

Protected Adults Regulations

EXECUTIVE NOTE

THE DRAFT PROTECTION OF VULNERABLE GROUPS (SCOTLAND) ACT 2007 PRESCRIBED SERVICES (PROTECTED ADULTS) REGULATIONS 2010

Powers under which Instrument is made

1. The draft Protection of Vulnerable Groups (Scotland) Act 2007 Prescribed Services (Protected Adults) Regulations 2010 (“the Protected Adults Regulations”) will be made by Scottish Ministers in exercise of powers conferred by section 94(1)(b) and (d) 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 4 million applications have been made for basic, standard and enhanced disclosures. In the 2008/09 financial year, 360,000 enhanced disclosures were processed for the purposes of working with vulnerable groups.
4. Since 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. It is an offence for anyone on the list to work in a child care position in Scotland.
5. The 2007 Act (when 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 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. 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, 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 draft guidance and FAQs which have been published on the Scottish Government website:
www.scotland.gov.uk/pvglegislation

The Protected Adult Regulations

8. The intention of the PVG Scheme is to make sure that those people who need protection are protected, without bringing all sorts of people into the Scheme who have no real opportunity to pose a risk to vulnerable groups. Unlike children who are inherently deemed vulnerable and in need of protection, most adults are able to make their own choices and decisions, and are more able to protect themselves from harm. So not all adults will need the protection that the 2007 Act delivers. This means that there must be a proportionate approach to requiring scheme membership in relation to work with “protected adults”.
9. The 2007 Act does not specify a list of positions, as the roles and duties that people undertake are flexible and any list would become out of date very quickly. What the 2007 Act does is provide information to allow individuals and organisations to establish which posts constitute regulated work. Individuals undertaking regulated work with protected adults should become a member of the scheme.
10. 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. 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 Protected Adult Regulations will be made under the powers at section 94(1)(b) and (d).
11. As the term “protected adult” under the 2007 Act is a service-based definition, it does not label adults on the basis of having a specific condition or disability. A person will only be a protected adult for the duration that they are receiving the service, therefore

some adults will be protected for longer periods than others (e.g. care home residents whilst in the care home) whereas others will only be protected for short periods (e.g. whilst receiving dental treatment at the dentist).

12. A person is only a protected adult in the context of the service they receive or the setting in which they are situated. In other words, an adult does not carry protected status around with them. The definition will therefore assist organisations to easily identify which of their own services make an adult protected. This also means that there will be no need to ask intrusive questions about an adult's personal circumstances.
13. As most adults are likely to be a protected adult at some time in their lives, section 94, which defines the exact nature of the services that make an adult protected, must be read with schedule 3, which specifies what constitutes regulated work. This will ensure that only those people in positions that would give them the opportunity to harm protected adults come within the scope of the scheme.

Background - regulated work with adults

14. Schedule 3 of the 2007 Act specifies particular positions as being within scope of regulated work. This is because the holder has a particular position of responsibility, performs certain activities as part of their normal duties (or supervises the performance of such activities) or because the work is being undertaken within certain establishments where it can be assumed that people who are protected under the 2007 Act will be present.
15. With positions other than those specified as holding certain responsibility or performed within a specified establishment, as a first step an employer must identify the type of service that makes an adult "protected".
16. The second step will be to assess which posts are undertaking regulated work by looking at the range of activities in schedule 3. The employer must then consider if the activity constitutes part of the position's normal duties and whether contact with protected adults is merely "incidental" in the course of the activity. (Broadly speaking, incidental contact is where the contact is fleeting or protected adults are not the target audience or client base.)
17. The Protection of Vulnerable Groups (Scotland) Act 2007 (Modification of Regulated Work with Adults) Order 2010 (also published for consultation) sets out the Scottish Minister's proposals to modify the current provisions relating to regulated work with adults to ensure that those who have little or no contact with protected adults are not needlessly brought within scope. The accompanying Executive Note accompanying that order provides information which may be usefully considered alongside this Executive Note.

Prescribed Services

18. The 2007 Act provides that receipt of certain health, care or welfare services confer protected status on an adult. The purpose of this instrument is therefore to prescribe

certain services, receipt of which will confer protected adult status on an individual for the purposes of the 2007 Act.

Healthcare related services

19. Section 94(1)(b) allows Scottish Ministers to prescribe healthcare related services which are provided to an adult that confer protected status.
20. Only those services provided by a health body under parts II, III, IV or VII of the National Health Service (Scotland) Act 1978 concerning the treatment, care and support of, and provisions of advice and assistance in relation to their health and well-being are prescribed services for the purposes of the 2007 Act.
21. The key requirement is to capture those services which involve workers delivering relevant NHS Scotland services. This will encompass those who do regulated work in hospitals, work in local general practices, or within the community and also ensure that non-specific services such as accident and emergency, the ambulance service and NHS 24 are also included.
22. This instrument also prescribes that receipt of any independent health care services as provided by sections 2(5) and 77 of the Regulation of Care (Scotland) Act 2001 (“the 2001 Act”) whose principle purpose is the treatment, care and support of, and provision of advice and assistance in relation to their health and well-being will also confer protected status on an adult.
23. This will also ensure similar coverage of private or independent health care services.

Welfare services

24. In order to assist voluntary and private sector organisations that provide a range of non-statutory services to individuals, these regulations define what constitutes a welfare service. This will enable such organisations to know which of their own services make an adult protected.
25. The definition of a welfare service in section 94(1)(d) of the Act includes “any service which provides support, assistance, advice or counselling to individuals with particular needs”. The policy is therefore that a welfare service must be provided in the course of work to one or more adults, be delivered on behalf of an organisation (as defined in section 97), require training to be undertaken by the person delivering the service, and to have a frequency and formality attached to the service. All four of these criteria are mandatory. In addition, a welfare service must either have an agreed contract in place between the organisation providing the service and the recipient or the service must be personalised to meet an individual adult’s needs.
26. This definition is similar to the definition of social care service under the existing disclosure scheme, so there should be little or no disruption to established procedures.
27. The Protected Adult Regulations prescribe only health services and welfare services for the purposes of the 2007 Act. Section 94 outlines other services the receipt of which confers protected adult status. These are: a support service, an adult placement

service, a care home service, or a housing support service (section 94(1)(a)); and community care services provided or secured by a council under the Social Work (Scotland) Act 1968 or the Mental health (Care and Treatment) (Scotland) Act 2003, or in respect of which a council has made a direct payment (section 94(1)(c)).

Consultation

28. 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.
29. 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.
30. 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 to the analysis of consultation on policy proposals for secondary legislation*" on 6 October 2008.
31. 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.

Issues specific to the Protected Adult Regulations

32. The consultation explored the proposals for identifying the health and welfare services, receipt of which make an individual a protected adult for the purposes of the 2007 Act.
33. There was broad support for the policy intention of designating an individual as a protected adult while in receipt of an NHS or independent health care service.
34. The majority of those who responded also supported defining welfare services by the nature and purpose of the service provided. It was considered that this would be the

simplest option for providers of services who do not contract with any health body or council (and is not a care service listed in section 94(1)(a), (b) or (c)). It was also considered that this provision should also be extended to commercial providers.

35. There was a clear majority from the voluntary sector in favour of a service based definition as it avoids stigmatising an adult by reason of disability or characteristics.
36. Scottish Ministers agreed that defining a category of adult to be protected in this way was viewed as the most appropriate means to ensure employers operate the 2007 Act as intended. It places no obligations or expectations on adults to demonstrate vulnerability and avoids categorising adults solely by a condition or disability. Proportionality is also achieved through application of the tests relating to regulated work that are outlined in schedule 3 of the 2007 Act.

This consultation exercise

37. 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. This SSI is one of those more significant SSIs and the Scottish Government will consider any comments made on this draft SSI received before **2 February 2010**. A response form is attached to the end of this Executive Note and also available in Word format separately.
38. There is a clear policy intention to achieve a proportionate balance in scheme coverage and it is not intended therefore that every aspect of an NHS or independent healthcare provider's service should be brought within the ambit of the scheme, for example staff solely involved in research or delivering IT or financial loan type functions. Moreover, as the type and nature of care and welfare services, and those who provide and deliver these, continues to adapt as more innovative and flexible services are designed, there was a need to ensure that the provision of a welfare service would itself make an adult a protected adult.
39. We are therefore interested in whether the proposals to ensure that adults are only protected when in receipt of the specified services are considered to be proportionate.
40. There will not be a report on this consultation exercise but the revised Executive Note accompanying the SSI when it is laid before the Scottish Parliament will address any significant issues raised by respondents.

Financial effects and Regulatory Impact Assessment

41. 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) has been published to accompany this and the other significant draft SSIs published for consultation. Changes in the revised draft RIA reflect much greater clarity on the detail of implementation and related costs.

PVG CONSULTATION ON SIGNIFICANT DRAFT SCOTTISH STATUTORY INSTRUMENTS
NOVEMBER 2009

You can find the latest draft RIA at: www.scotland.gov.uk/pvglegislation If you have any comments on it, please submit them in the same way as for comments on the SSI.

Scottish Government
Primary and Community Care Directorate

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Responding to the consultation

Your response must be received by **2 February 2010**.

You can e-mail your response to: pvg.enquiries@scotland.gsi.gov.uk

Alternatively, please send it to:

SSI Consultation
PVG Implementation Team
The Scottish Government
2-B North, Victoria Quay
Edinburgh EH6 6QQ

You do not have to use the response form below but please make sure you include the same information as this will help us to process your response.

RESPONSE FORM

My comments relate to SSI: **the Protected Adults Regulations**

My involvement with vulnerable groups is as: (*role*)

Name:

Postal Address:

1. Are you responding: (please tick one box)

- (a) as an individual (go to Q2a/b and then Q4)
 (b) **on behalf of** a group/organisation (go to Q3 and then Q4)

Individuals

2a. Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government website)?

- Yes (go to 2b below)
 No, not at all. We will treat your response as confidential

2b. Where confidentiality is not requested, we will make your response available to the public on the following basis: (**please tick one** of the following boxes)

- Yes, make my response, name and address all available
 Yes, make my response available, but not my name or address
 Yes, make my response and name available, but not my address

On behalf of groups or organisations

3. The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government website). Are you also content for your **response** to be made available?

Yes

No We will treat your response as confidential

Sharing responses / future engagement

4. We may share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for the Scottish Government to contact you again in the future in relation to this consultation response?

Yes

No

My comments

5. Please record your comments in the space below: (*take as much space as you need*)

2010 No.

PROTECTION OF VULNERABLE GROUPS

PROTECTION OF VULNERABLE ADULTS

**The Protection of Vulnerable Groups (Scotland) Act 2007
(Prescribed Services) (Protected Adults) Regulations 2010**

Made - - - -

Laid before the Scottish Parliament

Coming into force - - - - 2010

The Scottish Ministers make the following Regulations in exercise of the powers conferred by section 94(1)(b) and (d) of the Protection of Vulnerable Groups (Scotland) Act 2007(a) and all other powers enabling them to do so.

Citation and commencement

1. These Regulations may be cited as the Protection of Vulnerable Groups (Scotland) Act 2007, (Prescribed Services) (Protected Adults) Regulations 2010 and come into force on []2010.

Interpretation

2. In these Regulations—

“the Act” means the Protection of Vulnerable Groups (Scotland) Act 2007.

Prescribed services

3. For the purposes of section 94(1)(b)(i) of the Act, a prescribed service is a service by a health body acting in exercise of functions conferred by parts II, III, IV and VII of the National Health Service (Scotland) Act 1978(b) which concern the treatment, care and support of, and provision of advice and assistance to individuals in relation to their health and well-being.

4. For the purposes of section 94(1)(b) (iii), (iv), (v) and (vi) of the Act, a prescribed service is a service provided by an independent health care service as defined by section 2(5) and section 77 of the Regulation of Care (Scotland) Act 2001(c) which concern the treatment, care and support of and provision of advice and assistance to individuals in relation to their health and well-being.

(a) 2007 asp 14. Section 97(1) contains a definition of “prescribed” relevant to the statutory powers under which these Regulations are made.

(b) 1978 c. 29.

(c) 2001 asp 8.

PVG CONSULTATION ON SIGNIFICANT
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5. For the purposes of section 94(1)(d) of the Act a prescribed welfare service(a) is a service that:—

- (a) is provided in the course of work(b) to one or more persons over the age of 16;
- (b) is delivered on behalf of an organisation(c);
- (c) requires training to be undertaken by the person delivering the service;
- (d) has a frequency and formality attached to the service; and either
- (e) requires a contract to be agreed between the service provider and the recipient of the service prior to the service being carried out; or
- (f) is personalised to an individual adult's needs; and

Authorised to sign by the Scottish Ministers

[],
[]
2010

(a) section 94(5) contains a definition of “welfare service”.
(b) section 95 contains a definition of “work”.
(c) section 97 contains a definition of “organisation”.

PVG CONSULTATION ON SIGNIFICANT
DRAFT SCOTTISH STATUTORY INSTRUMENTS
NOVEMBER 2009
EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations prescribe certain services, receipt of which will confer protected adult status on an individual.

Regulation 3 provides that only those services provided by a health body acting under parts II, III, IV or VII of the National Health Service (Scotland) Act 1978 concerning patient care and assistance are prescribed services.

Regulation 4 provides that a prescribed service is a service provided by an independent health care service as defined in the Regulation of Care (Scotland) Act 2001, the principle purpose being patient care and assistance.

Regulation 5 prescribes welfare services. Paragraphs (a) to (d) specify the mandatory elements required to qualify as a welfare service. Paragraph (e) specifies an additional element where there is an agreed contract in place between the organisation providing the service and the recipient and paragraph (b) specifies an additional element where a particular service is being delivered in order to meet an adult's needs.