

Working with Vulnerable People (Background Checking) Risk Assessment Guidelines 2021 (No 1)

Disallowable instrument DI2021–4

made under the

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

EXPLANATORY STATEMENT

The intent of the Working with Vulnerable People scheme is to protect vulnerable people from harm. The intent is not to ensure that all individuals can engage in an activity of their choice, particularly if they are assessed as posing an unacceptable risk of harm to a vulnerable person.

New section 6A of the *Working with Vulnerable People (Background Checking) Act 2011* (the Act) puts the best interests of vulnerable people as the paramount consideration.

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.

The Guidelines outline the factors that will be considered by the Commissioner in conducting a risk assessment. Australian Standard AS ISO 31000:2018 *Risk management—Guidelines* (the Risk Standard) is a principle which is observed within the Guidelines however the Risk Standard does not in and of itself influence decision making.

The Act was amended in 2019 and again in 2020 with all changes commencing on 1 February 2021. Notable changes as a result of both amendments are: the introduction of disqualifying offences for people seeking registration to work in an NDIS activity or to work with children; continuous monitoring of registered persons; strengthened information sharing arrangements between the Commissioner for Fair Trading and a range of entities; and change to the maximum registration duration from 3 years to 5 years. Many of the changes being implemented align the scheme with the national approach to worker screening for the NDIS and also to national arrangements for working with children checks following the Royal Commission into Institutional Responses to Child Sexual Abuse.

The Act requires that the Guidelines must provide for the matters the Commissioner must or may take into account, and how, when making a decision. At a minimum: the person's criminal history (including for NDIS applicants and those seeking a registration to work with children, whether or not there are disqualifying offences); 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 and provide for other matters the Commissioner may consider when assessing an individual's risk of harm. With the exception of disqualifying offences in the case of an applicant seeking registration for NDIS work or to work with children, the Guidelines recognise that the existence of a criminal history in itself may not necessarily make a person unsuitable to have contact with vulnerable people accessing a regulated activity. In circumstances where disqualifying offences do not apply, 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 that an accurate profile of the applicant's risk is determined.

The definition of risk has been adopted from the ACT Civil & Administrative Tribunal matter, *Applicant 201915 v Commissioner For Fair Trading (Occupational Regulation) [2019] ACAT 117*¹ and means a "chance or the 'possibility'", while harm is described in that same decision as a "physical injury or a 'moral' one, which in turn means an emotional or psychological harm."

The primary source of risk identification is the criminal history check, though other sources of information may also prove valuable in determining levels of risk.

Risk analysis begins when a criminal history or other information that warrants assessment is identified during the application process. A risk analysis can also be conducted when there is new relevant information about a registered person.

Table 1 in the Guidelines relates to disqualifying offences and applies only to applicants seeking registration to work in an NDIS activity or a regulated activity involving children. Subject to some conditions, which are described in the Act and referenced in the Guidelines, a person seeking registration for NDIS work or to work with children may be excluded based on the existence of a disqualifying offence.

Tables 2 and 3 in the Guidelines represent the factors to be considered in relation to criminal history, non-conviction information, and other information, all of which the Commissioner is required to consider when making an assessment about the level of risk to vulnerable people posed by an applicant. Such information includes previous negative notices and previous registrations, whether the registration was suspended or cancelled, and will link to national data relating to NDIS worker screening as well as working with children checks. Examples of the sources of evidence which might be referred to in the process are provided in these tables, but this does not limit the type or source of information that may be obtained and/or provided and considered in the process.

¹ ACT Civil & Administrative Tribunal *Applicant 201915 v Commissioner For Fair Trading (Occupational Regulation) [2019] ACAT 117*

A relative weighting is given to each factor which may be linked to contemporary thinking in relation to 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. It should be noted that decision makers for the purposes of risk assessment outcomes will keep the paramount consideration of the Act at the forefront of thinking.

The end result of this process is to firstly determine the level of risk posed by an applicant, particularly whether or not the applicant poses an *unacceptable risk of harm* to vulnerable people and also to, where appropriate, determine whether or not restrictions need to be imposed on the registration in order to address the identified level of risk. In considering this, the Commissioner adopts observations from a decision of the Victorian Supreme Court² in which that Court reasoned that the term '*unacceptable risk*' is established if "*there is a sufficient likelihood of the occurrence of the risk which, having regard to all relevant circumstances, make it unacceptable.*"³ Further to this, the risk assessment process also adopts the observation from the same case in that "*Whether a risk is unacceptable will depend not only upon the likelihood of it becoming reality but also on the seriousness of the consequences if it does.*"⁴ This latter point reflects that it is the nature of the potential consequences that might elevate the risk level. This is consistent with the approach adopted by the Risk Standard in so far as a risk can become unacceptable where consequences are serious, even if the likelihood is low or infrequent.

The risk rating table which is included as part of Table 5 of the Guidelines identifies the registration outcome based on the level of risk assessed. Very low and low risk applicants will likely receive positive registration. The Guidelines identify that where a moderate or high level of risk exists, mitigation (in the form of restrictions including a role-based registration) is likely required. Critical risks are unacceptable and will likely 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 an absence of bias or predisposition by the decision maker; wherever possible evidence will be used to support a decision; and disputed matters will be investigated where appropriate.

The Act requires the applicant consenting to the Commissioner:

- checking the applicant's criminal history;
- checking non-conviction information;

² Victorian Supreme Court Department of Human Services v DR [2013] VSC 579

³ 2013 VSC 579 [60]

⁴ 2013 VSC 579 [61]

- 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.

The human rights compatibility statements of both the 2019 and 2020 amendments to the Act acknowledge that the changes will impact on a small number of registrants and future applicants under the scheme. The compatibility statements for the 2019 changes to the Act noted that the amendments *“will impact on the human rights of a small number of registrants under the Working with Vulnerable People Scheme...”* That statement also notes that the changes to the Act *“...seeks to protect the rights and dignity of vulnerable people by limiting their exposure to those who pose a risk to their safety and well-being”* and concluded that *“For the purpose of background checking, the person’s right to protection from harm was determined to be the prevailing right.”* The human rights compatibility statement of the 2019 amendments to the Act also concluded that *“While the WWVP registration scheme is inherently discriminatory [toward some applicants or registered persons] as it draws a distinction between individuals who have been convicted, found guilty of, or charged (or to be charged) with certain offences, the reason for the differential treatment is proportionate to the risk.”*

Additionally, the human rights compatibility statement of the 2020 amendments to the WWVP Act concluded that *“the protection of children and other vulnerable people is the paramount consideration and is prioritised over the rights of others involved in the WWVP scheme, including applicants.”* This compatibility statement went on to state that *“It is therefore necessary to treat certain people differently to best protect the rights and freedoms of vulnerable people.* The Guidelines and processes of background screening place the best interests of vulnerable people as the paramount consideration while also ensuring that natural justice and procedural fairness, within the constraints of the Act, are applied.

In addition to changes already outlined, other changes include: a requirement for the Commissioner to refer, where necessary, a matter to only one Independent Advisor instead of three; the inclusion of a new section relating to weighting of non-conviction information and other information; and the inclusion of a new section on giving consideration to exceptional circumstances. There has also been change to the format of the Guidelines.