

Australian Capital Territory

Working with Vulnerable People (Background Checking) Risk Assessment Guidelines 2024

Disallowable instrument DI2024–295

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* (Act) requires the Commissioner for Fair Trading (Commissioner) to make Risk Assessment Guidelines (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 or service.

The Guidelines set out the process and factors for the Commissioner to consider when assessing individual applications for registration under the Act and conducting additional risk assessments on people who already hold a registration under the Act. The Act and Guidelines serve an important and legitimate objective of protecting vulnerable people from harm through careful risk-based screening of people seeking to work with a vulnerable person.

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. Concurrently, significant changes were made to the Guidelines to reflect the amendments to the Act. The amended Guidelines also became effective on 1 February 2021.

A review of the efficacy of the Guidelines following practical implementation identified opportunities to critique the language to ensure the Guidelines are fit for purpose and maintain the rigour of the risk assessment process.

In this revision of the Guidelines, language in the section outlining registration outcomes ‘Positive with restrictions (including +/- NDIS or WWCC), or Role Based restriction’ has been amended to clarify under which circumstances a decision maker can use discretion. These amendments have not changed the powers a decision maker holds. They make clearer the distinction between prescriptive and non-prescriptive outcomes and make the Guidelines more internally consistent.

Table 5 of the Guidelines, outlining how risks should be rated, has been amended to better reflect actual decision making. Once the Guidelines came into effect, it became apparent that two cells in the risk matrix were not reflective of the actual level of risk routinely found during risk assessments. These two cells have been amended to ensure consistency with their real-world application based on the experience of risk assessors and decision makers.

Additionally, minor typographical anomalies have been corrected in Table 5 of the Guidelines outlining the relative severity of relevant offences.

Human rights implications:

During the development of the Guidelines, due regard was given to their compatibility with human rights as set out in the *Human Rights Act 2004*.

The human rights of vulnerable people, applicants, and registrants are core elements in the decision-making process. The Working with Vulnerable People background checking scheme and Guidelines engage and may limit rights of applicants and registrants, including the right to work, right to privacy, and right to equality. However, these limitations are reasonable and proportionate to achieve the important objective of protecting vulnerable people from serious harm.

The Guidelines establish a clear process for individualised risk assessment to be conducted in relation to each application and registration; with the applicant/registrant given the opportunity to respond and provide submissions prior to a final decision being made, ensuring that the applicant/registrant's right to procedural fairness is respected and that other rights are not unreasonably limited.

Tables 2 and 3 of the Guidelines represent the factors the Commissioner will consider when assessing the level of risk an applicant/registrant poses. These factors are drawn from the Act, and the Guidelines provide more detailed guidance as to how these factors are to be considered, ensuring that the assessment is clearly focused on determining the objective risk posed by an individual to vulnerable persons and that the reliability and relevance of evidence is carefully weighed.

The Act and Guidelines contain other safeguards to minimise the restriction of rights of applicants and registrants. The Commissioner acknowledges the valuable contributions individuals with lived experience offer in specific roles and can issue role-based registrations. The least restrictive conditional registration addressing an identified risk posed by an applicant or registrant will be granted wherever possible; whilst ensuring the best interest of vulnerable people is the paramount consideration in any decision outcome in accordance with section 6A of the Act.

When applying Schedule 3 of the Act, there are some serious offences which preclude registration in roles working with children or in the NDIS context as required by national schemes. These serious offences have a clear and rational link to the objective risk posed by a person. Where there is doubt about the categorisation of an offence the Guidelines provide that the Commissioner will consider the lowest categorisation of offence, thus allowing an applicant to make a case regarding exceptional circumstances and to allow registration where the person does not pose a risk to vulnerable people, following an individualised assessment.