

**Regulation of Care (Scotland) Act 2001: Proposed changes to the Regulations made under the Act covering fitness requirements for Providers, Managers and Employees in care services regulated by the Care Commission**

**Response from Community Care Providers Scotland  
May 2008**

Community Care Providers Scotland (CCPS) is the national association for voluntary sector providers of care and support services across Scotland. CCPS represents 65 of the largest providers, all of which have services regulated by the Care Commission. CCPS members employ around 35,000 staff.

When these Regulations were consulted on in 2004, CCPS and its members expressed considerable concern about the potential conflict between the proposals and other legislative requirements on employers during a recruitment process. With this in mind, CCPS was concerned to see similar proposals being consulted on again.

We are to some extent comforted by correspondence from the Scottish Government explaining the intention behind the changes to the Regulations in more detail<sup>1</sup>, but have concerns that a layman's reading of the consultation document does not make these intentions clear, and are additionally concerned that unintended consequences of the changes to the Regulations may complicate current systems of safer recruitment, rather than making them simpler as intended. *We therefore call on the Scottish Government to provide clear guidance in advance of any changes to the Regulations, and to spell out its intentions clearly in explanatory notes to accompany the Regulations.*

Our comments below cover three main concerns: the lack of clarity and potential for confusion or misinterpretation in the Regulations, the way in which it seems to be suggested that conviction information be used, and the extension of the use of conviction information to judge the fitness of employees.

**Lack of clarity and potential for misinterpretation**

While we accept that our initial reading of the consultation was clouded by our experience of previous consultation exercise on this subject, we believe that the wording of the consultation has the potential to lead to confusion around what is intended from the changes to the Regulations. We are concerned that this could in turn lead to potential conflict between employers, regulators and employees.

For example, mention of the Care Commission in paragraph 7, in relation to the fitness of providers, may lead the casual reader to believe that the Care Commission would also have flexibility in deciding whether prospective *managers* and *employees* are unfit on the basis of a conviction, which, we understand from correspondence, is not the case (“[i]t is anticipated that, as currently happens, managers will continue to decide on the suitability of staff; providers will decide on the suitability of managers and the Commission will decide on the suitability of providers”<sup>2</sup>).

There is also a degree of ambiguity around the phrase “and who is by reason of that conviction unfit to be a provider/manager/employee of a care service.” While we understand from correspondence that this is designed to allow flexibility in deciding whether or not a particular offence makes an individual unsuitable for a particular post (e.g. a driving offence

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<sup>1</sup> Letter from Adam Rennie, 7 April 2008

<sup>2</sup> Letter from Adam Rennie, 7 April 2008

would make someone unsuitable for a post involving driving but not for a post as a care worker where no driving is involved<sup>3</sup>), it is possible to read the clause as suggesting that anyone convicted of any offence punishable by a period of imprisonment of up to three months is automatically unfit as a result of that conviction.

These issues become clear when the intention behind them is explained, but this is not apparent from a simple reading of the consultation. We therefore believe that similar confusion may result from a simple reading of the Regulations, and ***call on the Scottish Government to provide guidance on the intention behind and operation of the Regulations, to ensure that employers, employees and regulators are fully aware of their rights and responsibilities, in particular in relation to 1) who decides on the fitness/suitability of any member of staff and 2) on what basis decisions on fitness should be made.***

### **The use of conviction information in recruitment processes**

We continue to have some concerns about the principle behind this part of the Regulations. While we appreciate that the proposed changes to the Regulations will give a greater degree of flexibility in deciding whether or not a particular offence makes an individual unfit for a particular post, we are concerned that conviction information, in isolation, should not be used to make a decision about an individual's suitability or otherwise for a post.

In addition, we believe that employers, who are already asked by the Care Commission to provide evidence that Disclosure checks have been carried out, and who are bound by the Police Act to consider the Disclosure Scotland Code of Conduct, which requires conviction information in relation to each case to be considered on its own merits, will already be carrying out a range of safer recruitment procedures, and feel that in this respect the need for these Regulations to mention convictions at all should be considered. We would also point out that the implementation of the Protection of Vulnerable Groups (Scotland) Act will act as an additional safeguard during recruitment processes, further diminishing the need for these Regulations to make reference to conviction information.

The Disclosure Scotland Code of Practice states that employers 'must not unfairly discriminate against the subject of Disclosure information on the basis of any conviction or other details revealed', and sets out a series of checks and balances that employers must consider when assessing the suitability of an applicant for a particular position. These checks relate to the relevance of the conviction to the position offered, the seriousness of the offence, the length of time since it took place, and so on. Similar principles apply under the Rehabilitation of Offenders Act 1974.

We are concerned, in contrast, that the focus on conviction information alone in the Regulations, and the potential ambiguity of their wording, may cause employers to 'play it safe' by simply not employing anyone with a conviction attracting a sentence of three months or more, and would again ***call for clear guidance to be published to assist employers in their understanding of the interaction between the Regulations and the Police Act/Rehabilitation of Offenders Act (a point on which CCPS is not clear at present). This is extremely important, to ensure that employers make their recruitment decisions within the law.***

### **Using conviction information to judge the suitability of potential employees**

The inclusion of conviction information as the basis on which to judge the suitability of employees seems to us to highlight some of the problems with the Regulations highlighted above.

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<sup>3</sup> Letter from Adam Rennie, 7 April 2008

First of all, there is some confusion as to who counts as an employee. The original 2002 regulations imply at section 1(3) that everyone working or volunteering in a care services is defined as an employee, yet the letter we received from the Scottish Government stated that “the amount of interaction with clients that the job entails” would be taken into account in deciding whether or not a particular post was covered by the Regulations<sup>4</sup>. It is also unclear to us whether the Regulations would cover employees already in post, or only new employees entering the organisation.

It is additionally not clear why mention needs to be made of conviction information in the Regulations at all. As the letter from the Scottish Government makes clear, the Care Commission already requires employers to Disclosure check employees<sup>5</sup>, giving them access to conviction information. If, as suggested, the Regulations give employers the flexibility to decide whether or not someone is unfit on the basis of a particular conviction, the change to the Regulations would not do anything to enhance the current recruitment practices operated by employers. It is our concern that changes to the Regulations could instead lead employers to misinterpret their obligations as described above and class anyone with a conviction of over three months as unfit, unless detailed guidance is produced.

CCPS would be pleased to provide further detail on these issues, and in particular would be keen to be involved in the production of guidance in connection with these Regulations. Please do not hesitate to contact me should you require further information.

Kirsten Gooday  
Policy and Development Manager, CCPS

### **Respondee information**

**Name:** Kirsten Gooday

**Email address:** [Kirsten.gooday@ccpscotland.org](mailto:Kirsten.gooday@ccpscotland.org)

**Postal address:** CCPS, 9 Ellersly Road, Edinburgh, EH12 6HY

I am responding on behalf of Community Care Providers Scotland and am happy to have my response made publicly available and for the Scottish Government to contact me in relation to my response.

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<sup>4</sup> Letter from Adam Rennie, 7 April 2008

<sup>5</sup> Letter from Adam Rennie, 7 April 2008