

PROTECTION OF VULNERABLE GROUPS (SCOTLAND) BILL

[AS AMENDED AT STAGE 2]

REVISED EXPLANATORY NOTES

CONTENTS

1. As required under Rule 9.7.8A of the Parliament's Standing Orders, these revised Explanatory Notes are published to accompany the Protection of Vulnerable Groups (Scotland) Bill as amended at Stage 2.

INTRODUCTION

2. The Notes have been prepared by the Scottish Executive in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill so where a section or schedule, or part of a section or schedule, does not seem to require any explanation or comment, none is given.

REFERENCES AND KEY TERMS

4. Throughout the notes, certain expressions are used either as convenient abbreviations or as having the particular meaning given to them by section 96 of the Bill, or in other sections in relation to particular Parts or sections of the Bill. The most important of these expressions are as follows:

- (a) "the Bill" means the Protection of Vulnerable Groups (Scotland) Bill;
- (b) "the 1974 Act" means the Rehabilitation of Offenders Act 1974;
- (c) "the 1995 Act" means the Criminal Procedure (Scotland) Act 1995;
- (d) "the 1997 Act" means the Police Act 1997;
- (e) "the 1998 Act" means the Scotland Act 1998;
- (f) "the 2001 Act" means the Regulation of Care (Scotland) Act 2001;
- (g) "the 2003 Act" means the Protection of Children (Scotland) Act 2003;

- (h) “the 2005 Act” means the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005;
- (i) “ECHR” means the European Convention on Human Rights and references to Articles are to Articles of ECHR;
- (j) “the ASP Bill” means the Adult Support and Protection (Scotland) Bill;
- (k) “the 2006 Act” means the Safeguarding Vulnerable Groups Act 2006;
- (l) “adults’ list” means the list of those individuals barred from regulated work with protected adults;
- (m) “child” means any person under the age of 18;
- (n) “children’s list” means the list of those individuals barred from regulated work with children;
- (o) “Central Barring Unit” means the unit with responsibility for determining, on behalf of the Scottish Ministers, whether an individual should be included on the adults’ list and/or children’s list and for maintaining those lists. The Central Barring Unit is expected to be part of an executive agency with Disclosure Scotland;
- (p) “Disclosure Scotland” means the unit responsible for undertaking disclosure checks on behalf of the Scottish Ministers. Disclosure Scotland is expected to be part of an executive agency with the Central Barring Unit;
- (q) “DWCL” means the Disqualified from Working with Children List as established by the 2003 Act;
- (r) “protected adult” means any person who has attained the age of 16 or over and who is in receipt of any of the services set out at section 94;
- (s) “regulated work” means work with children or adults of the type described in schedules 2 and 3, respectively. (Work itself is defined at section 95.);
- (t) “scheme member” means an individual who has successfully applied for scheme membership in respect of one or both of the children’s or adults’ workforces;
- (u) “scheme record” means the scheme member’s statement of scheme membership (see below) and all vetting information (set out at section 45);
- (v) “short scheme record” is a document which includes the scheme member’s statement of scheme membership, specifies the date of last disclosure of the scheme record, and indicates whether there is any new vetting information on that record since the last disclosure of it (set out at section 50); and
- (w) “statement of scheme membership” is a document which confirms an individual’s scheme membership (and consequently that the individual is not barred) in respect of one or both types of regulated work and whether the individual is under consideration for listing (set out at section 43).

SUMMARY AND BACKGROUND

5. 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.

6. It 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 2003 Act (which established the DWCL), 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;
- Establishing a scheme for those working with vulnerable groups, membership of which enables the ongoing collection of vetting information and assessment for unsuitability to work with those groups;
- Amendments to the 1997 Act to ensure consistency with the provisions in this Bill and to make a number of technical changes to facilitate the operation of Disclosure Scotland;
- Transferring the staff of Disclosure Scotland to the Scottish Administration; and
- Amending the definition of school care accommodation.

7. The Bill requires amendments to orders made under the 1974 Act so that exempted questions may be asked in respect of regulated work. The Scottish Ministers intend to bring forward this, and other secondary legislation in support of the Bill, after enactment in 2007.

8. A section 104 order under the 1998 Act will be required, following enactment of this Bill, in order to implement cross-border and reserved provisions which are required to make the scheme provided by the Bill operate effectively.

Safeguarding Vulnerable Groups Act 2006

9. The Safeguarding Vulnerable Groups Act 2006 received Royal Assent on 8 November 2006. The legislation establishes a vetting and barring scheme for England, Wales and Northern Ireland similar to that being proposed under this Bill for Scotland. This Bill makes provision to: complement the 2006 Act; ensure that both schemes are properly connected; and avoid cross-border loopholes. In addition, section 88 of the Bill provides a power to make further devolved provision by order for the purpose of giving full effect to the 2006 Act or to any future distinct Northern Ireland legislation.

Functions of the Scottish Ministers in the Bill

10. Many of the functions allocated to the Scottish Ministers will be undertaken on behalf of them by civil servants in an executive agency. The agency will be divided, administratively, into two separate elements: Disclosure Scotland and a new Central Barring Unit. The Central

Barring Unit will exercise most of the functions allocated to the Scottish Ministers in Part 1 and Disclosure Scotland will exercise most of the functions in Part 2 as well as continuing with criminal record checks and other functions allocated from the 1997 Act. For the sake of clarity, these explanatory notes refer to the Central Barring Unit and Disclosure Scotland, where appropriate, instead of the Scottish Ministers.

OVERVIEW

11. Part 1 sets out the provisions for the operation of the lists of those individuals who are barred from working with children and protected adults respectively. It provides for the Scottish Ministers (as the Central Barring Unit) to maintain the lists and to determine an individual's unsuitability to undertake regulated work with children or protected adults. Part 1 also provides the courts with duties or powers, in different circumstances respectively, to refer individuals for consideration by the Scottish Ministers for inclusion on the relevant list(s). Criteria for the automatic inclusion of individuals on the lists can be specified by order, made under powers in Part 1. Part 1 also makes provision for appeals and the process for removal from the list.

12. Part 2 sets out provisions for the vetting element of the new vetting and barring scheme, creating three new forms of disclosure certificate as well as making provisions for a scheme detailing all those individuals working in regulated positions with children and/or protected adults. Mechanisms for obtaining and reviewing new information in relation to individuals on the scheme are also set out.

13. Part 4 makes amendments to Part 5 of the 1997 Act other than for the immediate purposes of Parts 1 and 2. It provides for additional information to be included on criminal record (disclosure) certificates, allows application forms to be completed electronically, allows the Scottish Ministers to pay police forces for information provided and makes a number of technical amendments to provisions relating to registration with Disclosure Scotland.

14. Part 5 amends the definition of "school care accommodation services" in the 2001 Act and disapplies some fire safety duties to individuals providing such services on domestic premises.

15. Parts 6, 7 and 8 make supplementary and general provision, interpretation and short title and other supporting provision.

PART 1 – THE LISTS

Section 1. Duty of the Scottish Ministers to keep lists

16. This section establishes two separate lists, one concerning adults and one concerning children. In practice, these will be maintained by the Central Barring Unit.

Sections 2 – 6. Referrals by organisations, businesses, agencies and others

17. Section 2 sets out the grounds for a referral by an employer, employment agency, employment business or professional regulatory body to one or other of the lists. Sections 3, 4

and 5 place duties on organisational employers, employment agencies and employment businesses to make a referral when certain criteria are met. Unlike the 2003 Act, nurse agencies are not explicitly identified but they come within the scope of these provisions.

18. A referral can only take place if at least one of the grounds set out in section 2 has been met. An organisation can only make a referral in respect of the type of regulated work which the individual does. For example, a teacher who is undertaking regulated work with children can only be referred by the education authority, for consideration for inclusion in the children's list, on a ground in section 2(a).

19. The referral grounds at section 2 are identical for both the children's and adults' lists and they have been extended from those set out in the 2003 Act. Referrals can now be made where there has been inappropriate conduct but no harm. A referral can be made on the basis of inappropriate conduct in relation to both pornography and inappropriate conduct of a sexual nature involving a child or a protected adult. The conduct criteria ensure that a referral can be made where an individual has, for example, accessed child pornography. There is an additional criterion in respect of inappropriate medical treatment which would encompass, for example, the sedation of children or protected adults in order to make it easier to manage them, rather than for their own benefit.

20. Some of the grounds for referral rely on the meaning of "harm" and "risk of harm". Section 93 defines harm and risk of harm. The definition of harm makes clear that harm goes wider than physical harm; for example, including threatening behaviour (one type of psychological harm) or harm to the interests of an individual. The definition of risk of harm ensures that the individual does not need to be the direct agent of harm nor does it matter if the individual's actions are ineffective. For example, the firing of a gun at a child which the individual did not know was unloaded would be an attempt to harm under section 93(2)(a) and, therefore, would constitute placing the child at risk of harm.

21. The procedure for organisational referral under section 3 follows that of the 2003 Act. The intention is that the referral should be triggered by an organisation permanently removing an individual from regulated work. Provision is made at subsection (1)(b)(i) to accommodate referral grounds being identified after the individual has otherwise stopped doing regulated work for the organisation, for example of their own accord. A temporary removal, such as a suspension whilst circumstances are investigated, should not lead to a referral and this is made clear by subsection (3).

22. Sections 3, 4, 5 and 8 give the Scottish Ministers the power to prescribe the information which constitutes a referral. The Scottish Ministers will use this power 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.

23. 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 7. Reference by court

24. Section 7(A1) requires that, where a court convicts an individual of a relevant offence, the court must provide any information, as prescribed by the Scottish Ministers, that relates to the convicted individual. Section 11(1A) requires that Ministers must consider an individual for listing in the children's list where that individual has been referred by a court, following a conviction for a relevant offence (relevant offences are only applicable to the children's list and not the adults' list). The prescribed information provided by the court will be used for the purposes of these considerations.

25. Section 7(1) gives the courts a power to refer an individual for consideration for listing where that individual commits any offence other than a schedule 1 offence. The court is required to be satisfied that it may be appropriate for the individual to be listed on one or other or both lists. The Scottish Ministers, as the Central Barring Unit, will consider the court referral (under section 11) as they would any other referral.

26. This is a significant departure from the 2003 Act. Section 10(1) of the 2003 Act gives courts the power to make a referral in the case of any offence against a child (for certain serious offences specified in schedule 1 to that Act the court *must* refer). Where the court makes such a referral, the Scottish Ministers *must* include the individual on the list, i.e. the Scottish Ministers have no discretion in the case of a court referral under the 2003 Act. The individual's right of appeal is also a matter for the courts in the first instance; the individual may only apply to the Scottish Ministers for removal from the list after a time interval set out in section 14 of the 2003 Act, which depends on a number of factors, has elapsed.

27. The 2003 Act requires the court to assess the likelihood of the individual re-offending and applies different tests depending on the age of the individual. Section 10(3) of the 2003 Act provides that where the individual convicted of the offence was under 18 years of age, "*the court may propose to refer the case only if it is satisfied that the individual is likely to commit a further offence against a child*". Note that the court is required to be positively satisfied that the individual will re-offend. Conversely, section 10(4) of the 2003 Act provides for criminals over 18 years of age, "*the court shall not propose to refer the case if it is satisfied that the individual is unlikely to commit a further offences against a child*". The court is therefore required to be positively satisfied that the individual will not re-offend. Section 7 of this Bill, by contrast, requires the court to be satisfied that it may be appropriate for the individual to be listed. This is consistent with the other routes to listing and allows for the full circumstances of the case to be considered by the Central Barring Unit.

Section 8. Reference by certain other persons

28. Section 8 gives the professional regulatory bodies a power to make a referral. It is expected that any incident or behaviour which should trigger a referral will result in the employer, or employing organisation, making the referral. However, there are circumstances in which a proper referral might not be made, for example a negligent employer failing to refer or where an individual has a number of employers and no individual employer is in a position to make a referral. For example, if several education authorities raise concerns with the General Teaching Council for Scotland (GTCS) about a locum teacher, the GTCS may make a referral on the basis of the aggregate information available. Section 8 is therefore designed to enable

relevant professional bodies operating in Scotland or on a UK-wide basis to make a referral where the employer(s) could not, or negligently did not, make a referral in respect of a registered professional.

Section 9. Failure to refer: offence

29. Organisations, employment agencies, nurse agencies and employment businesses commit an offence if they fail to discharge their duty to refer within 3 months from the date that the duty arose. This offence replaces the same offence in the 2003 Act for failing to refer to the DWCL and attracts the same penalty, although the term of imprisonment on summary conviction has been increased from 6 months to 12 months in line with changes being made by the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 (asp 6). No time limit was specified in the 2003 Act.

30. This is one of the more serious offences in the Bill because a failure to refer means that an individual, who might have been barred had their case been considered, can continue to undertake regulated work with children and/or protected adults.

Sections 10 – 13. Consideration whether to list

31. There are four triggers for consideration for listing by the Central Barring Unit. These are organisational referrals and inquiries, for which the 2003 Act made provision, and two new triggers, court referrals under section 7 and vetting information about an individual under section 12.

32. The term “provisional listing” used in the 2003 Act has been discontinued. A listed individual must not undertake regulated work. The term provisional listing is unhelpful because it logically implies that the individual may not undertake regulated work whilst provisionally included on the list. But this is not the case in the 2003 Act (the individual can continue to work), nor is it the case in this Bill. In this Bill, no specific term is defined but the individual is regarded as under consideration for listing in the period between a competent trigger and a determination.

33. The mechanisms of the 2003 Act have been generalised to accommodate two lists and to provide flexibility for triggers in respect of an individual’s conduct in one workforce to lead to consideration in respect of listing on the other. For example, a referral in respect of a health worker undertaking regulated work with protected adults could, depending on the facts and circumstances of the case, result in consideration for listing in the children’s list.

34. Sections 10 and 13 are a development of provision in the 2003 Act.

35. The reference to prescribed information in section 10(1)(a) means that the referral must contain the information required by regulations made under sections 3 to 6 or 8. Section 10 replaces provision made at section 5(1) and (2) of the 2003 Act, which set out the test for provisional listing:

“The Scottish Ministers... on being satisfied...:

- (a) that the reference is not vexatious or frivolous; and*
- (b) that the information submitted to the Scottish Ministers with the reference indicates that it may be appropriate for an individual to be included in the list...*

36. Section 13 has departed slightly from the 2003 Act test for provisional listing at section 6(1)(c), being:

“...it appears to the Scottish Ministers from the report-

- (c) that the person who held the inquiry found that the individual has, at a time when individual was working in a child care position (whether or not in the course of the individual’s work...) harmed a child or placed a child at the risk of harm; and*
- (d) that the individual is unsuitable to work with children.”*

37. The test in section 13 is tied back to the referral ground defined in section 2 which is broader than the harm or risk of harm test.

38. Section 11(1A) means that Ministers must consider listing an individual convicted of a relevant offence (detailed in schedule 1), as opposed to being required to list them automatically after a court referral, as is the case under the 2003 Act. There is no schedule of relevant offences for protected adults corresponding to that for children.

39. Section 11(2) links back to a court referral under section 7. No such provision was required in the 2003 Act because the Scottish Ministers had no discretion to list following court referrals. Note that the Scottish Ministers must be satisfied as to the same matter as the court (compare section 7(1)(b) with sections 11(2)(a) and 11(3)(a)) and, additionally, that the individual does, has done or is likely to do regulated work. This latter element of the test before consideration for listing brings the focus onto the workforce but allows the Scottish Ministers to consider for listing individuals who are not scheme members.

40. The listing process is independent of any appeal against conviction. If the appeal against conviction is successful, it does not follow that the individual will be removed from the list, although the individual could make an application for removal under section 25 on the basis of change of circumstances. Where the individual had been a scheme member prior to conviction, there may be other information on the retained scheme record (retained by the Scottish Ministers using their power at section 58) which should be taken into account.

41. Section 12 connects with the scheme established by Part 2 of the Bill. This trigger is activated by vetting information, as defined at section 46. Where the Scottish Ministers become aware of vetting information about a scheme member in their capacity as Disclosure Scotland (under Part 2), they will consider whether this new information makes the individual unsuitable to work with children or protected adults in their capacity as the Central Barring Unit (under Part 1). (In practice, these decisions will be made by expert panels.)

42. Section 12 also makes provision for a determination relating to one list (whether or not the individual was listed) to lead to consideration for listing in relation to the other list. The intention is to allow the determination panel to refer a case for consideration in relation to the other list. It is expected that information which would lead to consideration for both lists would

be identified earlier in the process but, in some cases, information may only emerge at a late stage or the need for referral to the other list may only become apparent when the determination panel considers specific information or aggregate vetting information.

Section 14. Automatic listing

43. Section 14 requires the Scottish Ministers to place an individual on the children's list or the adults' list where the individual satisfies specified criteria for automatic inclusion. Such criteria will be specified by order, made subject to affirmative procedure in Parliament.

44. The Scottish Ministers intend to use the order making power at section 14(3) to capture historic, serious offences where the court was not able to make a referral at the time of conviction. This would prevent the need for a determination process in relation to, for example, an individual convicted of child rape in 1980.

45. Section 14(4) puts beyond doubt that an individual may be listed automatically following conviction for an offence elsewhere in the UK or as a result of them having been made subject to an order of a specified description imposing requirements about an individual's conduct.

Sections 15 and 16. Inclusion in the lists

46. Section 15 deals with inclusion in the children's list and section 16 deals with inclusion in the adults' list. There is one test no matter what triggered consideration for listing. The tests are therefore different from those in the 2003 Act. The test for listing an individual following an organisational referral (section 5(4) and section 5(5) of the 2003 Act) was that:

“the Scottish Ministers... are satisfied...

(e) that the organisation which, or person who, made the reference reasonably considered the individual to have (whether or not in the course of the individual's work) harmed a child or placed a child at the risk of harm; and

(f) that the individual is unsuitable to work with children.”

47. The test for listing an individual following an inquiry (section 6(3)(a) and (4) of the 2003 Act) was that:

“the Scottish Ministers... are satisfied...

(g) that the person who held the inquiry reasonably considered that the individual has, at a time when individual was working in a child care position (whether or not in the course of the individual's work) harmed a child or placed a child at the risk of harm; and

(h) that the individual is unsuitable to work with children.”

48. The tests in sections 15 and 16 take account of three developments in the listing process. Firstly, there is a wide range of triggers for consideration for listing, including the discretionary court referral (section 11) and vetting information trigger (section 12), neither of which exist in the 2003 Act. Secondly, the referral ground at section 2 goes wider than harm or risk of harm. Thirdly, the Scottish Ministers are to be able to consider listing an individual for unsuitability to work in one workforce because of an incident which took place in the other (as provided for by

section 12(1)(a)(ii) and (2)(a)(ii)), so the final listing test is not linked uniquely to one vulnerable group.

Sections 17 – 20. Information relevant to listing decisions

49. The Central Barring Unit may use a number of sources of information as part of considering an individual for listing. The 2003 Act, and the 2004 Determination Regulations (S.S.I. 2004/523) made under section 8 of that Act, make detailed provision for the determination of cases. An important principle enshrined there and carried over to this Bill is that the individual being considered for listing should have the opportunity to comment on all information which will be considered by the determination panel. Section 17 of the Bill re-establishes the basic procedure and the Scottish Ministers intend to use section 39 to set out the detailed determination procedure.

50. Unlike the 2003 Act, section 17(2)(b) and (c) provide for the Scottish Ministers to consider information beyond that which led them to begin their consideration. Most importantly, the Scottish Ministers can now consider vetting information alongside any referral.

51. Section 18 effectively allows the Scottish Ministers as the Central Barring Unit to ask the Scottish Ministers as Disclosure Scotland to provide a scheme record (see section 45) for the purposes of making a determination. Subsections (1) and (2) give the Scottish Ministers access to relevant non-conviction information and subsection (4)(a) will, in practice, be used to access criminal convictions on the Criminal History System (which will be operated by the Scottish Police Services Authority from 1 April 2007) and information relating to convictions and cautions on the Police National Computer.

52. The Scottish Ministers will no longer be able to receive sensitive information in their capacity as Disclosure Scotland for passing to employers only (for the purposes of this Bill). Under current arrangements, the police can provide Disclosure Scotland with a sealed envelope to go to an employer, but not an individual, as part of the enhanced criminal record certificate check. This practice is not continued because the Scottish Ministers will now be using all the information they receive from the police when considering an individual for listing. The individual cannot make effective representation, or meaningfully appeal a decision to list, if he does not have access to all the information used in making that determination.

53. Section 19 gives the Scottish Ministers the power to obtain information from other Scottish and UK-wide public bodies when deciding whether to list an individual. For example, a referral about a doctor from a Health Board might cause the Scottish Ministers to require further information from the General Medical Council. Subsection (2) gives the Scottish Ministers the flexibility to ask about the individual's performance of his or her duties (paragraph (a)) and to put that in the context of, for example, more general child protection policies (paragraph (b)), allowing benchmarking, for example.

54. Section 20 gives the Scottish Ministers the power to obtain information from employers and employment agencies with an involvement with the individual. There is an offence of failing to provide the required information.

Sections 21 – 24. Appeals against listing

55. These sections broadly reproduce provision made at section 15 of the 2003 Act and extend provision to the adults' list. They make provision for appeal on being listed into the court system.

56. Sections 21 and 22 provide for a three-month time limit for appealing to the sheriff after being placed on either list. Section 23 provides for appealing the sheriff's decision to the higher courts.

57. There are two significant departures from the 2003 Act. Appeal to the Court of Session is now restricted to points of law at section 23(2) of the Bill. Section 24(2) clarifies that any court proceedings in respect of these appeals may be heard in private.

58. Section 24(1) makes clear that no finding of fact on which a conviction is based may be challenged on appeal under the preceding sections. This means that the behaviour or conduct of the individual, as found by the convicting court, cannot be re-opened during an appeal against listing.

Sections 25, 25A and 26. Removing individuals from the lists

59. Sections 25, 25A and 26 broadly reproduce provision made at section 14 of the 2003 Act except that the application for removal goes to the Scottish Ministers in the first instance.

60. Section 25 gives the listed individual the power to apply to the Scottish Ministers for a review of his or her listing. Such an application is only competent if the individual has been listed for a prescribed period or if the individual's circumstances have changed.

61. The Scottish Ministers intend to make regulations under section 25(3)(a) which will specify the time period after which an individual can apply to be removed from the list(s). Section 25(3)(a) makes clear that this time period may begin on a date other than the date of listing itself (for example with the event which led to inclusion on the list). The power to prescribe a minimum time period, before an application for removal is competent, may be used to allow individuals who were listed whilst under the age of 18 to apply for removal from the list after a shorter period compared to those listed when over the age of 18. The Scottish Ministers intend to use this power to prescribe time limits similar to those in the 2003 Act but taking account of the changes to the procedures for court referrals made in this Bill (sections 7 and 11) and the new vetting information route to consideration for listing (section 12).

62. Section 25A provides that the Scottish Ministers must remove the individual from the list if satisfied that the individual is no longer unsuitable to undertake that type of regulated work.

63. Section 26 sets out the procedure for appealing the Scottish Ministers' decision in relation to application for removal from the list. This procedure mirrors that at section 23 in respect of appeals against initial listing decisions and, again, any such court proceedings may be held in private.

Section 27. Late representations

64. Where an individual could not engage with the consideration for listing process because the Scottish Ministers could not locate him (and he thereby forfeited his right to make representation at the time, section 17(1) and (6)), the Scottish Ministers must consider late representations from that individual. The details of the determination procedures will be set out in regulations made under section 39.

Section 28. Removal from list

65. Section 28(1)(a) provides for removing individuals from the list following successful appeals or applications for removal. Subsection (1)(b) makes provision similar to that at section 1(3) of the 2003 Act. This power may be used to enable an administrative mistake to be corrected, for example including the wrong John Smith on the list.

Section 29. Notice of listing etc.

66. All individuals included on a list under this Bill are barred from undertaking that type of regulated work. However, an individual may be barred from regulated work because of inclusion on another list in a different jurisdiction deemed to be equivalent by the Scottish Ministers (see section 92). Section 29 requires the Scottish Ministers to notify an individual, all relevant employers and regulatory bodies of the fact that the individual is barred from undertaking regulated work (whether or not that barring originates from being included on a list under this Bill), Details may also be provided relating to the circumstances that led to the individual being barred, as the Scottish Ministers think appropriate. The same duties apply to consideration for listing and any subsequent determination not to list the individual.

Section 30. Relevant inquiries

67. 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. (Note that the Tribunals of Inquiry (Evidence) Act 1921 has been superseded by the Inquiries Act 2005.)

Section 31. Relevant offences etc.

68. Section 31(1) defines "relevant offence" for the purposes of Part 1. A relevant offence is one included in schedule 1. Under section 7, a court is required to refer to the Scottish Ministers an individual who is convicted of a relevant offence and the Scottish Ministers are required to consider that individual for listing. (Under section 7, the courts also have a power to make a referral in respect of a conviction for any other offence.)

69. Section 31(2) provides the Scottish Ministers with an order-making power to amend schedule 1 so as to modify the list of offences which constitute relevant offences.

70. Section 31(3) and (4) makes provision similar to that at section 10(11) and (12) of the 2003 Act, which provides that a referral should be made even if the court acquitted the individual on the grounds of insanity, makes a finding under section 55(2) of the 1995 Act or makes an order mentioned in section 57(2)(a) to (d) of the 1995 Act. An order under section 57 would

include, for example, compulsion orders made under the Mental Health (Care and Treatment) (Scotland) Act 2003.

Section 32. Duty to notify certain changes

71. Individuals on either list are required to provide the Scottish Ministers with any change in the individual's name, address or gender within one month of such change taking place. It is an offence to fail to do so. There is no equivalent provision in the 2003 Act. This is intended to help to prevent a listed individual from changing their identity and attempting to re-enter the workforce. (Section 47 creates a similar duty on scheme members but with a longer timeframe and a lower penalty.)

Sections 33 – 36. Offences relating to regulated work

72. Sections 33 to 36 reproduce provision from section 11 of the 2003 Act covering offences committed by individuals, organisations and personnel suppliers in respect of barred individuals undertaking regulated work. The term of imprisonment on summary conviction has been increased from 6 months to 12 months (section 36). These are the most serious offences in relation to the scheme since they concern unsuitable individuals accessing vulnerable groups through their work which is what this legislation is designed to prevent.

73. Section 33 deals with offences committed by the barred individual. It is an offence for them to undertake any regulated work. It is a defence for that individual if they did not know, and could not reasonably know, that they were barred. This defence existed in the 2003 Act and covers scenarios such as the individual never receiving notification of being barred. There is a new defence of not knowing that the work was regulated work. In some situations, especially in respect of working with protected adults, it may be quite complicated to determine whether the work is regulated work or not and an employer might falsely reassure the individual that the work was not regulated work.

74. Sections 34 and 35 deal with offences committed by organisations and personnel suppliers in using or supplying barred individuals for regulated work. As in the 2003 Act, it is a defence for them not to know that the individual was barred from undertaking regulated work. Such a defence might be used if an individual presented them with a forged certificate and ID, perhaps impersonating a different individual. Note that the defence of not knowing that the work was regulated work does not apply here.

75. Section 35(1)(b) protects a personnel supplier from being misled by the organisation to which it is supplying workers. For example, if an events organiser asks a personnel supplier to provide kitchen staff for a conference, those positions would not normally be considered regulated work. If the events organiser then diverts one of the people provided by the personnel supplier to work in the creche (normally regulated work with children), then the personnel supplier is not responsible for the consequences if it transpires that the individual is barred from regulated work with children. This is provided, of course, that the personnel supplier did not know, or have reason to believe, that the individual supplied would be used for regulated work with children.

76. Note that personal employers do not commit an offence by employing a barred individual to do regulated work but, under section 33, the barred individual would be committing an offence by accepting such work.

Section 37. Police access to lists

77. Section 37 gives the police access to the lists and any other information, contained in the lists, which Ministers consider should be disclosed. Information that is likely to be disclosed is information which helps confirm the identity of the individual included on the lists. The police might, for example, store information about the addition or removal of an individual from either list on the Criminal History System. It is intended that police access to the lists will make it easier for them to investigate suspected offences under this Bill.

Section 37A. Restriction on listing in children's list

78. Section 37A(1) allows the Scottish Ministers not to include an individual in the children's list where that individual is already barred from regulated work with children as a result of them having been included on the children's barred list maintained under section 2 of the 2006 Act. An individual so included is already barred from undertaking regulated work with children in Scotland by virtue of section 92.

79. Section 37A(2) allows the Scottish Ministers not to consider an individual for inclusion on the children's list where it is more appropriate that the individual be considered for listing by the Independent Barring Board (IBB) under the 2006 Act (or where subsection (3) below applies). It is expected that this will apply to situations where the individual does regulated work in Scotland and elsewhere in the UK and the incident which triggers consideration for listing occurs outside Scotland.

80. Section 37A(3) allows the Scottish Ministers not to consider an individual for listing in the children's list where the IBB has already considered whether the individual should be included in the corresponding list, and decided not to include the individual. In such cases, the Scottish Ministers would be expected to consider the individual for listing only if there was new information available which was not available to the IBB at the time the IBB considered whether to list the individual.

Section 37B. Restrictions on listing in adults' list

81. Section 37B makes identical provision to section 37A, except in respect of the adults' list.

Section 38. Protections from actions for damages

82. Section 38 ensures that the decision to list, or not to list, an individual or information provided for such consideration cannot be the subject of proceedings for loss or damage. This section builds on section 9 of the 2003 Act which makes provision for protection from actions for defamation. This means, for example, that a teacher who loses his job after being listed cannot sue the Scottish Ministers for loss of earnings, whether or not the decision to list is upheld on appeal. However, an information provider who, knowingly or recklessly, provides untrue or

misleading information is not protected from actions for damages. For example, an employer who makes malicious claims in support of a referral is not protected under section 38(1).

Section 39. Power to regulate procedure etc.

83. This section allows for the details of the determination procedure that will be undertaken by the Central Barring Unit to be set out in secondary legislation. This provision is broadly equivalent to the powers at section 8 of the 2003 Act. Subsection (1)(b) enables the regulations to deal with the maintenance of the lists (e.g. the updating of the lists in consequence of information received under section 32).

Section 40. Transfer from 2003 Act list

84. This section provides for all individuals currently listed on the Disqualified from Working with Children's List under the 2003 Act, to be transferred to the children's list established in section 1 without any further determination. However, any listed individual can make an application to the sheriff under section 25(3) to the effect that their circumstances had changed, if they considered that the transfer made a material difference. The only individuals who would be immediately affected by such a transfer are those currently in a post which is not regarded as a child care position under the 2003 Act but is regulated work with children under this Bill. There were 84 individuals listed as at 9 June 2006 (after 17 months of operation) and it is unlikely that many will be so affected.

85. The time limits for applications for removal from the lists (previously specified in section 14 of the 2003 Act) can be prescribed by regulations made using the power in section 25(3)(a). The Scottish Ministers intend to make regulations, as necessary, which will ensure that no individual has to wait longer for their first opportunity to apply for removal, after commencement of this Bill, than they would have had to wait had they not been transferred from the DWCL under the 2003 Act.

PART 2: VETTING AND DISCLOSURE

Sections 41 and 42. The scheme and participation in it

86. Section 41 establishes the scheme and section 42 gives individuals the right to apply to the Scottish Ministers to join the scheme. In practice, Disclosure Scotland will administer the scheme on behalf of the Scottish Ministers. It is important to note that being a scheme member in relation to regulated work with children or protected adults is mutually exclusive to being barred from working with that same group. An individual cannot simultaneously be a scheme member and barred in respect of the same workforce. However, an individual can be barred from one workforce and a scheme member in respect of the other.

87. Participation in the scheme is not mandatory. There are no offences for undertaking regulated work whilst not a scheme member. However, the only way an employer can be sure that an individual is not barred from regulated work (and therefore be sure that he is not committing an offence in employing that individual) is by requesting a disclosure record. Enhanced disclosure checks will no longer be available for those undertaking regulated work

with children or protected adults. The only way a disclosure record can be generated is through the individual applying to join the scheme or already being a member of the scheme.

Section 43. Statement of scheme membership

88. It is intended that application to join the scheme will be linked to an application for a disclosure request (either a disclosure of scheme record under section 49 or a disclosure of scheme membership under section 51). This can be achieved by combining the applications on one form.

89. The only exception is where an individual joins the scheme without any employer, for example in anticipation of taking up regulated work in the near future. In that case, the individual will receive a statement of scheme membership and no other person will receive any information.

Sections 44 – 46. Scheme members, records and vetting

90. Application by an individual to become a scheme member will lead the Scottish Ministers, as Disclosure Scotland, to make enquiries to see whether any vetting information exists about that individual. Section 46 sets out what constitutes vetting information. Subsections (1)(a) and (c) relate to police information: conviction information from the Criminal History System and the Police National Computer and relevant non-conviction information from chief constables. Unlike the present situation where the test for relevance for non-conviction information is made against each post, under the Bill there will only be two relevance tests: one for each type of regulated work. Subsection (1)(b) provides that whether an individual is on the sex offender's register will also constitute vetting information.

91. Section 46(1)(d) provides a power for the Scottish Ministers to prescribe other information as vetting information. The Scottish Ministers intend to use this power to prescribe certain information held by regulatory bodies and local authorities. For example, registration or de-registration with the General Teaching Council for Scotland may be vetting information.

92. Any vetting information which is found by Disclosure Scotland will be passed to the Central Barring Unit for consideration. It is anticipated that in over 90% of cases no information will be found at all. In cases where vetting information is found, it will be included on the individual's scheme record. However, in many cases it will not be relevant for the Central Barring Unit and it will not be necessary to begin a formal consideration for listing. For example, a driving conviction would be classed as vetting information and would appear on the scheme record under section 45. However, in many circumstances, it will not be relevant information and would be discounted without any consideration for listing.

93. Section 44(2) requires the Scottish Ministers to make arrangements for the ongoing monitoring of vetting information for scheme members. As far as possible, this will be automated. The expectation is that the Scottish Ministers, as Disclosure Scotland, will be reactive rather than proactive because the information provider will trigger action. For example, any change to an individual's record on the Criminal History System will trigger a search of the register of scheme members held by Disclosure Scotland to see whether the individual is also a

scheme member. It is planned to make similar connections with the registers of members held by professional regulatory bodies so that any individual struck off will be checked against the register of scheme members. In the longer term, local authorities will notify Disclosure Scotland of vetting information. For example, when a child is added to the child protection register, the parents' names could be checked on the register of scheme members. This section allows the Scottish Ministers to make arrangements in this way.

94. Any new vetting information will be added to the scheme record. New relevant information will trigger a consideration for listing.

95. Section 44(4), among other things, provides protection against any breakdown in procedures or communications. If information does not show up when it should, it can be considered later. For example, if there is a delay in entering conviction information on to the Criminal History System, it can be treated as new vetting information when it is discovered.

Section 47. Duty to notify certain changes

96. This section makes it an offence for a scheme member to fail to notify the Scottish Ministers that they have changed name or gender within 3 months of these changes taking effect. Section 32 makes similar provision for listed individuals. Paragraph (1)(c) gives the Scottish Ministers the power to prescribe other information. This power could be used to prescribe change of address, although it is intended that such information will be captured through the disclosure application process.

97. Applications for a disclosure certificate under the 1997 Act require the applicant to provide address information for the five years preceding the application, as well as information on names and gender. This information allows the identity of the applicant to be verified and the address information enables the appropriate police forces to be contacted for relevant information. This is particularly important where the applicant has lived outside Scotland for any length of time.

98. For the scheme to work effectively, this information needs to be provided on an ongoing basis so that the Scottish Ministers can be sure of the individual's identity and continue to collect vetting information from the appropriate sources.

Section 48. Correction of inaccurate scheme record

99. This section places a duty on the Scottish Ministers as Disclosure Scotland to correct any scheme record where they are satisfied that the information included in it is inaccurate. This duty arises: following a request by a scheme member for correction; notification of a change by a scheme member under section 47; or otherwise. A corrected scheme record should subsequently be provided to the individual that is the subject of the record as well as any organisation for which the individual is doing regulated work and to which a copy of the inaccurate record has previously been disclosed. Section 48(4) puts beyond doubt that a request by a scheme member for correction may relate to any non-conviction information that is provided by the police. Where such an application for review is made, the Scottish Ministers must, under section 48(5), request that the relevant Chief Constable reconsiders whether the information provided is still

relevant. Section 46(6) puts beyond doubt that information is to be regarded as inaccurate whether it is found to have always been inaccurate or has subsequently become inaccurate.

100. This duty on Ministers will apply where, for example, information about the wrong John Smith was included in a scheme record or where John Smith changes his name to Joe Bloggs and notifies the Scottish Ministers under section 47.

Sections 49 – 52. Disclosure records

101. The mechanism for disclosure of scheme records and short scheme records is designed to operate in much the same way as the disclosure of enhanced criminal record certificates under the 1997 Act. Organisational employers are to be able to request either a scheme record or a short scheme record provided that all the disclosure conditions (A-D) set out at section 52 are met. Personal employers are to be able to ask for a disclosure of scheme membership as at section 51. This is a new provision which is not provided for in the 1997 Act.

102. In all three cases (disclosure of scheme record, short scheme record and scheme membership), the scheme member must authorise the disclosure (condition A). In all cases, there is an employer who will receive a copy of the disclosure. Condition A prevents unauthorised disclosure (i.e. a request by an employer without the permission of the scheme member).

103. The scheme member must participate in the scheme in relation to the type of regulated work to which the disclosure request relates (condition B). For example, a scheme member cannot obtain a disclosure in respect of the children's workforce if he is only a scheme member in respect of the adults' workforce (unless he applies to join the scheme in respect of working with children).

104. The employer must declare that the disclosure is for employment in the relevant workforce (condition C). The involvement of the employer in the process is a deterrent to employers outside the regulated workforce coercing an individual to join the scheme. They would be making a false declaration and committing an offence under section 65. Amendments will be required to the Exclusions and Exceptions Order (S.S.I. 2003/231) made under the Rehabilitation of Offenders Act 1974 to ensure that all posts within the definition of regulated work are exempted from the provisions of that Act.

105. Condition D applies only to scheme record disclosures and short scheme record disclosures because only they contain or make reference to vetting information. Condition D is rather like the requirement to countersign an application for an enhanced criminal record certificate.

106. It is expected that those individuals working for organisational employers (e.g. a teacher working for an education authority) will apply for scheme membership and a scheme record disclosure simultaneously. For any subsequent employment with any organisation, that individual can request a short scheme record which will identify whether there is any new information since the scheme record was disclosed. If that individual also wanted to do private

work for personal employers (e.g. one-to-one language classes in the evenings), that individual could request disclosure of scheme membership for that purpose.

107. Any individual working for personal employers can only request disclosure of scheme membership.

Section 53. Crown work

108. This section allows disclosures to be made for Crown work.

Section 54. Disclosure restrictions

109. There are no restrictions on disclosure of information provided by the police to the Scottish Ministers since they will only provide information which they are content to be disclosed to the individual and any employer. All police information provided to the Scottish Ministers (as Disclosure Scotland) will be used in any consideration for listing (by the Scottish Ministers as the Central Barring Unit).

110. 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. This power enables the Scottish Ministers to keep sensitive information on the scheme record without disclosing it to employers. Such sensitive information would, of course, have to be disclosed to the individual as part of any consideration for listing.

111. Section 54(2) and (2A) restrict the disclosure of information on, or information about additions or deletions to, a scheme record to information provided for the purpose of assessing the individual's suitability for that type of regulated work. In many cases, information will be relevant to both types of regulated work. However, there may be information, for example released by the police when applying the relevance test for working with protected adults, which they would not have released when applying the relevance test for working with children.

Sections 55 – 58. Removal from scheme

112. Section 55 places a duty on the Scottish Ministers (as Disclosure Scotland) to remove an individual from the scheme where that individual has been placed on the relevant list or is barred as a result of being listed in another jurisdiction. Section 55(2) provides a possible sanction for failing to pay an annual subscription, or other fee, if such arrangements were made under section 67.

113. Section 56 places a duty on the Scottish Ministers to remove an individual from the scheme if an individual asks to be removed and is no longer carrying out that type of regulated work. As a matter of administrative practice, the Scottish Ministers will remove individuals from the scheme on being informed of their death and satisfied that this is so.

114. Section 57 concerns notice of removal. If an individual is listed or barred they will already be notified under section 29. If they have withdrawn from the scheme at their own

initiative under section 56, they will know about it. However, this section covers other possible reasons for being removed from the scheme such as non-payment of fees, expiry of membership, or an irregularity which later comes to light concerning the application to join the scheme. In some circumstances, an individual might be removed from the scheme (but not listed) whilst still undertaking regulated work, in which case section 57(1)(a) allows for employers and regulatory bodies to be informed.

115. Section 58(1) gives the Scottish Ministers the power to retain scheme records in relation to individuals after removal from the scheme.

116. Section 58(2)(a) prevents the Scottish Ministers from continuing to make enquiries in relation to vetting information about an individual or disclosing the retained record.

Sections 59 – 61. Evidence of identity

117. In order to join the scheme or request disclosures, it will be necessary for Disclosure Scotland to verify an individual's identity. If sufficient evidence is not provided, Disclosure Scotland will not be obliged to consider such requests.

118. Section 60 allows the Scottish Ministers to use fingerprints to check an applicant's identity. This provision builds on current provisions in Part 5 of the 1997 Act. It does not mean that every applicant will have to submit fingerprints in support of their application.

119. Under the current provisions, fingerprints have only been required around 400 times since Disclosure Scotland began in 2002 (out of just over 1.5 million applications for disclosure certificates). Disclosure Scotland carry out checks to ensure that the applicant is the person they claim to be. However, there are occasions where somebody might give another person's details when arrested or where the applicant has a very similar name, date of birth and address history as an entry on the criminal history system. In these circumstances, a criminal record may potentially be attributed to the wrong person during a disclosure check. The Criminal History System uses fingerprints to link a criminal record to the individual. Disclosure Scotland can therefore use fingerprint identification to confirm whether or not the applicant is the same person as the one with the criminal record, thereby ensuring that a criminal record is not wrongly attributed.

120. Section 60(2) ensures that any fingerprints taken for the purposes of confirming the identity of applicants to the scheme, or existing scheme members, must be destroyed as soon as is reasonably practicable after the prints have been used for their intended purpose.

121. Section 61 gives the Scottish Ministers the power to use information held by: the Identity and Passport Service (formerly known as the UK Passport Agency); the Driver and Vehicle Licensing Agency; and the Department for Work and Pensions (National Insurance numbers) for the purposes of checking evidence of identity. Section 61(2) gives the Scottish Ministers the power to prescribe other persons holding data.

Sections 62 – 66. Offences relating to vetting information

122. These offences are designed primarily for the purpose of protecting personal and sensitive information about individuals rather than the exclusion of barred individuals from the regulated workforces. Therefore, they attract an intermediate level of penalty as set out at section 66. They build on already existing penalties and offences for disclosure information under Part 5 of the 1997 Act, but focus on misuse of scheme information, i.e. information about individuals working or intending to work with children or protected adults.

123. Section 62 creates the offence of falsifying a disclosure record. It mirrors the offences relating to falsifying criminal record certificates in the 1997 Act. Where a barred individual falsifies a disclosure record to access regulated work, that individual would be committing this offence *and* the offence at section 33. Reasons why an individual might attempt to falsify a disclosure record include to avoid the fee or because of embarrassment over some historic incident or conviction.

124. Section 63 makes it an offence for a person to disclose to others disclosure records which have been disclosed under section 49, 50 or 51. These offences are needed to ensure that the sensitive information contained in the scheme record is not shared unnecessarily. The section also recognises that it may be necessary to share the record with other employees, members and office holders within an organisation or where the disclosure has been requested on somebody else's behalf, and the section exempts such sharing from the scope of the offence.

125. Section 65 provides further clarification of the section 63 offence by setting out in subsection (1) the circumstances in which it is not an offence to disclose disclosure information. Subsection (2) makes clear that the record should only be shared for the purposes of enabling the employer to determine suitability for regulated work. This is an important safeguard to ensure that employers only share disclosure information for legitimate purposes.

126. Section 65(1)(a) makes clear that a scheme member may disclose their own disclosure record. So, for example, a disclosure of scheme membership obtained under section 51 by a scheme member in respect of one personal employer may be shown by that scheme member to other personal employers. For example, a private dance teacher who is teaching a class of 20 children each Wednesday evening might be asked to obtain a statement of scheme membership by one of the parents. There is nothing to prevent that dance teacher showing the statement of scheme membership to every parent; there is no requirement to generate 20 disclosures of scheme membership, one for each parent, although this would be permitted.

127. Section 64 makes it an offence for anyone to attempt to see a disclosure record, or to use such a record other than for the purpose of checking an individual's suitability for regulated work. Section 64(1) creates an offence designed to prevent employers who cannot legitimately ask for a record because they are not engaged in regulated work from requiring an individual to share the information on the record. For example, it would normally be an offence for a garage owner to ask mechanics in his garage if he could see their disclosure records, if they had obtained them for other purposes, since car repair work is not (normally) regulated work. Section 64(4) limits the offences to the disclosure record itself and not information contained on the record.

128. Section 64(3)(b) broadens the permitted purpose for which it is not an offence to request provision of, or to otherwise seek sight of, a disclosure record. A person ('Z') who is not the employer of the individual can ask to see a disclosure record without committing an offence in respect of individuals who are doing regulated work for a contractor. For example, where a council contracts school bus services, the bus driver is employed by the bus company and Z is the council. This subsection means that the council would not be committing an offence in asking to see the bus driver's scheme record disclosure, but the request can be refused by the bus driver.

Section 67. Fees

129. This section provides the Scottish Ministers with a 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 scheme membership. 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)(za) puts it beyond doubt that the Scottish Ministers have the power to charge different fees in different circumstances, for example to offer some types of disclosure record at a discount if the scheme member has already paid for disclosure before. The power at subsection (2)(b) could be used to provide free checks for volunteers in voluntary organisations. (An alternative is for the fee to be charged and then explicitly reimbursed as now.) Section 67(3) allows Disclosure Scotland to refuse to deal with applications unless and until the fee is paid.

130. The Scottish Ministers could, for example, 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 could be charged for any scheme record and any statement of scheme membership issued on joining the scheme. Short scheme records and subsequent statements of scheme membership could attract a lower level of fee. Scheme membership will expire 10 years after the later of (a) joining the scheme or (b) the last scheme record disclosure.

Section 68. Forms

131. This section allows Disclosure Scotland to set out the forms for applications for scheme membership or a disclosure record administratively. Under the 1997 Act, the Scottish Ministers are required to make changes to the application form for criminal record certificates and enhanced criminal record certificates in regulations. Section 83 brings the 1997 Act into line with section 68.

Section 69. Procedure

132. 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.

133. The power at section 69(2)(c) 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 Disclosure Condition A in section 52.

Section 69A. Consideration of suitability: supplementary

134. Section 69A makes explicit what constitutes considering an individual's suitability to do, or to be offered or supplied for, any type of regulated work. In particular, this consideration goes beyond employment (paragraph (a)) and employment agencies and businesses (paragraph (b)). Paragraphs (c) to (e) allow the General Teaching Council for Scotland, the Scottish Commission for the Regulation of Care and the Scottish Social Services Council to request disclosure records. Disclosures can already be obtained for these purposes under the 1997 Act. The power at section 69A(f) provides further flexibility by giving the Scottish Ministers the power to prescribe more circumstances in which disclosure records can be obtained. This power may be used to prescribe certain contractual relationships.

Section 70. Delegation of vetting and disclosure functions

135. This section allows the Scottish Ministers to delegate their vetting and disclosure functions (as Disclosure Scotland) in respect of Part 2 of the Bill. The Scottish Ministers may not delegate their listing functions (as the Central Barring Unit) under Part 1. Ministers may not delegate any order or regulation-making functions, the specification of forms under section 68 nor the power to determine the appropriate fee for information from police authorities under section 71(4). This section provides the flexibility to make contractual arrangements for routine information gathering functions but not any determinations in respect of individuals (because those are functions under Part 1 not this Part). The Scottish Ministers' intention is that the majority of their functions in both Parts 1 and 2 will be carried out by civil servants in the new executive agency which does not require any formal delegation of functions.

Section 71. Sources of information

136. Subsection (1) has the effect of requiring the Scottish Police Services Authority to give the Scottish Ministers access to the Criminal History System. Subsection (2) requires police forces to provide non-conviction information as requested. Subsection (3) prevents vetting information (under section 46) from the police including information which should not be disclosed to the scheme member because it would be contrary to the interests of the prevention of detection of crime. Subsection (4) obliges the Scottish Ministers to pay police authorities for information. Section 71(5) ensures that the Scottish Ministers are not liable for erroneous information provided to them by the police.

137. This section will be extended by a section 104 order, under the 1998 Act, to cover police forces in England and Wales and Northern Ireland in respect of the Police National Computer and other police information from non-Scottish forces.

Section 71A. Police access to Scheme information

138. Section 71A requires the Scottish Ministers to share certain details relating to those individuals who have joined the scheme, with Chief Constables of police forces and the Scottish Police Services Authority. Scheme membership information will be used by the police to assist them in identifying individuals. The section also enables scheme information to be used by the police for the purposes of: their functions under Part 2 in passing information to the Central Barring Unit re considering individuals for listing; preventing and detecting crime; and apprehending or prosecuting offenders.

Section 72. Statements of scheme membership: disclosure of whether individual under consideration for listing

139. Section 72 places a 6-month limit on the disclosure of the fact that an individual is under consideration for listing.

140. A statement of scheme membership (defined at section 43) normally includes whether the individual is subject to consideration for listing in respect of the type of regulated work to which the disclosure request relates. This is similar to the current position where, under article 13(1)(a)(ii) of the Police Act 1997 (Criminal Records) (Scotland) Regulations 2006 (S.S.I. 2006/96), an enhanced disclosure will include whether an individual is provisionally listed.

141. The 2003 Act (section 7) requires the Scottish Ministers to apply to the sheriff for an extension of a period of provisional listing beyond 6 months but does not limit the time taken to reach a decision. If the period expires without extension, the individual is removed from the list and the individual's enhanced disclosure will no longer state that he or she is provisionally listed. In practice, this has the effect of ensuring that cases are determined within this period.

142. Section 72 therefore has a similar effect to section 7 of the 2003 Act in relation to the disclosure of whether an individual is being considered for listing. But subsections (3A) to (3E) ensure that more than one extension can be granted and that an application for extension can be made right up to the expiry of the relevant period, and this is sufficient for the relevant period to be treated as not having expired until the application is determined.

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

Section 82. Information in criminal conviction and record certificates

143. Section 82 requires Disclosure Scotland to state on certificates that are issued under Part 5 of the 1997 Act whether or not a person is subject to the notification requirements under Part 2 of the Sexual Offences Act 2003. Under the existing provision, this information can only be included as additional information on enhanced certificates at the discretion of the Chief Constable. Under this provision, there will be no discretion and this information will always be included on the face of a disclosure certificate whilst the notification requirements remain live.

144. In addition, the Scottish Ministers are given a power to prescribe civil orders that should be included routinely on standard and enhanced certificates. It is expected that this will be used

for Sexual Offences Prevention Orders and Risk of Sexual Harm Orders in the first instance. 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).

Section 83. Form of Part 5 applications

145. Section 83 allows the Scottish Ministers to determine the application form for disclosures under Part 5 administratively. This brings procedures into line with those for disclosure records under Part 2 of the Bill. It also allows standard and enhanced disclosure certificates (which require a countersignature) to be processed electronically which is in line with the wider policy for e-Government.

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

146. Section 84 amends Part 5 of the 1997 Act to make it clear that when Disclosure Scotland make requests under subsection 113B(4) or (5) to: the States of Jersey Police Force; the salaried police force of the Island of Guernsey; the Isle of Man Constabulary; or a body outside the British Islands who are a police force and whom the Scottish Ministers prescribed for the purposes of Part 5, that Disclosure Scotland must pay a fee in respect of information received.

Section 85. Regulations about registration

147. Section 85 makes further amendments to Part 5 of the 1997 Act in relation to the conditions that apply to the register held under section 120 of the 1997 Act. Firstly, Disclosure Scotland can refuse to include a person on the register if they believe that that person is likely to countersign less than a minimum number of applications each year and, secondly, to remove a person who is already on the register if he or she countersigns less than a minimum number of applications each year. The figure for each circumstance will be prescribed in regulations.

PART 5: MEANING OF “SCHOOL CARE ACCOMMODATION SERVICE”

Section 86. Meaning of "school care accommodation service"

148. Section 86 makes amendments to the 2001 Act to change the definition of “school care accommodation service” as defined in that Act. Section 2(4) of that Act currently reads,

- (4) *A "school care accommodation service" is a service which is provided to a pupil by an education authority or the managers of an independent or grant-aided school, or by any person under arrangements made by any such authority or managers-*
- (a) *for the purpose of the pupil being in attendance at a public, independent or grant-aided school; and*
 - (b) *which consists of the provision, in a place in or outwith the school, of residential accommodation,*
- but a service may be excepted from this definition by regulations.*

149. The effect of the changes is twofold. Firstly, where arrangements are made by an education authority or managers of an independent or grant aided school for the pupil to stay in

someone's home, the service will be regarded as being provided by the authority/managers. It will therefore be for the education authority/managers to register the service rather than the individual providing the accommodation. Secondly, the new definition makes clear that accommodation provided only in the holidays will also be covered by the definition, if it is provided for the purpose of, or in connection with, the pupil's attendance at school.

Section 86A. Application of fire safety rules to school care accommodation service

150. Section 86A disapplies the fire safety duties under Part 3 of the Fire (Scotland) Act 2005 to individuals providing a school care accommodation service to pupils on domestic premises under an arrangement with an education authority or managers of an independent or grant-aided school.

PART 6: SUPPLEMENTARY AND GENERAL

Section 87. Transfer of Disclosure Scotland staff etc.

151. Disclosure Scotland is currently staffed by a mixture of employees from Strathclyde Joint Police Board and contractors for BT plc. This section sets out the arrangements for the transfer to the Scottish Administration of those staff employed by Strathclyde Joint Police Board who currently work in Disclosure Scotland. Under this section the Scottish Ministers may make a "staff transfer order" to effect this transfer. This section could be used to transfer other staff of the Strathclyde Joint Police Board (other than constables) but there is no intention to do so.

152. Subsections (4) to (9) concern employees of Strathclyde Joint Police Board who are subject to a staff transfer order. Subsections (4) to (6) provide that contract rights and obligations transfer from the former employer to the Scottish Ministers on the transfer date. Subsection (7) provides that employed staff may object in advance of their contract being transferred to the Scottish Ministers, in which case their contract is terminated at the end of the day before the intended transfer day. This termination will not be treated as dismissal of a person. Subsection (8) provides that an employee can terminate their contract of employment if they can show that a substantial detrimental change has been made to their working conditions.

153. Previously, it had been intended that Disclosure Scotland staff would transfer to the Scottish Police Services Authority on 1 April 2007, together with the remainder of the Scottish Criminal Records Office. Paragraph 37 of schedule 4 repeals the provisions in the Police, Public Order and Criminal Justice (Scotland) Act 2006 that would have transferred the Scottish Ministers' functions under Part 5 of the 1997 Act (the functions carried out by Disclosure Scotland) to the Authority.

Section 88. Power to give effect to corresponding legislation in England, Wales and Northern Ireland

154. The power provided in section 88(1) can be used to make provision, including amendments to devolved legislation, to ensure that the equivalent scheme for England and Wales functions properly. Given the complexities of this Bill and the 2006 Act, it may be necessary to make some provision after the passage of this Bill.

155. The power included in section 88(1A) provides Scottish Ministers with a similar power in respect of any future legislation establishing a similar scheme in Northern Ireland. The Scottish Ministers will be able to make provision responding to any legislation in Northern Ireland, that corresponds with this Bill, in the same way that they can in respect of the 2006 Act.

Section 90. Offences by bodies corporate etc.

156. Where an offence is committed by an organisation, this section provides that the organisation and, in some cases, a senior individual in that organisation are both to be held responsible. On the whole, the more junior member of staff whose conduct may have given rise to the offence is not criminally liable. The member of staff may still be disciplined by the organisation and, if one of the referral grounds at section 2 is met, he or she can be referred for consideration for listing.

Section 90A. Crown application

157. This section binds the Crown as is normal practice for Acts of the Scottish Parliament. The Crown will not, however, be held criminally liable for any contravention of a provision of the Bill but, in such circumstances, application may be made to the Court of Session concerning the contravention. Section 90A(5) provides that the provisions of the Bill apply to civil servants in the same way as they apply to other persons.

PART 7: INTERPRETATION

Section 91. Regulated work

158. Section 91 introduces schedules 2 and 3 which define regulated work with children and regulated work with adults, respectively. Schedule 2 to this Bill replaces schedule 2 to the 2003 Act; regulated work with children is the new term for “child care position” in that Act.

Section 92. Meaning of references to being barred from regulated work

159. There is a difference between being listed and being barred. Being listed means being included in the children’s or adults’ list. Being barred from regulated work in Scotland is a consequence of being listed, included in certain other lists in the UK or subject to a prohibition or disqualification in any other jurisdiction which the Scottish Ministers deem to correspond to being listed.

160. Subsections (1) and (2) mean that being included in the equivalent list in England and 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 to a Scottish list and therefore leading to being barred from regulated work in Scotland. Subsections (5) and (6) make allowance for developments in England and Wales or Northern Ireland and enable the lists in subsections (1) and (2) to be updated accordingly.

161. The effect of section 92 is that a teacher working in England who is referred to the Independent Barring Board (established under the 2006 Act) and included on their children’s

barred list would be *listed* in England and Wales and *barred* from regulated work with children in Scotland and equivalent work across the UK. Although barred, the individual will not be *listed* in Scotland; it is expected that the Independent Barring Board will retain that information and provide it to Scottish police forces and Disclosure Scotland as necessary.

Section 93. Harm

162. This is discussed in the context of referral grounds under section 2, paragraph 20 of these Notes.

Section 94. Meaning of “protected adult”

163. Section 94 defines a “protected adult” for the purposes of the Bill. A protected adult is defined as an individual aged 16 or over who is provided with (and thus receives) a type of care, support or welfare service as set out in this section.

164. Section 94(1)(b) allows for the Scottish Ministers to prescribe healthcare related services, whether provided by the NHS or by private suppliers. Section 94(1)(d) gives the Scottish Ministers the power to prescribe welfare services, receipt of which makes an individual a protected adult. Section 94(5) sets out that a welfare service includes any service which provides support, assistance, advice, or counselling to individuals with particular needs. The Scottish Ministers intend to make regulations prescribing welfare services to capture appropriate services provided by the voluntary sector. Section 94(2) gives the Scottish Ministers an order-making power to amend the definition of “protected adult” in subsection (1).

165. The equivalent term in the 2006 Act is “vulnerable adult” and applies to persons who are 18 years of age or over.

Section 95. Meaning of “work”

166. Section 95 defines the meaning of work, of which regulated work is a subset defined through section 91 and schedules 2 and 3. Section 95(1) clarifies that work includes paid or unpaid work and other types of work. For the purposes of this Bill, being a foster carer is regarded as work. But work does not come within the scope of the Bill if it is done for an individual in the course of a family relationship or in the course of a personal relationship with no commercial consideration. This means that a mother employing her brother to look after her child (a family relationship) does not constitute work for the purposes of this Bill, whether or not she pays her brother. However, a mother employing a friend to look after her child would not constitute work if there was no payment but, if the friend received payment, it would constitute work. In this latter case, therefore, it would be an offence for a barred individual to accept payment from the mother for babysitting (because it is regulated work) but not for the mother (because she is a personal employer) to employ the barred individual.

167. Section 95(9) provides the Scottish Ministers with the power to prescribe which types of work should and should not be considered work done in the course of a family or personal relationship. The Scottish Ministers may use this power to ensure consistency with: other legislation which defines family relationships; and the 2006 Act, which contains a similar power.

Section 95A: Fostering

168. Section 95A sets out what constitutes “foster carer” for the purposes of the Bill. Subsection (1) includes public fostering and private fostering within the definition of “foster carer”. Subsection (2) defines for whom the foster carer is to be treated as doing work and, therefore, who is entitled to require a disclosure record. Subsection (3) disapplies the family and friends exemptions to work in section 95. Subsection (4) ensures that foster carers can be referred for consideration for listing, in terms of section 3, if the “employer” has terminated the fostering arrangements on a referral ground.

Section 96. General interpretation

169. Section 96 makes provision for general interpretation. Some of these terms were highlighted at paragraph 4 of these Notes. Some terms which appeared in the 2003 Act have changed their meaning, e.g. “harm” which is defined at section 93 and discussed at paragraph 20 of these Notes.

PART 8: FINAL PROVISIONS

Section 97. Ancillary provision

170. Section 97 provides the Scottish Ministers with the power to make supplementary, incidental, consequential, transitional, transitory or saving provision in order to give full effect to the Bill and this may include modifying any enactment, instrument or document.

Section 98. Saving: disclosure of information

171. This section clarifies, for example, that the Bill does not affect the police’s common-law powers to disclose information for the purpose of preventing or detecting crime.

Section 99. Orders and regulations

172. Subsection (3) provides that orders and regulations are to be made by negative resolution procedure except for those listed in subsection (4). Subsection (4) provides that the following matters require affirmative procedure:

- criteria leading to automatic listing, as set out in section 14;
- amending schedule 1 to modify the list of “relevant offences”;
- some powers to modify the provisions of this Bill or any other enactment, as given at section 88 or 97;
- any change to the meaning of protected adult in section 94; and
- any modification to the definition of regulated work with children or regulated work with adults using the order making powers in schedules 2 and 3 respectively.

Section 100. Commencement

173. Section 100 provides flexibility for the Scottish Ministers to commence the various provisions of the Bill at different times. Subsection (3) makes clear that the Scottish Ministers could bring the provisions into force on an area by area basis.

SCHEDULE 1: RELEVANT OFFENCES

174. Schedule 1 lists those offences for which the court must refer an individual for consideration for inclusion in the children's list, following conviction (as provided for in section 7(A1) and 11(1A)). It replicates schedule 1 of the 2003 Act, updated to include new offences created by the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 and other offences under the Civic Government (Scotland) Act 1982 and the Sexual Offences (Amendment) Act 2000.

SCHEDULE 2: REGULATED WORK WITH CHILDREN

175. This schedule is a replacement for schedule 2 to the 2003 Act. It has been restructured: some positions have been added; some existing definitions have been narrowed; and others, which were child care positions under the 2003 Act, have been removed.

Part 1: Preliminary

176. Schedule 2 defines regulated work with children for the purposes of this Bill. Paragraph 1 applies the normal duties test to the activities set out in Part 2 and the positions set out in Part 3. Part 4 explicitly identifies a number of positions which fall within the definition of 'regulated work with children'.

Part 2: Activities

177. Paragraphs 2 to 5, identify those instances in which an individual is or is not undertaking regulated work with children when:

- Caring for children;
- Training, instructing, teaching or supervising children;
- Being in sole charge of children; or
- Having unsupervised contact with children

178. Paragraphs 2 to 5, read with paragraph 1(a), are designed to have broadly the same effect as schedule 2 to the 2003 Act but paragraphs 2 and 3 are qualified with an incidental test which narrows the scope of regulated work to exclude activities which are aimed at adults but incidentally include children.

179. Paragraph 6 is a new provision (not in the 2003 Act) covering positions such as workers on telephone advice lines and children's magazine agony aunts. The provision does not cover general broadcasting to children, such as children's television or radio programmes.

180. Paragraph 7 is a new provision (not in the 2003 Act) covering positions such as those involved in moderating Internet chat rooms intended for use by children where the individual has a role in protecting those children from harm. It does not cover incidental use by children of chat rooms intended for use by adults. It does not cover staff involved in maintaining and supporting such services whose function is not related to child protection, e.g. engineers.

181. Paragraphs 8-9 represent a development of paragraph 1(b) of schedule 2 of the 2003 Act but are now qualified to limit the positions covered to those involving contact with children. A cleaner, for example, in the head office of an organisation providing care home services would now no longer be regarded as doing regulated work with children.

Part 3. Establishments

182. Paragraphs 11-12 replicate paragraphs 2(a) and (b) in schedule 2 of the 2003 Act.

183. Paragraphs 13-15 are broadly equivalent to the reference to "educational establishment" in paragraph 2(c) in schedule 2 to the 2003 Act. Paragraph 14 provides the Scottish Ministers with the power to adjust the scope of further education institutions in the event of changes in the organisation of that sector.

184. Paragraph 16 replicates paragraph 2(d) in schedule 2 of the 2003 Act, updating the reference to the residential accommodation for persons with mental disorder to the Mental Health (Care and Treatment) (Scotland) Act 2003 which replaced the Mental Health (Scotland) Act 1984.

Part 4. Positions

185. Paragraphs 17-25 replace provision made at paragraph 6 of schedule 2 of the 2003 Act. New positions include the Commissioner for Children and Young People in Scotland, the Commissioner's staff (paragraphs 22-23) and the Registrar of Independent Schools in Scotland (paragraph 24). The only other changes are minor and technical.

Part 5 : General

186. Paragraph 26 permits the Scottish Ministers to amend schedule 2 by order subject to affirmative procedure.

SCHEDULE 3: REGULATED WORK WITH ADULTS

187. Schedule 3 of the Bill (read with section 94) defines "regulated work with adults".

Part 1: Preliminary

188. Part 1 sets out that it covers work in:

- a position whose normal duties include carrying out an activity mentioned in Part 2 or (if not already covered by Part 2) work in an establishment mentioned in Part 3;

- a position mentioned in Part 4; and
- a position whose normal duties include the day to day supervision or management of an individual working in one (or more) of the above positions.

Part 2: Activities

189. These are certain types of activity carried out by individuals in the course of performing their normal duties (e.g. caring, teaching, supervising, advising and guiding etc.), or carried out where the performance of an individual's duties in particular establishments (e.g. care homes) permits or requires them to have contact with protected adults. Paragraphs 3 and 8 qualify the scope of regulated work with adults by excluding these activities where they are done with children only and the presence of protected adults is merely incidental. This would prevent, for example, teaching at a secondary school becoming regulated work with adults merely because a few of the sixth form students were receiving care services.

190. Paragraphs 4, 5 and 6 qualify the scope of regulated work with adults by excluding these activities where they are merely incidental to carrying out the same activity in relation to other individuals who are not protected adults.

Part 3: Establishments

191. These are places in which individuals will do regulated work by virtue of performing their normal duties in a place providing accommodation for adults. Paragraph 9 clarifies the meaning of a care home by reference to the accommodation being occupied mainly or exclusively by adults in order to distinguish this from accommodation which is provided mainly for children.

Part 4: Positions

192. These are individuals whose positions of management responsibility, trusteeship of a charity, or membership of a Council Committee whose functions concern the provision of education, accommodation, social services or health services to protected adults, mean they will undertake regulated work.

Part 5: General

193. Paragraph 15 permits the Scottish Ministers to amend schedule 3 by order subject to affirmative procedure.

SCHEDULE 4: MINOR AND CONSEQUENTIAL AMENDMENTS AND REPEALS

194. This schedule is introduced by section 89. It makes amendments to the 1965 Act, the 1984 Act, the 1995 Act and 1997 Act. Importantly, the 2003 Act is largely repealed.

This document relates to the Protection of Vulnerable Groups (Scotland) Bill as amended at Stage 2 (SP Bill 73A)

**PROTECTION OF VULNERABLE GROUPS
(SCOTLAND) BILL
[AS AMENDED AT STAGE 2]**

REVISED EXPLANATORY NOTES

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Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by
RR Donnelley.

ISBN 978-1-4061-3261-8



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