provided with (and thus receives) a type of care, support or welfare service as set out in this section. This definition of protected adult supersedes the definition of “adult at risk” at regulation 10(3) of the Police Act

1997 (Criminal Records) (Scotland) Regulations 2006 for the purposes of eligibility for enhanced disclosure. To be classified as an adult at risk under those regulations, an individual has to meet three criteria: having a condition, in consequence of which they have a disability and receive a care service, all of which are set out in regulation 10. Section 94 replaces these 3 criteria with a test linked to the type of services being received by the individual. Individuals doing regulated work with protected adults (see the explanation of schedule 3 at paragraph 202 of these Notes) will no longer be eligible for enhanced disclosure but will be able to request disclosures under this Act.

164. **Section 94(1)(b)** allows for the Scottish Ministers to prescribe healthcare related services, whether provided by the NHS or by private suppliers. Section 94(1)(d) gives the Scottish Ministers the power to prescribe welfare services, receipt of which makes an individual a protected adult. Section 94(5) sets out that a welfare service includes any service which provides support, assistance, advice, or counselling to individuals with particular needs. The Scottish Ministers intend to make regulations prescribing welfare services to capture appropriate services provided by the voluntary sector. Section 94(2) gives the Scottish Ministers an order-making power to amend the definition of “protected adult” in subsection (1).
165. The equivalent term in the SVG Act is “vulnerable adult” and applies to persons who are 18 years of age or over.

Section 95. Meaning of “work”

166. **Section 95** defines the meaning of work, of which regulated work is a subset defined through section 91 and schedules 2 and 3. Section 95(1) clarifies that work includes paid or unpaid work and other types of work. For the purposes of this Act, being a foster carer is regarded as work. But work does not come within the scope of the Act if it is done for an individual in the course of a family relationship or in the course of a personal relationship for no commercial consideration. This means that a mother employing her brother to look after her child (a family relationship) does not constitute work for the purposes of this Act, whether or not she pays her brother. However, a mother employing a friend to look after her child would not constitute work if there was no payment but, if the friend received payment, it would constitute work. In this latter case, therefore, it would be an offence for a barred individual to accept payment from the mother for babysitting (because it is regulated work) but not for the mother (because she is a personal employer) to employ the barred individual.
167. **Section 95(9)** provides the Scottish Ministers with the power to prescribe which types of work should and should not be considered work done in the course of a family or personal relationship. The Scottish Ministers may use this power to ensure consistency with: other legislation which defines family relationships; and the SVG Act, which contains a similar power.

Section 96. Fostering

Scope of foster carer in this Act

168. **Section 96** sets out what constitutes “foster carer” for the purposes of the Act. Subsection (1) defines foster carer under the Act to cover:
- Public fostering arranged by councils under section 26(1)(a) of the Children (Scotland) Act 1995. This would cover many foster care placements and also include the situation where a looked after child is placed by the council with a relative or friend, even though that individual is not a career foster carer. It would thereby include some kinship care scenarios.
 - Private fostering under the Foster Children (Scotland) Act 1984. This covers the situation where a parent or guardian places a child in the care of another person who is not a close relative for more than 28 days. Parents have a duty to

report the arrangement to the relevant council who must inspect and monitor the accommodation and other aspects of the arrangements, but the parent or guardian assesses and approves the carers.

- Those looking after a child in pursuance of a permanence order (see paragraphs 170 to 172 below).
- Those looking after a child under a supervision requirement (see paragraph 173 below).

Employers and referrals

169. Subsection (2) deems who the ‘employer’ of the foster carer is considered to be, which is significant in terms of entitlement to disclosure records. For public fostering, the employer is deemed to be the council or voluntary agency who made the arrangements; for permanence orders and supervision requirements the employer is deemed to be the council; and for private fostering it is the person who made the fostering arrangements *and* has the power to terminate those arrangements. Subsection (3) disappplies the offences in sections 34 to 37 of the Act in relation to work as a foster carer under a permanence order or a supervision requirement.
170. Subsection (5) provides that section 3 (referral following disciplinary action) will apply to foster carers and ‘dismissing an individual’ in employment situations should be read as ‘terminating the fostering arrangements’ in the context of fostering.

Permanence orders

171. Subsection (1) includes an individual who looks after children in pursuance of permanence orders, created by the Adoption and Children (Scotland) Act 2007, within the definition of foster carer. These orders can only be applied for by a council and are granted by a court. The order consists of:
- the mandatory provision, whereby the right to regulate the child’s residence and the responsibility to provide guidance to the child are vested in the council;
 - the ancillary provisions, whereby other parental responsibilities and rights (PRRs) in respect of the child (as set out in sections 1 and 2 of the Children (Scotland) Act 1995) may be vested in the council or any other person or persons as the court considers appropriate. Ancillary provisions may also take these PRRs away from the birth parents; and
 - if appropriate, provision granting authority for the child to be adopted.
172. Since the child remains a looked after child and the responsibility for his or her care rests ultimately with the council, any carer of a child on a permanence order is regarded as doing regulated work so that disclosure records can be obtained and the carer is subject to continuous vetting. This will apply whether or not the carer is a relative or friend. The council is treated as an employer of the foster carer in this context.
173. The offences in sections 34 to 37 of the Act do not apply to carers of children on a permanence order, so that an administrative decision by the Central Barring Unit (on behalf of Scottish Ministers) cannot override a court decision made in the best interests of the child, by listing an individual who also happens to be the foster carer of a child on a permanence order. This is to avoid the individual and the council committing a serious offence by following the order of the court and allowing the child to remain with the individual beyond the date of the listing decision.

Supervision requirements

174. An individual who looks after a child in pursuance of a supervision requirement, which cover other types of foster care arrangement, is also brought within the definition of

foster carer. For the duration of the requirement, the child is a looked after child (in terms of the Children (Scotland) Act 1995) and the foster carer should be regarded as doing regulated work. This allows disclosure records to be obtained and continuous vetting of the carer. This applies whether or not the carer is a relative or friend.

Foster care and work

175. Subsection (4) disapplies subsections (2) to (7) of section 95 of the Act (meaning of work). These subsections in section 95 concern ‘work’ done in the course of family or personal relationships which are excluded from the generality of work in section 95. Subsection (4) prevents any foster care relationships being excluded from regulated work by being interpreted as family or personal relationships. Section 95(9) could be used to specify in greater detail the boundary of what constitutes work in terms of family and personal relationships, if this proves necessary.

Definitions

176. Subsection (8) imports into this section the meanings of “parental responsibilities”, “parental rights”, “permanence order” and “supervision requirement” as defined in the Children (Scotland) Act 1995 and the Adoption and Children (Scotland) Act 2007, as appropriate.

Section 97. General interpretation

177. [Section 97](#) makes provision for general interpretation. Some of these terms were highlighted at paragraph 3 of these Notes. Some terms which appeared in PoCSA have changed their meaning, e.g. “harm” which is defined at section 93 and discussed at paragraph 18 of these Notes.