

AG/JP/615

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Dear Jean

**PROTECTION OF VULNERABLE ADULTS
ESTABLISHMENT OF A LIST OF ADULTS UNSUITABLE TO WORK WITH VULNERABLE
ADULTS**

Many thanks to you and Dave for coming along to our consultation meeting last week. As agreed, I am now writing to summarise the issues raised and to amplify some of the concerns that providers expressed at the meeting.

There was general agreement among providers at the meeting on the broad concept of a List, and a sense that it will be an important addition to the panoply of measures now available in relation to adult protection. I should say that this view is not shared by all CCPS members; you will receive individual submissions from a number of organisations, some of whom are opposed to the idea of a List in principle and as a membership association we recognise and respect our members' right to put forward a range of views on this subject.

The chief concerns that our meeting participants have about the proposals relate first to how the List arrangements might work in practice, and second to the potential for unintended consequences that may further endanger vulnerable adults instead of affording them protection.

We realise that the consultation paper asks a specific set of questions about the proposals but on this occasion we feel it is important, if slightly anarchic, to group our concerns under a different set of headings. Do come back to us if there are particular additional points on which you would like a view.

Definitions

We understand that you do not propose to define '**harm**' or '**risk of harm**'. We further understand that these definitions will, in effect, be at the discretion of providers themselves, insofar as the actions of staff breach organisational rules of misconduct and lead to dismissal.

Providers are generally happy to have this clarified; however we note that it presupposes a consistency of approach to misconduct and dismissal across all provider organisations that may not, in fact, exist. Thus, certain individuals may be referred to the List for behaviour or misconduct which, engaged in by other staff in other organisations, would not result in a referral. This situation could only be resolved by the development of national guidelines on what constitutes 'dismissable' misconduct, to which all providers sign up: we are certainly not recommending this but it is nevertheless the logical extension of the proposal under consideration.

You will recall.../cont

You will recall perhaps that one of our members asked what should happen if the staff member is not dismissed, but moved to another part of the organisation where they would not come into contact with adults; looking again at the paper, I see that this is covered in paragraph 1.2 (a): “dismissed, *or transferred*, from positions giving access to vulnerable adults...”

You may also recall a question about staff members who are violent or abusive, not towards the vulnerable adults whom they support professionally, but towards someone else (for example their spouse, or another staff member). Again, we understood that this too is a matter for employer discretion and would not indicate an automatic referral to the List unless the person concerned was (a) dismissed from their post as a consequence of their actions, and (b) that the employer judges that they are unsuitable to work with vulnerable adults because of the nature of the actions that led to the dismissal.

Finally on this point, we understood from the meeting that the proposals are principally about malicious harm (abuse); however we understand that incompetence may also render someone unsuitable to work with vulnerable adults, but that unless such incompetence manifests itself in an incident leading to dismissal (or transfer) – as opposed to a general failure to meet performance standards – this would not in turn lead to a referral.

We had some discussion about the definition of a **vulnerable adult**. We noted that the definition proposed largely hinges on the services the adult receives, rather than any particular attributes of the adult him or herself. The Scottish Executive’s consultation paper on vulnerable adults (2002) differed significantly from this approach by proposing the following definition:

“an adult (aged 16 or over) who is unable to safeguard his or her personal welfare, property, or financial affairs, and is in need of care and attention arising out of age or infirmity, or suffering from illness or mental disorder, or substantially handicapped by any disability.”

The virtue of adopting this definition, or one like it, would be that ALL workers who came into contact with vulnerable adults would be subject to referral to the List, whereas under the present proposals, only those workers employed in the care or health services listed at paragraph 4.2 would be covered. There is a risk that this would miss out quite a lot of relevant people; for example, providers of housing support do not appear to be covered by the proposals as they stand.

Balance of rights and risks

You will have picked up from the meeting the significant concerns that providers have over the consequences of **‘provisional’ inclusion** on the List for those staff suspended by their employer pending the outcome of investigations.

Providers feel very strongly indeed that suspension pending investigation is a neutral act and is implemented without prejudice. In many provider organisations suspension will take place even where there is significant suspicion that the allegation is false or malicious and will remain in effect until this has been demonstrated.

In this respect, the consultation paper has served to crystallise a series of concerns that providers have entertained for some time about the way in which they deal with uncorroborated allegations against staff working without supervision to provide one-to-one support. Under these circumstances, suspension without prejudice pending investigation is the only course of action open to an employer where an allegation is made, and providers would be very unhappy indeed about the escalation of the situation that would inevitably result from a requirement to make a referral to the List, even if the status of the entry to the List is provisional.

Looking at the.../cont.

Looking at the leaflet that you brought along to the meeting about the children's services List, I can't see any reference to a requirement to refer staff who are suspended and I wonder if similar concerns were raised by child care employers, and accepted by the Executive. We did understand, I think, your concerns about the potential risk of a suspended employee going on to abuse vulnerable adults elsewhere whilst under suspension; however the balance of risk in these circumstances appears to us to be weighted far too heavily against the employee. In this respect the proposals appear to be attempting to eliminate risk, rather than to reduce and manage it, and this provision in particular seems to us to place the rights of the employee him or herself under too great a risk of abuse in pursuance of this aim.

A further issue that was raised in the meeting related to employers' possible reluctance to refer to the List, given the severity of the consequences. Employers may be reluctant to 'damn' someone to this extent on the basis of an incident that they may consider to be a 'one-off', and therefore deploy an alternative to dismissal – for example a final written warning – in order to avoid the requirement to make a referral. We see this as one of the principal **unintended consequences** of the arrangements, which may serve to reduce the scope for safety rather than enhance it, and again it indicates the need for national guidelines on indicators for dismissal.

Providers are also concerned that if they are brought before an Industrial Tribunal for unfair dismissal, and the tribunal finds in favour of the employee, the damages awarded may reflect the fact that not only was the person dismissed unfairly from their own position, they were also disqualified from working in any similar position elsewhere. In some ways this is a minor point, more related to provider interests than to those of vulnerable adults, but we would recommend some scrutiny of the legal position here because once again, it may lead to employers' avoidance of referrals, which is clearly not the intention of the proposals.

Co-ordination

Providers interpret the proposals as placing a series of significant responsibilities on to them as employers. At our meeting, we were keen to emphasise that in this respect, the proposals are the latest addition to an increasingly lengthy list of such responsibilities, which include the requirement to report similarly to the Care Commission; to the Scottish Social Services Council; to the Mental Welfare Commission; to the local authority or other commissioning or purchasing agency; and to the police. We feel that there is pressing need for some co-ordination in respect both of these multiple requirements, and of the variety of individual investigations that each of these agencies will have to undertake in relation to the same incident.

Providers clearly have a duty towards the people who use their services; we accept that we also have a responsibility to prevent harm and abuse more widely and you will know that many provider organisations are involved in developing systems and safeguards to this end. However we feel that there must be a limit to how much responsibility is shouldered by employers as individual organisations, with no overarching framework of co-ordination or even advice and support to help them discharge that responsibility.

In this respect, the idea floated at our meeting about a network of local 'adult protection committees', and a policy and legislative framework that ensures a cross-sector and inter-agency approach to this area and streamlines the present fragmented arrangements and multiplicity of investigations, is one that we would very much welcome. If this can be achieved by, say, some reviving and revamping of the Scottish Law Commission's draft bill on vulnerable adults, then we would welcome that too.

Assorted other concerns.../cont.

Assorted other concerns

Finally, can I reiterate the questions, concerns and points which I had earlier communicated to you but which we were unable to deal with in detail at the meeting because of pressure of time – and add one or two more that we raised after you left the meeting:

- We see no reason for the operation of two Lists – one for children’s services and one for vulnerable adults. We can envisage no circumstances in which someone unsuitable to work with children will be suitable to work with vulnerable adults, and vice versa. We would therefore support the extension of the ‘disqualified from working with children List’ to include the present proposals.
- It is proposed that the Care Commission will be able to refer workers for inclusion on the list. It is not clear whether this relates to its own workers, or to those employed by care providers. If the latter, we would have some concerns. In our response to the recent consultation on proposed changes to the ‘fitness’ requirements for staff working in registered services, we outlined a number of problems arising for employers if the Care Commission is given the power to make decisions about the suitability of workers who are employed by an independent organisation. The Scottish Executive is seeking further legal advice on this question and we would recommend that the present proposals are cross-referenced to that.
- The penalty for care providers for knowingly employing someone on the list can be imprisonment of up to five years. It is not clear who this means: the Chief Executive, the Chairperson or other trustees, or another individual. This is a relatively minor point but providers would welcome some clarification.
- We are concerned that the proposals may impact on recruitment timescales: these are already enormously problematic, as providers have to wait for several weeks now before enhanced disclosures can be supplied. Any widening of the scope of records to be consulted by Disclosure Scotland must not be allowed to lead to further delays in issuing certificates, or recruitment may become frankly unmanageable.
- There would have to be a robust mechanism by which employers are alerted to the inclusion on the List of a staff member, where that staff member has been referred by another employer for whom they work(ed). The penalties for providers relate to ‘knowingly’ employing someone on the List, but if that person is Listed during the course of their employment following a referral from a second employer, how would the first employer know?

We hope that you will find these comments useful in taking forward the proposals. We would certainly be happy to make any further comments or contributions as the proposals are developed.

Many thanks again for coming along to the meeting.

Yours sincerely

ANNIE GUNNER

Director