

Working with Vulnerable People (Background Checking) Risk Assessment Guidelines 2018 (No 1)

Disallowable instrument DI2018-223

made under the

Working With Vulnerable People (Background Checking) Act 2011, section 27 (Risk assessment guidelines)

EXPLANATORY STATEMENT

Section 27 of the *Working with Vulnerable People (Background Checking) Act 2011* (the Act) requires the Commissioner for Fair Trading (the Commissioner) to make Risk Assessment Guidelines (the Guidelines) about how the Commissioner will conduct risk assessments for the purposes of determining whether a person poses an unacceptable risk of harm to a vulnerable person accessing a regulated activity.

Schedule 1 of the Instrument outlines the factors that will be considered by the Commissioner in conducting a risk assessment. The risk assessment process has been based on the Australia/New Zealand Standard *AS/NZS ISO 31000:2009 – Risk management – Principles and guidelines*.

The Act requires that the Guidelines must provide for the matters the Commissioner must or may take into account, and how. At a minimum: the person's criminal history; non-conviction information; whether they were previously given a negative notice under the Act or a corresponding law; whether they were previously registered under the Act or a corresponding law; and any other information the Commissioner believes on reasonable grounds is or may be relevant in deciding whether the applicant poses a risk of harm to a vulnerable person, must be taken into account.

Accordingly, the Guidelines outline the minimum mandatory considerations (as specified in section 28(2), 29, 30 and 31) and provide for other matters the Commissioner may consider when assessing an individual's risk of harm. Due to the Act not specifying mandatory disqualifying offences, the Guidelines recognise that the existence of a criminal history in itself does not necessarily make a person unsuitable to have contact with vulnerable people accessing a regulated activity. The inherent requirements of the role, the 'risk factors' (behaviours or circumstances which indicate a risk) and the 'mitigating factors' (behaviours or circumstances which reduce the level of identified risk) are all considered during a risk assessment to ensure an accurate profile of the applicant's risk is determined.

The risk assessment process is represented in three tables in the Guidelines.

Risk analysis begins when a criminal history or other information that warrants assessment is identified during the application process. Table 1 represents the relative severity of a category of offences (*relevant offences* defined in the Act) and the starting level of consideration that will be given to those offences. Registration outcomes are not determined solely on the basis of a criminal history.

Table 2 presents the minimum considerations when considering information from a criminal history, non-conviction information, previous negative notices, previous registrations, and any other relevant information. Examples of the sources from which this information would be ascertained are provided, but do not limit the type of information that may be obtained and/or provided.

A relative weighting is given to each factor based on current research on recidivism and risk factors for harm against children. While there is substantial research on risk factors for sexual offences and abuse of children, comprehensive data on the incidence and risk factors of harm to disadvantaged adults is lacking – particularly given the breadth of the definition of disadvantaged adults.

It is for this reason that no definitive cut-offs are given for defining a person's level of risk. Each person's unique combination of background and mitigating factors (including prospective or actual employment role) will change how risk is considered in their circumstances, and hence the likely outcome.

A review of the efficacy of the Guidelines following practical implementation identified opportunities to critique the language to ensure the reliability and rigour in the consideration of factors concerned with the assessment of risk, particularly with regard to 'other information', that is information that the Commissioner believes on reasonable grounds is or may be relevant in deciding whether the applicant poses a risk of harm to a vulnerable person, must be taken into account.

The guidelines clearly expressed the considerations to be made in the assessment of risk for 'Conviction' and 'Non-conviction' information, however the language used in the previous Guidelines was not as direct concerning the consideration of 'other information'. The Act calls for the Risk Assessment Guidelines to have regard for the application of 'other information' (ref Part 5.2, section 31) and the amendments, notably to Table 2, aim to more clearly define the manner in which the Commissioner is to consider such information.

The risk matrix (Table 3) identifies the registration outcome based on the level of risk assessed. Very low and low risk applicants will receive general registration. The Guidelines identify that where a moderate or high level of risk exists, mitigation (in the form of conditional or role-based registration) is required. Critical risks are unacceptable and will result in a negative notice.

Procedural fairness, or natural justice, is a core aspect of the Guidelines' decision making process. This means that the applicant will be given the opportunity to reply/make submissions prior to a decision being made; there will be a lack of bias or predisposition by the decision maker; evidence will be used to support a decision; disputed matters will be investigated.

The Act requires the applicant consenting to the Commissioner:

- checking the applicant's criminal history;
- checking non-conviction information;
- checking other information that may be relevant in assessing the application;
- seeking information or advice from any entity in relation to the application or registration; and

- when necessary, contacting a named employer in relation to the status of the application or registration.

Additionally, the Guidelines indicate that the Commissioner, or delegate, will obtain the applicant's explicit consent to contacting entities for further information.

In this revision of the Guidelines, minor modifications have been made to references to repealed legislation and regulatory agencies responsible for the regulation of these guidelines. In addition to these amendments, minor typographical anomalies have been corrected.