

Chapter 2: Regulated Work

2.1- Introduction

1. This chapter explains the concept of regulated work in order to help individuals and organisations to decide which positions fall within the definition.
2. It is not possible to provide a definitive list of roles, positions or types of employment that constitute regulated work, not least because the structure and descriptions of peoples' work is constantly changing. Instead, the PVG Act defines regulated work by reference to: the activities that a person does; the establishments in which a person works; the position that they hold; or the people for whom they have day-to-day supervision or management responsibility. There are two types of regulated work:
 - regulated work with children; and
 - regulated work with adults.
3. The reason for having two types of regulated work, and two corresponding lists of individuals who are unsuitable to do such work, is to allow for the fact that unsuitability to work with one group does not always go hand in hand with unsuitability to work with the other.
4. An individual may be doing both types of regulated work as part of the same job (for example, a doctor) or in different contexts (for example, a teacher - doing regulated work with children - who volunteers - doing regulated work with adults).
5. The Scottish Government believes that the definition of regulated work is broad enough to safeguard children and protected adults from unsuitable people who would harm them through their work, but narrow enough to be proportionate to this aim.

Why does it matter if an individual is doing regulated work?

6. It is an offence for an individual to do, or seek or agree to do, regulated work of the type from which they are barred. It is also an offence for an organisation to knowingly recruit an individual who is barred to do regulated work of the type to which the barring relates. However, it is a defence for the organisation to show that they did not know, and could not reasonably be expected to know, that the individual was barred. Conviction for either of these offences may result in a fine, imprisonment up to five years, or both.
7. Note that there is no equivalent offence for personal employers; they can ask anybody to do regulated work (but it would be an offence for a barred person to do it).
8. In order to avoid committing the offence, organisations must work out whether or not the work they are asking an individual to do is regulated work. If it is regulated work, the organisation should ask for a scheme record or a short scheme record disclosure.

How to assess whether an individual is doing regulated work

9. There are five steps to assessing whether an individual is doing regulated work:
 - 1) **Is it work?** The meaning of work is explored in section 2.2.
 - 2) **Who are they working with?** The definition of child and protected adult is set out in section 2.3.
 - 3) **What do they do?** An explanation of regulated work with children is given at section 2.4 and regulated work with adults at section 2.5.
 - 4) **Is it their normal duties?** The meaning of normal duties is elaborated at section 2.6.
 - 5) **Are there any exceptions which apply?** There are some exceptions to what might otherwise be regulated work and these are explained at section 2.7.
10. It is suggested that these five steps are always followed in making any assessment. Note that not all steps are required in all cases.

2.2 – Step 1: Work

11. Work is defined at section 95 of the PVG Act and it has a very broad meaning as work of any kind. Work includes: paid or unpaid work, being a foster carer, carrying out of the functions of any statutory office, work under a contract, and caring for or supervising individuals who are participating in any organised activity.
12. There are, however, some types of work that do not come within the scope of the PVG Scheme, for example, if it is done for an individual in the course of a family relationship. Work also does not come within the scope of the PVG Scheme if it is done for an individual in the course of a personal relationship for no commercial consideration.
13. This means that a mother employing her brother to look after her child (a family relationship) does not constitute work for the purposes of the PVG Scheme, whether or not she pays her brother. Also, a mother employing a friend to look after her child would not constitute work if there was no payment. However, if the friend received payment, it would constitute work. In this latter case, it would be an offence for a barred individual to accept payment from the mother for babysitting (because it is regulated work) but not for the mother to employ the barred individual (because she is a personal employer).
14. Where an adult intended to employ and pay a friend to be, for example, a carer, then the friend would be doing work and similar considerations apply. However, only if the role constituted regulated work would the person be a protected adult.
15. Family has its dictionary meaning and includes parents, aunts, uncles, grandparents, siblings, children and grandchildren etc. But family relationship also includes a relationship between two individuals who live in the same household and treat each other as though they were members of the same

family¹. This means that, for example, a child, his mother, her unmarried partner and his child all living in one house would all be regarded as having a family relationship.

16. With self-help or support groups, it is important to consider whether the individuals meet as friends to provide support and help to each other or whether it is a service provided by an organisation. A self-organised group of individuals getting together to support each other is not doing work. If the group asks an individual to lead it, the individual may be working (but the recipients will not be protected adults because the individual is not providing a care service of the type which would make the individuals protected adults).

2.3 – Step 2: Defining children and protected adults

17. The PVG Act provides for the protection of two vulnerable groups: children, and protected adults.

Child - definition

18. Section 97 defines a child as an individual under the age of 18 years.

Protected adult - definition

19. Section 94 defines protected adult. A protected adult is defined as an individual aged 16 or over who is provided with (and thus receives) a type of care, health, support or welfare service. Protected adult is therefore a service based definition and avoids labelling adults on the basis of their having a specific condition or disability.

What services make a person a protected adult?

20. There are four categories of services receipt of any one of which makes an individual a protected adult²:

1. Registered³ care services

A service by a person carrying on:

- (a) a support service,
- (b) an adult placement service,
- (c) a care home service, or
- (d) a housing support service.

2. Health services

A service provided or secured by a public health body⁴ concerning the treatment, care and support of, and provision of advice and assistance to individuals in relation to health and well-being, or similar services provided by an independent health care service⁵ provider.

¹ Section 95(5) of the PVG Act.

² See section 94 of the PVG Act and the Protection of Vulnerable Groups (Scotland) Act 2007 (Prescribed Services) (Protected Adults) Regulations 2010 (SSI 2010/161).

³ Registered under Part 5, Chapter 3 of the Public Services Reform (Scotland) Act 2010.

⁴ Acting in exercise of functions conferred by the National Health Service (Scotland) Act 1978.

⁵ Independent health care service is defined in section 10F(2) of the National Health Service (Scotland) Act 1978.

3. Community care services

Social work and mental health services provided or secured by a council, or self-directed support paid for by a council. Further guidance about community care services is available on Disclosure Scotland's website at: <http://www.disclosurescotland.co.uk/publications/documents/2013095September-GuidanceonCommunityCareServices.pdf>

4. Welfare services

A welfare service includes any service which provides support, assistance, advice or counselling to individuals with particular needs, meeting the following conditions. The service must be a service that:

- (a) is provided in the course of work to one or more persons aged 16 or over,
- (b) is delivered on behalf of an organisation,
- (c) requires training to be undertaken by the person delivering the service,
- (d) has a frequency and formality attached to the service, and
- (e) either
 - (i) requires a contract to be agreed between the service provider and the recipient of the service prior to the service being carried out, or
 - (ii) is personalised to an individual adult's needs.

More about welfare services

21. In order to qualify as a welfare service, the service must include all the mandatory elements (a) to (d) above and, in addition, one or other of the elements in (e).
22. With regard to "training" (paragraph (c)), this test may be met by training which is not specialist or related to a professional qualification. As a matter of good practice, organisations asking their workers to provide welfare services should ensure that those workers have, at the very least, some basic training which is relevant to the service being delivered. For example, an organisation should train their workers to ensure that the worker is aware of:
 - the worker's duties;
 - the client's needs and how the worker should deliver the services to address those needs;
 - the standards of conduct, any code of practice or statutory duties;
 - how to escalate any concerns; and
 - where to turn for advice or guidance.
23. A "frequency and formality attached to the service" (paragraph (d)) means that the worker delivering the service should not be merely doing so on an informal, unforeseen or ad-hoc basis.
24. Note that the service must be also provided to individuals with particular needs. Particular needs are those over and above the general needs that any individual might have. It MUST be remembered that just having contact with

an individual with particular needs does not in itself qualify the role as regulated work. The role must meet the legislative definition of regulated work.

25. A particular need is a specific requirement an individual may have arising from either, physical or mental illness, or physical or mental disability which may disadvantage that person when compared to the rest of society. For example, the need for regular meals is a general need (everyone needs this) but the need for assistance in preparing meals is a particular need (only some people in the general population need that assistance). Similar arguments apply to: for example, personal care, washing, cleaning, access to shops, services and social contact. Everybody shares the need for these things, but some individuals (with particular needs) require specific assistance with them.
26. The following individuals may have particular needs:
 - individuals with (temporary or permanent) physical capacity issues above and beyond the normal course of events, that is, not including ailments which affect everyone from time to time such as colds or flu;
 - individuals with (temporary or permanent) mental disorder (that is, mental illness, learning disability or personality disorder);
 - individuals with degenerative diseases;
 - generally, individuals who suffer a prolonged impairment in doing ordinary tasks necessary to support their work or home life.
27. People do not have particular needs by virtue of the following alone:
 - people with debt problems;
 - people who do not have English as a first language;
 - people in detention;
 - the jobless, or otherwise economically deprived;
 - people in receipt of state benefits;
 - people with literacy or numeracy problems (although these may be symptoms of a condition which does give rise to particular needs); nor
 - friends or relatives of protected adults or individuals with particular needs.
28. We have agreed, although it is not provided for directly in the legislation, that this definition of particular needs applies to all welfare services. So unless a service is provided to adults with particular needs it is not a welfare service.

Other considerations

29. Most adults are likely to be a protected adult at some time in their lives, for example receiving treatment in hospital or receiving care in later life. But an individual is only a protected adult at the time they receive the service. For example, care home residents are protected adults at all times when they are in their care home. But other adults will only be protected for limited periods, for example, while receiving dental treatment.

Child and protected adult overlap

30. It is possible for 16 and 17 year-olds to be both children and protected adults. The assessment as to whether or not they are protected adults is no different to that undertaken in respect of any other adult.

2.4 – Step 3: Regulated work with children

31. Regulated work with children is defined at schedule 2 of the PVG Act. The original definition in the Act has been amended by Scottish Statutory Instrument 2010 No 446. The definitive reference point for regulated work with children is schedule 2 of the PVG Act (as amended) and this should be consulted in case of doubt. It is important to note that by no means all individuals who come into contact with children through their work are doing regulated work with children.
32. This section focuses on work which may be within scope of regulated work with children:
- (a) a position whose normal duties include carrying out particular activities;
 - (b) a position whose normal duties include work in particular establishments;
 - (c) particular positions of trust or responsibility; or
 - (d) a position whose normal duties include the day to day supervision or management of an individual doing regulated work with children by virtue of the activities the individual carries out or work the individual does in establishments.
33. It is important to read section 2.6 about normal duties and section 2.7 to see whether an exception applies. Note that normal duties can affect the assessment of: work carrying out activities; work in establishments; and day to day supervision or management of an individual carrying out those activities or working in those establishments. But it does not affect the particular positions of trust and responsibility – an individual who works in one of those positions will always be doing regulated work. Where there are exceptions which apply to the type of work listed below, these are referenced by numbers in square brackets and further explanation can be found in section 2.7. In summary, the exceptions are:
- [1] – Incidental activity
 - [2] – Work with children themselves in work
 - [3] – Work with children themselves in employment
 - [4] – Opportunity for contact
 - [5] – Incidental activity (caring for adults)
 - [6] – Establishments: children
 - [7] – Establishments: adults.

Activities

34. An individual may be doing regulated work with children if their work involves any of the following activities (as part of their normal duties):
- Caring for children. [1], [2]
 - Teaching, instructing, training or supervising children. [1], [2]
 - Being in sole charge of children (see below). [2], [3]
 - Unsupervised contact with children⁶ under arrangements made by a responsible person (see below). [2], [3]
 - Providing advice or guidance to a child or to particular children which relates to physical or emotional well-being, education or training (see below). [1], [2]
 - Moderating a public electronic interactive communication service which is intended for use wholly or mainly by children (see below).
 - Providing, or working for an organisation which provides, a care home service⁷ which is provided exclusively or mainly for children. [4]
 - Providing, or working for an organisation which provides, an independent health care service⁸ which is provided exclusively or mainly for children. [4]
 - Work on any part of day care premises⁹ at times when children are being looked after in that part.
 - Being a host parent¹⁰ (see below).

Being in sole charge of children

35. Being in sole charge of children might include, for example: a contracted taxi or minibus driver taking children to school classes but this only applies if no escort is present. If an escort is present then it is they who are in regulated work not the driver; the operator of a bouncy castle, where parents may be absent and the individual does have charge of what happens on the castle. It may also capture some aspects of school trips where a helper is not undertaking other kinds of activity which qualify as regulated work, for example, escorting a group of children between venues.

Unsupervised contact with children

36. Unsupervised contact with children under arrangements made by a responsible person is regulated work with children.
37. The PVG Act defines “unsupervised contact with children” to mean contact with children in the absence of—
- (a) a responsible person;
 - (b) a person doing regulated work with children by virtue of caring, teaching, instructing, training, supervising or being in sole charge of children; or

⁶ Defined at paragraph 1A of schedule 2 as amended.

⁷ “Care home service” has the same meaning as in schedule 12 of the Public Services Reform (Scotland) Act 2010.

⁸ “Independent health care service” is defined in section 10F(2) of the National Health Service (Scotland) Act 1978.

⁹ “Day care premises” means premises at which day care of children, within the meaning of schedule 12 of the Public Services Reform (Scotland) Act 2010, is provided.

¹⁰ See paragraph 2A and 11A of schedule 2 as amended.

- (c) an individual who, in relation to a child, has agreed to supervise the contact under arrangements made by the child's parent or guardian or any person aged 18 or over with whom the child lives in the course of a family or personal relationship.
38. The PVG Act defines "responsible person" to mean, in relation to a child, any of the following persons—
- (a) the child's parent or guardian;
 - (b) any person aged 18 or over with whom the child lives;
 - (c) the person in charge of any establishment in which the child is accommodated, is a patient or receives education (and any person acting on behalf of such a person);
 - (d) a person who provides day care of children, within the meaning of section 47, read with schedule 12 of the Public Services Reform (Scotland) Act 2010 (2010 asp 8);
 - (e) any person holding a particular position of trust and responsibility; and
 - (f) a charity trustee of a children's charity.
39. Family relationship and personal relationship have the same meanings as in section 95 (meaning of "work") of the PVG Act.
40. Note that any contact with the child which is supervised by a person who has agreed to do so with the child's parent, guardian or any other adult with whom the child lives is not unsupervised contact. The parent, guardian or adult resident must have agreed to the supervision of the contact by the friend or relative. Unsupervised contact with a child can only arise if the responsible person has made an arrangement with a person who is not caring for, teaching etc. or being in sole charge of that child, and it is subject to the usual rules about family and personal relationships.
41. For example, suppose a voluntary organisation organises a pantomime trip by coach involving the organiser (adult A) and the coach driver (adult B). Thirty children come along, twenty-eight accompanied by a parent but two come unaccompanied. Ordinarily, the fact that two children did not have a parent with them would mean that adult A would be doing regulated work because as organiser of the trip they would have the responsibility for care of the children who do not have a parent present. However, where the parents of those two children agree to nominate another parent on the trip to supervise their children in respect of contact with adults A and B, the provision in paragraph 33(c) above engages. That means that A and B's contact would not be 'unsupervised contact with children' because another parent would be looking after the two children. And as long as that parent was doing so in the course of a personal relationship and for no commercial gain they too would not be doing regulated work. This means that no-one on the trip is doing regulated work with children, so long as each child is supervised either by a responsible person or by someone nominated by the responsible person for that child.
42. The meaning of "agreed" in the preceding example does not require such agreement to be in writing, but any organisation not requiring PVG Scheme

membership on the basis of such agreement should make a contemporary record of it.

Providing advice or guidance to children

43. Providing advice or guidance to children covers positions such as workers on telephone advice lines and children's magazine agony aunts. The provision does not cover general broadcasting to children, such as children's television or radio programmes. Advice or guidance in relation to spiritual matters or spiritual well-being is considered to be captured by advice on emotional well-being and so is within the scope of this provision.

Moderating a public interactive communication service

44. The PVG Act states that a person moderates such a service if, for the purpose of protecting children, the person has any function relating to—
- (a) monitoring the content of matter which forms any part of the service,
 - (b) removing matter from, or preventing the addition of matter to, the service, or
 - (c) controlling access to, or use of, the service.
45. But a person only moderates such a service as mentioned in sub-paragraph (b) or (c) if the person has—
- (i) access to the content of the matter, or
 - (ii) contact with users of the service.
46. This covers positions such as those involved in moderating Internet chat rooms intended for use by children where the individual has a role in protecting those children from harm. It does not cover incidental use by children of chat rooms intended for use by adults. It does not cover staff involved in maintaining and supporting such services whose function is not related to child protection, for example, engineers.

Being a host parent

47. Provision in respect of host parenting captures overnight accommodation provided in family homes as part of school exchange programmes and visits, trips or excursions arranged by many voluntary, public and private organisations. (Note that this does not include foster caring, for which specific provision is made elsewhere¹¹.) Host parenting must fall within the definition of work, otherwise it cannot be regulated work (see section 2.2). So the provision applies both to arrangements made by a council, a charity or other organisation and to private hosting arrangements where this is for commercial consideration (that is, those made directly between the parent of the child and the host parent where this is not within the context of a family or personal relationship). But the provision does not apply to any arrangements made in the course of a family relationship (whether or not a payment is made) or in the course of a personal relationship for no commercial consideration, for example where the child stays over at a friend's house.

¹¹ At sections 95 and 96 and paragraph 26 of schedule 2 to the PVG Act.

48. To be host parenting, the overnight accommodation has to be provided as if the child were part of that person's family. This excludes any person working in a hotel or B&B providing accommodation for children on a commercial basis on similar terms as they would for other clients.
49. The offences at sections 35 and 36 of the PVG Act do not apply to host parenting, as they do to other types of regulated work. This means that it is not an offence for an organisation to appoint a barred individual as a host parent. Please note that if a person is a barred individual organisations will not receive a disclosure record. Section 34 does still apply which means that it will always be an offence for an individual to work as a host parent if barred from doing regulated work with children. Organisations are still under the same duty to refer individuals who become unsuitable to be host parents as they are in respect of their employees and other workers (see chapter 5).
50. Individuals aged 16 or over living in the same household as the host parent(s) are not eligible for disclosures under the PVG Scheme but are eligible for an enhanced disclosure¹². In theory, the decision to check these individuals is not contingent upon the decision in respect of checking the host parent(s) but, in practice, there would need to be an extremely strong justification for checking these individuals if the host parent(s) themselves were not required to obtain a disclosure under the PVG Scheme.
51. The PVG Act effectively gives organisations a free hand in determining whether or not to require PVG Scheme membership or disclosure records for host parenting activities. But organisations should exercise their discretion using a risk-based assessment and ensure that the measures are even-handed and fair. Organisations should:
- apply coherent criteria to all potential host parents in the same way (that is, not just require checks of only some parents who appear to be less suitable than others);
 - identify those criteria in advance and share them with potential host parents;
 - pay heed to any guidance or directions issued by relevant local bodies, such as local authorities; and
 - have regard to how other similar organisations manage similar host parenting activities.
52. Factors that organisations may wish to consider in determining whether to require PVG scheme membership for host parents include:
- the duration of the stay;
 - whether the children have the opportunity to meet responsible adults other than the host parents on a daily basis (that is, the opportunity to report concerns about the host parent to another responsible adult);
 - the views of the “sending” organisation / parents of the children; and
 - the age and vulnerability of the children.

¹² Under provision made in the Police Act 1997 (Criminal Records) (Scotland) Regulations 2010 (SSI 2010/168).

53. Organisations should be careful about assuming that just because an individual has children of their own or has done host parenting before that these factors alone make them suitable to do host parenting.

Establishments

54. An individual may be doing regulated work with children if they work in any of the following establishments (as part of their normal duties):
- An institution which is exclusively or mainly for the detention¹³ of children. [6]
 - A hospital¹⁴ which is exclusively or mainly for the reception and treatment of children. [6]
 - A school¹⁵. [6]
 - A further education institution¹⁶. [6]
 - A hostel used mainly by pupils attending a school or further education institution. [6]
 - A home which is exclusively or mainly for children and is provided by a council under social work¹⁷ or mental health legislation¹⁸. [6]
55. One exception applies to positions in all these establishments, namely that such positions are not regulated work unless doing anything permitted or required in connection with the position gives the person the opportunity to have unsupervised contact with children. This is explained in section 2.7.

Positions

56. An individual is doing regulated work with children if they hold any of the following positions (note there is no normal duty qualification or other exceptions which apply):
- Manager, or member of a governing body, body of trustees or other body responsible for the management, of a school, further education institution or hostel – as defined in establishments (but not a member of a council).
 - Member of certain¹⁹ council committees, joint committees or sub-committees concerned with the provision of education, accommodation, social services or health care services to children.
 - Member of a children’s panel.
 - Member of a Safeguarders Panel.
 - Member of Children’s Hearings Scotland.
 - Member of an area support team.

¹³ “Detention” means detention by virtue of an order of a court or under an enactment.

¹⁴ “Hospital” has the meaning given by section 108(1) (interpretation) of the National Health Service (Scotland) Act 1978.

¹⁵ “School” has the same meaning as in the Education (Scotland) Act 1980.

¹⁶ “Further education institution” means a body listed under the heading “Institutions formerly eligible for funding by the Scottish Further Education Funding Council” in schedule 2 to the Further and Higher Education (Scotland) Act 2005 (asp 6) or a college of further education which is assigned to a regional strategic body by order made under section 7C(1) of the Act.

¹⁷ Section 59 (provision by councils of residential and other establishments) of the Social Work (Scotland) Act 1968.

¹⁸ Section 25 (provision of care and support services by local authority) of the Mental Health (Care and Treatment) (Scotland) Act 2003.

¹⁹ See paragraph 19 of schedule 2 for full details.

- Staff of Children’s Hearings Scotland.
- Member of the Scottish Children’s Reporter Administration.
- Staff of the Scottish Children’s Reporter Administration.
- National Convener of Children’s Hearings Scotland.
- Principal Reporter
- Chief social work officer of a council.
- Chief education officer (however called) of a council.
- Commissioner for Children and Young People in Scotland or member of that Commissioner’s staff.
- Registrar of Independent Schools in Scotland.
- Foster carer²⁰.
- Charity trustee of a children’s charity (see below).

57. These positions cover work which might not otherwise be regulated work. These are positions which, by their very nature, put the post-holder in a position of power and trust in respect of children and those who work with children and could enable the post-holder to have or seek access to children. Additionally, some of these positions give the post-holder the power to influence or determine recruitment decisions or organisational policy and practice. A post-holder in one of these positions is doing regulated work with children without exception (that is, there is no normal duties test and it is immaterial whether or not the post-holder is or is not covered by any other provision in schedule 2).

Charity trustee

58. All trustees of children’s charities are doing regulated work. The PVG Act defines a children’s charity²¹ as a charity whose—

- (a) main purpose is to provide benefits for children, and
- (b) principal means of delivery of those benefits is by its workers doing regulated work with children.

An individual works for a charity if the individual works under any arrangements made by the charity.

59. This definition means that a charity whose main purpose is directed at the general population as a whole is not a childcare charity even if services exclusive to children are provided. A charity trustee cannot be in both workforces as a result of being a charity trustee.

60. The main purpose of including “children’s charity” trustees within the scope of regulated work is because of the trust and access to children *within and beyond the work of the charity itself* which that position confers or would be assumed to confer by a lay person.

61. The definition excludes Higher Education Institutions. It also excludes all charities whose main purposes are aimed at adults or the population more generally. Finally, it excludes charities which deliver “indirect” benefits only, such as financial, legal or medical research. The definition of children’s

²⁰ See paragraph 26 of schedule 2 and definition of foster carer at section 96 of the PVG Act.

²¹ Paragraph 27 of schedule 2.

charities covers those charities which would most commonly be thought of as such.

Day to day supervision or management of workers doing activities or in establishments

62. An individual may be doing regulated work with children if they are responsible for the day to day supervision or management of someone doing regulated work either as a result of the activities that person performs or the establishment in which that person works. However, this provision does not apply to managing or supervising someone who is in one of the particular positions of trust or responsibility.
63. A position is likely to include day to day supervision or management of an individual where:
- the holder of the position is responsible for the management, supervision, appraisal, training and immediate welfare of the individual (but note that responsibility for the recruitment, discipline and dismissal may reside with a dedicated HR department in large organisations);
 - the holder of the position meets regularly with the individual to discuss and review the individual's work;
 - the holder of the position quality assures the individual's work (for example, by being present on occasion or reviewing outputs); or
 - a person more senior than the holder of the position would hold that person responsible for any failing in respect of the individual's work.
64. Individuals above that first line of supervision or management are not doing regulated work because of their day to day responsibilities unless their normal duties include standing in for the front-line manager. Having said that, the professional role of a second-line manager or above could mean that the person is doing regulated work irrespective of any management responsibilities that they have.

Collective responsibility

65. Collective responsibility for a policy, process or organisation does not necessarily equate to collective responsibility for day to day supervision or management of workers. Even where the day to day supervision or management of an individual is the collective responsibility of a group, it is not the intention of the PVG Act that all members of the group are themselves doing regulated work and therefore expected to become PVG Scheme members. In such circumstances, it is preferable that one member of the group takes primary responsibility for the day to day supervision or management of the individual, at least in respect of the aspects of their work that are regulated work. It is also important to consider the "day to day" element of the test.
66. For example, a Kirk Session might have collective responsibility for youth work in a church. However, it is unlikely that many members have responsibility for the day to day supervision or management of the youth worker. It should be possible to allocate responsibilities such that only one of their number (one

might expect this to be the Minister) is doing regulated work by virtue of this function.

2.5 – Step 3: Regulated work with adults

67. Schedule 3 of the PVG Act defines regulated work with adults. This schedule has been amended by Scottish Statutory Instrument 2010 No 446.
68. This section focuses on work which may be within scope of regulated work with adults:
- (a) a position whose normal duties include carrying out particular activities;
 - (b) a position whose normal duties include work in particular establishments;
 - (c) particular positions of trust or responsibility; or
 - (d) a position whose normal duties include the day to day supervision or management of an individual doing regulated work with adults by virtue of the activities the individual carries out or work the individual does in establishments.
69. It is important to read section 2.6 about normal duties and section 2.7 to see whether any of the exceptions apply. Note that normal duties qualifies: work carrying out activities; work in establishments; and day to day supervision or management of an individual carrying out those activities or working in those establishments. But it does not qualify the particular positions of trust and responsibility; an individual who works in one of those positions will always be doing regulated work. Where there are exceptions which apply to the type of work listed below, these are referenced by numbers in square brackets and further explanation can be found in section 2.7.
70. Note that work that involves having access to financial or medical records or “sensitive” information is not regulated work.

Activities

71. An individual may be doing regulated work with adults if their work involves any of the following activities (as part of their normal duties):
- Caring for protected adults. [5]
 - Teaching, instructing, training or supervising protected adults. [1]
 - Being in sole charge of protected adults. [1]
 - Providing assistance, advice or guidance to a protected adult or particular protected adults which relates to physical or emotional well-being, education or training. Advice or guidance in relation to spiritual matters or spiritual well-being is considered to be captured by advice on emotional well-being and so is within the scope of this provision. [1]
 - Inspecting adult care services²² (including inspecting any premises used for the purposes of providing such services).

²² “Adult care service” is defined at schedule 3, paragraph 7 of the 2007 Act.

Sole charge of protected adults

72. Remembering that for an individual to be a protected adult, they must be in receipt of one of the services mentioned in paragraph 20 above, there are only limited circumstances where an individual is likely to be doing regulated work with adults only by virtue of being in sole charge of protected adults. These circumstances are most likely to be community bus or contract taxi services delivered as part of one of those services. The drivers of such vehicles, if the protected adult is unaccompanied by a relative or carer, are likely to be in sole charge of protected adults.

Establishments

73. An individual may be doing regulated work with adults if they work in any of the following establishments (as part of their normal duties):

- A care home - meaning accommodation occupied mainly or exclusively by individuals aged 16 or over which is provided by an organisation carrying on a care home service²³.^[7]
- A residential establishment or accommodation occupied exclusively or mainly by individuals aged 16 or over which is provided by, or the provision of which is secured by, a council under social work²⁴ or mental health legislation²⁵.^[7]

74. One exception applies to positions in all these establishments, namely that such positions are not regulated work unless:

- doing anything permitted or required in connection with the position gives the person the opportunity to have unsupervised contact with protected adults; and
- any contact with protected adults, when the holder of the position is doing anything permitted or required in connection with the position, is more than incidental.

75. This is explained in section 2.7.

Positions

76. An individual is doing regulated work with adults if they hold any of the following positions (note there is no normal duty qualification or other exceptions which apply):

- Member of certain²⁶ council committees, joint committees or sub-committees concerned with the provision of education, accommodation, social services or health care services to protected adults.
- Chief social work officer of a council.
- Charity trustee of certain charities (see below).

²³ As defined in schedule 12, paragraph 2 of the Public Services Reform (Scotland) Act 2010.

²⁴ The Social Work (Scotland) Act 1968.

²⁵ Section 25 (provision of care and support services by local authority) of the Mental Health (Care and Treatment) (Scotland) Act 2003.

²⁶ See paragraph 10 of schedule 3 for full details.

Charity trustee

77. All trustees of certain charities as defined in the PVG Act are doing regulated work with adults. These charities are whose—
- (a) main purpose is to provide benefits for protected adults, and
 - (b) principal means of delivery of those benefits is by its workers doing regulated work with adults.
- An individual works for a charity if the individual works under any arrangements made by the charity.
78. This definition means that a charity whose main purpose is directed at the general population as a whole is not a charity for protected adults even if services exclusive to protected adults are provided. A charity trustee cannot be in both workforces as a result of being a charity trustee.
79. The provision mirrors that for regulated work with children (see section 2.4).

Day to day supervision or management of workers doing activities or in establishments

80. An individual may be doing regulated work with adults if they are responsible for the day to day supervision or management of an individual doing regulated work through the activities the individual performs or the establishments in which the individual works. But note this provision on supervision of an individual does not cover supervising an individual who is in one of the particular positions of trust or responsibility.
81. The discussion of day to day supervision and management in section 2.4 applies equally here.

2.6 – Step 4: Normal duties

82. The concept of normal duties is extremely important in limiting the scope of regulated work. For an activity or work in an establishment to be regulated work, the carrying out of the activity or the work in the establishment must be part of the individual's normal duties.
83. Normal duties can be considered as something the individual might be expected to do as part of their post on an ongoing basis, for example appearing in a job description. Normal duties exclude one-off occurrences and unforeseeable events (that is, events that are one of a kind, unique, not repeated or not done again).
84. No particular frequency for undertaking the work or duration of work is specified in the Act as these will depend on the context. There should, however, be some formality to it in that it must be part of the normal duties.
85. An activity or work is likely to be “normal duties” when:
- it appears in an individual's job description, task description or contract (but these should not be manipulated to stretch the boundary of the PVG Scheme);
 - it can reasonably be anticipated; or

- it is not of an ad hoc nature.
86. An activity or work is unlikely to be “normal duties” when:
- done in response to an emergency (unless by an emergency worker);
 - arranged at the last minute to stand in for sickness or other unexpected absence of another worker; or
 - done as a one-off activity of short duration which is not part of the individual’s normal routine or occupation.
87. Note that *pre-arranged* stand-ins or substitutes may also come within the scope of the PVG Scheme, if this has been formalised with them in advance.

2.7- Step 5: Exceptions to regulated work

88. The following exceptions only apply in the specific circumstances set out in the previous sections. They must be read in that context.

[1] - *Incidental activity*

89. The scope of regulated work is narrowed by the incidental test. Some, but not all, activities with children or protected adults are excluded from being regulated work if the activity is occurring incidentally to working with individuals who are not children or protected adults.
90. An activity is likely to be incidental when:
- open to all (characterised by where the event is held, where it is advertised, admission policy etc.);
 - attractive to a wide cross-section of society; or
 - attendance is discretionary.
91. An activity is unlikely to be incidental when:
- targeted at children or protected adults (perhaps characterised by where the event is held, where it is advertised, admission policy etc.);
 - more attractive to children or protected adults than others; or
 - attendance is mandatory.
92. An important consideration is the degree to which it could be reasonably foreseen that children or protected adults would attend. Whether an activity is incidental or not is not so much about the numbers of children or protected adults attending but the purpose and intended client group for the activity. For example, an outdoor navigation skills day event advertised in a mountaineering magazine for the population in general may or may not attract some participants who are children. Whether the turnout is 5% or 50% children, the instructing of children is still an incidental activity.
93. If an activity is believed to be incidental, but actually attracts an overwhelming majority of children or protected adults, then the issue of whether the activity is or is not incidental should be reviewed before the next year / term / season. However, it is not practical or appropriate to change the classification of an activity “in flight”.

[2] - Work with children themselves in work

94. Some activities are excluded²⁷ from regulated work with children if they are carried out in relation to children aged 16 or 17 in the course of the children's work. This means, for example, that a shop manager recruiting or supervising children aged 16 or 17 as assistants (whether as employees or volunteers) is not within the scope of regulated work with children.

[3] - Work with children themselves in employment

95. Some activities are excluded²⁸ from regulated work with children if they are carried out in relation to children under the age of 16 in the course of the children's employment. "Employment" is defined in section 97. Employment means paid employment whether under a contract of service or apprenticeship or under a contract for services. Work is much wider than employment in the PVG Act. This means, for example, that a shopkeeper employing a 14 year-old to do a paper round is outside the scope of regulated work.

Younger children on work experience

96. Individuals working with children aged 16 or 17 on work experience are exempt by paragraph 2(a) of schedule 2 as the children are themselves working. In respect of younger children on work experience (and who are not themselves employed), neither paragraph 2(a) or (b) of schedule 2 offers any exemption. But it is to be expected that most employees in the host organisation working with such children would not be doing regulated work because their interaction with the children would either: not be one of the activities; not be their normal duties; or be incidental. Each case has to be assessed on its own merits. For example, any care offered to children on a work placement would have to be above and beyond what is normally provided to employees for this to be any more than incidental. In practice, only any individual(s) allocated special responsibilities for the children for the entire duration of their placement is (are) likely to be doing regulated work.

[4] – Opportunity for contact

97. Some activities²⁹ are only regulated work with children if doing anything permitted or required in connection with the position gives the holder of the position the opportunity to have contact with children. A cleaner, for example, in the head office of an organisation providing care home services would not be regarded as doing regulated work with children.
98. Contact usually means physical proximity. However, in some limited circumstances it might also include remote communications such as telephone or email.
99. Opportunity for contact with children means that there is a reasonable expectation, but not necessarily certainty, of contact with children. For example, an individual who is walking down a school corridor during the school day has the opportunity for contact with children. Whether or not the opportunity materialises, that is, whether the individual actually meets any

²⁷ Paragraph 2(a) of schedule 2 to the PVG Act.

²⁸ Paragraph 2(b) of schedule 2 to the PVG Act.

²⁹ Namely those at paragraphs 9 and 10 of schedule 2.

children, will vary from instance to instance and is not relevant to the assessment.

[5] - Incidental activity (caring for adults)

100. Remember that 16 and 17-year-olds can be both children and protected adults. This exception to caring for protected adults³⁰ relates to an activity involving caring for protected adults under the age of 18 which is merely incidental to caring for children generally. Incidental activity is explained at [1] above. This application of the incidental test is different to the others, which apply it to the population in general, because receipt of care services makes an individual a protected adult. This exception excludes from regulated work with adults, work which primarily involves caring for children.

[6] – Establishments: children

101. Work in an establishment³¹ is not regulated work with children unless doing anything permitted or required in connection with the position gives the person the opportunity to have unsupervised contact with children. Unsupervised contact with children is defined in the PVG Act, see section 2.4 above.

102. The establishments identified in Part 3 were included in schedule 2 because they are places where there is the potential opportunity for workers having close, unsupervised proximity to children which may allow an unsuitable person the possibility of either “grooming” a child over a period of time or more immediate inappropriate behaviour.

103. Most “front-line” workers in these establishments will anyway be doing regulated work by virtue of their activities, especially: caring for children; teaching, instructing, training or supervising children; and being in sole charge of children. These provisions would cover teachers, nurses and doctors in children’s hospitals, staff in children’s detention institutions etc., irrespective of work in establishments.

104. If an individual’s normal duties in an establishment do not involve an activity that is regulated work or provide the opportunity for unsupervised contact with children, then they are not doing regulated work.

105. The effect of this exception is twofold. Firstly, any individual working in an establishment, or part of an establishment, where no children are present is outside the scope of regulated work. Secondly, any individual working in an establishment where children who are otherwise being cared for, taught or supervised are present is not *by this fact alone (the fact that they are working in an establishment)* within the scope of regulated work.

106. The phrase “doing anything permitted or required in connection with the position” precludes individuals who create an opportunity for unsupervised contact with children by acting outside their authority. For example, a builder who was permitted to work in a part of a school which was sealed off for

³⁰ Paragraph 2 of schedule 3 to the PVG Act.

³¹ Part 3 of schedule 2 to the PVG Act.

refurbishment but who strays into a part of the school which is in active use is going beyond what is permitted or required of him. The appropriate protection here is the prevention of unauthorised access to facilities which then afford the possibility of contact rather than access to PVG Scheme membership and disclosure records.

107. The exception takes out from the scope of regulated work, for example, a builder doing renovation work in a school building over the summer holidays or outside school hours when there are no children present. It also excludes the postman who delivers to a school's main reception every day but does not have unsupervised contact with children. Another exclusion might be the driver of the "gritting lorry" that comes round at 7.00 a.m. before any pupils have arrived.
108. However, positions such as a school caretaker or ward cleaner in a children's hospital can reasonably be anticipated to provide the opportunity for unsupervised contact with children and these are within the scope of regulated work.

Parent Council meetings and other activities on school premises

109. Parent Councils, Combined Parent Councils or other parental bodies meeting in a school (or other educational establishment) either when there are no children present (for example, evenings) or in the presence of a responsible person (for example, a teacher or headmaster) are excluded from regulated work. However, Parent Councils, Combined Parent Councils or other parental bodies meeting in an educational establishment at times when children are present and in the absence of a responsible person are likely to come within the scope of regulated work (depending on the precise arrangements). But it should be possible for schools to make arrangements to ensure that parents attending Parent Council meetings are not doing regulated work with children by, for example, arranging for them all to be picked up from reception and taken to the meeting room.
110. An evening class for adults taking place on school premises would normally be ruled out from the scope of regulated work by this exception by virtue of the lack of opportunity for unsupervised contact with children.

[7] – Establishments: adults

111. Work in an establishment³² is not regulated work with adults unless:
- doing anything permitted or required in connection with the position gives the person the opportunity to have unsupervised contact with protected adults; and
 - the contact with protected adults, when the holder of the position is doing anything permitted or required in connection with the position, is more than incidental.
112. The PVG Act defines "unsupervised contact with protected adults" to mean contact with protected adults in the absence of an individual doing regulated

³² Part 3 of schedule 3 to the PVG Act.

work within the establishment where the contact takes place (“a supervisor”). For work in establishments which does not involve any of the other activities (for example, caring) to be regulated work with adults it must involve unsupervised contact.

113. Contact is unlikely to be unsupervised if:
- a supervisor or person carrying out regulated work with a level of authority is in the same room; or
 - a supervisor has a line of sight on the protected adult(s) and / or the individual(s) whose work is being supervised.
114. Note that only one supervisor or staff member is required at any given instant, however many protected adults or other workers are in the vicinity (within reason). For example, a singer who regularly entertains the residents in the lounge of a care home where a PVG Scheme member (in respect of regulated work with adults) is present is not doing regulated work with adults, despite working in a care home.
115. Incidental contact is also excluded. For example, people such as tradesmen, window-cleaners and entertainers whose work is supervised are not doing regulated work.
116. Certain workers may still be doing regulated work, for example, administrative staff, gardeners or cleaning staff who can move freely around the building or grounds and have unsupervised contact with the residents as part of their normal duties. For example, a concierge in an establishment is likely to be doing regulated work as his or her normal duties could lead to unsupervised contact with residents. Of course, most front-line workers such as care staff, nurses and social workers will be undertaking regulated work as they will be carrying out relevant activities.