

Scotland

The Protection of Vulnerable Groups (Scotland) Act 2007

Introduction

The Protection of Vulnerable Groups (Scotland) Act 2007 comes into force in 2010 and will establish a new and enhanced Scottish Vetting and Barring Scheme. A new body, called the Central Barring Unit (CBU), will be established as part of Disclosure Scotland and will be responsible for setting up, deciding on and maintaining the lists of people barred from working with children and/or protected adults in Scotland on behalf of Scottish Ministers. The CBU's remit is similar, though not identical, to the Independent Safeguarding Authority in England, Wales and N. Ireland.

The new children's list will replace the existing Scottish POCA list. Scotland does not currently hold any list of people barred from working with adults, and so the adult list will be entirely new.

As is the case with the Westminster legislation, the 2007 Act was introduced as a result of the Bichard Inquiry into the Soham murders of Jessica Chapman and Holly Wells. However, after parliamentary debate, the approach taken in Scotland has been slightly different to that taken in the rest of the UK. The Governments in Scotland and Westminster are working to ensure that there are no loopholes between the legislation that could compromise the safety of children or vulnerable adults.

This briefing is for members working in Scotland. A briefing for members in England, Wales and Northern Ireland is available at: http://www.rcn.org.uk/newsevents/congress/2009/congress_2009_resolutions_and_matters_for_discussion/4_isa_151_for_better_or_worse

About the new Vetting and Barring Scheme in Scotland

The new Scheme in Scotland, once it comes into force, will replace, and should improve, the current enhanced disclosure system. As with the existing system, the new disclosure process is not intended to replace rigorous recruitment practices in individual organisations.

Under the new Scheme, paid staff and volunteers undertaking 'regulated work' will apply to join the new Scheme for children, or for protected adults, or for both, depending on the regulated work they are undertaking. This application will trigger a new, enhanced disclosure check. Should this disclosure check reveal information which suggests that the individual might prove a risk to children and/or protected adults, the information will be considered by the CBU. If the CBU decides that the applicant poses a significant threat, the individual will be barred from the Scheme and listed on the children's list, the protected adults list or both, depending on which part of the Scheme they applied to join and the nature of the information gathered during the disclosure check. This is expected to be an uncommon occurrence; most

applications will not need to be referred to the CBU with applicants simply being accepted as Scheme members.

An appeals process is detailed in the legislation for all listings, except those determined automatically by an individual being found guilty in the courts, or cautioned, of a specific list of offences, or for those already barred in other parts of the UK.

Scheme membership will last for 10 years and will then require to be renewed. Employees will only need to fill out a full disclosure form once, at the start of each 10 year period. New employers will have access to secure disclosure records without the need for new forms. Also, unlike the current “snapshot” approach to disclosure certificates which are, in effect, only current on the day they are produced, the new Scheme will bring in a “live” disclosure process in which relevant new information on a Scheme member can be conveyed to their employer(s), and to the Scheme member, as soon as it comes to light. The barring process can, therefore, begin at any time.

To ensure proportionality, the 2007 Act lays down the specific circumstances in which an employer may request a Scheme record. The employee, or potential employee, must be undertaking ‘regulated work’ as set down in the legislation, and that regulated work must be carried out with children and/or with ‘protected adults’. It is an offence for an employer to request a Scheme record to be disclosed unless both these criteria are met.

The key to understanding the concept of ‘**regulated work**’ for either children or protected adults is to grasp that an individual must be engaged in certain prescribed tasks, or be working in certain prescribed settings as part of their **normal duties**, or be, as part of their normal duties, supervising the day-to-day work of such employees. The detail is set out in the 2007 Act, but in summary it is likely to include the work of most frontline registered nurses and health care support workers in Scotland, whether they work in the public or independent sectors.

For the purposes of the 2007 Act, a ‘**child**’ is defined as any person under the age of 18.

A **Protected Adult** is defined as any adult (aged 16 or over) receiving one or more services listed in the 2007 Act. This is quite different from definitions of adult vulnerability or incapacity in other legislation, which are based on the specific characteristics of the individual (such as mental incapacity). At the moment **anyone** aged 16 or over, receiving **any** health service (provided by the NHS in Scotland, a NHS contracted provider, an independent hospital, clinic or medical agency, or a private psychiatric hospital) is included in the protected adult category. This may be changed in the near future to a list of prescribed health services to improve the proportionality of the 2007 Act.

Sixteen and seventeen year-olds could be classed as either a child or a protected adult under the legislation.

Given the need to fulfil **both** strict criteria (‘regulated work’ and ‘work with children and/or protected adults’), it is quite possible that, under the Scottish scheme, some registered nurses will not be required to undergo the new vetting and barring process.

This is a key difference to the system set out for England, Wales and N. Ireland. It would be an offence in Scotland for an employer to insist such nurses join the Scheme or to request their Scheme records if they are already a member.

Nurses and health care support workers who do join the Scheme should note that they will be under a duty in Scotland to inform Disclosure Scotland of any changes to their name, address or gender assignment within one month of the change, or they commit an offence.

There are a number of key issues under the 2007 Act which will be brought in by way of subordinate legislation. The Scottish Government is expected to issue a consultation on some of these issues in due course prior to any decisions being made. Topics to be covered include:

- Will the provision of *all* health services, or of a *prescribed list* of health services, count as regulated work?
- How will retrospective checking of the existing workforce roll out?
- What will the fee structure be?
- Should sensitive information from regulatory bodies always be made available on disclosure certificates?
- Which specific offences will lead to automatic inclusion in one or both barred lists?

The RCN in Scotland will develop a response to any formal consultation on these issues and is keen to hear from members with comments.

Launch date

The Scheme will go live sometime in 2010 but, as yet, Scottish Ministers have not confirmed the exact date. Until this time, the existing disclosure scheme will remain in place.

The proposal is that, in the first year of the Scheme, only people taking on a new post within the regulated workforce, or people entering the regulated workforce for the first time, will go through the new system. For this first year, all applications to the Scheme will be paper-based. From year 2, the Scheme system will work electronically, with a phased roll-out planned to retrospectively check all paid and voluntary staff carrying out regulated work. The detail of this phased entry process is still being decided.

Once the Scheme is fully operational it is expected that between 800,000 and 900,000 people in Scotland will be Scheme members.

Cost of registration

The cost of initially joining the Scheme, or for requesting subsequent checks, has not yet been confirmed, though this has been an issue of heated debate. It is expected that the Scheme will be self-funding from charges made to participants of the Scheme / employers.

The Scottish Government has confirmed that checks for volunteers will continue to be free. A charge will be levied on checks for paid staff. Responses to the initial consultation on this issue favoured a two-tier system, with a higher fee for initial checks and requests for a Full Scheme Record, with a lower fee for requests for Short Scheme Records or a Statement of Scheme Membership. We await the detail of the Scottish Government's final proposals and will comment on these in detail as they are published.

What will the Central Barring Unit do?

The CBU, as part of Disclosure Scotland, will act on behalf of Scottish Ministers to review disclosure information from all available sources and decide on whether or not an individual should be listed on one or both of the barred lists. In two cases, individuals will be barred automatically:

- Where an individual has been convicted in the UK courts, or cautioned, of a specific serious offence
- Where the individual is already on one or both of the barred lists in England, Wales or N. Ireland

In all other cases, when the CBU is considering listing an individual it must make that individual aware of this, give them an opportunity to make representations to the CBU and consider those representations. Nurses should note that any "relevant finding of fact" made in a court or by the NMC, for example, cannot be challenged as being wrongly made through the listing decision-making or appeals process. The individual's employer and any relevant regulator will also be informed that the CBU is considering listing the individual. Currently this does not automatically include the NMC, but it may in the future. The CBU has a set period in which it can consider listing an individual before making a final decision.

A recent Scottish Government document made clear that an individual being investigated for possible listing is not necessarily expected to be removed from post.

Decisions about barring will involve a thorough and fair process... While under consideration for listing, the person can continue to work with vulnerable groups but all organisations and groups known to have an interest in them will be notified that their PVG Scheme membership status has changed.

Scottish Government,

Protecting Vulnerable Groups Scheme; Check to Protect (2009)

It is expected that this notification process will not preclude individual employers from making their own decisions about the deployment of individual members of staff and the safety of patients, though future regulation may impact on this.

The 2007 Act is clear that where a decision is made to list an individual that person should have access to **all** the information used to make the barring decision. This is to ensure a fair and open appeals process. Appeals against listings can be made to a Sheriff, and must be lodged within 3 months unless a Sheriff allows a later appeal to be lodged. The decision of the Sheriff can be appealed to the Sheriff Principal. The

decision of the Sheriff Principal can be appealed to the Inner House of the Court of Session, by either the individual or the Scottish Ministers, on a point of law only. Listed individuals can also apply to be removed from the barred list(s) after a period of time (still to be determined) has elapsed, if they consider their circumstances have changed. This decision will also be made by the CBU and is open to an appeals process.

The vetting information on which decisions are made will come from a number of sources. As well as police and court information, employing organisations will be under a duty to refer information to Disclosure Scotland, where an employee who is undertaking, or has undertaken, regulated work for them has, or would have been, dismissed on certain ground listed in the 2007 Act. The Registrar for Nurses and Midwives (i.e. the NMC) is under a similar duty. Both will commit an offence if they fail to refer without reasonable excuse.

A Scheme member who stops doing any regulated work can apply to be removed from the Scheme at any time.

RCN Scotland – next steps

Key details of the Scottish Scheme, which will launch at least a year after the rest of the UK, are still open to further consultation and debate. This includes issues around fees, the involvement of the regulator in some parts of the Act and the proposals for the Scheme's fee structures. RCN Scotland still has the opportunity to shape these outcomes and is keen to hear from any members with ideas, comments or suggestions.

Please contact Rachel Cackett, Policy Adviser, RCN Scotland at:
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Further information:

For general information please go to: www.scotland.gov.uk/pvglegislation

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