

# **The Protection of Vulnerable Groups (Scotland) Act 2007: Section 35(2) and (3)**

## **The Protection of Vulnerable Groups (Scotland) Act 2007 (Removal of Barred Individuals from Regulated Work) Regulations 2010**

### **Analysis of Consultation Responses**

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## Executive Summary

In 2007 the Scottish Parliament enacted the Protection of Vulnerable Groups (Scotland) Act (“the 2007 Act”). Part 1 of the 2007 Act provides for the barring of those persons that Scottish Ministers consider to be unsuitable for regulated work with children or protected adults (or both). The 2007 Act provides Scottish Ministers with a power to impose certain prohibitions or requirements on employers seeking to employ persons to do regulated work. Failure to comply with those prohibitions or requirements would result in the employers committing criminal offences under the 2007 Act.

In 2010, Ministers made regulations by a Scottish Statutory Instrument under section 35(2) and (3) of the 2007 Act (*the Protection of Vulnerable Groups (Scotland) Act 2007 (Removal of Barred Individuals from Regulated Work) Regulations 2010 (SSI 2010 No 244)*) (“the 2010 Regulations”).

A person who is barred from regulated work commits a criminal offence under section 34 of the 2007 Act by seeking or doing regulated work with the group from which they are barred. The effect of the 2010 Regulations is that an employer commits a criminal offence if they have been told by Scottish Ministers that the individual is barred and the employer still permits that person to continue working for them and does not remove that person from doing that regulated work.

Retrospective checking began on 29 October 2012 and was scheduled to be completed by 29 October 2015. As of the end of October 2015, the vast majority of organisations and employers in Scotland had brought the relevant members of staff into the PVG Scheme. However, a small number of organisations had not yet achieved that target.

The purpose of this consultation was for the Scottish Government to seek the views of organisations, employers and individuals on whether or not new regulations should be made under section 35(2) and (3) of the 2007 Act once retrospective checking is complete in order to revoke and replace the 2010 Regulations.

At the outset of the programme of retrospective checking, Ministers gave a public commitment that regulations to set out the new prohibitions and requirements under section 35(2) and (3) of the 2007 Act would be consulted on with stakeholders prior to draft regulations being laid in Parliament. This consultation fulfilled this commitment.

### Analysis and Reporting

The consultation ran from 26 January 2016 to 19 April 2016. The Scottish Government received 85 written responses to the consultation. Of these:

- 21 were from the public sector;
- 12 were from individuals;
- 5 were from regulatory bodies;
- 30 were from the voluntary sector;
- 17 were from the private sector.

38 respondents wished for their identity to remain anonymous. 5 respondents wished for their identity and answers to remain anonymous. A list of those who responded can be found in Annex A.

Comments given at each open question were examined and key themes, similar issues raised or comments made in a number of responses, were identified. In addition, we looked for sub-themes such as reasons for opinions, specific examples or explanations, alternative suggestions or other related comments.

Where possible, we looked at whether respondents said they agreed or disagreed with the specific proposals. In the analysis of these questions if a respondent indicated clearly yes, or provided comments of a positive nature then they were considered to have said yes. If the comments were negative they were interpreted as having said no.

The key themes were looked at in relation to individuals and organisation groupings to ascertain whether any particular theme was specific to one particular group, or whether it appeared in responses across groups.

When looking at sub-group differences, it must be also borne in mind that where a specific opinion has been identified in relation to a particular group or groups, this does not indicate that other groups agree or disagree with this opinion, but rather that they have simply not commented on that particular point.

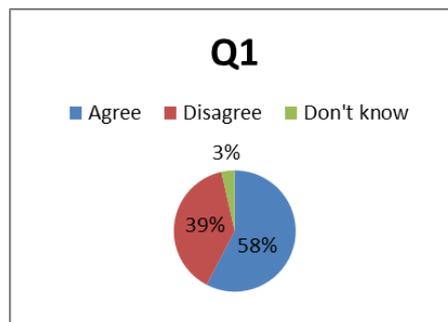
This exercise was a consultation and not a survey. While the consultation gave all those who wished to comment an opportunity to do so, given the self-selecting nature of this type of exercise, any figures quoted here cannot be extrapolated to a wider population.

#### Main Findings from Consultation

- 58% of the respondents felt that the current provisions within the 2007 Act and the 2010 Regulations were sufficient. 39% felt that there was a need to introduce additional or new prohibitions.
- A common theme in the responses from those in favour of maintaining the current provisions was that the current provisions provide sufficient safeguards for vulnerable groups. The current provisions are simple and easy to understand. A change in the provisions could place additional financial and administrative burdens on businesses and organisations.
- A common theme in the responses in favour of new provisions is that they will provide an extra safe-guarding step and further reduce the risk of an unsuitable person being in regulated work.
- Most respondents were from the public and voluntary sectors.
- The majority of respondents believed that maintaining the status quo or creating new provisions would not have any impact on protected equality groups.
- A number of respondents felt that the introduction of new provisions would have an impact on businesses. This impact could be financial and administrative.

## Question 1: Do you think we should maintain the current provisions?

### Analysis

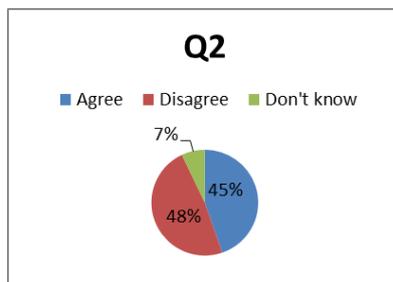


- Of the 85 respondents, 49 believed that the current provisions were sufficient.
- The general consensus amongst those in favour of maintaining the current provisions was they are simple to understand and apply. It was felt that the current provisions provide robust enough checks and balances with the risks of an unsuitable person being in regulated work very low.
- A number of respondents felt that a change in the legislation would result in an increased burden and cost to employers with very little benefit.
- Volunteer Scotland Disclosure Services sought feedback from over 4000 organisations that are enrolled with them. Only one response they received favoured changing the current provisions for employer offences.
- Youth Link Scotland also agreed that the current provisions should be maintained. They stated: “that the current situation of organisations voluntarily carrying out retrospective checks on current employees/volunteers is adequate. That the burden of responsibility should continue, as is set out in the 2010 regulations, to be a shared responsibility between Disclosure Scotland and the organisation.” A number of respondents also stated that with retrospective checking ending, everyone in regulated work should now have been PVG checked. A number also felt that the PVG Scheme post retrospective checking should be allowed to function for a time to allow a more mature assessment of how it is working and whether changes are required.
- The respondent from NHS Education for Scotland said: “Having consulted with other HR professionals across the NHS it is my opinion that the 2010 Regulations remain fit for purpose with specific regard to patient safety, and do not require any further changes to the law.”
- North Ayrshire Council suggested maintaining current provisions but that: “these should be further supported by the employer signing a declaration confirming that all employees who were in post prior to the new regulations being introduced on the 28th February 2011 have now had a retrospective check carried out and if required barred employees contracts have been terminated.”

- Aberdeen City Council also favoured the retention of the current provisions. The Council noted that greater clarity over whether or not some roles were covered by the PVG Scheme would assist the effective function of the current provisions. Two respondents, who favoured the current position and who wished to remain anonymous, said that the uncertainty over whether certain jobs were covered by PVG Scheme membership acted as a barrier to effective public protection. That uncertainty could lead to an offence being committed unintentionally if the organisation had reached the wrong conclusion about the role not being covered by the PVG Scheme.
- The 33 respondents that did not agree with maintaining the current provisions considered that new provisions would offer greater protection to vulnerable groups by encouraging all organisations offering regulated work to ensure their staff had been PVG checked. There was a concern that the current provisions may result in a barred individual continuing to work with vulnerable groups.
- One respondent who wanted to remain anonymous stated that the current provisions should not be maintained as the current requirement that Disclosure Scotland has notified an organisation that an individual has been barred is 'too restrictive'.
- The BMA also stated that "the scheme in its current form is often found to be hugely bureaucratic and onerous for both the employee and employer." They wanted to see a simpler more transparent system.

Question 2: Do you agree that there is a need for new prohibitions and requirements on organisations employing barred individuals?

## Analysis

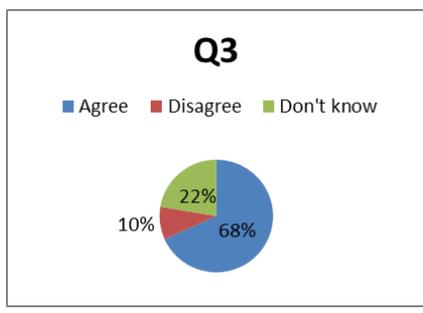


- 41 of the 85 respondents disagreed that there is a need for new provisions. 38 felt there was a need for new provisions.
- The majority of those respondents not in favour of new prohibitions felt that the current approach was sufficient, ensured safety and was simple to understand and implement.
- YouthLink Scotland stated that “We disagree with the responsibility sitting with the organisation, without the involvement of Disclosure Scotland. This move would mean that organisations would be compelled to engage with Disclosure Scotland to ensure that an offence was not committed. We do not want these measures to be a ‘back-door’ way of making membership of the PVG Scheme mandatory from the perspective of organisations. We would prefer that organisations are supported to understand the benefits of engaging with Disclosure Scotland to maintain confidence in the process and services provided.”
- A number of respondents also believe that the introduction of new provisions will result in an increased burden, financially and administratively for organisations.
- The general themes from the 38 respondents that agreed that new provisions are needed are that it will close a potential loophole allowing employers to continue to employ a barred individual working with vulnerable people and ensure the safe-guarding intentions of the Act are met. New provisions will reduce the risk of harm further.
- Association for Change stated that if PVG was mandatory it would remove the need for any new provisions whilst benefitting employers and organisations. Young Foundations Ltd was in agreement that the PVG Scheme should be mandatory. Two further respondents, who wish to remain anonymous, called for the PVG Scheme to be made mandatory.
- Carli’s Kindergarten stated the provisions should be changed to incorporate mandatory renewals of existing PVG members every three years. This is in line with SSSC guidance. A few respondents both for and against new provisions have suggested similar.

- The Society of Personnel and Development Scotland agrees that new provisions would give “more weight” for employers to check prospective employees, however, they have concerns how this will be enforced in practice.

Question 3: Do you agree that either of the options suggested will not impact on any of the protected equality groups?

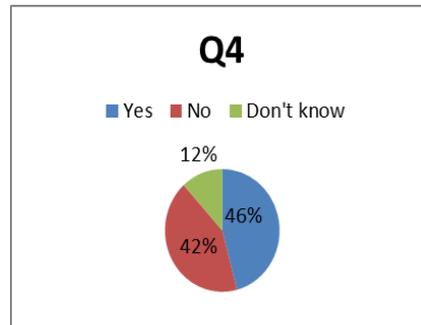
Analysis



- The majority of respondents feel that maintaining the current provisions or creating new provisions will not have any impact on any of the protected equality groups.
- 8 respondents felt that there could be an impact on these protected equality groups. Making no new provisions may result in people “slipping through the net” putting the most vulnerable at risk.
- YouthLink Scotland stated that they are “concerned that the introduction of new requirements and the changes to offence may be a barrier to community groups and organisations self-organising. These grassroots organisations often serve our most vulnerable, most in need or most excluded community members including those from protected equality groups.”

Question 4: Do you have any concerns that either of these options will have an impact on businesses?

### Analysis



- 42% of respondents feel that maintaining the current provisions or creating new provisions will not have any impact on businesses.
- 46% of respondents felt that there could be an impact on businesses.
- Anonymous said changing regulations always results in costs for businesses. New provisions will result in more resources needed. New provisions could result in a mandatory scheme which would increase costs. Delays in recruitment. Burden and costs of rechecks. Organisations not having the infrastructure in place to implement new provisions.
- YouthLink Scotland believes that “The introduction of Option 2 will place additional burden and responsibility upon small voluntary organisations. In times of diminishing resources all efforts to reduce the impact of administrative changes should be made. As we set out in Question 1, we would prefer resource to be used to raise awareness of organisations of the existing duties on retrospective checks. We would be concerned if any proposed new regulations were to come in to place which created additional financial cost for PVG checking by the organisation in order for them to fulfil their duties.”
- SPAEN States that “Our concerns are not around the impact on "businesses" but that of persons with disabilities; long-term conditions or impairments who have been assessed as eligible to receive a Direct Payment and may use this to employ support staff directly. Pre the 2007 Act, these persons were able to obtain an Enhanced Disclosure and make recruitment decisions based on all available criminal conviction and non-conviction information. Since the implementation of the 2007 Act, the provisions allowing persons seeking to employ someone in a supporting role in such a manner were removed and the amount of conviction and non-conviction information available to these persons significantly reduced. SPAEN would like a wider consultation and discussion on whether persons employing assistants in these limited and very specific circumstances should be permitted to access a greater level of detail to allow a more robust "safe recruitment process".”

## Scottish Government Response

The Scottish Government would like to thank all those who took the time and effort to respond to this consultation. The information obtained helped to form an evidence based decision as to whether there should be an amendment to the current PVG 2010 Regulations.

The results from the consultation show that more than half of the respondents believe that the current provisions are suitable. A small majority also felt that the introduction of new provisions would result in an impact on businesses or organisations, including small voluntary organisations. The majority of respondents were in agreement that neither proposal would have an impact on protected equality groups.

Following the results of the consultation Scottish Ministers do not intend to amend the current 2010 Regulations. Scottish Ministers have taken this decision based on the fact that the current provisions seem to be sufficient and there is not enough evidence to support the need for change.

Since PVG go-live in February 2011 those who have started doing regulated work in either the children's or adults' workforce and who have joined the PVG Scheme will be PVG scheme members. If, since joining the Scheme, these individuals were placed under consideration for listing or barred from working in either or both workforces their employers would have been notified by Disclosure Scotland that this was the case. And in cases where barring was notified, the employers would have been required to remove those persons from doing regulated work of the type to which the barring related.

The new proposed provisions would have had the effect of requiring organisations to carry out a PVG check on those who have remained in the same regulated work as they were in before the go-live date, and who have since then not been asked to join or who have refused to join the PVG Scheme. However, with retrospective checking coming to an end, organisations have been conscientious in asking staff who were doing regulated work at PVG go-live to join the PVG Scheme. There are currently just over 950,000 PVG scheme members. The number of people in regulated work and not in the PVG Scheme is deemed to be small and it is likely that the vast majority of people doing regulated work are already PVG scheme members. Therefore, the additional administrative cost on businesses to implement these new provisions outweighs the perceived small benefit. In light of that, Scottish Ministers believe that the offences in the PVG legislation as it stands just now (together with the prohibitions and requirements in the 2010 Regulations as they currently stand) are sufficient.

Scottish Ministers also note the concerns raised that the new regulations could, as an unintended consequence, make the PVG Scheme seem more like a mandatory scheme and concerns were also raised about the cost impact to businesses of potentially having to do more PVG checks.

Finally with retrospection coming to an end this year, the current provisions may be looked at again if there is evidence to suggest that new provisions are required.

## List of Respondents

1. Aberdeen City Council
2. Armed Forces Veterans Association
3. Association for Real Change
4. BMA Scotland
5. Camphill Scotland
6. Care Inspectorate
7. Carli's Kindergarten
8. Coalition of Care and Support Providers in Scotland
9. Community Pharmacy Scotland
10. Community Volunteers Enabling You
11. Douglas Harrower
12. Fife Council
13. FirstGroup plc UK Bus Division
14. Fran Thow
15. Friendship Services
16. Headway (Dumfries & Galloway) Assoc Ltd
17. Hillside School
18. Home-Start East Highland
19. Horse Scotland
20. Inverclyde Family Contact Centre
21. Kibble Education and Care Centre
22. NHS Education for Scotland
23. NHS Lanarkshire
24. North Ayrshire Council
25. Prestonfield & District Neighbourhood Workers Project
26. Renfrewshire Access Panel
27. Scottish Auto Cycle Union (part of Scottish Motor Sport (SMS))
28. Scottish Borders Council
29. Scottish Council of Independent Schools
30. Scottish Council on Deafness
31. Scottish Darts Association
32. Scottish Social Services Council
33. SEC - Scottish Episcopal Church General Synod
34. SPAEN - Scottish Personal Assistant Employers Network
35. SPDS (Society of Personnel & Development Scotland)
36. The General Teaching Council for Scotland
37. The Pony Club UK
38. Voluntary Action South Lanarkshire
39. Volunteer Scotland Disclosure Services
40. Waterski & Wakeboard Scotland
41. Young Foundations Ltd.
42. YouthLink Scotland

\* 43 respondents asked to remain anonymous



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