

01/06

GUIDANCE FOR COLLEGES
ON DISCLOSURE CHECKS FOR
BOARDS OF MANAGEMENT

October 2006

Introduction

The purpose of this Guidance is to clarify the legal requirements applicable to the Boards of Management of Colleges of Further Education under the Protection of Children (Scotland) Act 2003, specifically in relation to disclosure checks for members of Boards of Management.

This Guidance covers the following:

1. Protection of Children (Scotland) Act 2003
2. Offences under the Protection of Children (Scotland) Act 2003
3. Responsibilities of Boards of Management
4. Liabilities of Boards of Management/Individual Members
5. Disqualifications applicable to Members of Boards of Management
6. Disclosure Checks – Recommendations
7. Status of Guidance

1. Protection of Children (Scotland) Act 2003

- 1.1 The Protection of Children (Scotland) Act 2003 (“the Act”) came into force on 10 January 2005. The main purpose for enacting this legislation was to establish a list of persons disqualified from working with children. The Scottish Ministers are to maintain a list of persons who are deemed unsuitable to work with children (“the List”) (a child in the Act is defined as someone under the age of 18).
- 1.2 The Act covers any individual in a “child care position”, whether in paid employment or working on a voluntary basis. The Act also applies to any organisation that employs any individual in a child care position.
- 1.3 The definition of an “Organisation” covers an educational establishment, and includes the managers of an educational establishment. The definition of the term “managers of an educational establishment” is given the same meaning as that in the Education (Scotland) Act 1980, namely the “governing body, trustees or other person or body of persons responsible for the management of an institution for the provision of any form of further education and the premises of such institution”. In the case of a College, this will be taken to be the Board of Management.

2. Offences under the Act

- 2.1 Under the provisions of the Act it is an offence for the College to:
 - Offer work in a child care position to, or to procure such work for, an individual who is disqualified from working with children (i.e. is named on the List held by the Scottish Ministers). This is provided under Section 11 (3)(a) of the Act and came into force 11 April 2005. “Work” includes voluntary positions as well as paid posts.
 - Fail to remove an individual who is on the List from a child care position. This is provided under Section 11 (3)(b) of the Act. This section is not yet in force and, as of the date that this Guidance has been issued, a date for the commencement of this Section has not yet been set.
- 2.2 There is no obligation on the College to carry out a disclosure check under the Act. However, the fact that someone is disqualified from working with children will be released as part of a disclosure check for a child care position. If the College could have known that an individual member of the Board was disqualified from working with children by carrying out a disclosure check but failed to carry out the check, the College will have no defence under Section 11 (5) of the Act (namely that the College did not know, and could not reasonably be expected to have known, that the individual was disqualified from working with children).

3. Responsibilities of Boards of Management under the Act

- 3.1 Under Section 2 of the Act, a Board of Management is responsible for ensuring that the College:
- refers an individual to the Scottish Ministers, for inclusion on the List, when they have harmed a child or put a child at risk or harm, and have been dismissed or moved away from contact with children as a consequence;
 - refers an individual to the Scottish Ministers for inclusion on the List, where an individual would have been dismissed from the College because they have harmed a child or put a child at risk of harm, but retired, resigned or ended their term of employment before dismissal took place; and
 - does not employ any individual who is named on the List.

Failure by a College to make a reference to the List when required by the Act is also an offence under the Act. Board Members should therefore make strenuous efforts to ensure offences do not occur.

4. Liabilities of Boards of Management/Individual Members

- 4.1 Under the provisions of the Act, it is not only the collective Board of Management that may be liable to prosecution if an offence occurs. The individual Board Members who exercise control within the College can have proceedings brought against them personally, where they consented to, conspired to, or through neglect allowed, an individual who is named on the List being placed in a child care position.
- 4.2 Prosecution can be brought by the Procurator Fiscal, usually following a police investigation. Although possible, it is unlikely that any prosecution would be instigated unless a person is actually harmed by a member of staff who has not been disclosure checked, or had been checked but did not have a suitable record. The police and Procurator Fiscal are likely, in determining whether to prosecute, to take into account whether a College may have a good defence under Section 11 (5) of the Act (as outlined in paragraph 2.2).
- 4.3 If the Procurator Fiscal invokes the summary procedure, on conviction the penalties are a fine not exceeding £5,000 (currently) and/or imprisonment for a term not exceeding six months. If the Procurator Fiscal invokes a solemn procedure (at his discretion), on conviction the penalty is an unlimited fine and/or a maximum of five years imprisonment.
- 4.4 In addition to responsibilities under the Act, a Board of Management also has a responsibility under the common law to ensure that its College meets its duty of care and prevents reasonably foreseeable harm to its employees, students and third parties. Liability for a Board of Management arises where harm or loss to a person is caused by a breach of the duty of care owed to that person.
- 4.5 The Board of Management must act in a way which is consistent with that of a "reasonable Board of Management" to meet its duty of care. The responsibilities of each individual member of a Board of Management highlighted in this Guidance, together with any other relevant responsibilities should be stated explicitly in a College's standing orders.

5. Disqualifications applicable to Members of Boards of Management

5.1 The Further and Higher Education (Scotland) Act 1992

Section 12 of the Further and Higher Education (Scotland) Act 1992 (“the 1992 Act”) also provides for situations in which a person is ineligible for appointment as a Member of a Board of Management. As detailed in Schedule 2 of the 1992 Act, a person will be disqualified from appointment as a Member of a College Board in the following circumstances:

- If the person has, within 5 years of the date of his appointment would take effect, has been convicted of any offence and has had passed on him a sentence of imprisonment (whether suspended or not) for a period of not less than three months;
- If the person’s estate has been sequestrated – please note that this disqualification shall cease if and when the sequestration of the estate is recalled or reduced; or if the person is discharged under the Bankruptcy (Scotland) Act 1985);
- If the person has made an arrangement with his/her creditors, or has granted a trust deed for his/her creditors or a composition contract – this disqualification shall cease when such an arrangement, trust deed or composition contract (as the case may be) is no longer in force;
- If the person has been adjudged bankrupt – this disqualification shall cease **unless** the bankruptcy order made against that person is previously annulled on his discharge from bankruptcy; **and** if the bankruptcy order is so annulled on the date of annulment; and
- If the person is incapacitated by mental illness.

5.2 Protection of Children (Scotland) Act 2003

5.2.1 As has already been explained above, an individual must not be appointed as a Member of a College Board of Management if that individual is disqualified from working with children under the Act.

5.2.2 The exclusion under the Act is simply one more ground of ineligibility or disqualification which it is the responsibility of the Board of Management to enforce.

5.2.3 A Board must ensure that a person disqualified from working with children after appointment is removed from membership of the Board. The Board is also required to refer a person for the exclusion list if the College itself has decided that the individual is not suitable for working with children even if that person has resigned from the Board (or College employment).

5.3 The Charities and Trustee Investment (Scotland) Act 2005

5.3.1 The recent introduction of new charities legislation, in the form of the Charities and Trustee Investments (Scotland) Act 2005 ("the 2005 Act"), has also raised the possibility of disqualification of Members of College Boards on grounds that are separate from the 1992 Act.

5.3.2 Under the new provisions of the 2005 Act, a College will have to qualify as a "Charity". The definition of "Charity" in the 2005 Act originally excluded Colleges, as they would be subject to direction by the Scottish Ministers. However, the Scottish Ministers have now acted to ensure that Colleges will be able to retain their charitable status by introducing the Further and Higher Education (Scotland) Act 1992 Modification Order 2006 ("the Order"), which came into force on 24 April 2006. The effect of the Order is to modify the 1992 Act by removing from the Scottish Ministers their powers of direction to College Boards of Management. This now ensures that the constitutions of Colleges comply with the 'charity test' that bodies must meet in order to be granted, or retain, charitable status.

5.3.3 If a College qualifies as a Charity under the 2005 Act, its Board Members will be considered Charity Trustees. The significance is that this will impose additional duties on Board Members. Under Section 69 of the 2005 Act, an individual will be disqualified from being a Charity Trustee in the following circumstances:

- If the person has an unspent conviction for an offence involving dishonesty, or an offence under the 2005 Act;
- If the person is an 'undischarged bankrupt';
- If the person has been removed by an order of the Court of Session (either using its power to deal with management of charities, or on application by the OSCR) from being concerned in the management or control of any body;
- If the person has been removed from the office of a Charity Trustee by an order made by either the Charity Commission or the High Court of Justice in England, on the grounds of any misconduct in the administration of the charity for which the person was responsible; or
- If the person is subject to a disqualification from being a Company Director.

5.3.4 Any person disqualified from being a Charity Trustee may apply to OSCR to have the disqualification waived in relation to a particular charity, or type of charity.

5.3.5 Any person who acts as a Charity Trustee while disqualified shall be guilty of an offence. If convicted on indictment, the person will be liable to imprisonment not exceeding 2 years and an unlimited fine. On summary conviction, the person will be liable to imprisonment of up to 6 months and a fine not exceeding £500.

5.3.6 It should be noted that OSCR considered whether Disclosure Scotland certificates should be required for every prospective Charity Trustee, in its consultation paper, entitled "Meeting the Charity Test", with responses invited by 27 January 2006. OSCR's view was that such an enquiry into the character of individual Charity Trustees would not be appropriate for OSCR as the charity regulator nor proportionate to OSCR's resources. OSCR has yet to issue full guidance on the information required in relation to prospective Charity Trustees.

5.3 The Charities and Trustee Investment (Scotland) Act 2005 (continued)

5.3.7 On 21 August 2006, OSCR released a new publication, entitled "Guidance for Charity Trustees – acting with care and diligence", which gives more detailed guidance on the duties of Charity Trustees under the 2005 Act. The guidance was sent to all Scottish Charities (including Colleges) in September 2006, and is available from the OSCR website.

6. Disclosure Checks – Recommendations

- 6.1 A Board of Management of a College, having ultimate responsibility required must ensure that its College complies with the provisions of the Act. We therefore recommend that Boards of Management ensure that their Colleges have a robust Disclosure Policy in place in order to address their responsibilities and liabilities. Disclosure checks may also become necessary in the future as a result of charity legislation as outlined above.
- 6.2 It is recommended that adequate procedures are put in place to ensure that disclosure checks are obtained, prior to the election of new Board Members. The only way to ensure that an offence is not committed under the Act in relation to the appointment of Board Members is for disclosure checks to be carried out on non-staff and staff Board Members to deal with a disqualification if evidence comes to light.
- 6.3 It is also recommended that disclosure checks be obtained for all individual non-staff and staff Board Members in advance of appointment. This should include any student nominated by the student body to be a Board of Management member.
- 6.4 Finally, it is suggested that all existing non-staff and staff Board Members should be disclosure-checked at least every three years, in accordance with previous guidance issued by the Scottish Executive. This should be followed until such time as further information on the enforcement of Section 11 (3)(b) of the Act is issued. Colleges should also make a disclosure check if they receive report that a Board Member may have been placed on the exclusion list since appointment to the Board.

7. Status of Guidance

- 7.1 This Guidance is intended to give general advice only. It should not be treated or relied upon as specific legal advice. Professional advice should be sought before acting on the material contained in this Guidance as it may not be appropriate to your circumstances.
- 7.2 This Guidance relates only to the specific obligations applicable to the Boards of Management of Colleges and does not cover other legal obligations which may apply to Colleges under the legislation referred to in this Guidance or otherwise.
- 7.3 Disclosure checking of the remainder of the College staff and others associated with the College may also be necessary as a result of the Act. This has not been dealt with in these Guidelines.

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October 2006

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