INTRODUCTION

1. This document relates to the Protection of Vulnerable Groups (Scotland) Bill introduced in the Scottish Parliament on 25 September 2006. It has been prepared by the Scottish Executive to satisfy Rule 9.3.3(c) of the Parliament’s Standing Orders. The contents are entirely the responsibility of the Scottish Executive and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 73–EN.

CONTENT OF THE BILL

2. The Protection of Vulnerable Groups (Scotland) Bill has three strands:

- the vetting and barring scheme;
- sharing child protection information; and
- minor amendments to the Regulation of Care (Scotland) Act 2001 to change the meaning of “school care accommodation service”.

3. Parts 1 and 2 create the legislative framework for a new vetting and barring scheme covering those working with children and/or protected adults, whether paid or unpaid. The scheme is intended to ensure that people who are unsuitable do not gain access to children or protected adults through work and those who become unsuitable are detected early and prevented from continuing to work. Part 1 establishes the lists of individuals unsuitable to work with children or protected adults. Part 2 establishes the vetting arrangements for individuals working with children and/or protected adults. Part 4 makes a number of technical amendments to the Police Act 1997 to ensure the effective operation of Disclosure Scotland, including changes to the existing system consequential to the introduction of the new scheme. Part 6 makes provision for the transfer of Disclosure Scotland staff to a new agency and provides a power to make provision consequential on the English and Welsh vetting and barring scheme.

4. Part 3 makes provision for sharing information for child protection purposes, placing duties on relevant public bodies and organisations to disclose information when a child is at risk of harm. It also requires the Scottish Ministers to produce a code of practice about child protection information.
5. Part 5 makes minor amendments to the Regulation of Care (Scotland) Act 2001. The Act requires school care accommodation services to register with the Care Commission. Many of these services have pupils who stay with “guardians” during term time, e.g. at weekends or half term, and sometimes during school holidays. The Bill amends the 2001 Act to allow the services being provided by guardians to be regulated by the Care Commission as part of the school care accommodation service without the need for separate registration of guardians as childminders.

6. This policy memorandum covers the three strands in turn.

THE VETTING AND BARRING SCHEME (PARTS 1, 2, 4 AND 6)

The Bichard Inquiry

7. The vetting and barring scheme has been developed in response to recommendation 19 of the Bichard Inquiry Report published in June 2004 by Sir Michael Bichard following his inquiry into the murder of two schoolgirls in Soham in 2002. Recommendation 19 states that new arrangements should be introduced requiring those who work with children or vulnerable adults to be registered. Following a feasibility study by the Home Office, the UK Government proposed an agency operating a scheme by which people would, where appropriate, be barred from working with children. Sir Michael Bichard was satisfied that this proposal met with the material requirements of his recommendation and endorsed the approach.

8. Sir Michael Bichard’s report was directed at England and Wales but the significance of the underlying issues prompted the Scottish Ministers to agree that the recommendations should also be considered in a Scottish context and acted upon where appropriate.

Alternatives

9. In response to the report, and to policy developments in England and Wales, a number of options were considered:

10. Do nothing. The Bichard Inquiry Report focussed on child protection procedures and intelligence recording and information sharing in England and Wales and the recommendations were designed to remedy those weaknesses. However, the issues inherent in the Bichard Inquiry Report and its recommendations suggested ways in which Scottish procedures could be tightened and improved yet further to ensure that vulnerable groups were afforded the best protection. Additionally, as policy developed in England and Wales, further developments would be needed in Scotland to avoid cross-border loopholes that could be exploited by those wanting to harm children and/or protected adults.

11. A single UK scheme. Any safe haven effect could be avoided by the adoption of a UK scheme. This would require the current Scottish operation and infrastructure to be subsumed into the scheme being developed for England and Wales. This could be achieved by extending the Westminster legislation\(^1\) which will implement the Bichard recommendations for the other UK jurisdictions to Scotland using a Legislative Consent Motion through the Scottish

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\(^1\) The Safeguarding Vulnerable Groups Bill was introduced to the House of Lords on 28 February 2006. The Westminster Bill has its Report and Third Reading scheduled for later this year.
Parliament. However, the issues inherent in vetting and barring and the protection of vulnerable groups are devolved and transferring legislative responsibility for such substantive issues to Westminster was not considered appropriate. There are also legal and operational differences in Scotland compared with England and Wales and there is benefit in a system which reflects the Scottish context and is responsive to Scottish requirements both now and in the future.

12. **A Scottish scheme.** A Scottish scheme which dovetails with that being developed for England and Wales was felt to be the optimal choice. It would guard against cross-border discrepancies whilst building on the current Scottish legislation and infrastructure, particularly the Protection of Children (Scotland) Act 2003 and existing disclosure arrangements. It would also allow more flexibility in responding to Scottish circumstances and priorities. Critically for this important area, it will ensure appropriate accountability to the Scottish Parliament.

13. The Scottish Ministers concluded that a Scottish scheme carefully aligned to that developed for the other UK jurisdictions was the most appropriate way of proceeding in responding to the Bichard recommendations and the Minister for Education announced on 8 February 2006 (Official Report, col 23115) the consultation on legislative proposals for a new vetting and barring scheme.

**Consultation**

14. A formal consultation was undertaken between 8 February and 2 May 2006 in which the Executive sought views from a wide range of organisations and individuals on all aspects of the proposed scheme. In addition to the publication of the consultation paper *Protecting Vulnerable Groups: Scottish Vetting & Barring Scheme*[^2], a total of 7 consultation events were held across Scotland to discuss and explore the vetting and barring scheme and to provide stakeholders with the opportunity to contribute directly to the consultation process. Three of these events were held in March and were open to any individuals wishing to attend; 130 delegates participated. A further four stakeholder events were held during April and were attended by around 120 delegates invited to represent interests across a range of organisations and sectors. The April events provided an opportunity to explore, in some detail, the issues previously identified in the March meetings as well as in the consultation paper.

15. Over 200 written responses were received as part of the consultation process. The Executive appointed George Street Research to analyse the written consultation responses and feedback from the consultation events, to facilitate five focus groups and undertake ten individual interviews to gain the views of stakeholders from various sectors with a particular interest in the proposed scheme. A focus group was held with each of the following groupings:

- voluntary organisations;
- regulatory bodies;
- local authorities;
- organisations working on behalf of children and protected adults; and

[^2]: http://www.scotland.gov.uk/Publications/2006/02/07134454/0
groups with an interest in the rehabilitation of offenders.

16. Individual interviews were held with representatives from police forces, the judiciary, the education, care and leisure sectors, Disclosure Scotland and the Central Registered Body for Scotland, who process free disclosure checks for the voluntary sector.

17. The report on the consultation exercise findings Protecting Vulnerable Groups: Scottish Vetting and Barring Scheme - Analysis of the Consultation was published on 18 August 2006 and revealed widespread support for the introduction of a new vetting and barring scheme. Most of the comments related to detailed aspects of the scheme and have been considered in the development of the legislative provisions. These comments are reviewed in the relevant sections of this memorandum.

18. The consultation exercise was designed to inform the framework for the new vetting and barring scheme and thus the primary legislative provisions. Further comprehensive consultation and engagement with stakeholders will be undertaken to develop secondary legislation and guidance required to fully implement elements of the scheme.

19. In addition to the formal consultation process, policy development has been, and continues to be, informed by the Scottish Bichard Implementation Group. This group comprises representatives from the NHS workforces, Convention of Scottish Local Authorities (COSLA), the Association of Chief Police Officers Scotland (ACPOS), the Scottish Council of Voluntary Organisations (SCVO) and Disclosure Scotland. The Group will remain a key link in moving from legislation to implementation of the Bill. The Child Protection Reform Programme Steering Group has also been kept in touch with policy development and, in addition to the representation above, also includes the Association of the Directors of Social Work (ADSW), the Association of Directors of Education (ADES) and the Crown Office and Procurator Fiscal Service.

Current Scottish Position

20. Around one million people in Scotland work with children or protected adults either through their paid employment or as volunteers. Part 5 of the Police Act 1997 put in place a statutory framework to allow for criminal record checks for employment for these and other workers. It was agreed in 2000 that the most cost-effective way to provide this service was through a public/private partnership. Since April 2002, the Scottish Ministers and BT have worked in partnership as “Disclosure Scotland” to provide criminal record checks for Scotland.

21. The current vetting system operates via a disclosure certificate being obtained by individuals applying to Disclosure Scotland. There are three types of disclosure - basic, standard and enhanced, all of which cost £20 to the individual (although this cost is sometimes met by employers). A basic disclosure only provides information on convictions that are unspent under the Rehabilitation of Offenders Act 1974. A standard disclosure provides details on both spent and unspent convictions and, in instances where an individual is applying for a job to work with children, whether the individual is on the Disqualified from Working with Children List.

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3 http://www.scotland.gov.uk/Publications/2006/08/16155712/0
4 Scottish Executive estimate based on published workforce and volunteer numbers and the definition of regulated work in the Bill
(DWCL). In the case of an enhanced disclosure, as well as spent and unspent convictions, the police have discretion to provide non-conviction information they consider to be relevant to the position being considered.

22. Individuals seeking employment in care/childcare positions are normally eligible for an enhanced disclosure check under current arrangements. (There is no requirement in law to obtain an enhanced disclosure check but it is an offence to employ an individual included on the DWCL.) All applications for disclosure certificates have to be completed by the applicant. Standard and enhanced disclosures have to be countersigned by a body registered with Disclosure Scotland.

23. Since Disclosure Scotland became operational in 2002, just under 1.5 million applications have been made for basic, standard and enhanced checks. It is the responsibility of the individual to pay the disclosure fee, although as a matter of practice this cost is sometimes met by employers. Checks for volunteers in the voluntary sector are paid by the Scottish Ministers and support in 2005/06 was just under £700,000 for around 50,000 such applications.

24. The Protection of Children (Scotland) Act 2003 established the Disqualified from Working with Children List and was commenced on 10 January 2005. By 9 June 2006, after 17 months of operation, there were 84 individuals listed on the DWCL, 65 through court referrals and 19 through panel determinations. There is not currently a disqualification list for protected adults in Scotland.

**Policy Context for Legislative Changes**

25. The Scottish Ministers have set out their high-level vision for children and young people in Scotland, wanting them to have ambition for themselves and to be confident individuals, effective contributors, successful learners and responsible citizens. The Scottish Ministers want to see all Scotland’s children and young people being:

- nurtured
- safe
- active
- healthy
- engaged in learning
- achieving
- included
- respected
- responsible

26. This Bill is about keeping Scotland’s children safe from those who pose a danger when working with them, whether paid or unpaid, whilst reducing the bureaucracy for those that provide services to children (not least by making it simpler to apply for subsequent checks once
a scheme member, see paragraph 64.) Robust child protection systems support children’s engagement in learning, sport and leisure activities, and artistic activities, for example, which are so important in their development.

27. It is equally important that Scotland’s adult population be afforded appropriate care and protection. Ministers are committed to protecting and improving the health and quality of life of people in Scotland, promoting better health and community care services and by ensuring that there is treatment, care, support and protection for those in greatest need.

28. The Adult Support and Protection (Scotland) Bill was introduced to the Scottish Parliament on 30 March 2006. It aims to enhance the protection of adults at risk of being abused by introducing investigative rights and duties and a range of post-assessment interventions. These provisions will be underpinned by the creation of local multi-disciplinary Adult Protection Committees to coordinate that work.

29. These adult support and protection reforms will be augmented by the creation of a list of those disqualified from working with protected adults. Listing provisions could have been made in the Adult Support and Protection Bill but some individuals have occupations which span children and protected adults and some people choose to work with both groups. A consistent approach to protecting both groups is clearly essential and a joint administrative approach offers operational efficiency. The Scottish Ministers therefore decided that the creation of the adults list should be included in the Bill to develop the new vetting and barring scheme following the Bichard Inquiry.

Policy Objectives

30. The underpinning objectives of the vetting and barring provisions are that:

- people who *are unsuitable* do not gain access to children or protected adults through work;
- people who *become unsuitable* are detected early and prevented from continuing to work, or seeking to work, with children or protected adults; and
- so far as practicable, the underlying processes minimise bureaucracy.

31. In achieving these objectives and developing associated legislation, careful consideration has been given to striking the right balance between protecting vulnerable groups and not unduly comprising the privacy rights of individuals or the rehabilitation of offenders.

SIMPLIFIED WALKTHROUGH THE VETTING AND BARRING SYSTEM

32. The following paragraphs summarise the operation of the vetting and barring scheme; the scheme is described in more detail in subsequent sections.
33. The Bill provides for two lists, one for children and one for protected adults\(^5\) corresponding to the two types of regulated work. The effect of being included on a list (listed) is that an individual is barred from undertaking that type of regulated work\(^6\) (i.e. with children or protected adults) and commits an offence if they do so. The lists will be managed by a new Central Barring Unit (CBU) which will form part of a new executive agency\(^7\) (yet to be named).

34. The Bill also creates a scheme which people undertaking regulated work with children and/or protected adults should join. Scheme participation is not mandatory but it is the only mechanism for employers to be sure that they are not employing a barred person. **Individuals can join the scheme in respect of one or both types of regulated work.** In practice, scheme membership will be recorded electronically by Disclosure Scotland, who will register membership for each workforce separately. Disclosure Scotland will form the other part of the new executive agency and will undertake the assembling of vetting information for new applicants and some administrative tasks associated with operating the scheme.

35. **An individual can only be in the scheme in respect of one or other type of regulated work if they are not barred from that type of regulated work.** (An individual is barred if they are listed in Scotland or any other corresponding list in the UK or in a foreign jurisdiction.) Employers will be committing an offence if they permit someone who is barred from the relevant workforce to undertake regulated work with children and/or protected adults. Employers can only establish that an individual is not barred by ensuring the individual is a scheme member, since the two are mutually exclusive.\(^8\)

36. Individuals apply to join the scheme as a member of the children or the protected adults workforce or both since some people work in both sectors and/or some occupations span both groups of people. **Any conviction and non-conviction\(^9\) information** (vetting information) about the individual is assembled. In the vast majority of cases (currently 90%) no information will exist and the individual will proceed immediately to become a member of the scheme. Where information is identified, it will be assessed to determine whether it might imply the individual may be unsuitable for the workforce. For example, a speeding conviction in isolation would not be deemed relevant but an assault against a child would be. In such instances, the individual becomes a scheme member but where information is deemed relevant, they will be considered for listing on either or both of the children’s list and the adults’ list. Their case will then go to a determination to assess whether the individual should be deemed unsuitable to undertake regulated work with children and/or protected adults. If the person is considered unsuitable, they will be listed and removed from the scheme. If they are not deemed unsuitable,

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\(^5\) For the purposes of this Bill children are defined as under 18 and protected adults are individuals aged 16 or over defined in relation to the services provided to the adult, most notably care and health services.

\(^6\) Regulated work with children and with protected adults is defined in schedules 2 and 3 and encompasses specific activities, establishments and positions such as chief social work officer or members of a local authority education committee. For children, it encompasses internet chat room moderators and telephone advice services aimed at children.

\(^7\) The Bill is couched in terms of Ministers but their functions will be discharged by an executive agency.

\(^8\) It will no longer be possible to obtain an enhanced disclosure under Part 5 of the Police Act 1997 for regulated work with children or protected adults.

\(^9\) Non-conviction information will include relevant police intelligence and inclusion on the Sex Offenders Register, inclusion of certain civil orders (defined by regulations) as well as the possibility of other relevant civil orders, and relevant information held by local authorities and regulatory bodies through regulations.
This document relates to the Protection of Vulnerable Groups (Scotland) Bill (SP Bill 73) as introduced in the Scottish Parliament on 25 September 2006

a fresh disclosure certificate will be issued to them. A flowchart encapsulating what happens when an application is made is at Annex A.

37. On admittance to the scheme, a scheme record is generated which contains a statement of barred status and vetting information. At the request of the scheme member, this is disclosed to a registered person (usually an organisational employer10) who declares that the disclosure is requested to assess the suitability of the individual for a particular post which is within the definition of regulated work. The organisation now knows that the individual is not barred because they are a scheme member and can assess the relevance of the vetting information for the specific post. For example, a dangerous driving conviction would not lead to an individual being deemed unsuitable to undertake all regulated work with children and/or protected adults and consequently included on the list. However, it is likely to be a factor taken into account by an organisation if the post for which that individual has applied may involve driving children and/or protected adults in a minibus.11

38. Once a scheme member, an individual’s scheme record will be updated with any new conviction and non-conviction information as it arises. In practice, a conviction, pending case or intelligence going onto the Criminal History System12 or a related database would send a trigger to Disclosure Scotland to check whether the individual was a scheme member. They would then decide whether the new information was relevant and serious enough to merit consideration for listing and a determination of unsuitability. If it is not, it is treated as new vetting information and is available through subsequent checks. If it is deemed to warrant a reassessment of unsuitability, the scheme member will be considered for listing. A determination will then occur and the scheme member may be listed and removed from the scheme. The individual and all organisations employing a scheme member in the relevant type of regulated work are notified of any consideration for listing and the outcome.

39. As well as being listed through the assessment of vetting information on applying to join the scheme and if new relevant information arises, individuals can be listed on the children’s list for certain convictions in specific circumstances. A court referral in relation to specific, serious offences leads to automatic inclusion on the children’s list. There are no offences specified in the Bill leading to automatic listing in respect of regulated work with adults because of the more fluid definition of protected adult.

40. Organisational employers, employment agencies and employment businesses13 must also refer in specified circumstances, for example following disciplinary action which leads to the dismissal of an individual or them being transferred from regulated work. Organisational

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10 Organisational employer means a public authority, business, charity, voluntary organisation etc as opposed to a personal employer meaning a private individual such as a parent.

11 As at present, the disclosure process is only one element of sound recruitment practice. Good practice guidance encourages employers and organisations in the care/childcare sector to operate a “safe recruitment” policy whereby an applicant for a job may be required to provide further information, such as the names of individuals who can act as referees for their suitability to work with vulnerable groups. Nor does it replace comprehensive child and adult protection practices and procedures.

12 The Criminal History System is a record of convictions, flags to other intelligence and other information operated by the Scottish Criminal Record Office for the Scottish Police Forces.

13 Employment agencies find workers and employment businesses supply workers to do work for organisational employers, see section 96 of the Bill.
referrals are assessed initially to ensure they are not vexatious or frivolous. If it is considered that there is cause for concern, the individual will be considered for listing. During this period the person is allowed to continue undertaking regulated work.

41. Whilst a scheme member is **under consideration for listing**, they can continue to undertake regulated work but organisational employers of that individual will be notified that they are under consideration for listing and the Scottish Ministers may issue guidance about what actions an organisation should consider taking as a result. For example, the employer may consider it appropriate to increase the supervision of a scheme member who is under consideration for listing. (Any new organisational employer would also be informed of the consideration for listing through the disclosure certificate.)

42. The determination of unsuitability (the barring function) will be undertaken by the Central Barring Unit (CBU) which will ensure independent, accountable, robust and consistent decision-making. Recall that Disclosure Scotland will undertake the assembling of vetting information for new applicants and some administrative tasks associated with operating the scheme (the vetting function).

43. If a scheme member is planning to move posts or wants to undertake regulated work with another organisation (perhaps voluntary work) then they can request an updated certificate (**a short scheme record**). This would reveal: the date on which the scheme record was last disclosed; whether any new vetting information exists; and whether the individual is under consideration for listing in respect of that type of regulated work. The effect would be to signal whether a request should be made for the scheme record to be disclosed.

44. The Bill also makes provision for disclosure of a **statement of barred status** which will: advise whether an individual participates in the scheme for regulated work with children, protected adults or both; confirm that the individual is not barred from doing that work; and indicate whether they are under consideration for listing. This statement of barred status, which will not be accompanied by vetting information, is intended for use by **personal employers**. People taking their children to a local piano teacher for example, will have a mechanism for ascertaining whether he is barred from working with children but not the details of his conviction and non-conviction information. It would not be appropriate for them to know this other information and it would be difficult for individuals to know how to assess it. This approach is considered to strike the right balance between an individual’s right to privacy and providing reassurance to parents that the individual has not been deemed unsuitable with respect to the children’s workforce.

45. The above processes are underpinned by: appropriate appeals mechanisms; offences; cross-border checks; safeguards on identity and the appropriate handling and disclosure of information; powers to set and charge fees; and for updating vetting information. The new systems will, of course, be accompanied by appropriate guidance and training and a communications strategy. Much of the operational detail will be subject to secondary legislation.
FULLER INFORMATION ON THE SCHEME

Key Definitions

46. Through the consultation, stakeholders have expressed the view that clear definitions should be provided for key terms in the Bill, such as ‘child care position’ and ‘protected adult’. Effort has been made to provide clarity on the scope of the provisions. However, it is difficult to avoid all ambiguity without defining care positions by listing specific posts; the difficulty with that approach is that when job descriptions change, the definitions become out of date. Specificity can also unwittingly rule out positions which should be included.

47. Schedule 2 sets out the definition of regulated work with children. The consultation exercise highlighted that some people found the definition of ‘child care position’ in the 2003 Act confusing and difficult to use. In particular, some consultees found it difficult to understand what roles were child care positions. Around 30% of written responses highlighted the need for clear definitions of terms, including "child care". The Scottish Ministers have taken the opportunity in this Bill to present the positions in a clearer and more accessible way.

48. The consultation proposed that individuals with substantial access to personal and sensitive information about children should be encompassed within the scheme. Scotland’s Commissioner for Children & Young People and her staff and the Scottish Registrar of Independent Schools are now included in the definition of regulated work with children.

49. The consultation sought views on extending vetting and barring arrangements to include occupations with indirect contact to children and protected adults. This would include people such as internet chat-room moderators and telephone helpline operators. There was general agreement from stakeholders on this point so provision has been made accordingly.

50. Child care positions are of relevance to organisational employers (e.g. a company, local authority, NHS Board, or voluntary organisation). The Bill also makes provision for personal employers to check that an individual is not barred from working with children. This provides a wide ranging safeguard for parents employing individuals to work with their children, for example a childminder or piano teacher.

51. Schedule 3 sets out the definition of regulated work with adults. This needs to be read in the context of section 94 which sets out the definition of "protected adult". The situation in respect of protected adults is necessarily more complicated than for children because the definition of a child is unambiguous and children are usually fairly easy to identify. However, a protected adult is defined in relation to the services provided to an adult and, out of context, it might be impossible to identify a protected adult without prior knowledge of their situation. We believe that the Bill provides a useful basic framework for rolling out protections to these adults; protections which can be expanded through the order making power in schedule 3 and the regulation making power in section 94.

52. The consultation document used the term ‘vulnerable adult’ to refer to those adults covered by this Bill. Following extensive consultation on the Adult Support and Protection (Scotland) Bill (ASP Bill), a decision was made to move away from "vulnerable" because users
of services considered the term inappropriate and discriminatory. The Adult Support and Protection Bill uses the term "adults at risk" but the group of adults covered by this Bill are not the same as those covered by the ASP Bill. This Bill uses the term ‘protected adults’.

53. The ‘adult at risk’ definition in the ASP Bill is more person-centred and focuses on intrinsic properties of the person (e.g. mental disorder) that put them at greater risk of abuse than others. The individuals who may be investigated (e.g. for abuse) are not only those who work in regulated settings but will also include family members. The definition of a ‘protected adult’ in this Bill is a service-based definition and includes those who are not normally vulnerable or at risk of harm or abuse but might be so through receiving certain care.

54. The ‘protected adult’ definition excludes those who may have been assessed as being in need of services, but who are not being provided with services, because it is the fact that someone is in receipt of services that brings them into contact with “care workers” in the first place. The aim of the adults’ list is to make sure that service users get the best possible service by ensuring that unsuitable staff are kept out of the care workforce.

**APPLYING TO THE SCHEME**

**Applying to the Scheme: Types of Checks**

55. To join the scheme, individuals will be required to apply for a new form of check. All individuals undertaking regulated work will be expected to become scheme members through a check. The Bill provides for three types of check, all of which require an individual to become a scheme member, if not already one.

56. **Scheme record** for those working with vulnerable groups with an organisational employer under the following circumstances:

- Joining the scheme for the first time (entry to one workforce or simultaneous entry to both workforces). See Box 1.
- Joining the other workforce for the first time.
- Renewal after 10 years (or whatever the lifetime of scheme membership is prescribed to be).
- On request, following discovery of new information through a short scheme record disclosure (see below).
- As a registration requirement by a regulatory body.
- Any other time agreed by the individual and employer.
57. **Short scheme record** for those working with vulnerable groups with an organisational employer under the following circumstances:

- Taking up a new position with a new employer when already a scheme member in respect of that workforce.
- As part of a periodical check requested by a current employer.

58. **Statement of barred status** for those working with vulnerable groups in the following circumstances:

- Joining the scheme for the first time and without an organisational employer. See Box 2.
- Taking up a new position with a personal employer when already a scheme member.

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**September 2010. Mrs Jones has been offered a position as a secondary school teacher, subject to a satisfactory scheme record disclosure. Mrs Jones applies to Disclosure Scotland for a scheme record disclosure in respect of the children’s workforce. Disclosure Scotland carry out background checks with the police, regulatory bodies and local authorities. A flag on the Criminal History System alerts Disclosure Scotland that the police hold information on Mrs Jones. This is referred to the relevant police force. This records that in 2008 Mrs Jones was arrested for buying alcohol for children but was not charged or convicted. The police pass this information to Disclosure Scotland as they consider it relevant to working with children. No other checks reveal any information.

Where police pass on relevant information, it is automatically passed by Disclosure Scotland to the Central Barring Unit for determination. Mrs Jones is considered for listing. Mrs Jones becomes a scheme member and her scheme record is issued to her and the education authority offering employment. The record includes the relevant information and the fact she is under consideration for listing. After pursuing her references, the education authority decide to employ Mrs Jones but she is not allowed to work in after school clubs until her case is determined.

The Central Barring Unit determine that Mrs Jones should not be barred from working with children because it was an isolated incident. An amended scheme record is issued, containing reference to the 2008 arrest, but the previous reference to being under consideration for listing is removed.

**Box 1.** New applicant to the scheme to take up work with an organisational employer.

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14 In England and Wales it will not be possible to request the equivalent of a short scheme record. A short scheme record has the advantage of avoiding the need for a scheme record where there is no new information.
October 2010. Mr Smith decides he would like to offer one-to-one tutorials on the piano to children. In preparation for this, he applies for a statement of barred status completing the application form and sending the fee. Disclosure Scotland receive the form, and make exactly the same enquiries that they would make for an application for a scheme record. No information of any kind is discovered about Mr Smith and he becomes a scheme member and is issued with a statement of barred status.

Box 2. New application to the scheme in anticipation of self-employment as a piano teacher.

59. Scheme participation is not mandatory; there are no offences for undertaking regulated work or employing somebody to do regulated work without obtaining a disclosure or becoming a scheme member. However, it is the only mechanism for employers to ensure that they are not employing a barred individual (which is an offence for organisational employers).

Applying to the Scheme: Fees for Disclosure Records

60. The consultation proposed that the Scottish Ministers should have a power to set a fee, likely to be in excess of the current disclosure fee, to join the scheme. The consultation also suggested that subsequent checks could be set at a lower level than the joining fee. It also proposed that the Scottish Ministers would continue to cover the cost of disclosures for volunteers working in voluntary organisations.

61. The consultation exercise suggested that there was some concern (around 10-20% of written responses) that a higher disclosure fee would:

- be an increased burden for organisations and individuals to put their staff/themselves through the disclosure system;
- act as a deterrent against joining the workforce; and
- make life difficult for charities that have a small number of paid staff.

62. However, some consultees (around 15% of written responses) thought that the increased fee was worthwhile, taking into account the benefits of:

- continuous monitoring of scheme members;
- fewer scheme record checks required because of the ability to make short scheme record checks; and
- the increased range of information sources and improved vetting.

63. The Bill does not specify the fees but provides full flexibility for each type of check and each workforce, including flexibility for an annual subscription, if this was required at some stage in the future. The fees for vetting and barring disclosure will be set through secondary legislation and be the subject of further consultation in 2007. The Scottish Ministers intend to set two fee levels: a higher fee for a scheme record disclosure or a statement of barred status on first joining the scheme, and a lower fee for all other checks. The financial memorandum
provides further information on the anticipated financial consequences of the vetting and barring scheme and the possible range of fees.

Applying to the Scheme: Duration of Scheme Membership

64. Currently, a disclosure certificate is only valid on the date of issue (i.e. new information arising after the date of issue is only picked up if and when a subsequent application for disclosure is made). The Bill provides for disclosure records which give membership of the scheme for a period set by the Scottish Ministers. The consultation paper proposed that scheme membership might last for 10 years. Once an individual is a scheme member, it is expected that they will be able to apply for subsequent checks at lower cost and more easily than for enhanced disclosures now. (The new disclosure records will replace enhanced disclosures for regulated work.)

65. Consultees welcomed the concept of extended validity and the proposed time limit of 10 years was generally accepted. The time limit itself was not a key issue for respondents, although 10-15% considered 10 years was too long. Around half of all written responses supported a finite lifetime for the disclosure certificate (scheme membership) but around 25% questioned whether this was necessary. The Scottish Ministers will consider this issue further as part of secondary legislation which will be consulted on in 2007.

Applying to the Scheme: Preventing Inappropriate Use of Scheme Membership

66. Section 64 makes it an offence to unlawfully request scheme records. This offence is designed to prevent people requesting scheme records for any other purpose than for working in the regulated workforce. For example, it would be an offence for a garage owner to coerce a mechanic to join the scheme (as if he intended to work with children) because being a garage mechanic is not (normally) a child care position.

VETTING AN APPLICATION

Vetting an Application: Role of Disclosure Scotland

67. Disclosure Scotland is currently part of the Scottish Criminal Record Office (SCRO) which is a common police service provided by the Scottish Ministers. It had been proposed that Disclosure Scotland would form part of the new Scottish Police Services Authority which is being established under the Police, Public Order and Criminal Justice (Scotland) Act 2006. However, in light of this Bill, the Scottish Ministers considered it more appropriate for Disclosure Scotland to become part of the new agency encompassing the Central Barring Unit.

68. The Bill bestows functions on the Scottish Ministers but, in practice, many of these functions will be discharged by an executive agency. Bringing the Central Barring Unit and Disclosure Scotland into one executive agency:

• brings together the end to end process under one body, which will assist in the effective monitoring and management of workflows, support quality assuring the
process, maximise responsiveness, allow common IT/information resources, and provide the scope to share other support services;

- provides a seamless service to the public and with a recognised public identity; and
- allows new vetting and barring activities to be informed and build on the 4 years operating experience of Disclosure Scotland.

69. Staff working for Disclosure Scotland who are currently employed by Strathclyde Joint Police Board will be transferred to the new agency (under provisions at section 87). Disclosure Scotland will continue to process all other applications for disclosure under Part V of the Police Act 1997 on behalf of Ministers from within the agency.

70. Section 70 provides a power for the delegation of the Scottish Ministers’ functions in respect of vetting and disclosure, but not in respect of barring. This would enable a private contractor to take a greater role in the vetting and disclosure processes. It is not considered appropriate to provide a power in respect of barring functions since these are administrative justice decisions, rather than simply information gathering.

**Vetting an Application: Vetting Information**

71. Section 46 allows the Scottish Ministers to prescribe what constitutes vetting information. This includes all matters which would appear on an enhanced disclosure:

- unspent criminal convictions;
- spent criminal convictions; and
- non-conviction information considered relevant by the police (except now the relevance test will apply to the workforce rather than a specific post).

72. Additionally, inclusion on the Sex Offenders’ Register will always be regarded as vetting information (it was normally, but not always, disclosed on an enhanced criminal record certificate). Under Part 4 of the Bill, provision is made to ensure that while a person is on the Sex Offenders Register, that fact should be included on the face of all certificates issued under Part V of the 1997 Act.

73. The Scottish Ministers intend to prescribe in regulations that vetting information will also include:

- relevant civil orders (see below);
- relevant information held by local authorities; and
- relevant information held by regulatory bodies.

Of course, the Scottish Ministers will also check for inclusion on either list in Scotland, in any other UK jurisdiction and any foreign jurisdiction with broadly equivalent provision. In the case that the individual is included on a recognised list, they will not be able to become (or continue as) a scheme member. So being included on a recognised list is not technically "vetting information" which is defined in the Bill in relation to scheme members.
Vetting an Application: Relevant Civil Orders

74. The consultation proposed that relevant civil orders will be disclosed and that these would be specified in regulations, for which there was broad agreement from consultees.

75. The Scottish Ministers intend to prescribe that all Risk of Sexual Harm Orders and Sexual Offences Prevention Orders will be considered relevant and should always be included on a scheme record disclosure. Part 4 of the Bill ensures this will also be the case in respect of standard and enhanced certificates issued under Part V of the 1997 Act (which will continue to be available for purposes other than regulated work). As highlighted in the consultation document some civil orders may not be relevant in all cases and Chief Constables will continue to have discretion to disclose them. For example, an Anti Social Behaviour Order might be relevant if the order was given as a result of antisocial behaviour involving children or protected adults. As with enhanced disclosure certificates, the police will have the power to disclose other relevant information and this might include information about other civil court orders that have not been prescribed by the Scottish Ministers if the circumstances of the order suggest that it is relevant to regulated work.

Vetting an Application: No Relevant Information

76. Where no information, or information which is not relevant to unsuitability to undertake regulated work (e.g. a driving conviction), is found when an individual joins the scheme, the disclosure record is issued by Disclosure Scotland without reference to the Central Barring Unit.

Vetting an Application: Relevant Information

77. Where Disclosure Scotland gather vetting information which is relevant to the regulated work to which the application pertains, this information will be passed on to the Central Barring Unit for consideration. The Central Barring Unit will either:

- list the individual immediately (automatic barring);
- consider the individual for listing, leading to a panel determination; or
- take no further action.

78. This is discussed in more detail at paragraphs 107 to 117.

DISCLOSING INFORMATION

Disclosing Information: Content of Records

79. A scheme record will include:

- Convictions, spent and unspent
- Inclusion on the Sex Offenders Register
- Prescribed civil orders
This document relates to the Protection of Vulnerable Groups (Scotland) Bill (SP Bill 73) as introduced in the Scottish Parliament on 25 September 2006.

- Relevant information from the police
- Relevant information from regulatory bodies
- Relevant information from local authorities (in the longer term)
- Confirmation of scheme membership, including whether the individual is subject to consideration for listing in respect of the type of regulated work for which the application was made. (Scheme membership means the individual is not barred.)

80. A short scheme record will include:

- Date of the last scheme record disclosure.
- Indication of whether there is any new vetting information which would have been included on a scheme record disclosure since that date
- Confirmation of scheme membership, including whether the individual is subject to consideration for listing in respect of the type of regulated work for which the application was made. (Scheme membership means the individual is not barred.)

81. A statement of barred status will include:

- Confirmation of scheme membership, including whether the individual is subject to consideration for listing in respect of the type of regulated work for which the application was made. (Scheme membership means the individual is not barred.)

82. The disclosure of barred status has been the subject of considerable discussion. The consultation paper proposed giving mediated access to scheme records to personal employers. It stated that small scale employers and parents and other personal employers should have access to a job applicant’s barred status, possibly mediated via a registered body to protect the security of such sensitive information.

83. Consultees expressed concerns over the provision of sensitive and personal information to personal employers. While accepting that personal employers should be able to obtain some form of disclosure for individuals, some consultees feared that the information revealed to a personal employer through the disclosure process might be used inappropriately. For example, personal employers might not employ an individual on the basis of a misunderstanding of complicated disclosure information and some might pass on "interesting" information to friends. Consultees felt that there was a need for a body that could deal with disclosure requests on behalf of parents and personal employers in order to ensure confidentiality when information is provided.

84. Having considered the responses to this proposal, the Scottish Ministers have decided to tackle this issue in a different way. A new route has been provided for individuals to join the scheme without having to apply for a scheme record disclosure. They can apply for a statement of barred status, application for which does not have to be countersigned by a registered person. This is potentially an attractive method of joining the scheme for people who are self-employed and wish to undertake regulated work, see Box 3. Instead of receiving a scheme record disclosure, individuals will receive a statement to confirm that they are members of the scheme and confirming that they are not barred. Personal employers are not entitled to ask to see a
scheme record disclosure. This method of joining the scheme does not require an intermediary body as proposed in the consultation.

**November 2010** Let’s return to Mr Smith a month after he became a scheme member. He is now employed by parents to teach their children the piano in their homes. The statement of barred status is only a few weeks old and is accepted by personal employers (in this case the children’s parents), especially since he is well known in the local community.

**Box 3.** Use of the statement of barred status to secure employment with personal employers.

**Disclosing Information: Protection of Information**

85. The Scottish Ministers recognise the importance of protecting sensitive personal information released through a scheme record disclosure. The Bill extends the current safeguards around unlawful access to, and unlawful use of information on, disclosure certificates to include information disclosed under the vetting and barring scheme.

86. Section 62 makes it an offence to falsify vetting records. This offence extends the protections of the Police Act 1997 to scheme records, short scheme records and statements of barred status. This offence encompasses any person who supplies information to Disclosure Scotland with vetting information.

87. Section 63 makes it an offence to unlawfully disclose scheme records. It is already an offence under section 124(7) of the Police Act 1997 to misuse disclosure information. This extends the offence to prevent individuals who become party to barred status and other sensitive information from misusing it. Employers will be informed when an employee becomes barred but should not use this information for anything other than its intended purpose, which is to remove the individual from undertaking that type of regulated work.

**Disclosing Information: Interpretation of Disclosure Information**

88. Concern was raised through the consultation as to whether employers would have sufficient knowledge or experience to interpret information provided to them (particularly non-conviction information) and some consultees felt that clear guidance or training on interpretation should be issued for use by employers. The Scottish Ministers will consider what training and guidance can be given on issues around interpretation of disclosure information as part of the larger package of training and guidance that will be developed in advance of the system going live.

**HANDLING NEW INFORMATION ABOUT A SCHEME MEMBER**

89. New relevant information might arise about a scheme member at any time. Such information includes:

- organisational referrals;
- relevant information from the police, including convictions;
This document relates to the Protection of Vulnerable Groups (Scotland) Bill (SP Bill 73) as introduced in the Scottish Parliament on 25 September 2006

- relevant information from regulatory bodies;
- relevant information from local authorities; and
- court referrals.

90. In addition, important identity information about the individual (e.g. name, gender or address) might change and the individual is required to notify Disclosure Scotland of these changes.

Handling New Information about a Scheme Member: Organisational Referrals

91. Organisations employing individuals to work with children or protected adults, whether paid or unpaid, are required to refer cases to the Central Barring Unit where one of the referral grounds set out at section 2 is met and the organisation has permanently removed the individual from regulated work or would have done so had the individual not already left. Referral grounds include harming a child or protected adult or putting them at risk of harm but are extended to capture other inappropriate conduct or behaviour. Permanent removal means the employee: has been dismissed; moved into a position which does not involve contact with children/protected adults; or has left that employment before such action could be taken by the employer. The Central Barring Unit will then consider the referral and will determine whether the individual should be barred on the basis of the organisational referral. The Bill also places a duty on employment businesses and employment agencies to make referrals and provides a power for regulatory bodies to do so.

92. Section 9 creates the offence of failing to refer an individual for consideration for barring, replicating the offence in section 2(2) of the 2003 Act, but it is now extended to protected adults. Any organisation, employment agency or employment business who fails to refer an individual comes under the terms of this offence.

December 2010. Let’s return to Mrs Jones. It is now three months since she took up post as a teacher. Mrs Jones has been convicted for dangerous driving. The sheriff clerk enters the conviction onto Criminal History System and this triggers an automatic check to see whether she is a scheme member. She is a scheme member and Disclosure Scotland is alerted to new information existing on Mrs Jones. Disclosure Scotland determine that the new information is not relevant to working with children so the information is not passed to the Central Barring Unit. The Disclosure Scotland database now records Mrs Jones as having "new information" since the scheme record was last disclosed.

Box 4. New information about a scheme member.

Handling New Information about a Scheme Member: Police Information

93. Once they have established that the individual is a scheme member, the police would inform Disclosure Scotland that there is new, relevant information about the individual. This will probably be automated through links between the Criminal History System and Disclosure Scotland’s register of scheme members. Disclosure Scotland would pass this information to the Central Barring Unit for consideration.
94. In the case of new vetting information which is not relevant to the vulnerable groups’ workforce as a whole, this information will only be propagated through a new scheme record check. An example might be a driving conviction in some circumstances, see Box 4. (The individual’s employers are not automatically informed that new information exists). The fact of the existence of this information, though not the information itself, will be available through a short scheme record disclosure, see Box 5. If the employer wishes to check the precise nature of the new information then they would have to ask the individual to undertake a new scheme record check.

March 2011. Returning to Mrs Jones three months after her driving conviction, she is now applying for a voluntary position with the Guides. The guide leader requests that she apply for an online statement of barred status. Mrs Jones logs on to the Disclosure Scotland website and generates a pass code (e.g. 16 digit PIN number) for the online check and, in doing so, notifies Disclosure Scotland of a new "employer". The guide leader performs an online check using the pass code and discovers that Mrs Jones is not barred but there is new information since the last scheme record was generated in September 2010. The Guide leader determines that a new scheme record is not necessary since Mrs Jones has already advised them of the conviction for dangerous driving and the post she will be taking does not require her to drive. As part of the online check, the Guide leader confirms to Disclosure Scotland that Mrs Jones will be taking up a post with them and the Guides are added to the list of Mrs Jones’ employers.

Box 5. Scheme member applies for further regulated work.

Handling New Information about a Scheme Member: Local Authorities

95. In due course, local authorities will be required to share information they hold that could indicate that an individual is unsuitable to work with children or protected adults. For example, where children have been put at risk of harm by a parent and have subsequently been placed on the Child Protection Register and/or moved from their home, it may be appropriate that Disclosure Scotland is notified. Disclosure Scotland would in turn notify the Central Barring Unit. If the parent was a member of the scheme, or applies to join the scheme in future, an assessment could be made by the Central Barring Unit.

96. While the detail is still being developed, it is not considered that placing this requirement on local authorities will be unduly onerous. In 2005, there were 2,294 children on the Child Protection Registers held in all local authority areas across Scotland. (In 80% of cases placed on the Register, the source of the concern is a parent.) Inclusion on the Register follows a multi-agency case conference, usually led by social work in the relevant local authority area. One possibility is that local authorities, as part of the case conference, would consider whether the reasons for placing a child on the Register are such that it would be appropriate to provide the information to the Central Barring Unit for consideration. Details of the individual(s) that had placed the child at risk would be passed to the Central Barring Unit. It will not be appropriate in all cases for local authorities to pass information to the Central Barring Unit; decisions would need to be made on a case-by-case basis. In each local authority it would then be the responsibility of the appointed Keeper of the Register to inform the Central Barring Unit.
Handling New Information about a Scheme Member: Court Referrals

97. The courts must refer to the Central Barring Unit all those convicted of an offence against a child specified in schedule 1 to the Bill and this will lead to automatic inclusion on the children’s list. The courts may also refer individuals to the Central Barring Unit for other offences committed against children or protected adults. Courts will refer an individual to one or both lists at the time of conviction. From then on, the court referral is handled in the same way as an organisational referral, leading to consideration whether to list the individual. If the individual successfully appeals the conviction, then this would count as a change of circumstances and be grounds for applying to be removed from the list.

Handling New Information: Information from Scheme Members

98. Under current arrangements, applicants for disclosure are required to provide address information for the last five years. This is part of the process of confirming identity and enabling police checks with the relevant forces for relevant information. If the new scheme is to work in collecting new relevant information on an ongoing basis, any change of address or identity of the individual will need to be captured. However, the tariff for this offence is limited to a fine as it is an administrative matter and most failures to comply will be accidental.

99. Section 47 makes it an offence for scheme members to fail to notify a change of name, gender or address within 3 months of the change. This is a new offence (disclosure has always been static in the past) required because Disclosure Scotland needs up-to-date information for all scheme members.

CENTRAL BARRING UNIT

Central Barring Unit: Functions

100. Section 1 of the Bill requires the Scottish Ministers to keep lists of individuals unsuitable to work with children or protected adults. The Central Barring Unit will manage these lists on behalf of the Scottish Ministers. Depending on whether the individual has applied to work with children, protected adults or both, the Central Barring Unit will consider any relevant information which may indicate unsuitability to work with either group.

Central Barring Unit: Status

101. Accountability for decisions made in relation to the unsuitability of individuals ultimately rests with the Scottish Ministers. However, the determination process itself will be carried out on behalf of the Scottish Ministers by a new central decision-making body, the Central Barring Unit.

102. The consultation paper sought views as to the status and governance arrangements for the Central Barring Unit. The paper identified three possible options for the Unit’s structure: a Non-Departmental Public Body; an executive agency; or a core civil service function. The consultation paper stated that the new body must be accountable, cost effective and be able to share information effectively.
103. There was a mixed response from consultees with most favouring a body able to take decisions at arms length from Ministers. Almost 60% of the 130 delegates at the March events (see paragraph 14) were in favour of a new body to make barring decisions. The majority of written responses expressing a view felt that the decisions taken by the Central Barring Unit would have to be made by an expert, and specially trained, panel which included representatives from a wide range of sectors.

104. The Scottish Ministers have decided that the Central Barring Unit and Disclosure Scotland should join to form a new executive agency. This arrangement maintains decision-making on particular cases at a suitable distance from Ministers while allowing for the Central Barring Unit and Disclosure Scotland to be housed in one single organisation, effectively creating a single location for all disclosure activity in Scotland.

Central Barring Unit: Making a Determination

105. If an individual is referred to the Central Barring Unit by an organisation, the referred individual will be considered for listing on either or both of the children’s list or the adults’ list, if the Scottish Ministers are satisfied that:

- the matters contained in the referral are not vexatious or frivolous; and
- that the information submitted with the referral indicates that it may be appropriate for the individual to be included in the children’s or adults’ list.

106. If the case fails to meet this criteria for referral, it will be dismissed and the individual and the referring organisation will be advised that no further action will be taken.

107. Where new, relevant vetting information arises, it will be assessed by the Central Barring Unit and the Unit will either:

- list the individual immediately (automatic barring);
- consider the individual for listing, leading to a panel determination; or
- take no further action.

108. Automatic barring is discussed at paragraphs 111 and 112 and consideration for listing at paragraphs 113 to 117.

109. Before making any determination, the Central Barring Unit will request the information equivalent to that which would appear on a scheme record disclosure from Disclosure Scotland and will check its own archives for any historic referrals. The scheme record would ensure that the Central Barring Unit has the latest information from the police, local authorities and regulatory bodies. Section 20 also gives the Scottish Ministers the power to require any regulated work provider (e.g. organisational employer) to provide any information which might be relevant when considering whether to list an individual, and makes it an offence to fail to comply.
110. Details of the determination process to be undertaken by the Central Barring Unit will be provided in secondary legislation under the power at section 39, but are likely to reflect broadly those currently used for the Protection of Children (Scotland) Act 2003 (the 2003 Act). For the children’s list, there is currently a panel of three assembled for each case to determine it on behalf of the Scottish Ministers. The panel consists of: a Senior Civil Servant who advises the Scottish Ministers on child protection issues; a member of the Social Work Inspection Agency; and a member of Her Majesty’s Inspectorate of Education. It is likely that a similar structure will be adopted for the determination process for the adults’ list. The panels will consider all the information presented by the parties involved and will determine if, on the balance of probabilities, the individual is unsuitable to work with children or protected adults, or both. The exact nature of the decision making process will be the subject of consultation in 2007.

Central Barring Unit: Automatic Barring

111. The children’s list will continue to operate in a similar way as the 2003 Act currently operates. There are some offences committed against children, defined in schedule 1, for which the court must refer the individual for listing. The list of offences in schedule 1 has been expanded largely to take account of new sexual offences created under the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005. (The court has the discretion to refer where it convicts any individual for any other offence against a child and where the court considers that it may be appropriate for the individual to be listed. Unlike the 2003 Act, discretionary court referrals will now be considered by the Central Barring Unit and not result in the automatic listing of the individual.) Additionally, there will be historic offences (i.e. committed before January 2005) which lead to automatic barring if and when an individual applies to join the scheme to work with children. These offences will be specified in regulations.

112. The Bill itself does not specify any offences for which the court must refer an individual to the adults’ list. This is a different approach to that of the children’s list, justified because it is more difficult to identify relevant offences. Even very serious offences against adults might not be relevant to working with protected adults. However, the court does have the power to refer, just as for the children’s list, under section 7. Section 14 also provides a power to prescribe criteria for automatic inclusion in the adults list. Although it is difficult to specify particular offences or other facts which should lead to automatic barring from regulated work with protected adults, the flexibility is retained to do so.

Central Barring Unit: Consideration for Listing

113. The consultation proposed that, where it will take time to determine whether an individual should be listed, the individual should be entitled to continue to work whilst the determination is made. This is the way the 2003 Act operates at present. (The 2003 Act calls it "provisional listing"; this term has been replaced by consideration for listing in this Bill.) The alternative is that an individual is barred from regulated work pending determination of their case. Views expressed in the consultation exercise were mixed.

114. Consultees in favour of an individual being removed from the workforce pending determination noted:
the risk that the individual might pose through their continued presence in the workforce; and

the cost to employers of retaining someone who is under consideration for listing if they feel it is necessary to suspend them or move them on to other duties and employ another person to take over their normal duties. This was a particular concern for small organisations.

The alternative view was that:

- it would be disproportionate to remove the individual whilst the determination process is ongoing, potentially causing unnecessary disruption to the organisation; and
- employers can take action they consider appropriate to mitigate any risk during this period, e.g. a change of duties or increased supervision.

115. Under the 2003 Act, approximately one third of organisational referrals have led to inclusion on the list. This means that the majority of individuals "provisionally listed" (under consideration for listing) under the current arrangements do not end up on the children’s list.

116. The Scottish Ministers have decided that on balance the arrangements currently operating under the 2003 Act should continue. Therefore, it should not be an offence to employ someone in regulated work or for an individual to seek regulated work while under consideration for listing. Three important safeguards underpin Ministers’ decision:

- A pending determination will appear on all disclosure records so both organisational and personal employers requesting a check will be made aware of it.
- Section 29 requires that any organisation for whom the individual is undertaking regulated work should be informed that an individual is under consideration for listing. This enables the organisation to take appropriate action which may be to suspend the individual pending determination, see Box 6.
- There is a power for the Scottish Ministers to prepare general guidance for organisations on what to do when an individual is under consideration for listing. As a matter of administrative practice, the Scottish Ministers intend that this guidance will be sent to any organisation together with notification of the consideration of listing of an employee.

117. Normally, a determination will be made within 6 months of the start of the period of consideration for listing, whatever triggered the consideration for listing. Box 7 illustrates consideration for listing triggered by new vetting information. During this time, evidence is gathered from both the referred individual and the referring organisation, in the case of an organisational referral. Where there are other ongoing investigations relating to the conduct or incident(s) which led to the referral, e.g. by police or regulatory bodies, the Central Barring Unit will defer their final decision until the other proceedings have been finally concluded. In those circumstances, the 6 month period runs from the day following the conclusion of the other proceedings, just as under the 2003 Act.
Central Barring Unit: A Single List, or Two Lists

118. Considerable thought has been given as to whether there should be one list of people disqualified from working in the vulnerable groups workforce, or two separate lists, one for those barred from working with children and another for those barred from working with protected adults. Although no specific question was asked in relation to this in the consultation paper, it proposed an additional list for those barred from working with protected adults rather than amalgamating this into the existing children’s list.

119. The consultation process, especially the consultation events, highlighted a wide range of views amongst a broad cross-section of consultees. Simple "show of hands" voting at the April events (see paragraph 14) yielded a majority in favour of one list in some venues and a majority in favour of two lists at others. Written responses in terms of number tended towards a single list but were more balanced in terms of reasoned argument on both sides. The results could be interpreted with more confidence had there been an explicit discussion and question on this in the consultation paper.

120. Arguments presented in favour of a single list were:

- a breach of trust in respect of one group, even if the incident related to extortion or other non-violent abuse, should lead to barring from both groups;
- it was difficult to identify reasons why an individual might be barred from one list but not from the other; and
- it would be simpler to implement and easier for users to understand because there would be no issues as to whether somebody should be barred on one list but not the other.

121. Arguments presented in favour of two separate lists were:

- greater flexibility because it would be possible to place someone on one or both lists whereas, with only one list, the Central Barring Unit might not be able to respond proportionately to the less extreme cases or be forced to raise the thresholds for barring;
- there will be cases where individuals’ propensity to harm is focused on one group only (e.g. the abuse of trust in persuading elderly people into rewriting their will);
- greater compatibility with the Safeguarding Vulnerable Groups Bill and arrangements for England and Wales; and
- greater fairness to the individual, avoiding undue deprivation of their ability to obtain work and is more in line with the ethos of rehabilitation of offenders.

122. The Scottish Ministers have decided that, on balance, the arguments in favour of a two list approach are stronger. In particular, the ability to respond proportionately to individual cases was seen as particularly important. Provision is made in the Bill for any individual referred to one list to be considered for the other, enabling barring from both workforces where this is
appropriate. In many cases, an individual will be considered for listing on both lists, e.g. in cases of violent abuse. However, not having the flexibility to distinguish between workforces could result in some individuals losing their livelihoods in circumstances where they could quite safely work in the other workforce.

Central Barring Unit: Grounds for referral and harm test

123. The grounds for referral, set out at section 2, are the same for both regulated work with children and regulated work with adults. They include harm or risk of harm to a child or protected adult (discussed below). They also go beyond harm to include having been engaged in inappropriate conduct involving pornography or inappropriate conduct of a sexual nature. Possession of child pornography is illegal but the individual being referred may not have harmed a child; the harm having been done by others. Finally, giving inappropriate medical treatment, for example sedating children or protected adults in order to make caring for them easier or to have fewer staff on duty (possibly to cut costs), is also a ground for referral.

124. The harm test for the vetting and barring scheme (and, incidentally, the information sharing provisions in Part 3) is set out at section 93. The 2003 Act uses a harm test as part of the criteria for both making a referral to the list and listing an individual: the test is that the individual "harmed a child or placed a child a list of harm". However, "harm" was not defined in detail. In this Bill, a detailed definition for harm is provided which puts beyond doubt the inclusion of certain actions or behaviours which might otherwise be disputed. The definition of harm makes clear that the following are included: physical harm, psychological harm, harm to the interests of an individual, attempt to harm, inciting another to harm and encouraging self-harm.

February 2012. It is now almost a year since Mrs Jones started working with the Guides. A member of the public repeatedly sees Mrs Jones supplying children with alcohol outside an off-license. The member of the public informs the police of Mrs Jones’ behaviour.

The police investigation gathers enough information for a prosecution. They add the intelligence gathered to the Scottish Intelligence Database which triggers a new information flag upon the Criminal History System. This in turn alerts Disclosure Scotland that there is new information on a scheme member (Mrs Jones now works in two regulated positions, as a teacher and with the Guides). The Central Barring Unit is passed the new information by Disclosure Scotland.

The Central Barring Unit determines that Mrs Jones’ status should be reviewed and she is considered for listing. A new scheme record is issued to Mrs Jones and her employers stating that she is under consideration for listing and containing the new relevant information. Both the education authority and the Guides suspend Mrs Jones pending the listing determination. The Central Barring Unit are aware that Mrs Jones faces a criminal trial shortly and await notification from the court. Following conviction, the sheriff clerk adds the conviction to the Criminal History System. The court also uses its power to refer the case to the Central Barring Unit so it receives notification from both the court directly and the Criminal History System (via Disclosure Scotland).
The Central Barring Unit determine that this latest incident, in conjunction with information they already have in respect of the 2008 arrest, indicate a pattern of behaviour which makes her unsuitable to work with children: Mrs Jones is added to the children’s list. The Central Barring Unit ask Disclosure Scotland to notify all her employers in Scotland and the Criminal Records Bureau (the equivalent of Disclosure Scotland for England and Wales), in case she is undertaking regulated work in England and Wales. Disclosure Scotland remove her from the scheme and advise the education authority and Guides that she has been listed and they terminate her employment.

**Box 6.** New relevant information is discovered about a scheme member which leads to a criminal conviction and listing.

125. There is always a risk in moving from a commonsense interpretation to a precise definition in that a definition is commonly interpreted as exhaustive (i.e. can be used to argue the exclusion of unforeseen circumstances). We believe the benefits of being clear on the matters above outweigh any risks.

**Central Barring Unit: The Children’s List**

126. The Bill builds on the existing Disqualified from Working with Children List (DWCL) established by the 2003 Act by:

- expanding and clarifying the definition of child care position (regulated work with children) at schedule 2;
- updating the offences for which courts must refer an individual on conviction (listed in schedule 1 to the 2003 Act) to include offences created in the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005; and
- enabling police forces access to the children’s list and the adults’ list for the purposes of preventing and detecting crime and the apprehension or prosecution of offenders.

April 2012. Let’s return to Mr Smith about 17 months after he started working giving private piano lessons to children. A number of parents report to the police that Mr Smith is hanging around the local school grounds on a regular basis despite not having any children, although he is not obviously doing anything untoward. He returns to school grounds despite several warnings from police to stay away. The second time he is stopped, the police create a record on the Scottish Intelligence Database which triggers a new entry flag on the Criminal History System. As Mr Smith is a scheme member, the new entry flag triggers a request from Disclosure Scotland for relevant information from the police. They pass this information to the Central Barring Unit for determination. Mr Smith is considered for listing and is given the opportunity to make his case.

During the period when he is under consideration for listing, any personal employer who asked for an up-to-date statement of barred status for Mr Smith would be advised that he was being so considered. This information would also appear on any scheme record disclosed during that period.
This document relates to the Protection of Vulnerable Groups (Scotland) Bill (SP Bill 73) as introduced in the Scottish Parliament on 25 September 2006

The Central Barring Unit determine that Mr Smith should be placed on the children’s list. He is notified of this and that it is now an offence for him to continue to do regulated work with children.

Box 7. New information comes to light about the scheme member leading to barring.

Central Barring Unit: Transitional Provisions for Those Listed on DWCL

127. The Bill makes transitional provisions for individuals already listed under the 2003 Act to be automatically transferred to the new children’s list. Under the Bill, barred individuals will be excluded from a different, wider set of child care positions than when they were listed under 2003 Act. These individuals can apply for removal from the list on the basis of a change of circumstances on being transferred to the new list.

128. An individual provisionally listed under the 2003 Act will be treated as under consideration for listing on the new children’s list. References made by employers and others under 2003 Act and pending appeals will also be transferred.

Central Barring Unit: The Adults’ List

129. The Bill establishes a list of people unsuitable to work with protected adults. The list will operate on a similar basis to the DWCL with decisions in relation to barring being made by the same central decision-making body, the Central Barring Unit. The tests for referral will be the same, while the details of the determination process will be broadly similar. For the purposes of this Bill, a protected adult is an adult who is provided with one of a number of prescribed community or health care services. Therefore, the definition of a protected adult is a service-based definition which includes those who are not normally vulnerable or at risk of abuse but who might be as a result of receiving certain care. The definition specifically excludes those who may have been assessed as being in need of services but not being provided with services because it is the fact that someone is in receipt of services that brings them into contact with ‘care workers’ in the first place.

Central Barring Unit: Consequences of Listing

130. A listed individual cannot undertake regulated work corresponding with that list. Section 33 creates the offence of working or seeking to work in a regulated position when barred. This offence replicates section 11(1) of the 2003 Act, but is now extended to protected adults. It is not an offence to seek work in the other regulated workforce. For example, if you are barred from working with children, you may still work with protected adults. (Sections 34 and 35 make it an offence to employ or supply for employment a barred individual. These offences replicate section 11(3) of the 2003 Act, but are now extended to protected adults. Personal employers are excluded from these offences.)

131. Additionally, individuals on either list must keep Disclosure Scotland informed of any change to certain specified personal details. Section 32 makes it an offence for a barred individual to fail to notify the Scottish Ministers (Disclosure Scotland) of a change of name, address or gender. Keeping such details up to date will be important for the scheme to function
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effectively. For example, if a listed individual did not tell Disclosure Scotland that they had moved house and changed name, it might be easier for them to re-emerge later with a different identity and re-enter the workforce.

132. This offence is new in the sense that the 2003 Act does not require listed individuals to provide these details. The purpose of this offence is to try to prevent listed individuals re-emerging with a different identity and trying to enter the scheme or undertake regulated work sometime later. The issue of tracking identity has not really been tested with the DWCL since it has only been operational since January 2005, leaving little time for any listed individuals to undergo a change of name, gender or address. (There is a lesser offence for scheme members failing to provide identity information at section 47.)

Central Barring Unit: Access to the Lists

133. Currently, the police do not have access to the DWCL. Section 37 of the Bill places a duty on the Scottish Ministers to make available prescribed information to the police, likely to be the fact that an individual is listed on either list and other information stored by the Central Barring Unit to confirm identity, for the purposes of the prevention and detection of crime. The consultation paper referred to "granting the police powers to access the DWCL directly" (paragraph 3.4.18). In practice, it is likely that the addition or removal of an individual from either list will trigger a flag on the Criminal History System.

134. The police may be required to disclose the barred status of an individual to a relevant person (as defined in section 80) if they consider that it constitutes child protection information (as defined in section 73) and they believe action is required to protect an individual child.

OFFENCES SUMMARY

135. There are a number of offences created by the Bill designed to protect the integrity of the scheme, although most build on those in the 2003 Act and 1997 Act.

Serious offences

136. There are three serious offences, extending those in the 2003 Act to the adults’ workforce. These relate to doing regulated work when barred, employing/supplying someone to do regulated work when they are barred and failing to refer an individual for consideration for listing. These offences are the most serious because they relate directly to unsuitable individuals getting access to vulnerable groups through the workforce. These offences attract a maximum penalty of a fine or 5 years imprisonment on conviction on indictment or, on summary conviction, to 12 months imprisonment or to a fine not exceeding the statutory maximum:

- Section 33 creates the offence of working or seeking to work in a regulated position when barred, see Box 8.
- Sections 34 and 35 make it an offence to employ or supply for employment a barred individual.
October 2012. Six months after being listed, Mr Smith again offers his services as a piano teacher in a different town despite the fact he has been barred from working in the children’s workforce and he is committing an offence. He attempts to use his original statement of barred status, issued in October 2010 to prove that he is not barred. Parents, not knowing anything about his past and a little suspicious, check the guidance on the Disclosure Scotland web site about the validity of checks. The guidance is clear that such a statement is out of date. One parent requests that Mr Smith applies for a new statement of barred status. Mr Smith is not seen again and the parent informs the police because he suspects that Mr Smith was seeking work with children whilst barred from doing so and committing an offence.

Box 8. Barred individual attempts and fails to secure employment in the children’s workforce.

Intermediate offences

137. Three offences centre around protecting personal, sensitive information and attract a maximum penalty of a level 5 fine or 6 months imprisonment on summary conviction only:

- Section 62 makes it an offence to falsify vetting records.
- Section 63 makes it an offence to unlawfully disclose scheme records.
- Section 64 makes it an offence to unlawfully request scheme records.

138. Additionally, there are two offences in relation to a failure to provide information with potentially serious consequences which attract the same penalty:

- Section 32 makes it an offence for a listed individual to fail to notify the Scottish Ministers (Disclosure Scotland) of a change of name, address or gender.
- Section 20 makes it an offence for any regulated work provider to fail to provide vetting information to the Scottish Ministers in response to a request.

Minor offences

139. There is one offence attracting a maximum penalty of a level 3 fine on summary conviction only:

- Section 47 makes it an offence for scheme members to fail to notify a change of name, gender or address.
Offences by bodies corporate

140. Section 90 extends the liability for offences committed by bodies to those responsible for controlling or managing those bodies: officers of the body, members of the body if they manage it, an officer or member of a council, a partner or an individual concerned with the management of an association.

DEVELOPMENTS IN OTHER UK JURISDICTIONS

141. The Safeguarding Vulnerable Groups Bill ("the Westminster Bill") implements recommendation 19 of the Bichard Inquiry Report for England and Wales. It is intended that the provisions in the Bill will be applied to Northern Ireland partly through the Bill and partly through an Order in Council. Both jurisdictions share the following aims:

- to prevent loopholes developing which unsuitable people could exploit; and
- to make it as easy as possible for the vulnerable groups workforce to move between jurisdictions.

142. The Westminster Bill was introduced to the House of Lords on 28 February 2006 and is currently progressing through the Parliament. It is expected to have its Commons Report Stage and Third Reading in the autumn, achieving Royal Assent in November. Currently, there are three separate lists of persons who are barred from working with children or, as the case may be, vulnerable adults in England and Wales. These lists operate under different legislation and with different criteria and procedures: List 99 (maintained under section 142 of the Education Act 2002), the Protection of Children Act (POCA) List (maintained under the Protection of Children Act 1999) and the Protection of Vulnerable Adults (POVA) List (maintained under Part 7 of the Care Standards Act 2000). The Westminster Bill provides that there will be two aligned barred lists – one for those who are barred from working with children and one for those who are barred from working with vulnerable adults and makes provision to support these lists, for example establishing the Independent Barring Board.

Similarities between the Legislation

143. Both schemes:

- cover working with children and vulnerable/protected adults;
- remove unsuitable people from the workforce, rather than register suitable people;
- provide for two separate lists: one for the children’s workforce and one for the vulnerable/protected adults’ workforce;
- define regulated work ("regulated activity" in the Westminster Bill) with broadly similar coverage;
- allow individuals to become members in anticipation of employment;
- allow organisational employers access to full disclosure (in England and Wales this is through enhanced disclosure whereas in Scotland this is through new disclosure records established in this Bill);
allow parents and personal employers to confirm that those they employ are not barred but prevent access to full disclosure information;

will disclose broadly the same amount of information;

treat an individual listed in the other jurisdiction as barred;

will use similar criteria for barring individuals;

do not specify on the face of the Bill any offences which lead to automatic barring from the vulnerable/protected adults workforce;

will allow individuals under consideration for listing to continue to work until their case has been determined in some cases (in all cases in Scotland);

will be protected by a similar set of offences which will attract similar penalties in each jurisdiction (except there are not offences in relation to failing to obtain a disclosure record and failure to participate in the scheme in Scotland); and

provide a mechanism for individuals already barred from working with children to be transferred onto the new children’s lists.

**Differences between the legislation**

144. The Scottish scheme:

- is not compulsory, unlike the Westminster scheme which has offences for failure to participate (this is discussed at paragraph 59);
- has no equivalent of “controlled activity”, which the Westminster scheme includes, broadly speaking, for individuals who work in ancillary jobs in health and further education settings where they may have the opportunity for contact with children or vulnerable adults;
- allows for short scheme record disclosures which reveal whether there is any new information on the individual (very useful to employers, saving them making a full check);
- allocates vetting and barring functions to the Scottish Ministers, consistent with the Central Barring Unit being an executive agency unified with Disclosure Scotland, unlike the Independent Barring Board for England and Wales which is legally distinct from the Secretary of State;
- allows for appeals to the sheriff, broadly following the 2003 Act procedure whereas the Westminster scheme allows for a procedure for consideration of representations in some cases, then appeal to the Care Standards Tribunal followed by the Court of Appeal; and
- could be commenced on a different date to the Westminster scheme with different classes of workers (e.g. teachers, social workers, doctors etc) being bought on stream at different times. However, both jurisdictions will work together to ensure that both schemes are commenced in a co-ordinated, if not identical, manner.
Cross-border connections

145. It is the Scottish Ministers’ policy that the Scottish vetting and barring scheme should be fully compatible with systems being developed in other parts of the UK in so far as this can be achieved without compromising the Scottish scheme. All UK jurisdictions are committed to developing policies, systems and approaches which ensure children and protected adults are afforded a high level of protection across the UK. Although the scheme in Scotland will be operated separately to barring in England, Wales and Northern Ireland, all jurisdictions are committed to avoiding cross-border loopholes which might be exploited and will ensure the compatibility and seamless interaction between the newly developed systems.

146. Irrespective of the jurisdiction in which an individual works with children or protected adults (and joins the new scheme) the intention is that:

- the individual can move easily to work in another jurisdiction;
- if listed in one jurisdiction in respect of one type of regulated work, the individual will be barred in all jurisdictions in respect of that type of regulated work;
- the criteria for listing will be broadly similar in all jurisdictions;
- the information revealed through the new disclosure records will be broadly similar.

147. The Scottish Ministers will continue to work closely with the UK Government on these matters.

148. The Scottish Ministers will make the necessary devolved provision in respect of the Westminster Bill by bringing forward amendments at stage 2 to the Scottish Bill. There is also a general power to make such provision at section 88 of the Bill. Similarly, it is proposed to make the necessary reserved provision in respect of the Scottish Bill through a section 104 order. The Scottish Ministers will request the UK Government to present such an order at Westminster soon after the enactment of the Scottish Bill in 2007.

149. The principal amendments or additional provision which may be required to make the cross-border connections are:

- Changes so that an individual who is already subject to monitoring in England and Wales (equivalent to scheme membership in Scotland) can become a scheme member in Scotland with the minimum of effort on their part and without unnecessary duplication of requests for vetting information (and vice versa).
- Changes to allow devolved and reserved bodies to share information. In practice, both jurisdictions are expected to be willing to share information but it is a matter of making sure that this is done lawfully and efficiently.
- Changes to ensure that, where the Central Barring Unit (for Scotland) and the Independent Barring Board (for England and Wales) could make listing decisions about the same individual, a sensible procedure/protocol is followed.
- Provisions to enable payment of fees for vetting information.
Northern Ireland

150. The following provisions of the Safeguarding Vulnerable Groups Bill extend directly to Northern Ireland: the establishment of the Independent Barring Board; provisions relating to the information monitor for the purposes of the Police Act 1997; amendments to the Police Act 1997; and the provision of information to professional regulatory bodies that are reserved. The intention is that the remainder of the provisions in the Bill will be applied to Northern Ireland through an Order in Council. This will enable provisions specific to Northern Ireland to be made which will allow them to ensure that the infrastructure established for the England and Wales scheme, such as entry to the scheme, decisions on barring, and the appeals procedures, reflect Northern Ireland’s requirements, with accountability to the Secretary of State for Northern Ireland or the Northern Ireland Assembly (as appropriate).

Information from Overseas

151. The consultation paper did not discuss information from overseas, although it did refer to the need for a coherent approach within the UK. However, this issue was raised at most consultation events and in 10-15% of written responses to the consultation because of the number of overseas workers (e.g. teachers) in Scotland. There were requests for links to be established with as many countries as possible so that disclosure information can be shared.

152. Work is underway in the European Union to secure the exchange of conviction information between Member States. Work is also being taken forward to secure bilateral agreements with both EU and non-EU countries relating to exchanging information for employment purposes and this is focused primarily on arrangements for non-UK nationals who come to the UK to work. In the longer term, there is also work ongoing with EU Member States on the potential for mutual recognition of disqualifications for working with children.

IMPLEMENTATION ISSUES

Retrospective Checking/Phased Implementation

153. The consultation proposed that the Scottish Ministers will have a power to set a time by which the entire relevant workforce should be registered with the scheme and indicated a 3-5 year transition. This may be phased-in by occupation, sector or even geographic area and is likely to take place over three years after commencement.

154. Whilst phased roll-out was generally accepted by consultees, 5-10% of written responses indicated this 3-5 year timescale was too long and only 1-2% indicated it was too short. A greater proportion (just over 10%) requested further consultation on this issue. Some consultees requested a timeframe while others wanted to know which groups would be prioritised first. The calculations in the financial memorandum are based on a three-year phasing and the arrangements for phasing will be the subject of further consultation in 2007.

155. The Scottish Ministers recognise that the phasing-in of the workforce is an important aspect of getting the new scheme up and running. To prevent the system being overloaded and to prioritise effectively, the most sensitive positions may have earlier time limits set than others.
No decision has yet been taken as to the timeframe required, although the financial memorandum has assumed a three-year phasing. Nor has the order in which different parts of the workforce are brought on to the scheme been determined. Detailed proposals will be set out for consultation in 2007. The Bill provides broad powers to enable the phasing-in to be prescribed in detail so that the workload of the agency can be managed effectively.

**Provision of Guidance and Training**

156. While not directly discussed in the consultation paper, it is clear that the provision of good guidance and training will be required so that the affected workforce is in a position to operate the new scheme when it goes live. This emerged as a key theme across the consultation with consultees requesting the provision of guidance so that organisations and individuals have a clear picture of how the new system will work, the impact it will have on the individuals and their organisation, and how to integrate this into their own procedures.

157. The Scottish Ministers acknowledge the need for the provision of guidance and training and will be working to develop these implementation tools over the coming year, in preparation for the system going live in 2008. Some consultees believed the guidance and training programme to support the implementation of the 2003 Act worked well and the Scottish Ministers intend to build on that for the implementation of this Bill.

**Communication strategy**

158. Another related issue that was often raised by consultees alongside the guidance and training, was the need for a concentrated information and communications campaign. One issue raised was that some consultees felt that introducing a new vetting and barring scheme for those working with vulnerable groups could discourage potential volunteers. These consultees felt that an awareness raising exercise centred around the benefits of the new scheme would be a way to counter negative perceptions of the disclosure process while increasing knowledge and confidence in the system.

159. The Scottish Ministers accept the need to publicise the new vetting and barring scheme, highlighting its functions and the benefits it will bring. Consideration will be given as to how best to raise the profile of the scheme in conjunction with providing training and guidance, sufficiently far in advance of the scheme going live.

**EQUAL OPPORTUNITIES**

160. The Bill’s provisions are not discriminatory on the basis of gender, race, disability, marital status, religion or sexual orientation. The Bill provides for a formal, fair and transparent process for placing an individual on the lists of persons disqualified from working with children and protected adults. The test for inclusion on both lists will be consistently applied and everyone placed on the lists will have rights of appeal. The consultation document was sent to 850 individuals and organisations with a potential interest in the development of the Bill. The consultation sought input from a very wide range of stakeholders including equalities groups, religious groups, civil liberties groups, disability groups and those representing the elderly.
161. There was some critical comment in the consultation responses about the use of the term ‘vulnerable adult’ (now removed from the Bill) and requests to make the guidance and other information available in a large number of formats so that deaf people and others with disabilities could easily gain a good understanding of the new scheme.

**HUMAN RIGHTS**

162. The Scottish Executive considers that the provisions of the Bill are compatible with those provisions in the European Convention on Human Rights (“the Convention”) which constitute “the Convention rights” within the meaning of the Scotland Act and the Human Rights Act 1998. In the view of the Executive, the main Articles of the Convention by reference to which issues arise under the Bill are Article 6 (determination of civil rights), Article 8 (right to respect for private and family life) and Article 1 of Protocol 1 (protection of property).

163. Article 6 provides, in respect of the determination of civil rights and obligations or of any criminal charge, that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. This Bill complies with Article 6. The vetting and barring scheme is a fair and impartial system designed to prevent unsuitable individuals gaining access to vulnerable groups through their employment, where they could harm, or place at risk of harm, a child or protected adult. If deemed unsuitable either by the courts or through the determination process conducted by the Central Barring Unit, which would be instigated by new information coming to light, then an individual will be placed on one or both lists and will no longer be able to work in the corresponding workforce(s).

164. Individuals being considered for listing will be informed of the determination process and will be able to make representations to the Central Barring Unit setting out their position with regard to the matters under consideration. There will also be a right of appeal against placing on the list following a determination by the Central Barring Unit. Individuals listed after determinations will be able to appeal to the sheriff against their inclusion on the list and an unsuccessful appeal may then be appealed to the sheriff principal and to the Inner House of the Court of Session. In the case of a court referral, following conviction for serious offences against children specified in schedule 1, individuals will automatically be placed on the relevant list. A successful appeal against conviction would be grounds for applying for removal from the list. Otherwise, such an individual will be able to apply for removal after a prescribed period of time has elapsed. Given the independent decision-making of the Central Barring Unit, combined with the rights of appeal provided, it is considered that the requirements of Article 6 are satisfied in respect of any determination of an individual’s civil rights.

165. Turning to Article 8, paragraph 1 of that Article states that: “Everyone has the right to respect for his private and family life, his home and his correspondence”. Any interference by a public authority with the exercise of this right must, under paragraph 2, be “in accordance with the law and necessary in a democratic society”. In addition, any interference must satisfy a further test that it is “in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”.

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166. In this context, the Bill engages Article 8 on a number of levels. The Bill makes provision for the inclusion of persons in the barred lists by the Central Barring Unit and such inclusion will prohibit a person from engaging in regulated work. The vetting and barring scheme also allows for the exchange of information about the behaviour of individuals from a number of bodies, ranging from employers, the police and regulatory bodies, to the Central Barring Unit. In addition, employers will be informed when an employee is listed. (Prospective employers will only be able to confirm that an individual is not barred by asking for a disclosure; they will never be told explicitly that an individual is barred.) To protect the privacy of individuals, as required by Article 8(1), the Bill makes it an offence to misuse the information revealed to employers by the scheme. This provision is designed to prevent the fact that an individual is barred, or details of any criminal convictions, becoming widely known and their privacy and personal safety being violated as a result of their status being disclosed.

167. Article 8 issues also arise concerning the disclosure by the police of intelligence information for the purposes of producing the vetting record. This is particularly the case when this includes non-conviction information held by the police about an individual (e.g., that the person had been charged with an offence but that the charges were subsequently dropped). Such information might affect the recruitment decision being made by a prospective employer and Article 8 is engaged. However, case law has suggested that it is appropriate for certain charges and other relevant information held by the police to be included in existing disclosures under the Police Act 1997 if the nature of the information was such as to give the police reasonable cause to consider that it would be relevant to the person’s job application for work with vulnerable groups. It is considered that the inclusion of such information in the scheme record meets the requirements of necessity and proportionality inherent in Article 8(2) and pursues the legitimate aim of protecting vulnerable groups.

168. Ultimately, the Bill aims to prevent people deemed unsuitable to work with one or other or both vulnerable groups from so doing. The Bill confers powers which are capable of being exercised in a manner that is compatible with the Convention rights and the Scottish Ministers consider that they do not, in themselves, cause an unjustified interference with Article 8. Insofar as Article 8 is engaged, the Scottish Ministers consider that any interference would be justified in that it would be in accordance with the law and necessary in a democratic society to pursue legitimate aims of preventing crime, protecting public health, and protecting the rights and freedoms of others. The primary legitimate aim being pursued is the protection of children and certain adults from harm.

169. Article 1 of Protocol 1 provides that persons are entitled to the peaceful enjoyment of their possessions and that no one shall be deprived of their possessions except in the public interest and subject to conditions provided for by law. This Article may be engaged by barring determinations of the Central Barring Unit where the consequence is damage to the individual’s capacity to continue working in a certain profession or damage to the business of a self-employed person. However, similar arguments to those above in relation to Article 8 would apply to justify any interference as being in pursuance of a legitimate aim.

ISLAND COMMUNITIES

170. The Bill will apply to all parts of Scotland but there is a power in section 100 to commence the various provisions of the Bill in different areas at different times. This power
may be used to manage the transition onto the new scheme and may mean that the islands are brought onto the scheme before or after other parts of Scotland. However, this will be the subject of further consultation and, if used, it will be done in such a way as to ensure that there is no adverse impact to island communities.

171. In small, island communities it could be particularly damaging for sensitive information about an individual to be misused. It is important that such information is adequately protected. The Police Act 1997 prevents people from misusing information released through the disclosure process. This Bill makes it an offence to misuse information obtained through the new barring disclosure, including barred status itself.

LOCAL GOVERNMENT

172. The Executive acknowledges that the Bill will have implications for local government recruitment practices and procedures and in cost terms for their staff. Any increased costs to individuals joining the scheme are likely to be offset by a reduction in the number of full scheme record disclosures they require. These costs, which impact primarily on individual workers rather than employers are more widely explored in the Financial Memorandum that accompanies the Bill.

SUSTAINABLE DEVELOPMENT

173. There should be no impact on sustainable development as a result of the vetting and barring scheme.

SHARING CHILD PROTECTION INFORMATION (PART 3)

Background

174. The Bill introduces provisions in relation to information sharing for child protection purposes. Part 3 is not part of the vetting and barring scheme discussed in-depth above. However, vetting information, information on a disclosure record and listing information could constitute child protection information for the purposes of this Part.

175. Poor information sharing has been identified as a contributory factor in a number of catastrophic child protection failure cases. The Scottish Ministers have been concerned to address these issues. The Report of the Child Protection Audit and Review, It's Everyone's Job to Make Sure I'm Alright (2002)\(^\text{15}\) and Protecting Children and Young People: Framework for Standards (2004)\(^\text{16}\) identified the importance of timely and accurate information sharing in ensuring appropriate action to protect and support children. The importance of information sharing in effective child protection has also been raised by members of the Scottish Parliament’s Education Committee.

176. The direction of policy in children’s services is towards joint working and cooperation as evidenced by the integrated planning agenda and joint inspections of children’s services. The


\(^{16}\) [http://www.scotland.gov.uk/Publications/2004/03/19102/34603](http://www.scotland.gov.uk/Publications/2004/03/19102/34603)
consultation paper *Getting it Right for Every Child: Proposals for Action* (2005)\(^{17}\) proposed a framework for reforming children’s services and for strengthening and modernising the children’s hearings system. The Scottish Ministers have now published an Implementation Plan\(^{18}\) and a draft Bill is expected to be published for consultation later this year.

177. These wider reforms will promote and support multi-agency working, information sharing and cooperation including requiring agencies to work to a single assessment, record and plan. However, the critical importance of child protection has prompted Ministers to bring forward early legislative provision where a child is at risk.

**General Policy Objectives**

178. Public bodies and other organisations providing services to children and families should already be sharing information and cooperating on information sharing for the purposes of child protection and have the necessary governance arrangements to support such information sharing. The Scottish Ministers recognise that many professionals currently do exchange information effectively and the aim of the Part 3 provisions is to make explicit this good practice and build on it through a code of practice. The provisions will ensure that anyone working with children can feel confident about reporting concerns and that they know how to do this.

**Stakeholder Engagement**

179. Development of the information sharing provisions were informed by stakeholders at three specially convened stakeholder events in June 2006, covering major organisations, professional bodies, inspectorates and the voluntary sector.

180. Key points emerging from stakeholders included:

- There is currently felt to be a lack of clarity about when to share information;
- There is uncertainty about how information sharing interacts with data protection legislation;
- Different professional groupings use different language about risk and thresholds for intervention which is seen by some as a barrier to a consistent approach to information sharing;
- Sharing information within organisations (for example between local authority departments) may also be inconsistent;
- Conflicting interests may arise for some professionals whose relationship is with an adult rather than the child. It was suggested that this led to difficulties striking the right balance between sharing information for child protection purposes whilst not compromising the trust and confidentiality of the service provided to the adult;
- Concern was expressed about the impact of new provisions on the voluntary sector may have the unintended consequence of deterring volunteers.

\(^{17}\) [http://www.scotland.gov.uk/Publications/2005/06/20135608/56098](http://www.scotland.gov.uk/Publications/2005/06/20135608/56098)

\(^{18}\) [http://www.scotland.gov.uk/Publications/2006/06/22092413/0](http://www.scotland.gov.uk/Publications/2006/06/22092413/0)
181. Significantly, the participants in the stakeholder events did not question the principle of information sharing to enhance child protection and the proposal to legislate to create duties in this area. There was a clear view that delineating good information sharing practice and how this interacts with data protection provisions in guidance would be a significant advance in progressing more effective information sharing.

**Specific provisions**

182. The Bill creates a range of duties and powers.

**Duty to share child protection information**

183. The Bill places a duty on specified organisations (as defined below) to share child protection information with the relevant council when a child is at risk of harm. Local authorities normally lead on individual child protection cases and making them the initial point for reference for information about a child at risk is consistent with existing arrangements.

**Duty to co-operate with requests for child protection information**

184. Since the sharing of information by itself may not lead to better outcomes for children at risk of harm, a similar duty to co-operate will be also be placed on the same organisations. This is intended to ensure that professionals are appropriately empowered to co-operate with each other and the relevant council to ensure the protection of children at risk of harm.

**Code of Practice**

185. The Scottish Ministers recognise that whilst the Bill’s provisions will provide a legal framework for the sharing of child protection information, positive and sustained change will require clarity about what is expected of relevant organisations and delineation of exemplary practice. For this reason, the duties on information sharing will be complemented by a code of practice.

186. The Scottish Ministers will be under a duty to prepare and publish a code of practice containing guidance about child protection information. This will include guidance on:

- the key principles of information sharing;
- difficulties in information sharing;
- the legal framework;
- consent, confidentiality and disclosure;
- priorities and values; and
- the process of information sharing.

187. The code of practice may include guidance, recommendations, advice and information on *types* of information that may be considered relevant for child protection purposes and the *ways* in which relevant persons and workers should share that information.
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188. Relevant organisations are required to promote awareness and understanding and to ensure that workers have regard to the code of practice on sharing child protection. They must also have regard to the code when deciding whether information is child protection information, and how to comply with the duties to share information and/or co-operate.

189. The code of practice will be pivotal in improving practice. The Bill therefore requires the Scottish Ministers to consult on its content prior to publication.

Duty to enable, encourage and help workers to share child protection information

190. In addition, the Scottish Ministers wish to ensure that all those who work for the defined agencies are enabled to share information and understand the circumstances in which it can be shared. Section 77 places a duty on agencies to take reasonable steps to enable, encourage and help workers to share child protection information.

191. Further details of how agencies are expected to comply with this will be detailed in the code of practice. The Bill requires agencies to ensure that reasonable steps to ensure that its workers: are aware of the code of practice; understand how it applies to them in the course of their work; and have regard to the code of practice.

Lifting of restrictions on sharing child protection information

192. The Scottish Ministers are keen to remove uncertainty about the ability to disclose information when a child is, or may be, at risk of harm. The duties (both in relation to sharing of information and cooperation) in this legislation are placed on "relevant persons" which are, in the main, public sector organisations. However, the Bill also provides a power (not a duty) for those working with children, parents or adults who may pose a risk to children, to disclose child protection information to a relevant organisation in order to protect a child from harm. Such a person will not be subject to any sanction provided that the information is only shared for the purposes of child protection.

Enforcement

193. It is recognised that there is a possibility that the Scottish Ministers may need to take action to ensure that organisations do comply with the duties to share and cooperate. Section 81 of the Bill includes a provision to allow them to make an order to this effect.

Coverage

Definition of a child

194. The duties will relate to children as defined for Parts 1 and 2, being an individual under the age of 18. The Adult Support and Protection (Scotland) Bill, defines the relevant age of adults at risk as being a person aged 16 or over (and this Bill defines the same age threshold for protected adults). This places professionals dealing with individuals aged 16 and 17 under both duties. However, the actions expected of them are similar, i.e. reporting information to, and cooperating with, the relevant council so this overlap is not considered problematic.
What information?

195. The Bill defines child protection information as being any information which the holder of the information reasonably believes to be information relevant for the purposes of protecting a child. This may include historical information if it is relevant to consideration of a child currently being at risk of harm.

To whom will the duties and powers apply?

196. The intention is to ensure that all public sector organisations working with children, parents or adults who may pose a risk to children are covered. Careful consideration has been given to who should fall within the scope of the information sharing duties. The primary intent is that these should apply to public bodies providing services to children, their parents, or adults who may pose a risk to children but also organisations such as independent schools and nurseries. However, there are also a large number of public bodies upon whom it would not be proportionate to place duties in relation to child protection.

197. The bodies that will be expected to comply with the duties are: Councils; Chief Constables of police forces in Scotland; the Scottish Crime and Drug Enforcement Agency; the Common Services Agency for the Scottish Health Service (commonly known as NHS NSS); Health Boards, and Special Health Boards (as constituted under section 2 of the National Health Service (Scotland) Act 1978); the Mental Welfare Commission for Scotland; the Principal Reporter; the Scottish Commission for the Regulation of Care; the Scottish Social Services Council; the General Teaching Council for Scotland; care service providers (as defined in the Regulation of Care (Scotland) Act 2001); managers of educational establishments other than those operated by local authorities; the General Teaching Council for Scotland and registered social landlords (for example, housing associations).

198. In addition, the Scottish Ministers are empowered to extend this list in future, to any other organisations, or types of organisation, or office-holder, as they may by order specify.

199. A key consideration has been the impact of the information sharing provisions on the voluntary sector. Where a voluntary organisation is undertaking a public function (for example, a local authority taking residential places in a care home run by a voluntary organisation), it is expected that the local authority would ensure that appropriate child protection measures are in place including sharing information where there is a concern that a child is, or may be, at risk of harm. However, it is recognised that it would be onerous to place duties on all voluntary organisations and so the duties only extend to those carrying out functions under contract to a relevant body. However, the power to share is intended to ensure that anyone working with relevant groups can (but will not have a duty to) refer child protection information if they consider this to be necessary.

200. These new provisions do not compromise existing arrangements in relation to the respective roles of police and local authorities. The police have a statutory responsibility to investigate any crime notified to them including those where a child has been harmed or put at risk of harm. Local authorities have a responsibility to assess the needs of children who are in need which may include a need to be protected.
Welfare of the Child

201. The welfare of the child will be at the core of information sharing decisions and, if it would not be in the child’s best interests, then the information should not be disclosed.

202. In certain complex situations, there may be occasions where disclosure in relation to one child may have the consequence of putting another child at greater risk. It is not intended that disclosure of child protection information should introduce a greater risk of harm to another child. The Bill provides a safeguard at section 79 to allow professionals to override the duty to share information where the disclosure would put another child or children at greater risk of harm than that of the child for whose protection the disclosure might be made.

Human Rights

203. The Scottish Executive considers that the information sharing provisions of the Bill are compatible with Convention rights and in particular with Article 8 right to respect for private and family life the terms of which are more fully set out in paragraphs 163 to 166 above. Issues under Article 8 arise in relation to the proposed duty on specified relevant persons: (i) to share child protection information with councils; and (ii) to cooperate in helping councils making inquiries. The duty to share child protection information will apply to any information, including personal information, relevant for the purposes of protecting a child from harm. The duty is in accordance with the law. The interests of protecting children satisfy the tests, not only of being necessary in a democratic society, but also of being in the interests of public safety, for the prevention of crime, for the protection of health, or for the protection of the rights and freedoms of others. The same considerations apply to the exercise of the duty of co-operation which is also subject to a requirement on the relevant persons to which the duty applies to act consistently with the proper exercise of their functions which, to the extent that they are public bodies, will ensure necessary Article 8 compliance. The lifting of restrictions on sharing child protection information also gives rise to Article 8 issues but any power arising from the lifting of restrictions will be capable of exercise in a manner that is compatible with Convention rights.

Other Considerations

204. The Part 3 provisions are not considered to raise any material issues in relation to equal opportunities, island communities, local government and sustainable development.

MEANING OF "SCHOOL CARE ACCOMMODATION SERVICE" (PART 5)

Background

205. Section 2 of the Regulation of Care (Scotland) Act 2001 (“the 2001 Act”) defines the care services to be regulated by the Care Commission. School care accommodation services are defined at section 2(4) of the 2001 Act. The Care Commission commenced regulation of these services on 1 April 2005. During the early scoping of the sector, prior to commencement of regulation, it became clear that there existed a variety of mechanisms (“guardianship arrangements”) which children of parents living overseas or elsewhere in the UK could use to enable their children to attend school in Scotland. These arrangements were either offered directly by the individual school or through an “agency”-style arrangement. As these
This document relates to the Protection of Vulnerable Groups (Scotland) Bill (SP Bill 73) as introduced in the Scottish Parliament on 25 September 2006

arrangements did not fit squarely within the definition of school care accommodation services, as contained within the 2001 Act, there was confusion as to whether they could be monitored and inspected within the regulatory framework of school care accommodation services.

Policy Objectives

206. The policy objective is to ensure the protection of the children in such “guardianship arrangements” within a proportionate and targeted regulatory regime which fits with the principles of better regulation. Currently, these arrangements require to be regulated as childminders with significant costs, not just through fees, but also potentially in making alterations to their houses. This is discouraging people from offering this service (which is often voluntary) with an adverse knock-on effect for the school and parents who require such arrangements. There is general agreement that these arrangements should be regulated as part of school care accommodation services. This change must be effected in primary legislation.

Definition of School Care Accommodation

207. The Bill amends section 2(4) of the 2001 Act to include within the definition of a school care accommodation service the following types of service provided by an education authority or the managers of an independent or grant aided school:

- arrangements with a person which consists of the provision of residential accommodation within that parent’s domestic premises; and
- introduction of parents of a pupil to a person who provides residential accommodation within that person’s domestic premises.

208. Section 2(4) of the 2001 Act is also amended to make it clear that a school care accommodation service is one that is provided not only for the purpose of the pupil being in attendance at the school during term time, but also where residential accommodation is required by the pupil during part or all of the holidays.

Consultation

209. There is a general agreement that these services should be regulated to ensure the protection of the children in their care. Following discussion with the key stakeholders in the sector, including service providers and their umbrella organisation, the regulatory bodies (e.g. the Care Commission and Her Majesty’s Inspectorate of Education), the Scottish Ministers have agreed that these arrangements should be regulated by the Care Commission as part of the school care accommodation service. This Bill amends the definition of school accommodation in section 2(4) of the 2001 Act in line with the general consensus.

Guidance

210. The Care Commission as regulator of school care accommodation services will issue guidance to all relevant service providers as part of the system of regulation, to ensure service providers are aware of what is required under the 2001 Act and the relevant National Care Standards.
Other Considerations

211. The Part 5 provisions are not considered to raise any material issues in relation to equal opportunities, island communities, local government and sustainable development.
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PROTECTION OF VULNERABLE GROUPS (SCOTLAND) BILL

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