

Safeguarding Vulnerable Groups Act 2006

On 12 October 2009 the first phase of a new regime was introduced for regulating those who work with children or vulnerable adults under the Safeguarding Vulnerable Groups Act 2006 (the Act). A wider range of activities and people are caught by the Act than under the previous regime, and affected employers need to be aware of their legal obligations to avoid potential criminal liability.

What does the Act do?

The Act established the Independent Safeguarding Authority (ISA) which now operates a centralised vetting and barring scheme, largely in response to failings identified following the murders of two children by their school caretaker in 2002. It brings under one agency the previous lists (including POCA, POVA and List 99) to provide a database where an individual's status is continuously monitored and updated, rather than the previous "snapshot in time". The ISA uses information from a number of sources to make decisions about who should be barred from working with children or vulnerable adults.

The Act, which is coming into effect gradually over the next five years, specifies who needs to be registered with the ISA depending on the type of work they do. It sets out two types of activity covered, "regulated activities", and "controlled activities". Organisations which engage or supply workers for such activities already have certain reporting duties to the ISA about those workers. These organisations will also be obliged to ensure that the workers, whether employees, volunteers or contractors, are ISA-registered, although the implementation date for this is not now clear. Under the Coalition Government, the Act is undergoing a review amid concerns that it is disproportionate and overly burdensome.

Who is caught by the Act?

The Act covers organisations which carry out or supply workers for "regulated activities" and "controlled activities". It applies to employees, volunteers and contractors carrying out those activities, as well as specified roles, and in this guide the expression "workers" will be used to cover all such individuals. "Employer" will refer to those engaging volunteers and contractors as well as employees. Activities carried out in the course of family or personal relationships are outside the remit of the Act.

Under the Act, "children" are those under 18, and "vulnerable adult" covers a wide range of people including those with disabilities, the elderly, expectant and nursing mothers, those in residential accommodation or receiving domiciliary or health care.

The requirements are slightly different depending on whether an activity is "regulated" or "controlled".

Regulated activities

Since the new regime began in October 2009, the definition of "regulated activities" has been changed. Generally, a regulated activity is one where an individual is working closely with children or vulnerable adults

(either paid or unpaid) on a frequent, intensive and/or overnight basis which is not part of a family or personal arrangement.

A regulated activity is 'frequent' if it occurs once a week or more; 'intensive' if it is for more than 3 days in any 30 day period and/or overnight between the hours of 2am and 6am.

'Regulated activity' includes:

- specified activities such as teaching, training, care or supervision, advising, treatment or therapy, moderating chatroom/internet services, transportation of children or vulnerable adults)
- activities carried out in a particular place (eg education establishments, nurseries, children's homes, care homes) by the same person 'frequently', or 'intensively'. If their work is 'frequent or 'intensive' this may include catering, cleaning, administrative and maintenance staff if they come into contact with children or vulnerable adults.
- fostering and childminding
- activities carried out by those in positions of trust (eg school governors, trustees of charities for children or vulnerable adults, inspectors of schools, chief inspector of prisons etc)

Employers engaging workers or volunteers in regulated activities are under a duty to refer information to the ISA in certain circumstances (see further below) and there are also various criminal offences under the Act.

Criminal offences for regulated activities

A person is "barred" from carrying out a regulated activity if he/she is included in one of the barred lists at Schedule 3 of the Act. The lists include those whose conduct has endangered, harmed (or puts a child/vulnerable adult at risk of harm) or involves indecent sexual material of children.

A barred person cannot engage in regulated activity – even if it is not done frequently, or for more than three days in any 30 day period, or overnight. As well as it being a criminal offence to do so by the worker, it will also be a criminal offence for an employer or personnel supplier to:

- permit a barred worker to engage in regulated activity (subject to limited defences) where they know or have reason to believe that the worker is barred, punishable by up to five years' imprisonment and/or a fine
- permit a worker not yet registered with the ISA to engage in regulated activity where they know or have reason to believe that the worker is not registered, punishable by a fine of up to £5,000
- fail to check whether the worker is ISA-registered and their ISA status, punishable by a fine of up to £5,000 (separate checking requirements apply to personnel suppliers). You cannot employ someone (even temporarily) until the check has been made, meaning that employment must be **put off** until then. This could have a significant effect on organisations obliged to comply with certain worker-to-service user ratios, such as nurseries

The first offence came into effect on 12 October 2009. The last two offences are being phased in gradually so that it does not initially apply to those already in post before this offence comes into effect. It was envisaged that new appointments would be subject to these last two provisions from November 2010. However the Act is now undergoing a review by the Coalition Government and the ISA registration scheme has been halted pending this review. If phased registration goes ahead and is eventually applied to those already in post, it is estimated that some 11 million workers will need to be ISA-registered.

Domestic employees

A barred individual cannot take part in a regulated activity in domestic circumstances. Those who employ domestic workers, such as housekeepers, private tutors and care workers in their own home will not be obliged to check that the worker is ISA registered, but are able to do so if they have the worker's consent.

Controlled activities

Controlled activities are those that do not constitute a regulated activity and are essentially those done by support workers (such as cleaners, caretakers, shop workers, catering staff) in the NHS, further education, adult social care and health settings. It also includes those working for specified organisations (eg local authority) with frequent access to sensitive records.

A barred worker can sometimes engage in controlled activity if sufficient safeguards are put in place. Employers are, however, under a duty to refer workers carrying out controlled activities to the ISA in certain circumstances, (see below).

What happens to CRB checks?

The requirement to check a worker's ISA status does not replace the need for CRB (Criminal Records Bureau) checks for posts that require it. However, where a worker is to work in regulated activity, a Standard CRB check is no longer available and an Enhanced CRB check must be made. The CRB will work in partnership with the ISA to administer the checks. Employers should carefully consider when it is appropriate or required to make checks for the post, and how they should respond to any issues that are raised by a disclosure.

What is the duty to refer and how has it changed?

Certain employers have a statutory duty to refer workers who have ceased to work for them because they have harmed a child or vulnerable adult, or placed them at risk of harm. Prior to 20 January 2009 this was done to different government departments. All such referrals are now to the ISA (except misconduct referrals on teachers which are not child-protection related, which is done to the GTC).

From 12 October 2009, more employers will be placed under the duty to refer information to the ISA according to whether or not they are a regulated activity provider or a controlled activity provider, not just those with existing statutory duties.

Who has a duty to refer?

The duty to refer information to the ISA under the Act applies to:

- adult/child protection teams in local authorities
- named professional bodies and supervisory authorities
- employers and service providers of regulated and controlled activity
- personnel suppliers such as employment agencies, employment business and education institutions

Other employers of those working with children and/or vulnerable adults, as well as parents or domestic employers may refer relevant information but are not under an obligation to do so.

When is the duty to refer engaged?

The duty to refer is engaged when, for a reason relating to harm or potential harm of a child or vulnerable adult by a worker, an employer withdraws permission for that worker to carry out the activity, or the employer would or might have done so if the worker had not otherwise stopped carrying out the activity. So this will generally mean when a worker:

- has their services terminated
- is dismissed
- resigns or leaves
- is transferred to other duties or another job which does not involve carrying out that activity
- is off sick and has not returned to work

and the employer thinks that the worker has harmed or may harm a child or vulnerable adult, has engaged in 'relevant conduct', or has committed an offence which would lead them to be automatically barred (as specified in regulations).

As well as general harm or potential for harm, 'relevant conduct' includes specific types of conduct eg child pornography or violent pornography. Employers who have any concerns about a worker's conduct with children or vulnerable adults should check whether their concerns must be referred to the ISA under the Act.

Similar requirements apply where for the same reasons a personnel supplier becomes aware of circumstances outlined above, or decides to stop acting for the worker, or might have done so if the arrangement with the worker had not otherwise come to an end.

Relevant information should be referred to the ISA as soon as it becomes available.

Employers and personnel suppliers are also under a duty to provide information to the ISA where requested, for example where ISA is considering whether to include someone on a barred list or remove them from it. Failure to comply without reasonable excuse is a criminal offence.

What information should be referred?

Regulations specify the exact information that must be provided to the ISA where there is a concern about harm or risk of harm to children or vulnerable adults. It includes information such as:

- application forms, offer letters and job descriptions
- employment history, disciplinary record, training records,
- information about the conduct concerned and the worker's response or explanation to any allegations
- details of investigations and disciplinary proceedings including information about any child or vulnerable adult potentially placed at risk of harm

The Regulations also specify the information that must be provided by personnel suppliers.

Action points

- Consider whether your organisation might be caught by the Act – seek our advice if you are not sure.
- Ensure you have robust recruitment procedures, references are taken up and you fully understand why job applicants left any previous employment – now doubly important because there is no mechanism for "provisional listing" as there was under POCA and POVA.
- Review and amend offer letters and contracts. Immediate consideration should be given to making an offer of employment conditional on the worker confirming that they are not barred, because employing a barred worker (knowingly, or where there is reason to believe they are barred) has been an offence since 12 October 2009. Going forward, and dependant on the outcome of the Government's review, the offer of employment must also be conditional on the worker being ISA-registered, not being barred (unless only "controlled activity" is involved), and no issues being raised by the ISA check. Contracts also need to provide that changes to a worker's ISA status during the course of the engagement are grounds for disciplinary/dismissal action or termination of the engagement.
- Keep an eye on the roles workers are undertaking – watch for ones changing into regulated activities.
- For existing workers, consider who will pay for ISA registration. The onus is on workers to pay for it (£64 – free for volunteers) but some employers may want to cover this cost.
- Keep up to date with the outcome of the Government's review and any changes to the vetting and barring scheme that are made as a result of it.
- Ensure you understand in what circumstances you have a duty to refer information to the ISA and how to do so – particularly if you did not have such a duty previously. This is a sensitive area which could give rise to grievances and breach of contract claims, and should be approached with care.

- Be aware that as a result of recent case law, employees facing disciplinary hearings which might affect their ability to be re-employed (eg where referral to ISA might result in them being barred) may ask to be accompanied by a lawyer. Please seek our advice where such a request is received.

Contact

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