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## Working with Children: Vetting and Barring - Legislation and Policy in Scotland

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The University of Edinburgh/NSPCC Centre for UK-wide Learning in Child Protection (CLiCP) conducts research and provides analysis on child protection policy across the UK. One research strand is the protection of children in community settings and includes the systems for vetting adults working with children and barring unsuitable people from such positions.

This briefing sets out current vetting and barring arrangements in Scotland; and examines reforms to the system to be implemented in 2009. Further Briefings will be produced on the vetting and barring systems in England, Wales and Northern Ireland and on a comparative analysis of the systems in operation in the UK.

### Vetting and Barring in Scotland

#### Introduction

In the past fifteen years there has been unprecedented activity on vetting and barring by governments in the UK. This Briefing analyses the regimes in Scotland for vetting people working with children and barring of unsuitable individuals from such positions. It covers the systems currently in operation and planned reforms to be implemented in autumn 2009.

This paper is concerned with the formal vetting process that involves using criminal history information and the centralised system of barring of individuals from working with children. These form only part of safe recruitment practice. Indeed government advice is organisations that work with children should in addition use a range of tools including "other recruitment and employment practices including interviews, taking up references, checking qualifications and monitoring performance on an ongoing basis" (Scottish Executive Education

Department, 2004). For the purposes of this Briefing the focus is solely on the formal vetting and barring systems for work with children.

#### Barring individuals from working with children

##### The Disqualified from Working with Children List

The purpose of the barring system is to prevent unsuitable people from working with children in a paid or unpaid capacity (Scottish Executive Education Department, 2000b). The Disqualified from Working with Children List (the List) is the cornerstone of the barring system in Scotland. Introduced under the Protection of Children (Scotland) Act 2003, it has been in operation since January 2005. In December 2008 there were 297 people on the Disqualified from Working with Children List.



## Key points from the briefing

- The purpose of vetting and barring systems are to prevent unsuitable people from working, paid or unpaid, with children or young people
- They are intended to be used in addition to other safe recruitment practices to protect children from harm, abuse and exploitation

### Barring

- The current system in Scotland for barring people from working with children is centred on the Disqualified from Working with Children List (the List) introduced under the Protection of Children (Scotland) Act 2003 (the 2003 Act)
- The List holds details of individuals deemed unsuitable to work with children
- It is a criminal offence for those on the List to attempt to, or actually, work in a child care position (as defined in the 2003 Act)
- It is a criminal offence for an organisation to employ an individual in a child care position knowing they are Listed
- Courts and employers have a duty to refer individuals in child care positions to the List where they have harmed a child or put them at risk of harm

### Vetting

- Enhanced Disclosure certificates show all criminal convictions and cautions, relevant police intelligence and if an individual is barred from working with children
- The vetting system enables employers to obtain an Enhanced Disclosure for staff in child care positions
- The information can be used by the employer in their assessment of the suitability of the individual for the particular child care position

### System Reform

- The vetting and barring systems are due to undergo significant reform in 2009 under the Protection of Vulnerable Groups (Scotland) Act 2007
- The aim is to develop the strengths of the existing regime and improve effectiveness and efficiency
- Scheme membership for people working with children will be available to those not barred from working with children
- Criminal history information will be shown on a Scheme Record and issued with Scheme Membership
- Scheme Records will be maintained and updated and employers informed if significant new criminal history information emerges about a Scheme Member
- If criminal history information found in the vetting process indicates the individual is unsuitable to work with children they will be barred from such work
- The List of individuals barred from working with children will be renamed the "Children's List".

The List holds details of individuals in Scotland barred from working with children and is the hub of the barring regime that also comprises:

- legal duties for employers to refer to the List staff who have been dismissed because they are unsuitable to work with children
- circumstances where Courts should refer individuals convicted of certain offences to the List
- criminal offences related to employment of a Listed person in a child care position.

The 2003 Act specifies types of work with children covered by the legislation. These are termed “child care positions” and defined under schedule 2 of the 2003 Act (as amended). In short, child care positions are where the normal duties involve contact with children and the managers of such posts. (See Box 1 below for a précis of the definition of child care position). The aim is comprehensive coverage of posts involving contact with children and young people but without extending to informal arrangements or those made personally or by family.

### **Effect of inclusion on the Disqualified from Working with Children List**

It is a criminal offence for anyone on the List to work in a child care position or attempt to do so. It is also an offence for an organisation to employ, or offer a child care position to someone they know to be on the List.

With regard to new appointments, organisations employing are legally obliged to check if potential staff for child care positions are on the List (or equivalent Lists elsewhere in the UK). This can only be done by the employer obtaining criminal history information (a Disclosure check; see next section for further details). This should be obtained at the point in the recruitment process that the individual is provisionally offered the post (Scottish Executive Education Department, 2003). Where this shows an individual is on the List the employer would commit an offence if they offered them the child care position.

With existing staff, an employer commits an offence if they allow an individual they know to be barred to continue in a child care post

(Scottish Executive Education Department, 2004). The position differs when an employer is unaware someone in a child care position is Listed. It was intended that all staff already in child care positions should be vetted and it is an offence for the employer to fail to remove any barred individual from such a post. Although this clause is included in the Act, practical difficulties have prevented it from being implemented. So there is no obligation to check if existing staff in child care positions are barred. Organisations can do so but it is not the general practice. It is the case that a barred person would be committing an offence if they remain in a child care position immaterial of whether or not their employer is aware they are Listed.

As a consequence there remain many people in child care positions who have not been checked against the List – a significant potential weakness in the system. The intention is to address this when the barring system is overhauled in 2009. The reforms will include a duty for organisations to check existing staff working with children are not barred. Part 3 of this Briefing deals with these developments in more detail.

### **Referrals to the Disqualified from Working with Children List**

The 2003 Act also placed duties on specified bodies to refer individuals to the List and the circumstances in which this should happen.

Courts, employers and employment businesses (providers of staff) are obliged to refer people to the List in specified circumstances; other organisations such as regulatory /professional bodies (e.g. General Teaching Council for Scotland; Care Commission; Scottish Social Service Council) can refer people to the List. The circumstances under which referral must be made, and subsequent processes for dealing with referrals are outlined below.

**Box 1 Schedule 2 of the Protection of Children (Scotland) Act 2003: Meaning of Child Care Position**

Child care position is a deliberately broad definition that includes work where contact with children is part of the "normal duties" of the posts. It covers services for children i.e. education; health; social care; accommodation; leisure; religion and criminal justice (Scottish Executive Education Department, 2000a). It includes paid and unpaid posts in public, voluntary and private sectors (Scottish Executive Education Department, 2000a). It includes staff in frontline child care positions, their managers and supervisors. Not included are activities carried out with children through family or personal arrangements.

The definition child care positions also encompasses all posts involving "caring for, training, supervising or being in sole charge of children", and all posts in establishments for children i.e. detention centres; local authority homes; hospitals. Also covered are those "providing or working for" care home or health services solely or primarily for children. Everyone working in children's day care premises is included; except where the work is "in a part of the premises in which children are not looked after" or "at times when children are not looked after there". All posts in schools, further education establishments and linked hostels are child care positions with the exemptions of Parent Teacher Councils and services primarily for adults.

There are a few positions specifically given because they bestow authority over or access to children:

- members of a local authority education or social services committee
- Chief Social Work Officers and Directors of Education
- Children's Panel Members and Advisory Committee
- Children's charities' management board members.

## Referrals by courts

A Judge or Sheriff has a duty to consider referring to the List anyone convicted of a "relevant" criminal offence. The specific offences are listed in Schedule 1 of the Protection of Children (Scotland) Act 2003. They include crimes against or involving children; cruelty, neglect and sexual offences; lewd, indecent or libidinous practices. Courts have a duty to make the referral subject to the following considerations;

An individual who was under 18 at the time they committed the offence should be referred to the List where the Judge or Sheriff believes it likely they will commit another such offence. People aged 18 or over should be referred to the List except when the Sheriff or Judge is "satisfied that the individual is unlikely to commit a further offence against a child" (as stated in the 2003 Act (as amended)).

A Judge or a Sheriff can also refer, on conviction of any offence, an individual they believe to be unsuitable to work with children. Once referred by a court an individual is automatically Listed and barred from work in child care positions.

## Referrals by employers and regulatory bodies

It is mandatory for employers of (and organisations that are providers of staff for) child care positions to refer them to the List in the following circumstances:

the individual harmed a child or placed a child at risk of harm (whilst in their child care role or otherwise)

and as a consequence:

the organisation dismissed or otherwise removed the person from the child care position or would have done had the individual not vacated the position (Scottish Executive Education Department, 2004)

Employment agencies (that provide staff to child care posts but do not employ them directly) can refer individuals under the same criteria but it is not mandatory. Regulatory/professional bodies can also refer individuals in the absence of a referral from any other organisation.

Individuals referred by employers are not automatically included on the List. They are assessed by a specialist Panel of senior civil servants in the Scottish Government who decide if the case warrants the individual being Listed.

The Panel has no investigatory powers but can follow up and act on information received. They can request information for the case. At all stages the individual concerned has the opportunity to respond in writing to the referral information provided. During the time the case is under consideration the referred individual is "provisionally listed" and they can continue to work in a child care position pending the final decision regarding Listing. Relevant and known employers of the individual are notified of their provisional listing status. The employer can suspend them or take other action. An Enhanced Disclosure check will show provisional listing (Scottish Government, 2008).

## Referral as a result of public inquiries

The final source of referral to the List is individuals named in public or parliamentary inquiries. The Explanatory Notes to the 2003 Act specify such individuals are automatically Listed when "the person who held the inquiry reasonably considered that the individual had harmed a child or put a child at risk of harm whilst working in a child care position and that the individual is unsuitable to work with children".

## Appeals and removal from List

An individual can appeal to a Sheriff against the decision to include them on the List. They can make a request through a Sheriff to be removed from the List once a minimum time period has elapsed; currently 10 years for adults and 5 years for anyone aged under 18;

## Consideration of the Barring System

The barring system draws in part on findings from inquiries of abuse of children by adults working with them. In these the case was made for the use of "hard" information - criminal convictions and "soft" information - not corroborated or about actual abuse (Utting et al., 1997). Barring aims to prevent people who have been a danger to children

from gaining access to them by identifying and prohibiting them from child care posts.

## Vetting people working with children

### Criminal History Information: Disclosures

The vetting system operates differently but shares with the barring system the purpose of preventing unsuitable people working with children. Rather than the centralised Listing, the vetting system provides information to employers and it is they who must make any decisions regarding unsuitability of staff.

Criminal history information is made available to employers to vet individuals for certain posts. In Scotland, the most probing of these, an Enhanced Disclosure, is available to any employer for child care positions, subject to the consent of the individual. The application for an Enhanced Disclosure check triggers a search of an individual's criminal history. Any information found, or confirmation that there is none, is set down in the person's Enhanced Disclosure certificate. This is sent to the individual and the potential employer for use in assessing suitability for the particular child care post (Disclosure Scotland, 2007). The Enhanced Disclosure certificate contains;

- All UK criminal convictions; the name of the Offence(s); the date of conviction, the court and the disposal
- Police cautions, issued by a senior police officer in England and Wales
- Non-conviction "intelligence" held in police records, considered relevant and agreed for release by the Chief Constable
- If the individual is on the Scottish Disqualified from Working with Children List or equivalent lists held elsewhere in the UK (Scottish Executive Education Department, 2006)

Enhanced Disclosures are intended to be one of the instruments in an organisation's child protection and safe recruitment apparatus that should also include references, interviews and induction period.

### Accessing Disclosures

The actual Disclosure check is carried out by Disclosure Scotland; the body established to meet the new and increased demand for criminal records checks in light of the access

given to a wider range of organisations under the Police Act 1997. Originally part of the Scottish Criminal Records Office, it became a Scottish Government agency in 2007 (Disclosure Scotland, 2008). There is a fee, currently £20, charged for each Disclosure check.

Criminal history information is sensitive data and there are strict rules for its use and storage. Only employers registered with Disclosure Scotland can receive Enhanced Disclosure certificates for child care posts. Registered bodies are required to comply with standards regarding use and storage of disclosure information and it is an offence to use it inappropriately (Disclosure Scotland, 2007).

Many smaller voluntary organisations are not able to guarantee meeting the storage requirements and do not register directly with Disclosure Scotland. Instead they can access Disclosure checks through the Central Registered Body in Scotland (CRBS); established to act as their Registered Body. The CRBS has responsibility for verifying the authenticity of the applicant organisation, assisting in interpreting information revealed in a Disclosure and meeting storage requirements. The CRBS also processes Disclosure checks for volunteers in voluntary organisations. The costs of these are covered by the Scottish Government.

### Consideration of the vetting system

In 2007/08 there were over 400,000 applications for Enhanced Disclosures. In nine out of ten no criminal history information was found. In the 10% containing criminal convictions a wide range of offences were revealed. In some cases the convictions are for serious offences and a clear basis for considering an individual as not suitable for a post with children. In other cases the information is more ambiguous; a lesser crime, possibly having been committed some time ago. In a third group of cases information may be difficult to interpret because the conviction reveals little about the behaviour. Consequently the interpretation of an Enhanced Disclosure can be a far from straightforward process for an employer.

Where the Enhanced Disclosure shows that an individual is on the Disqualified from Working with Children List, the employer is legally bound

to bar them from work with children. This is the only instance where the employer is directed unequivocally to act. For all other information it is at the discretion of the employer as to whether and how they act on it. Enhanced Disclosure checks are not mandatory for child care posts. In practice these are necessary for an employer to check if a potential new recruit for a child care post is barred.

### **Vetting and Barring in practice: analysis of current systems in operation**

In practice, a number of weaknesses in the current systems were becoming apparent.

Firstly, there is no system for adding new criminal history information to an Enhanced Disclosure certificate so it is only guaranteed accurate on the day it is issued. If someone is convicted of a crime after being issued with a Disclosure certificate, and they remain in the same child care position, the employer would not be informed (unless the conviction led to barring). A completely new Disclosure is required to access new information and must be carried out every time the individual applies for a new child care post even if this is in the same organisation.

Some individuals are subject to repeat Disclosure checks; a new Enhanced Disclosure for each new childcare post they are offered since this is the only way to obtain up to date criminal history information. This is the case even though for the majority of applicants there will be no criminal history information.

Finally, criminal record checks have not been implemented retrospectively. There are people who have been working in the same child care position prior to 2005 who have not had an Enhanced Disclosure check. This undermines the attempt to implement an impenetrable cordon covering all child care posts to exclude all barred persons.

Currently even serious criminal history information, from Disclosure checks, is not used as a source for identifying individuals unsuitable to work with children. Information revealed is only seen by an employer. An opportunity is missed to capture, assess and use this criminal history information in the barring system. Subsequent legislation attempts to solve these system deficiencies. However the same

fundamental principles of vetting and barring remain. The new systems and key changes are considered in the following section.

### **Protection of Vulnerable Groups – the next phase**

The planned reforms to the vetting and barring regime, introduced under the Protection of Vulnerable Groups (Scotland) Act 2007 (the 2007 Act) is considered here. These are due to be implemented autumn 2009. The aim is to improve the existing system, deal with inefficiencies and improve effectiveness.

The main new development is the introduction of a Membership Scheme for people working with children. Anyone barred from working with children will be refused Membership of the Scheme. The barring system will also undergo reforms; further routes for referral to the List will be added to the existing ones. There will also be major changes to the pre-Listing assessment criteria. These will integrate further the vetting and barring processes. This legislation will also introduce for the first time in Scotland a list of people prohibited from working with specified groups of vulnerable adults; the "Adults List".

The definition of posts to be covered by the new legislation is refreshed. Termed "Regulated Work with Children" in the 2007 Act, the positions covered include the current "child care positions" with coverage extended to new roles e.g. children's chat room moderators. Regulated Work with Children is intended to be clearer and simpler for employers to use. (See Box 2 for a summary of the types of work covered by "Regulated Work with Children").

### **Barring – the new system**

The 2007 Act retains many of the main functions of the existing barring system; reforming and adding to it. The Scottish Government will continue to hold a list of individuals prohibited from working with children with a new "Children's List" replacing the existing Disqualified from Working with Children List. As currently, it will be a criminal offence for anyone on the Children's List to work or attempt to work with children; or for organisations to offer work to someone on the Children's List. It will become mandatory for organisations to ascertain proactively if anyone



in regulated work is Listed and remove them from such posts.

Anyone on the analogous Lists held in England, Wales or Northern Ireland will also be prohibited from regulated work in Scotland. The Scottish Government can also recognise other countries' similar Lists and so bar individuals included on these from working with children.

### **Duties and powers to refer individuals to the Children's List**

There are alterations to key elements in the barring process including revision of the duties and powers to refer individuals to the List and additions to the sources for referrals and the circumstances for referring to the List.

#### **Further sources of referral to the Children's List**

The legal duty for Courts, employers and individuals named in public inquiries (as having harmed a child) are retained. To these are added two new sources of referral; information revealed through a criminal history check and Inclusion on the Adults' List.

The Adults' List holds those prohibited from working with vulnerable adults. In instances where someone is added to the Adults' List consideration will automatically be given to including them on the Children's List.

The second new source for referral for Listing is cases where a vetting check reveals criminal history information. In these cases the individual concerned will be added to the Children's List when the criminal history information is assessed as indicating they are unsuitable to work with children. In practice most criminal history information is for minor offences and it is envisaged that only in a minority of cases will vetting information prove to be the basis for Listing.

#### **Reforms of the referral criteria: employers and regulatory bodies**

The circumstances under which referrals by employers (and employment bodies that supply staff) must refer to the Children's List will be expanded. It will apply to any individual doing "regulated work with children", who has;

- harmed a child or placed a child at risk of harm (as under the 2003 Act)
- engaged in inappropriate conduct involving pornography
- engaged in inappropriate conduct of a sexual nature involving a child
- given inappropriate medical treatment to a child
- and as a result the organisation;
- removed the individual from regulated work with children or would have done if the individual had not already vacated the position.

In these circumstances the organisation has a duty to refer the individual to the Children's List. This is regardless of whether the action took place during the course of their regulated work with children or in another setting.

Regulatory bodies retain the option of reporting individuals to the Children's List in these same circumstances and no individual employer has referred the individual. The list of regulatory bodies covered by the duty is expanded to include medical professionals; chiropractors, dentists, the General Medical Council, midwives and others.

#### **Courts: referrals to the Children's List**

Courts retain a duty to refer to the Children's List anyone convicted of a "relevant offence" as listed in Schedule 1 of the 2007 Act. This adds to and updates the list of relevant offences in the 2003 Act. Courts continue to have discretion to refer anyone convicted of any offence to the List where they are, as stated in the 2007 Act, "satisfied that it may be appropriate for the individual to be listed".

In a change to the current processes, referrals from Courts will not result in automatic listing but will be assessed by the Central Barring Unit (see below). This means all referrals will be dealt with more consistently, immaterial of their referral source.

#### **Central Barring Unit: the consideration for Listing process**

The 2007 Act created a new agency – the Vetting and Disclosure Unit – within which will be a Central Barring Unit that will be responsible for assessment of referrals for Listing. There will be a three tier system used:

- Automatic listing – Individuals will be automatically Listed where the case meets the criteria set down in regulations; probably conviction of specified serious offences
- Assessment of referrals – This will involve assessment and recommendations by case workers in the Central Barring Unit according to set criteria probably including offending behaviour timescales and the time lapsed since last offence
- Consideration by Expert Panel of civil servants - The Panel will deal with particularly complex cases and make the decision on Listing (Scottish Government, 2007).

There are resourcing implications depending on where the thresholds for the type of action are set.

### Appeals and removal from the Children's List

The right of appeal to a Sheriff against inclusion on the Children's List continues and is enshrined in the 2007 Act. As part of the reforms, anyone listed will be able to apply to Scottish Ministers to be removed from the List. Should this be refused the individual can appeal this decision to a Sheriff. A minimum time period of listing must be served prior to this being an option.

### Personal Employer

One entirely new feature introduced under the 2007 Act is the Statement of Scheme Membership. This is a document available to people who provide individual services to children e.g. piano tutor, carers etc. The Statement of Scheme Membership will confirm an individual is not on the Children's List. It can be given to parents and carers to confirm they are not barred from working with children. No criminal conviction information will be included in this form of Statement of Scheme Membership.

### Vetting information: consideration of reforms

A major reform in the vetting process will be the introduction of a new Membership Scheme to cover all personnel in regulated work with children. An application for Scheme Membership will activate a vetting process of checking criminal history information similar to the current system. It will be undertaken by the Vetting and Disclosure Unit in the newly formed

Scottish Government agency (Scottish Government, 2007).

The first stage of the vetting process will establish if the applicant is barred from working with children i.e. on the Children's List or equivalent. If this is the case, Scheme Membership will be refused and the individual should not attempt or be able to do regulated work with children. Scheme Membership will verify that the person is not barred from working with children.

If the individual is accepted as a Scheme Member the application will proceed to the second stage of vetting; identification of criminal history information. At the end of the vetting process a Scheme Record will be produced and sent to the individual and employer. The Scheme Record will verify the individual has been accepted as a Scheme Member and contain any criminal history information. As currently, this information will be released to the individual and the Registered Body only. As with existing Enhanced Disclosure certificates, the Scheme Record will contain;

- convictions
- cautions
- relevant police intelligence.

It will also identify if the individual is on the Sex Offenders register. The Scottish Government can prescribe other information to be disclosed in the future.

It is not mandatory for an individual in regulated work with children to be a Scheme Member. The only way for an employer to establish whether an individual is on the Children's List is if they are refused Scheme Membership. So in practice the workforce and volunteers in regulated work with children will need to be Scheme Members.

**Box 2 Schedule 2 of the Protection of Vulnerable Groups (Scotland) Act 2007: Regulated Work with Children**

A new category, "Regulated work with Children" will be introduced to define the roles covered by the 2007 Act. This will replace the existing category "Child Care position" but includes many of the same roles. The intention is for the definition to be more straightforward for users. Employers retain responsibility for identifying the posts in their organisation that fall under the scope of the legislation.

"Regulated Work with Children" aims to incorporate the diverse paid and unpaid roles where there is contact with children. In so doing it uses dual concepts of (1) activities and (2) work venues. Activities, encompasses a wide range of services to children i.e. teaching, caring for or being in sole charge of children. These are all regulated work with children irrespective of venue.

The second dimension is venues. All posts located in the establishments listed in the 2007 Act are included as regulated work i.e. Education institutions (with specific exceptions as before); Children's hospitals, Homes and Detention Centres. The intention is to include the range of staff working in these venues whatever their actual activity; staff who do not necessarily provide front-line care to children i.e. cleaners and gardeners.

"Regulated work with children" also includes posts managing or supervising staff performing regulated work with children. There are also roles newly incorporated that involve indirect contact and giving advice to children – i.e. phone advice lines; magazine agony aunts; and moderators of children's chat rooms.

The final group of roles specified in "Regulated Work with children" are particular positions. These are members of a local authority education or social services committee; Chief Social Work Officers; Children's Panel Members and the Scottish Commissioner for Children and Young People.

All "Regulated Work" posts are subject to a "normal duties" test i.e. the regulated activity or work in the establishment is an expected part of the job. The purpose of this test is to "exclude one-off occurrences and unforeseeable events" that brings them into contact with children. Posts that do not pass the "normal duties" test are not regulated work with children and so not subject to the provisions of the 2007 Act.

## **Maintaining and updating Scheme Records**

Unlike Disclosure checks, Scheme Records will be maintained and updated. Where new vetting information arises and is serious enough to constitute consideration for Listing both the person and their relevant employers will be notified. Where the vetting information does not result in listing, it will still be included in the Scheme Record and will be part of any future release. This new process removes the need for repeat disclosure checks.

If a person takes a job or moves to another regulated post a Short Scheme Record will be issued which will provide notification of any changes in information since the last full Scheme Record disclosure. The introduction of the Short Scheme Record should simplify and speed up the disclosure process. The intention is to ensure a more effective, less bureaucratic system for applicants and employers. There is a commitment to having everyone in Regulated Work with children become Scheme Members over the next 3-5 years commencing in autumn 2009 (Scottish Government, 2007)

## **Conclusion**

A decade ago there was no centralised, formal system for prohibiting people from working with children and criminal records checks operated in a rudimentary way. Now the twin tracks of barring those unsuitable from working with children and giving employers vetting information to assess staff and volunteers, are embedded in the systems for safeguarding children. This has been a period of rapid reform with the latest version due for 2009 intended to improve the systems further.

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