

PROTECTION OF VULNERABLE GROUPS (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Scottish Executive in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Protection of Vulnerable Groups (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.
2. The contents of this Memorandum are entirely the responsibility of the Scottish Executive and have not been endorsed by the Scottish Parliament.

OUTLINE OF BILL PROVISIONS

3. The Bill follows the extensive review of child protection procedures in England and Wales carried out by Sir Michael Bichard and published as the Bichard Inquiry Report on 22 June 2004. Since that report was published, the Scottish Ministers and UK Government have accepted all the recommendations and have been working to implement them. This Bill substantially implements the proposals set out in the Scottish Executive's consultation paper, *Protecting Vulnerable Groups: Scottish Vetting and Barring Scheme*, published on 8 February 2006. The Bill also makes provision for sharing information for child protection purposes and to amend the definition of school care accommodation services.
4. The Bill makes provision for the following matters concerning the protection of vulnerable groups:
 - Establishing a list of individuals unsuitable to work with children and consequently repealing the Protection of Children (Scotland) Act 2003 (which established the disqualified from working with children list), and establishing a separate list of individuals unsuitable to work with protected adults;
 - Replacing enhanced criminal record certificates with new disclosure records for those working with vulnerable groups, whether paid or unpaid;

These documents relate to the Protection of Vulnerable Groups (Scotland) Bill (SP Bill 73) as introduced in the Scottish Parliament on 25 September 2006

- Establishing a scheme for those working with vulnerable groups, membership of which enables the ongoing collection of vetting information and assessment for unsuitability;
- 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, supported by a code of practice;
- Amendments to the Police Act 1997 to ensure consistency with the provisions in this Bill and to make a number of technical changes to facilitate the operation of Disclosure Scotland; and
- Amending the definition of school care accommodation.

5. The Bill relies on amendments being made to orders made under the Rehabilitation of Offenders Act 1974 so that exempted questions may be asked in respect of regulated work. The Scottish Ministers will consult, as appropriate, on this and other significant secondary legislation in support of the Bill after enactment in 2007 before bringing them before the Scottish Parliament. The intentions set out in this document are subject to change, depending on the outcome of the consultation exercise in 2007.

6. Further information about the Bill's provisions are contained in the Explanatory Notes and Financial Memorandum published separately as SP Bill 73-EN and in the Policy Memorandum published separately as SP Bill 73-PM.

APPROACH TO USE OF DELEGATED POWERS

7. The Bill contains a number of delegated powers provisions which are explained in more detail below. In deciding whether these provisions should be specified on the face of the Bill or left to subordinate legislation, the Scottish Executive has had regard to:

- the need to strike the right balance between the importance of the issue and providing flexibility to respond to changing circumstances;
- the need to make proper use of valuable Parliamentary time;
- the need to ensure that other areas of regulation can be developed in a coherent and consistent way by other authorities;
- the likely frequency of amendment;
- the possible need to change provisions in a coordinated way, for example to react to developments in England and Wales; and
- the need to anticipate the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by the Parliament.

8. In addition to the powers outlined below, the Bill also contains a duty on the Scottish Ministers to prepare and publish a code of practice about child protection information (at section 76) and another power to issue guidance about what steps an organisation should take to protect children or protected adults if their employee is under consideration for listing (at section 29). It is considered that these are of an executive rather than legislative nature and as such they are not detailed in this memorandum.

GENERAL SUBORDINATE LEGISLATION PROVISION

9. Section 99 contains the general subordinate legislation provisions and provides that all powers to make orders or regulations are exercisable by statutory instrument. Subsection (2) allows different provisions to be made for different purposes and permits the powers to be used to make supplementary, incidental, consequential, transitory, transitional or saving provision. Subsection (4) provides that all these powers are subject to negative resolution procedure, except for: orders made under sections 14(3), 31(2), 81(1), 88(1), 94(2) and 97(1) which are subject to affirmative resolution procedure: orders made under paragraph 26 of schedule 2 (except an order of the type mentioned in paragraph 14 of that schedule) and paragraph 15 of schedule 3 which are also subject to affirmative resolution procedure; and commencement orders under section 100(2) which are not subject to any parliamentary procedure.

10. The delegated powers provisions are listed below, with a short explanation of what each power allows, why the power has been taken in the Bill and why the selected form of Parliamentary procedure has been considered appropriate.

PART 1: THE LISTS

Sections 3, 4 and 5 – References by Organisations, Agencies and Businesses

Power conferred on: Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Negative resolution

Provision

11. Sections 3, 4 and 5 place a duty on organisations, employment agencies and employment businesses to refer an individual to the Scottish Ministers (as the Central Barring Unit) where at least one of the grounds set out at section 2 is met and they (would) have taken action on the basis of the referral ground. These sections give the Scottish Ministers the power to prescribe in regulations the information which constitutes a reference.

Reason for taking power

12. The power gives the Scottish Ministers the ability to ensure that all necessary information is included in a referral to expedite the processing of a case and minimise the need to correspond with employers for clarification. (This is different from the 2003 Act where a referral can be competent irrespective of whatever gaps there may be in the information provided.) Subordinate legislation is considered appropriate in view of the level of detail required, which is excessive for the face of the Bill, and the flexibility to evolve as the scheme beds down.

13. The Scottish Ministers intend to prescribe that the information constituting a referral will be very similar to that set out in paragraph 1 of schedule 1 to the Determination Regulations 2004 (S.S.I. 2004/523) made under the powers conferred by section 8 of the Protection of Children (Scotland) Act 2003. That paragraph reads:

1. Where a reference is made by a referring body in terms of sections 2(1) and 4(1) of the Act, the following information shall, if known or available to the referring body, be submitted with that reference-

(a) identity details relating to the individual, including the individual's full name and any other names by which the individual is, or has been known; any address or addresses at which the individual is or has been resident in the 10 years preceding the date of the reference; the individual's date and place of birth and National Insurance number;

(b) information as to any checks carried out by the referring body to verify the individual's identity;

(c) details as to the child care position held by the individual;

(d) full details of the circumstances in which the referring body considers that the individual harmed a child or placed a child at risk of harm;

(e) where the reference is made in terms of section 2(1) of the Act, details of any circumstance referred to in section 2(3) or (4) of the Act;

(f) details of any investigation carried out by the referring body, any documentation relevant to that investigation and the conclusions of such investigation;

(g) information as to any relevant disciplinary policies or practices or conditions of employment of the referring body;

(h) details of all relevant action taken by the referring body prior to making the reference;

(i) information as to the involvement of any other organisation or body in matters relating to the reference; and

(j) details of any associated disciplinary appeal or legal proceedings.

14. Obviously, changes will need to be made to reflect the inclusion of regulated work with adults and the interaction of the two lists.

Choice of procedure

15. Regulations made under these provisions will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered appropriate given that the regulations in question will relate to the detailed information that will be required in a reference. The regulations will be quite technical and will implement detailed policy within the framework of the Bill. The information that will be prescribed is factual or procedural, will already be known to the individual to which it relates, and may require ongoing adjustment. The regulations will build on the Determination Regulations which were subject to negative resolution procedure under section 8 of the 2003 Act.

Section 6 – Reference relating to matters occurring before provisions come into force

Power conferred on: Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Negative resolution

Provision

16. Section 6 gives employers and employment organisations the power to make referrals in respect of incidents which took place prior to the Bill being commenced. Section 6(2) gives the Scottish Ministers the power to prescribe in regulations the information which organisations may provide.

Reason for taking power

17. For the same reasons as sections 3, 4 and 5. The Scottish Ministers intend to prescribe the same information for any such referral as for those referrals being made under sections 3, 4 and 5.

Choice of procedure

18. For the same reasons as sections 3, 4 and 5 (paragraph 15 above).

Section 7 – Reference by court

Power conferred on: Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Negative resolution

Provision

19. Section 7 gives the courts a power to refer an individual for consideration for listing where that individual commits an offence against a child (other than a relevant offence) or an offence against a protected adult. The court may also give the Scottish Ministers any prescribed information that the court holds in relation to the convicted individual.

Reason for taking power

20. The Scottish Ministers intend to use their power at section 7(2) to prescribe the information provided by the court so that it is as similar as possible to that prescribed in sections 3 to 6. Obviously, there will be some differences because the individual may not be currently undertaking regulated work, nor is an employer necessarily involved. The power will be used to include certain types of evidence and findings of fact which led the court to exercise its power to refer. Subordinate legislation is considered appropriate in view of the level of detail required, which is excessive for the face of the Bill, and the flexibility to evolve in conjunction with regulations made under sections 3 to 6.

Choice of procedure

21. Regulations made under these provisions will be subject to annulment in pursuance of the resolution of the Scottish Parliament. The negative resolution procedure is considered appropriate for the same reasons as for sections 3 to 5 (paragraph 15 above).

Section 8 – Reference by certain other persons

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution

Provision

22. Section 8 gives the professional regulatory bodies a power to make a referral. Section 8 is designed to enable professional regulatory bodies to make a referral where the employer(s) could not, or negligently did not, make a referral in respect of a registered professional. Section 8(2)(d) gives the Scottish Ministers the power to specify by order other persons that should themselves have the power to refer to the CBU.

Reason for taking power

23. The power provides the flexibility to respond to developments in the structure and involvement of professional regulatory bodies in relation to regulated work. The Scottish Ministers intend to use the power to include professional regulatory bodies relevant to regulated work with children and/or protected adults, e.g. the General Medical Council.

Choice of procedure

24. An order under this provision will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered appropriate given the limited nature of the enabling power (the specification of other persons who will have a power - not a duty - to make a referral) and the need for flexibility if consequential changes are required following any changes in the structure of professional regulatory bodies.

Section 14 - Automatic Listing

Power Conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Affirmative Procedure

Provision

25. Section 14(3) allows the Scottish Ministers to specify criteria for automatic inclusion on either list. Section 14(1)(b) allows the Scottish Ministers to specify further criteria, in addition to those offences identified in schedule 1, which can lead to automatic inclusion on the children's list. Section 14(2) provides a similar power in relation to the adults' list. Section 14(4) provides that the criteria which may be so specified include convictions and cautions in relation to specified offences or civil orders in relation to an individual's conduct.

Reason for taking power

26. The order-making power at subsection 14(3) provides the flexibility to capture historic, serious offences where the court was not able to make a referral at the time of conviction or civil orders imposed by a court on an individual. The order-making power could also be used to set more complex criteria based on recidivism, e.g. a series of more minor offences which, on aggregate, become serious. The order making power enables the Scottish Ministers to respond to developments in criminal offences, including offences outwith the law of Scotland, as provided for by section 14(4)(a).

Choice of procedure

27. Such an order will be subject to affirmative procedure. This is because any order made using this power will expand the number of cases where the individual: does not have the right to engage in the determination process; and cannot appeal for some (prescribed) time after listing. Therefore, it is appropriate, given the potential significant effect on individuals, that the order is subject to the level of parliamentary scrutiny attracted by affirmative procedure.

Section 17 – Information relevant to listing decisions

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution

Provision

28. The Scottish Ministers (Central Barring Unit) may use a number of sources of information as part of considering an individual for listing. Section 17 identifies these sources and gives the individual the opportunity to comment on all information which will be considered by the determination panel. However, the individual is not allowed to make representation that certain findings of fact, made after due consideration by other persons in formal circumstances such as courts or inquiries, were wrongly made. Subsection (5) lists the “relevant finding of fact” which cannot be challenged when an individual makes representation as to why they should not be listed. The Scottish Ministers may extend the definition of relevant findings of fact which may not be challenged using the order-making power at section 17(5)(f).

Reason for taking power

29. The Scottish Ministers intend to use this power to extend the relevant findings of fact to those made by any other professional regulatory bodies specified under section 8(2) (see paragraphs 22-24 above). Flexibility is required to keep the provisions in line with the order made under section 8. This power is also required to allow for consequential changes to be made if any of the professional regulatory bodies identified undergo changes of name or structure.

Choice of procedure

30. Orders made under this provision will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered appropriate given the limited nature of the enabling power which simply provides for the specification of further persons or circumstances similar to those already provided for in section 17(5)(a)-(e). Any orders made under this power will have the effect of implementing current

policy, as provided for at section 17, in a consistent manner to those professional regulatory bodies specified in the orders made under section 8. There is also a need for flexibility if consequential changes are required following any changes in the structure of professional regulatory bodies already specified in section 17(5).

Section 19 – Information held by public bodies etc.

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution

Provision

31. Section 19 gives the Scottish Ministers the power to obtain information from other public bodies and persons when deciding whether to list an individual. Subsection (3) gives the Scottish Ministers the power to expand the list of persons from whom they can require such information by specifying any other person in an order.

Reason for taking power

32. The Scottish Ministers intend to use this power to include the bodies identified at paragraphs 22-24 in respect of section 8. Flexibility is required for consistency with the orders made under sections 8 and 17. This power is also required to allow for consequential changes to be made if any of the persons identified in section 19(3) undergo changes of name.

Choice of procedure

33. Orders made under these provisions will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered appropriate given the need for flexibility and the limited nature of the enabling power, which simply enables the specification of other persons who will provide information to the CBU, (and all such information will be made available to the individual under consideration for listing).

Section 25 – Application for removal from list

Power conferred on: Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Negative resolution

Provision

34. Section 25 gives the listed individual the power to apply to the sheriff for a review of their listing. Such an application is only competent if the individual has not made an application within a prescribed time period or if the individual's circumstances have changed. Subsection 3(a) allows Ministers to identify the period for which an individual must have been listed prior to them applying for removal from the list.

Reason for taking power

35. The Scottish Ministers' intention is to reproduce the *policy effect* of provision made at section 14 of the 2003 Act, taking account of the complexities arising from considering historic

offences. (Section 14 of the 2003 Act does not work for circumstances where an individual is listed because of an historic offence, i.e. occurring well before commencement, because it ties the appeal period to the date of conviction or release from prison.)

36. This power may be used to prescribe different timeframes between listing and application for removal from the list for different individuals depending on their circumstances e.g. their age at the time of listing and the reason for their initial listing. For example, individuals aged under 18 at the time of listing may be entitled to appeal after just five years and those who were over 18 may have to wait 10 years before making an appeal (if there are no changes of circumstance).

37. Flexibility is required in order to make provision consistent with the Safeguarding Vulnerable Groups Bill and to connect with other regulations. For example, it may be desirable to specify shorter time periods for individuals whose inclusion on the list was automatic through the order made under section 14(3).

Choice of procedure

38. Regulations made under these provisions will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered to offer an appropriate balance between speed, flexibility and the ability to ensure consistency with the UK Bill on the one hand, and the need for scrutiny for a provision of this nature. In addition the power is clearly limited to the specification of time periods for different circumstances and is essentially consequential to the principle of applications for removal from the lists which, itself, is provided for in the primary legislation.

Section 29 – Notice of listing etc.

Power conferred on: Scottish Ministers
Power exercisable by: Order made by Statutory instrument
Parliamentary procedure: Negative resolution

Provision

39. Section 29 requires the Scottish Ministers to notify the individual, all relevant employers and regulatory bodies where the individual: has been listed; is otherwise barred from undertaking regulated work; or is under consideration for listing. Subsection (7) identifies the relevant regulatory bodies which must be notified and gives the Scottish Ministers the power to specify other such bodies in an order.

Reason for taking power

40. The Scottish Ministers intend to use this power to extend the list of relevant regulatory bodies to include those specified by orders made under section 8 (see paras 22-24 above). Flexibility is required for consistency with the orders made under sections 8, 17 and 19. This power is also required to allow for consequential changes to be made if any of the persons identified in section 29(6) undergo changes of name.

Choice of procedure

41. Orders made under these provisions will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered appropriate given the need for flexibility and the limited nature of the enabling power which simply enables the specification of other persons who must receive notice of listing. This is a logical extension of the current policy as set out in the primary legislation. Negative resolution procedure also ensures consistency with sections 8, 17 and 19.

Section 30 – Relevant inquiries

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution

Provision

42. This section sets out the inquiries that are deemed relevant under section 13 and is a reproduction of section 6(6) of the 2003 Act. Subsection 2(c) gives the Scottish Ministers the power for Ministers to extend the definition of relevant inquiries.

Reason for taking power

43. There is no immediate intention to use this order-making power but the flexibility is important to cover inquiries which are not specifically mentioned in subsection (2) or if changes are made to Westminster legislation concerning inquiries.

Choice of procedure

44. Orders made under these provisions will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered appropriate because any order made under this power will simply specify other types of inquiry similar to those already specified in section 30(2) and will constitute a logical extension of current policy, the principle of which is set out in the primary legislation.

Section 31 – Offences against children and protected adults

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Affirmative procedure

Provision

45. Section 31(1) defines "relevant offence", "offence against a child" and "offence against a protected adult" for the purposes of Part 1. Section 31(2) provides the Scottish Ministers with an order-making power to amend these definitions.

Reason for taking power

46. Flexibility is required to modify the relevant offences at schedule 1 to take account of the creation of new offences in future. Schedule 1 to this Bill replicates schedule 1 to the 2003 Act, updated to include new offences created by the Protection of Children and Prevention of Section

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Offences (Scotland) Act 2005 and some other offences under the Civic Government (Scotland) Act 1982 and the Sexual Offences (Amendment) Act 2000. The 2003 Act includes a similar power to do this at section 10(10) which, in the absence of this Bill, would have been used to affect these changes.

47. The power to amend the definition of "offence against a protected adult" might be used to clarify it, if the courts have difficulty in identifying when such offences have taken place. (The fact that an adult is a protected adult is not necessarily easy to identify, especially when the adult is away from the care setting which defines him as a protected adult.)

Choice of procedure

48. Such an order will be subject to affirmative procedure. This is appropriate in respect of "relevant offence" because it leads to automatic listing and the reasoning follows that given in respect of section 14. It is also appropriate for the definition of the other offences because such a power could be used to radically change the power of the courts to refer an individual for listing. This is a significant power and this power should be subject to the level of parliamentary scrutiny that the affirmative procedure provides.

Section 32 – Duty to notify certain changes

Power conferred on: Scottish Ministers
Power exercisable by: Regulations
Parliamentary Procedure: Negative resolution

Provision

49. This section makes it an offence for an individual included on either list to fail to notify the Central Barring Unit that they have changed name, address or gender within 1 month of these changes taking effect. Section 32(1)(c) gives the Scottish Ministers the power to prescribe any other change in circumstance that must be provided by scheme members.

Reason for taking power

50. There is no immediate intention to use this power but it provides flexibility to respond to future developments in means of confirming identity or location.

Choice of procedure

51. Regulations made under these provisions will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered appropriate in view of the technical nature of any regulations which may be made under this power and given that the content of any such regulations will be within the detailed legislative framework of notifying certain changes in circumstances, which is established in the primary legislation.

Section 37 – Police access to lists

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary Procedure: Negative resolution

Provision

52. This section requires the Scottish Ministers to make information from the children's list or adults' list available to chief constables of police forces for the purpose of preventing or detecting crime. The information which must be provided will be prescribed in regulations.

Reason for taking power

53. As well as providing police with names of people included on the list(s) for the purposes of preventing and detecting crime, the Scottish Ministers believe that the police need additional information to satisfy themselves of the identity of the person about whom they are enquiring. The information that will be prescribed is likely to be the full name, date and place of birth, and current address of the person included on the list(s).

54. Flexibility is required to respond to any changes to the information stored on the lists, in particular for consistency with regulations made under section 39(1)(a). It is also important to be able to respond to developments in policing and subject identification.

Choice of procedure

55. Regulations made under these provisions will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered appropriate in view of the technical nature of these regulations and the limited information which is stored on the lists. (By far the most sensitive piece of information is the fact that the individual is listed; the other information merely confirms identity.) The regulations will provide that a subset of the information contained in the lists, as provided for in regulations under section 39, will be provided to the police and this allows for implementation of the principle of police access to the lists, which is provided for in the primary legislation.

Section 39 – Power to regulate procedure

Power conferred on: Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Negative resolution

Provision

56. Section 39(1) gives the Scottish Ministers the power to make regulations about information included in, and maintenance of, the lists and procedures to be followed in relation to any decision which the Scottish Ministers take in respect of them.

Reason for taking power

57. The power at section 39(1)(a) will be used by the Scottish Ministers to clarify the identity information which will be stored on the lists so that listing is unambiguously connected with the

right individual. It is likely that the following information which is routinely collected under the 2003 Act will be specified:

- ID (unique case reference number)
- Surname
- Forename
- Middle name
- Title
- Date of Birth
- NI Number
- Listing Status
- Address
- Date of address

58. Additionally, changes of name, address or gender notified under section 32 will be recorded. Flexibility is required to respond to changes in information used to confirm identity and changes to the information notified under section 32.

59. Section 39(1)(b) may be used to specify how the information on the list is properly kept up-to-date. Provision here needs to be flexible to respond to lessons learned from the practical operation of the lists over a period of time.

60. Section 39(1)(c) provides the Scottish Ministers with powers to prescribe procedures for determining an individual's unsuitability to work with children and/or protected adults. This provision is broadly equivalent to the powers at section 8 of the 2003 Act and will be used to make regulations similar to the Protection of Children (Scotland) Act 2003 Determination Regulations 2004 (S.S.I. No. 523). The new regulations will need to take account of the complexity of two lists and the transfer of cases between them at various stages in the procedure. Subordinate legislation is appropriate given the likely length and level of detail required for these provisions.

Choice of procedure

61. Regulations made under these provisions will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered appropriate given the technical nature of these provisions and the fact that they implement detailed policy and procedure within the framework of the Bill. In addition, the more significant aspects of the operation of the lists are set out in the primary legislation while the regulations will cover the maintenance of the lists and the procedures by which decisions are made under the Bill, rather than the substantive decisions themselves. It may also be necessary to make minor and technical changes to these regulations from time to time. These regulations will reflect the Determination Regulations under the 2003 Act which were also subject to negative resolution procedure.

PART 2: VETTING AND DISCLOSURE

Section 46 – Vetting information

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative Resolution

Provision

62. This section sets out what constitutes vetting information. Section 46(1)(d) provides a power for the Scottish Ministers to prescribe information as vetting information.

Reason for taking power

63. This power will be used to prescribe certain information held, for example, by regulatory bodies and local authorities. For example, registration or de-registration with the General Teaching Council for Scotland will be vetting information as would certain information held by local authorities in relation to child protection. The professional regulatory bodies holding prescribed information will be the same as those identified at paragraphs 22-24 in respect of section 8. Subordinate legislation is appropriate because the precise information which constitutes vetting information from these bodies, and local authorities, has yet to be identified and will anyway evolve over time.

Choice of procedure

64. Orders made under these provisions will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered appropriate in view of the need to make regular, technical changes as the types of information evolve. This procedure is considered to offer an appropriate balance between speed and flexibility on the one hand and the need for scrutiny for a provision of this nature. The principle of vetting information, and the use to which it will be put in relation to a scheme member, is provided for in the primary legislation. Indeed the content of vetting information is specified at section 46(1)(a)-(c) and that prescribed under subsection (1)(d) will implement detailed policy while reflecting the framework already provided for in the Bill.

Section 47 – Duty to notify certain changes

Power conferred on: Scottish Ministers
Power exercisable by: Regulations
Parliamentary Procedure: Negative resolution

Provision

65. This section makes it an offence for a scheme member to fail to notify the Central Barring Unit that they have changed name, address or gender within 3 months of these changes taking effect. Section 47(1)(c) gives the Scottish Ministers the power to prescribe any other change in circumstance that must be provided by scheme members.

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Reason for taking power

66. There is no immediate intention to use this power but it provides flexibility to respond to future developments in means of confirming identity or location.

Choice of procedure

67. Regulations made under these provisions will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered appropriate in view of the technical nature of any regulations which may be made under this power and given that the content of any such regulations will be within the detailed legislative framework of notifying certain changes in circumstances which is established in the primary legislation.

Section 54 - Disclosure restrictions

Power conferred on: Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Negative resolution

Provision

68. Section 54(1) provides the Scottish Ministers with the flexibility to limit the content of scheme records and to exclude from the disclosure of a scheme record certain types of information which may be contained on it.

Reason for taking power

69. This power enables the Scottish Ministers to keep sensitive information on the scheme record without disclosing it to employers. (It would, of course, have to be disclosed to the individual as part of any consideration for listing). This power is expected to be used in conjunction with that at section 46(1)(d), where information revealed may be relevant to a listing decision but not for employers. The power can therefore be used for the protection of individuals so that sensitive information on the scheme record will not be disclosed to employers. Subordinate legislation is necessary to provide flexibility in conjunction with section 46 and the ability to respond to developments in the type or sensitivity of information which is counted as vetting information.

Choice of procedure

70. Regulations made under these provisions will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered appropriate for the same reasons as for section 46 (see paragraph 64 above).

Section 60 – Power to use fingerprints to check applicant’s identity

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary Procedure: Negative resolution

Provision

71. The Scottish Ministers (as Disclosure Scotland) may require a person seeking to join the scheme to provide them with fingerprints for the purpose of confirming their identity. Section 60(2) gives the Scottish Ministers the power to prescribe how and where fingerprints may be taken. Section 60(2) gives them the power to prescribe who must destroy any such fingerprints and the circumstances in which they must be destroyed.

Reason for taking power

72. Fingerprints will be used only in those cases where the other information provided by the applicant and separately gathered by the Scottish Ministers is not sufficient to satisfy Ministers of the applicant’s identity, and where that doubt causes Ministers to believe that the applicant might have a criminal conviction. The power will be used to set out the circumstances in which the fingerprints will be taken, used, and destroyed.

73. Following procedures similar to those in force under Part 5 of the Police Act 1997 it is intended that when fingerprints are required, the applicant will be invited to attend a police station and have their fingerprints taken by an employee of the police force. These fingerprints will then be examined by a fingerprint officer and the result of the examination advised to the Scottish Ministers. Once this has happened, the fingerprints will be destroyed and the subject will be entitled to witness their destruction or to have a certificate issued by the officer in charge of the police station where the prints were taken stating that the fingerprints have been destroyed.

Choice of procedure

74. Regulations made under these provisions will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered appropriate in view of the technical nature of this provision and the fact that they implement detailed policy within the legislative framework set out in the primary legislation. The regulations will ensure that persons who must destroy any such fingerprints can be prescribed quickly given that this destruction is in the interests of the individual.

75. The negative resolution procedure is also currently used in respect of regulations made under section 118(3) of the Police Act 1997 (see section 125 thereof for the procedure) and regulations made under section 60 of the Bill will be broadly similar to those made under the 1997 Act: the Police Act 1997 (Criminal Records) (Scotland) Regulations 2006 (S.S.I. 2006/96) (see, in particular, regulation 16(5) thereof).

Section 61 – Power to use personal data to check applicant’s identity

Power Conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary Procedure: Negative Resolution

Provision

76. Section 61 gives the Scottish Ministers the power to use information held by: the UK Passport Agency; the Driver and Vehicle Licensing Agency; and the Department of Work and Pensions (National Insurance numbers) for the purposes of checking evidence of identity when processing an application for a scheme record or statement of barred status. Section 61(2) gives the Scottish Ministers the power to prescribe other persons holding data.

Reason for taking power

77. The Scottish Ministers have no immediate intention to use this power but it provides flexibility for interaction with any future identity card scheme, for example. It also allows consequential changes to be made if Whitehall Departments change the arrangements for passports, driving licences or national insurance numbers.

Choice of procedure

78. Regulations made under these provisions will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered appropriate in view of the technical nature of this provision and given the limited nature of the enabling power which simply provides for the prescribing of other personal data holders from whom the Scottish Ministers may use information. The use to which that information will be put is already detailed in the primary legislation.

Section 65 – Unlawful disclosure: supplementary

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative Resolution

Provision

79. This section applies to section 63 (unlawful disclosure of scheme records) and 64 (unlawful requests for scheme records) and details the conditions in which information contained on a disclosure record, or the disclosure record itself, can be shared with persons other than the individual to whom the disclosure relates or the countersigning individual/organisation. Subsections (1)(f) and (3)(f) give the Scottish Ministers the power to prescribe the exempted questions (as defined in the Rehabilitation of Offenders Act 1974) for which disclosure information can be disclosed. Subsections (1)(g) and (3)(g) give the Scottish Ministers the power to prescribe other purposes or circumstances respectively for which disclosure information may be disclosed.

Reason for taking power

80. Subsections (1)(f) and (3)(f) will be used to ensure that the Bill is consistent with the provisions of the 1974 Act. Flexibility is required to be able to respond to changes to secondary legislation made under that Act. Subsections (1)(g) and (3)(g) might be used to specify audit or monitoring purposes or to prescribe other purposes or circumstances that may come to light, with the benefit of usage, in which disclosure of the scheme records should be made lawful.

Choice of procedure

81. Regulations made under these provisions will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered appropriate in view of the technical nature of these provisions and given that any prescribing will be excluding certain types of disclosure from the offence provisions, a principle which is already established in the Bill. Five different exclusions from the offence provisions are specifically provided for in subsections (1)(a)-(e) and (3)(a)-(e) and any regulations would therefore be an extension of the exclusions which are already detailed extensively in the primary legislation.

Section 67 – Fees

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary Procedure: Negative resolution

Provision

82. This section provides the Scottish Ministers with a very flexible power to charge fees in respect of the scheme. The Scottish Ministers could charge different levels of fee for joining the scheme, scheme records, short scheme records and statements of barred status. Different levels of fee could be charged for the children's workforce, the adults' workforce and applications in respect of both workforces. Fees can be charged as application fees or as an annual subscription. The power at subsection (2)(b) could be used to provide the free checks for volunteers in voluntary organisations. (The alternative is for the fee to be charged and then explicitly reimbursed as now.)

Reason for taking power

83. The Scottish Ministers intend to make regulations distinguishing two levels of fee to be payable only when requesting a disclosure record (not for scheme membership itself). A higher level of fee is likely to be payable for any scheme record and any statement of barred status issued on joining the scheme. Short scheme records and subsequent statements of barred status are likely to attract a lower level of fee.

Choice of procedure

84. Regulations made under these provisions will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered appropriate in order to achieve the correct balance between being able to set and amend fees quickly, to take account of inflation for example, while ensuring appropriate parliamentary scrutiny of the levels of fees which will be payable for scheme records. Fees for criminal record certificates under the Police Act 1997 are similarly subject to negative resolution procedure

These documents relate to the Protection of Vulnerable Groups (Scotland) Bill (SP Bill 73) as introduced in the Scottish Parliament on 25 September 2006

(sections 112, 113B and 125) so it is appropriate that the parliamentary procedure for fees regulations under the Bill should be consistent with this previous Act.

Section 69 – Procedure

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary Procedure: Negative Resolution

Provision

85. This section gives the Scottish Ministers the power to make regulations governing the administration of the scheme. This power could be used, for example, to set the lifetime of scheme membership at 10 years.

Reason for taking power

86. The power at section 69(2)(b) is expected to be used to enable online disclosure requests. For example, the individual might log on to the Disclosure Scotland website using their own password to begin the process of a disclosure request and generate a 16 digit PIN which they pass to the employer to authorise the employer to have once-only access to the disclosure information. This provision would allow the Scottish Ministers to specify that a 16 digit PIN generated by a scheme member constituted a request by the member as required by Condition A section 52.

Choice of procedure

87. Regulations made under these provisions will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered appropriate given that the power is to make further administrative, operational and procedural provision in relation to the functioning of the Scheme. This provision will be used in the context of implementing the workings of the scheme, the substance of which is provided for in the primary legislation. Negative resolution procedure achieves an appropriate balance between flexibility, especially given the need to respond speedily to technological developments and changes in IT systems in this area, and the need for parliamentary scrutiny.

PART 3: SHARING CHILD PROTECTION INFORMATION

Section 80 – Relevant persons

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution

Provision

88. Part 3 places a number of duties on relevant persons in respect of child protection information. Section 80 defines the meaning of relevant persons and gives the Scottish Ministers the power to extend the definition of relevant persons.

Reason for taking power

89. The Scottish Ministers may use this power to roll out the duties to other public bodies in Scotland and to ensure that references to the relevant persons already specified in section 80 remain accurate and up-to-date.

Choice of procedure

90. Orders made under these provisions will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered appropriate in view of the limited nature of the enabling power (the specification of other persons who will be under duties with regard to sharing child protection information). Given that 13 relevant persons are already listed in section 80 the scope of this provision can be clearly ascertained and any orders made would be within the legislative framework already provided for in the primary legislation. There is also a need for flexibility if consequential changes are required following any changes in the structure of the relevant persons already specified in section 80.

Section 81 – Enforcement

Power conferred on: Scottish Ministers
Power exercisable by: Orders made by statutory instrument
Parliamentary Procedure: Negative resolution/affirmative if it amends an Act

Provision

91. This section gives Scottish Ministers the order-making power to make further supplementary, incidental or consequential provisions to ensure that relevant persons comply with the duties imposed by Part 3. Such orders made under this section may modify any enactment, instrument or documents.

Reason for taking power

92. The Scottish Ministers may use the power to put in place measures to ensure compliance with duties imposed by part 3. The duties apply to public bodies or to bodies subject to a defined regulatory regime such as care service providers. Specific measures to ensure compliance may not therefore be necessary. However, the duties are new and it may be that with the benefit of experience that further provision is deemed necessary to ensure that relevant persons comply properly and fully with the duties imposed upon them. As a matter of practicality, it is difficult to anticipate the extent of any such provision that may be required before the relevant persons have built up some experience of fulfilling these duties. Given the importance of this duty – sharing child protection information – it is essential that the Bill can provide mechanisms to cover unforeseen circumstances. This order power ensures that such provision can be made without requiring further primary legislation. The power may also be used in the event that Scottish Ministers add to those falling within the scope of the duties any person or type of person who is not a public body or a body subject to a regulatory regime which is considered insufficient to ensure such compliance.

Choice of Procedure

93. Any such orders will be subject to affirmative procedure. This is appropriate given the potentially wide scope of this power and because of the ability to amend primary legislation by order. This is a significant power and, therefore, should be subject to the level of parliamentary scrutiny that the affirmative procedure provides.

PART 4: AMENDMENT OF PART 5 OF THE POLICE ACT 1997

Section 82 – Information in criminal conviction and record certificates

Changes to sections 112, 113A, 119 and 119A of the 1997 Act

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary Procedure: Negative resolution

Provision

94. Section 82(2)(d) gives the Scottish Ministers a power (in the 1997 Act) to prescribe civil orders that should be included routinely on standard and enhanced certificates.

Reason for taking power

95. The Scottish Ministers intend to use this power to include Sexual Offences Prevention Orders and, Risk of Sexual Harm Orders in the first instance. (Notification requirements under Part 2 of the Sexual Offences Act 2003 are included by virtue of provision at section 82(2)(a).) Chief Constables will retain the discretion to disclose information about other civil orders on enhanced certificates (which will continue to be available for purposes other than regulated work). The power is necessary to ensure that relevant matters included in criminal record certificates under Part 5 of the Police Act 1997 can remain up-to-date by making consequential provision for any changes in types of relevant court orders.

Choice of procedure

96. Regulations made under these provisions will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered appropriate given that this corresponds with the procedure used for section 113A of the Police Act 1997. The regulations will concern the detailed implementation and meaning of “relevant matter” which is already specified within section 113A.

Section 84 – Payment of fee for information from certain police forces

New section 125A of the 1997 Act and changes to various sections

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary Procedure: Negative resolution

Provision

97. This section amends Part 5 of the Police Act 1997 to allow Scottish Ministers to make a payment to certain police forces when requests are made to police forces under section 113B of the 1997 Act. The power was omitted when Part 5 was amended by the Serious Organised Crime and Police Act 2005.

Reason for taking power

98. This power will allow Scottish Ministers to pay the prescribed bodies (usually the relevant police authority) for the States of Jersey Police Force; the salaried police force of the Island of Guernsey; the Isle of Man Constabulary; and a body with functions in any country or territory outside the British Islands which correspond to those of a police force in any part of the UK if the Scottish Ministers make a request to that force for information in connection with a criminal record check. The power will be exercised once to prescribe the 3 named forces above and once for any other force which is added by virtue of section 113B(10)(m) of the 1997 Act.

Choice of procedure

99. Regulations made under these provisions will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered appropriate given that this corresponds with the procedure used generally in Part 5 of the Police Act 1997. The regulations concern the prescribing of bodies to which the Scottish Ministers will pay fees for information and concern the detailed implementation of the criminal record certificate system which is already extensively set out in the Police Act 1997.

Section 85 – Regulations about registration

New section 120ZB of the 1997 Act and changes to section 120 and 124A

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary Procedure: Negative resolution

Provision

100. This section amends Part 5 of the Police Act 1997 to allow Scottish Ministers to make further registration requirements in respect of applicants or nominee to be registered person under section 120 of the 1997 Act.

101. The Scottish Ministers have a number of powers at present to deal with registration under section 120. They cannot, however, impose any control on the number of registered persons or their nominees in terms of the volume of applications that they countersign on an annual basis. The power will help Disclosure Scotland manage the day to day operation of the Part 5 Scheme

and also the Scheme being introduced by the Bill as registered person status under Part 5 impacts some aspects of how the new Scheme will operate.

Reason for taking power

102. The Scottish Ministers intend to use the powers created in the 1997 Act to set a lower limit of countersignatures in any one year. If a registered person does not reach that limit, then the Scottish Ministers will have the option of removing that person's name from the register. The use of this sanction will come within the scope of the existing appeals process.

Choice of procedure

103. Regulations made under these provisions will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered appropriate given that the regulations will specify aspects of the detailed administrative and procedural operation of the registration system which is already specified in Part 5 of the Police Act 1997.

PART 5: MEANING OF SCHOOL CARE ACCOMMODATION SERVICE

Section 86 - Meaning of "school care accommodation service"

New sections 2(4), 2(4A) and 2(4B) of the 2001 Act

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary Procedure: Negative resolution

Provision

104. Section 86 substitutes a new section 2(4) into the Regulation of Care (Scotland) Act 2001 ("ROC"). Section 2(4) of ROC provides the definition of "school care accommodation service" for section 2(1)(c) of ROC. A "school care accommodation service" broadly covers the provision of residential accommodation to a pupil by an education authority or the managers of an independent school in connection with the pupil's attendance at school. The main purpose behind the substitution is to cater for situations where the school managers or an education authority make arrangements with an individual to provide the pupil with accommodation in the individual's own home (see the new section 2(4A) of ROC in particular): in those circumstances, the service is to be regarded as being provided by the school managers/education authority (as the case may be) and therefore for the school/education authority to register the service and bear the registration fees (rather than the individual).

105. Section 2(4B) of ROC includes power to except services from the definition.

Reason for taking power

106. The intention behind retaining the power is principally to cater for exceptions to the provision of accommodation by local authorities. Accommodation can be provided by local authorities to children and young adults under social welfare legislation (for example under the Children (Scotland) Act 1995 and the Social Work (Scotland) Act) as well as under education

legislation (e.g. boarding and hostel accommodation under sections 7 and 13 of the Education (Scotland) Act 1980), and it is not the current intention of the Scottish Ministers to regulate accommodation provided principally for a social welfare purpose rather than education purpose as a school care accommodation service.

107. Given the various types of accommodation which may be provided under social welfare legislation and the changing nature of those services, it is considered that subordinate legislation is the most appropriate approach to carve out such accommodation due to the flexibility of such a power. Such regulations will be by negative resolution of the Scottish Parliament.

Choice of procedure

108. Negative resolution procedure is appropriate in this instance. Given the variety and changing nature of the services, this procedure balances the need for flexibility and speed and the need for appropriate parliamentary scrutiny.

PART 6: SUPPLEMENTARY AND GENERAL

Section 87 – Transfer of Disclosure Scotland staff etc.

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary Procedure: Negative resolution

Provision

109. This section gives the Scottish Ministers the power to make an order to transfer into the Scottish Administration those employees of Strathclyde Joint Police Board employed at the Scottish Criminal Record Office who carry out the Scottish Ministers' functions under Part 5 of the 1997 Act. This will enable Disclosure Scotland to become part of the new executive agency.

Reason for taking power

110. The Scottish Ministers intend to exercise the power to specify a date on which the transfer will take place, and will state in the order either the names of the individuals affected by the order or use a recognisable means of describing them as a group so as to avoid uncertainty about who is affected. The power allows Ministers to add other provisions about the transfer as they see fit.

Choice of procedure

111. Orders made under these provisions will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered to offer an appropriate balance between speed and flexibility when making staff transfer arrangements and the need for parliamentary scrutiny. It is also noted that similar order making powers for dealing with staff transfers in other ASPs have also been made under negative resolution procedure (see for example Housing (Scotland) Act 2001, sections 86 and 109).

Section 88 – Power to give effect to the Safeguarding Vulnerable Groups Act 2006

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution/affirmative if it amends in Act

Provision

112. A vetting and barring scheme for England and Wales is being established through the Safeguarding Vulnerable Groups Bill, currently before the House of Commons. Section 88 provides a power for the Scottish Ministers to make provision or modify any enactment in order to ensure that the scheme for England and Wales functions properly.

Reason for taking power

113. It is the Scottish Ministers' intention that all necessary provision will be made through stage 2 amendments to this Bill. However, given the complexities of this Bill and the importance of interaction with the Safeguarding Vulnerable Groups Bill, it may be necessary to make subsequent changes.

Choice of procedure

114. Such an order will be subject to affirmative procedure if it amends primary legislation. It is appropriate that such an order should be subject to the higher level of parliamentary scrutiny provided by affirmative procedure in that case. If the order does not amend primary legislation then it will be subject to annulment in pursuance of a resolution of the Scottish Parliament.

PART 7: INTERPRETATION

Section 92 – Meaning of references to being barred from regulatory work

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution

Provision

115. Section 92 sets out the lists in other jurisdictions which result in being barred from regulated work in Scotland. Subsections (1) and (2) mean that being listed in the equivalent list in England, Wales or Northern Ireland, will result in being barred from regulated work with children and adults, respectively, in Scotland. Subsections (3) and (4) give the Scottish Ministers an order-making power to regard any other list abroad as being equivalent and leading to being barred from regulated work in Scotland. Obviously, the Scottish Ministers would require to be satisfied that the procedures for determination, appeal etc in the foreign jurisdiction were satisfactory before making any such order. Subsections (5) and (6) make allowance for developments in England, Wales or Northern Ireland and enable the lists in subsections (1) and (2) to be updated accordingly.

Reasons for taking power

116. The Scottish Ministers have no immediate intention to exercise these powers but will do so as necessary with respect to changes to the lists in England, Wales or Northern Ireland. There is no immediate prospect of recognising any lists in foreign jurisdictions as equivalent.

Choice of procedure

117. Orders made under these provisions will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered appropriate in view of the need to ensure that references to the other UK lists remain up-to-date which is essentially a technical change. The powers in subsections (3) and (4) are potentially wider but again would involve specifying a non-UK list as corresponding to being barred in Scotland, which is implementing a principle already provided for in the primary legislation. Negative resolution in this instance will balance speed and flexibility with the need for parliamentary scrutiny.

Section 94 – Meaning of protected adult

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative procedure for s94(1)(b) /affirmative for s94(2)

Provision

118. This section defines a "protected adult" as an individual aged 16 or over who is provided with (and thus receives) a type of care and support service. A person becomes a "protected adult" when provided with certain care and support services as listed at sub-section (1)(a), (b) or (c). Section 94(1)(b) allows for the Scottish Ministers to prescribe healthcare related services. Section 94(2) gives the Scottish Ministers the power to amend the definition of "protected adult" as they think appropriate.

Reason for taking power

119. The care and support services listed at sub-section (1)(a), (b) and (c) are those which are presently regulated by the Care Commission, or are services provided by the NHS or independent medical providers, or by local authorities in the course of meeting their statutory obligations to provide care to those in need. In relation to those services mentioned in 94(1)(b), the key requirement is to capture those services which involve delivery of care and support to adults. There is a clear policy intention to achieve a proportionate balance in scheme coverage and it is not intended therefore that every aspect of an NHS or independent healthcare provider's service should be brought within the ambit of the scheme i.e. staff solely involved in research, or delivering IT or financial loan type functions. As the way NHS services are being delivered continues to develop, the intention is to prescribe in regulations only those healthcare related services (e.g. provided by the NHS or by private clinics or agencies) mentioned in 94(1)(b) which deliver care and support.

120. Moreover, as the type and nature of care and support services, and those who provide and deliver these, continues to adapt as more innovative and flexible care packages are designed, it

will be necessary to keep under review these services, and to amend the categories at 94(1)(a) and (c) where necessary to ensure protection.

121. This provides the Scottish Ministers with the flexibility to ensure that, where such change is necessary and appropriate, protection can be afforded to protected adults expeditiously.

Choice of procedure

122. As regulations made section under 94(1)(b) may be lengthy and complex, in further implementation of the legislative framework provided for in section 94 itself, the negative procedure whereby the regulations are subject to annulment in pursuance of a resolution of the Scottish Parliament is considered appropriate. As an order under section 94(2) can amend the definition of “protected adult” provided for in the primary legislation and may, consequently, have a wider impact on the way a particular service is affected, such orders will be subject to affirmative procedure. It is considered appropriate that this significant power should be subject to the higher level of parliamentary scrutiny provided by affirmative procedure.

Section 96 – General interpretation

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution

Provision

123. Section 96(1) gives the Scottish Ministers the power to define "care service provider", as used in Part 3 of the Bill re sharing child protection information, in an order.

Reason for taking power

124. In section 80 one of the relevant persons to whom the duties concerning sharing child protection information relates is “care service providers”. Section 96(1) states that this term means a person who provides a care service of a type specified by order so the power to define this term is necessary so it is certain as to who will be under the duties imposed by Part 3 of the Bill. The Scottish Ministers will consider which care services will be appropriate to attach the duties in Part 3 to, and this power is necessary to ensure that Part 3 can respond to changes and developments in types of care services provided.

Choice of procedure

125. Regulations made under these provisions will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered appropriate in view of the need to balance parliamentary scrutiny with the desirability of responding to changes in circumstances quickly and flexibly. The providers of the care services specified will be under the duties with regard to sharing child protection information that are already detailed in Part 3 of the Bill so this power is an extension of the legislative framework provided for in the primary legislation.

PART 8: FINAL PROVISIONS

Section 97 – Ancillary provisions

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary Procedure: Negative resolution (except affirmative resolution if it amends an Act)

Provision

126. Section 97 confers on the Scottish Ministers a power to make by order such supplementary, incidental, consequential, transitional, transitory or saving provision as they consider appropriate for the purposes of, or in connection with, or for the purposes of giving full effect to, any provision of the Bill. Section 97(2) ensures that the power extends to the modification of any enactment (including the Bill), instrument or document, although where that is done section 99(4) provides that the instrument will be subject to affirmative procedure. The terms consequential, incidental, supplementary and transitional are not mutually exclusive; there is a significant degree of overlap. Incidental or supplementary provision might, for example, fill in detail which is consistent with the provisions of the Act but missing from it, or make changes, to other Acts, which represent the exercise of a choice brought about by the enabling Act and which are not necessarily a direct consequence of that Act. Transitional and transitory provision may be used to specifically assist the changeover from the state of the law before the Bill comes into force to the state of the law when it is fully in force, while savings provision may preserve the previous law in certain circumstances.

Reason for taking power

127. Any body of new law, especially given the complexity and scope of this legislation, gives rise to a need for a range of ancillary provisions. For example, minor adjustments to other statutes (e.g. the Police Act 1997) may be necessary. Any minor amendments which are identified over the coming months will, where possible, be made through Executive amendment during stage 2. It is considered that the power to make such provision should extend to modifying enactments, including the Bill itself. Without the power to make such provision it may be necessary to return to the Parliament, through subsequent primary legislation, to deal with a matter that is clearly within the scope and policy objectives of the original Bill and that would not be an effective use of the Parliament's or the Executive's resources.

128. It is expected that transitory and transitional provision (in addition to that provided for in section 40) will also be required to facilitate the transfer from the Protection of Children (Scotland) Act 2003 to this Bill. Flexible provision will be necessary to ensure that this can be achieved comprehensively and effectively. It is prudent to include this power, including the savings provision, to guard against the risk that any change in the law inadvertently leads to a situation where a person who is considered unsuitable to work with children under the 2003 Act avoids listing under this Bill and also to ensure that individuals are treated fairly during the transition from the existing law to the new law.

Choice of procedure

129. Where an order changes primary legislation affirmative procedure is appropriate because of the higher level of parliamentary scrutiny involved. In any other situation, the negative procedure is considered appropriate for these powers.

Section 100 – Commencement

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: No parliamentary procedure

Provision

130. Section 100(2) provides that the Scottish Ministers may by order appoint a day when the provisions of Parts 1 to 7 of the Bill shall come into force. Such an order may appoint different days for different purposes and for different areas, as provided for by subsection (3).

Reason for taking power

131. A large and significant measure such as this Bill will not come into force, in its entirety, on Royal Assent or indeed on a single day. The Scottish Ministers' policy objective is to make sure that the transition onto the scheme is manageable for individuals, employers, Disclosure Scotland and the Central Barring Unit. With approximately one million people expected to be transferred to the scheme over three years, a mechanism will need to be found which moves people onto the scheme in a very even fashion. The Scottish Ministers may wish to specify a month-by-month transition by workforce or geographic area in order to manage demand. This will be the subject of further consultation in 2007. Consequently, no commencement date is specified in the Bill as the Scottish Ministers are yet to determine when it would be appropriate to bring the substantive provisions of the Bill into force.

Choice of procedure

132. As is normal with commencement orders, no form of parliamentary procedure is required. The decision on when and to what extent the Bill is commenced is an administrative issue for Scottish Ministers.

SCHEDULES

Schedule 2, Part 3, paragraph 14 - further education institutions

Power Conferred on: Scottish Ministers
Power Exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution

Provision

133. Paragraphs 13-15 have expanded the reference to educational establishment in paragraph 2 (c) in schedule 2 to the 2003 Act using the definition from the Education (Scotland) Act 1980. The provision has been modified to remove higher education institutions from the definition since, in many positions in higher education institutions there is little or no routine contact with

children. Paragraph 14 provides the Scottish Ministers with a power to expand the definition of "further education institution".

Reason for taking power

134. This power enables the Scottish Ministers to respond to further changes to the structure of either the legislation or the institutions involved in the provision of further and higher education in Scotland. The Scottish Ministers only intend to use this power if it is necessary to do so to preserve the policy effect of the provisions in the Bill (e.g. if existing education institutions undergo changes of name).

Choice of procedure

135. Orders made under these provisions will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered appropriate in view of the technical and administrative nature of this provision and the minor changes that would be effected by its use.

Schedule 2, Part 5, paragraph 26 - power to amend schedule

Power Conferred on: Scottish Ministers
Power Exercisable by: Order made by statutory instrument
Parliamentary procedure: Affirmative procedure

Provision

136. Schedule 2 to the Bill defines "regulated work with children". Paragraph 26 gives the Scottish Ministers the power to modify schedule 2, reproducing the power at paragraph 13 of the 2003 Act.

Reason for taking power

137. The power is required to allow for the flexibility to respond to changes in the way in which services are provided to children.

Choice of procedure

138. Such an order will be subject to affirmative procedure given that it can be used to modify primary legislation. In addition it is appropriate because the power could be used to increase the scope of regulated work with children, with the effect of: (i) prompting more individuals to become scheme members; and (ii) excluding barred individuals from a wider range of positions. Affirmative resolution procedure was also used to modify schedule 2 to the 2003 Act.

Schedule 3, Part 5, paragraph 15 - power to amend schedule

Power Conferred on: Scottish Ministers
Power Exercisable by: Order made by statutory instrument
Parliamentary procedure: Affirmative procedure

Provision

139. Schedule 3 to the Bill (read with section 94) defines "regulated work with adults". Paragraph 15 gives the Scottish Ministers the power to modify schedule 3.

Reason for taking power

140. The power is required to allow for the flexibility to respond to changes in the way in which services are provided to protected adults.

Choice of procedure

141. Such an order will be subject to affirmative procedure given that it can be used to modify primary legislation. In addition it is appropriate because the power could be used to increase the scope of regulated work with adults, with the effect of: (i) prompting more individuals to become scheme members; and (ii) excluding barred individuals from a wider range of positions.

This document relates to the Protection of Vulnerable Groups (Scotland) Bill (SP Bill 73) as introduced in the Scottish Parliament on 25 September 2006

PROTECTION OF VULNERABLE GROUPS (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM