

COMMUNITY CARE PROVIDERS SCOTLAND

Consultation on Protecting Vulnerable Groups: Scottish Vetting and Barring Scheme

Comments from CCPS

May 2006

Community Care Providers Scotland is the association of voluntary sector organisations providing care and support services in Scottish communities. Its membership comprises all of the leading national non-profit and charitable providers in Scotland.

CCPS members provide a variety of services for children and adults at risk, both in registered residential settings and in their own homes.

This response covers issues arising from the proposed scheme which would affect voluntary sector service providers, as well as raising some more general points for clarification. Members have been encouraged to submit their own responses to the consultation where they wish to raise issues which may affect service users, or to comment on the make up of the Central Barring Unit or proposals for information sharing procedures.

CCPS has previously commented on the proposals for a list of those unsuitable to work with vulnerable adults through the May 2004 consultation, questions posed directly to CCPS by the Executive in October 2005 and the Regulatory Impact Assessment in February 2006. We trust that information submitted at those times has been considered in framing the new system, but reiterate several points in this response which are still of concern to members.

Much of this response is framed in “what if” terms, and this reflects a considerable degree of uncertainty amongst members around what is actually being proposed. CCPS would very much welcome clarification of several issues, and the opportunity to participate in further consultation as proposals are firmed up.

Part 1, question 4: interests of employers

The majority of this response concerns the effect of proposals on voluntary sector employers, in particular the **financial implications**, and the interplay between the proposals and existing **employment law and good practice**.

Issues, explained in more detail below, which would have a marked effect on employers are:

- The costs associated with Vetting and Barring Disclosures, in particular where the scope of the Disclosure may be widened to include some administrative staff;
- The costs associated with retrospectively checking the entire workforce (should this be introduced);

- The costs associated with rechecking staff through the Disclosure system every 10 years;
- The potential implications for recruitment and retention of administrative staff of including them in the scope of Vetting and Barring Disclosures;
- The impact on services of the waiting time between applying for a Vetting and Barring Disclosure and confirming employment;
- The uncertainty around the legality of not employing someone who is, for example, only listed on the adults List and applying for a job with children, and the potential for comeback from prospective employees;
- The uncertainty around what to do if an employee is provisionally listed after being referred by another employer; is it acceptable to dismiss them on these grounds, or to allow them to continue working with you?
- The time and cost implications for employers involved in appeals processes, particularly for retrospective referrals;
- The degree of uncertainty around when employers are required to refer an employee to the List, and what legal comeback that employee may have against the employer if the CBU decides not to list them.

Part 2, proposals 1-3: scope of Vetting and Barring Disclosures

CCPS' greatest concern in this area is the possibility that some **administrative staff** will be included under the label of "those who have substantial access to personal and sensitive information about children or vulnerable adults." This would have **financial implications**¹ for employers required to check admin staff but, more importantly, may also have implications for **recruitment and retention**, as staff may not be willing to go through a Disclosure check or to wait until their Disclosure certificate has been returned to be offered a position. This is already an issue which some employers have come across in relation to social care staff, but it is likely to be more of a problem with administrative staff, who can take up the same type of position elsewhere without the need for a Disclosure check.

While some organisations already routinely Disclosure check administrative staff, the potential need for them to be checked against the barred lists, and the increase in the numbers of organisations checking admin staff (as some do not currently do so) is likely to put **pressure on the Disclosure system**, and on the Central Registered Body. It is vital that the Scottish Executive conducts an impact assessment on the likely impact of all of the Vetting and Barring proposals on the workloads of these organisations, so as to avoid overloading and slowing down the system.

A further concern is the possibility that no clear **guidance** will be given on which staff are likely to have "substantial access" to information, leaving it up to employers to decide who to check and who not to, in turn leaving them open to a situation where they unknowingly employ someone on the barred list or resulting in organisations applying for Vetting and Barring Disclosures for large numbers of staff unnecessarily in order to 'cover their backs'. The latter would have cost implications for employers and workload implications for Disclosure Scotland.

¹ Note: where reference is made to costs of Disclosure checks, this refers to both the direct cost of the Disclosure and the indirect costs to the organisation e.g. staff time taken to process application forms for Disclosure checks.

Part 2, proposals 4-5: costs of/funding the Vetting and Barring Disclosures

The question is posed in the consultation paper as to how much respondents would be willing to pay for a Vetting and Barring Disclosure. This question has perplexed CCPS somewhat as, if Vetting and Barring Disclosures are to be compulsory, it is fairly irrelevant what organisations would be willing to pay for them. It is our understanding that the Disclosure system is to be self financing i.e. the cost of the Vetting and Barring Disclosures would be reflective of the cost of processing it, and of carrying out subsequent checks of barred status.

What is important to CCPS members is that voluntary sector service providers are not expected to simply absorb these **extra costs**. CCPS has been working extensively with the Scottish Executive on the development of a Full Cost Recovery model to fund public services provided under contract on behalf of local authorities. Disclosure checks are a direct cost, which should be recoverable from funders.

CCPS members fully support the proposal that checks on volunteers should still be free to organisations.

The proposals suggest that the bulk of costs for Vetting and Barring Disclosures would be met when the individual first enters the system, with subsequent checks of barred status free or much cheaper. When conducting a financial impact assessment of the proposals, the Executive should not presume that all organisations will be satisfied with checking the barred status of an individual who is already in the system and therefore will not incur much expense. While an individual's barred status is the only thing which would legally prevent an employer from hiring that individual, good employers use the full range of information provided by Disclosure Scotland in reaching their decision on whether or not an individual is suitable for a certain post. If full information is not available through subsequent checks, good employers will be likely to do a full Disclosure check for every potential employee, thereby negating much of the benefit of ending multiple checks. In addition, they will then have to bear the cost of a full disclosure every time. **CCPS would recommend that subsequent checks on an individual should provide the same, full, Disclosure information as the initial check.**

Part 2, proposal 26: lifetime of certificates and checks

CCPS members would welcome clarification of the rationale behind requiring everyone to be re-checked every 10 years, if the Vetting and Barring system is designed to flag up to employers if someone working for them is added to the List. While carrying out a new Vetting and Barring Disclosure every 10 years could potentially bring to light new information on, for example, a minor criminal conviction, as we understand it any information which would result in a person being added to the barred lists would be flagged up to the CBU as it arises. As the only grounds on which it is illegal to employ someone is their inclusion on one or other of the barred lists, and as this information would come to light during the 10 years anyway, it is not clear why there should be a need for re-checking.

This proposal seems to reflect a lack of confidence in the Vetting and Barring system (checking every 10 years in case something has slipped through the net). If this mistrust becomes widespread, employers would be even more likely to be unwilling to simply check the barred status of an individual rather than seek a full Disclosure as

proposed. This has cost implications for employers, and implications for the workload of Disclosure Scotland and the CRBS.

It is worth noting that, for many employees, the current reality is that they have to undergo a Disclosure check much more regularly than every 10 years; the Scottish Social Services Council requires employees to be checked every three years, and local authority Supporting People contracts are likely to stipulate the same. What is frustrating for employers is that these organisations are unwilling to work together to coordinate the timescales for this, so that some employees will potentially have to be checked every 18 months. It is our hope that, where employees have been checked within the 10 year timeframe, there will not be an obligation to check them again. This will depend on what kind of Disclosure check will be undertaken to satisfy the SSSC and local authorities (i.e. will they require/be able to access a Vetting and Barring Disclosure?), which is not clear to us at present. **CCPS would welcome Scottish Executive guidance for local authorities and other regulators on efficient use of the Disclosure system.**

Part 2, proposal 6: retrospective Vetting and Barring Disclosure

Local Authorities which contract services out to voluntary organisations often ask voluntary sector providers to provide Disclosure certificates for all staff i.e. retrospectively check staff who do not have Disclosures. It is our understanding from the Central Registered Body that Disclosures are intended as a way to check new employees only, and that employers and other bodies therefore have no legal right to insist on retrospective checking. Nevertheless, this does happen in some cases. The proposal that “from day one, any employer will have the opportunity to request that existing employees apply for the new Vetting and Barring Disclosure” is likely to lead to a rush on the Disclosure system, as Local Authorities ask for all staff to be put through the new system. It is also possible that employers who either misunderstand their obligations or wish to cover themselves against any risk will request that existing employees be checked well ahead of their obligation to do so, also increasing the number of Disclosure requests in the system at any one time, with corresponding consequences for the **workload of Disclosure Scotland and the CRBS**, and the **length of time taken to process Disclosures**.

Where retrospective checking is to be introduced, CCPS members favour the phasing of this; **phasing by occupation rather than by sector** would spread the impact on individual employers over a longer timeframe and may make it easier for them to manage. However it is introduced, retrospective checking will be a considerable financial burden to voluntary sector service providers, and will almost inevitably slow down the time taken to process Disclosures. Unless **detailed guidance** is provided well ahead of the introduction of the system, the issue of retrospection is likely to be the source of considerable confusion.

Part 2, proposals 7-9: unsuitable to work with children/adults at risk lists

CCPS members are, of course, supportive of all attempts to prevent unsuitable people from working with children and adults at risk. There is some doubt, however, as to whether this aim is best supported by the creation of two distinct barred lists for these groups. It seems arbitrary to distinguish between these groups on the basis of age (why would an employee be unsuitable to work with someone the day before their 16th birthday but not the day after), particularly when for groups such as adults with

learning disabilities physical age is not a determinant of capacity or likely behaviour. **CCPS cannot envisage any situation where someone unsuitable to work with one group would be suitable to work with the other.** It has been put to CCPS that one such case would be where an employee financially harms an adult at risk, as they would not have the same access to children's finances. Regardless of whether or not this assumption is correct (and we would contest that) this employee has broken the trust of the adult, and could equally do so in some other way with a child.

There are also a number of questions around how this would work in practice. Would the majority of those listed be placed by the CBU on both barred lists? If so, again, why is there a need for two lists? If not, what implications does this have for employers where, for example, someone applying to work with children is found to be on the adults list; is this reasonable grounds on which employers could choose not to employ them? This also raises the question of how much information will be given on the Vetting and Barring Disclosure about *why* an individual has been listed – this would be key information in determining whether or not to employ someone in the scenario described. An additional issue for clarification here is whether applications for Vetting and Barring Disclosures will specify what kind of position the individual is applying for i.e. which list they should be checked against, or whether both lists will automatically be checked.

The creation of the barred lists makes it a criminal offence for employers to employ someone listed on either list. CCPS would question how this will work in practice, in relation to the length of time it takes to process a Disclosure. Will it be an offence to employ someone before a Vetting and Barring Disclosure is received, even if the employee is supervised or not in contact with children or adults at risk? If so, this will have an enormous impact on service delivery, as posts may remain vacant for weeks or months even after a suitable candidate has been identified. In addition, the nature of care provision means that workers are often unsupervised, and many smaller organisations may not have the capacity to employ staff in a different non-contact role until the Disclosure comes through. This brings into sharp focus issues which CCPS has raised in the past about the importance of the length of time taken for Disclosure checks to be as short as possible.

Part 2, proposal 15: appeals against listing

A CCPS member has brought to light the example of an appeal against a retrospective referral to an English barred list, which involved someone who had worked for the member 10 years previously and had been referred by another organisation. As part of the appeal process, the member organisation was asked to produce a significant amount of paper work, and staff required time away from work to attend hearings. CCPS would be concerned about the **time and cost implications to employers** if situations like this are to occur frequently, particularly in relation to retrospective referrals.

Part 2, proposal 23: cross-referencing with other lists

CCPS is concerned to note that inclusion on other lists e.g. corresponding lists in England and Wales will not automatically lead to an individual being barred in Scotland. Additionally, CCPS is concerned that the Executive proposes to “make sure that the approach both sides of the border is consistent” while the Safeguarding Vulnerable Groups Bill, introduced to the Westminster Parliament in February 2006,

seems to make provision for those listed in Scotland to be barred in England and Wales (3(2) and 3(3)).

Part 2, proposal 14: provisional listing

Provisional listing would affect CCPS members mainly where they employ someone who is referred to the CBU by another organisation and provisionally listed. Where the organisation has no reason to mistrust the employee, is it acceptable for them to continue their employment and contact with children/adults at risk during the provisional listing? Where an organisation may wish to suspend or dismiss someone as a result of provisional listing (even though this does not relate to their work with that organisation), it is unclear how this would be viewed in terms of employment law, particularly if the CBU subsequently decide not to list the employee. CCPS members would defend an organisation's right to make its own decisions about who to employ, and therefore would not wish to see those provisionally listed automatically suspended, but would welcome **legal advice** on the different options available to employers in this situation. CCPS would also welcome clarification on whether, when an individual has been provisionally listed but not fully listed, a record will be kept of this, and whether this would appear on subsequent Disclosure checks?

Part 2, proposals 24-25: referrals

It would be useful for employers to have some **guidance on referral criteria**, as the notion of "harm or risk of harm" is open to considerable interpretation and could cause some confusion amongst employers. For example, should cognisance be taken of the intention of the employee to cause harm, or would incidents where an employee caused harm as a result of, for example, insufficient expertise also lead to referral.

Employers have concerns about the link between their organisational standards and the criteria for inclusion on the Lists. It is possible that a situation may arise where an organisation takes the decision to dismiss an employee who does not meet the required standards of the organisation, but where the organisation does not judge that their actions are of sufficient magnitude that they should categorically never work with children and/or adults at risk again. Some employers have indicated that they may end up accepting resignations from employees in this situation rather than taking forward a disciplinary, in order to avoid a difficult situation regarding whether or not to refer the employee.

In addition, employers are concerned about **potential comeback from employees** where the organisation refers an employee who the CBU does not include on the list. In particular, there are concerns around whether an employee could challenge their dismissal on the basis that the CBU did not include them on the list after viewing the evidence which led to their dismissal. This may also lead to employers avoidance of referrals, which is obviously not the intention of the proposals.

For further clarification on any of the points raised, please contact:

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