

PROTECTION OF VULNERABLE GROUPS (SCOTLAND) BILL: KEY ISSUES

SARAH HARVIE-CLARK AND KATE BERRY

On 17 December 2003, Ian Huntley was convicted of the murders of Jessica Chapman and Holly Wells in Soham. Following the conviction, it became apparent that Huntley had been known to the authorities over a period of years. However, this relevant information did not emerge during the vetting check carried out prior to Huntley's employment as a school caretaker.

Consequently, in 2004 Sir Michael Bichard headed an urgent inquiry into the child protection procedures, as instructed by David Blunkett, the then Home Secretary. Sir Michael published his report in June 2004.

Although the Bichard report contained recommendations directed at England and Wales, Scottish Ministers were keen to bring forward proposals in Scotland, to ensure that there were no cross-border loopholes that could be exploited.

The [Protection of Vulnerable Groups \(Scotland\) Bill](#) is the Scottish Executive's response to recommendation 19 of the Bichard Report. This briefing outlines some of the key issues associated with this Bill.

For a description of the current system in Scotland and the main proposals in the Bill see the separate SPICe Briefing entitled 'Protection of Vulnerable Groups (Scotland) Bill: Background and Main Proposals' (Harvie-Clark 2006).

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KEY POINTS OF THIS BRIEFING

- The Protection of Vulnerable Groups (Scotland) Bill ('the Bill') introduces a new system for vetting and barring of individuals who work, or wish to work, with vulnerable groups (ie children under the age of 18 and 'protected adults')
- The Bill makes provision for the creation of two lists – a Children's List (which builds on the foundations laid by an existing children's list) and a new Adults' List. A key feature of the new lists is that they will be continuously updated on the basis of information from various sources, including the police. Decisions as to whether to list an individual will be taken by the new Central Barring Unit (CBU)
- The need for streamlined procedures, guidance, training and an information/communications campaign was another key issue arising from the Scottish Executive consultation. Some respondents felt that they were just getting to grips with the existing system which had been significantly reformed by the Protection of Children (Scotland) Act 2003 (asp 5)
- Concern has been expressed by some organisations about what the cost will be of obtaining a disclosure check for their employees under the new system, particularly as the existing workforce will have to be retrospectively checked. The fees for obtaining a disclosure check are not yet known and will be set by secondary legislation, although the Financial Memorandum outlines a number of possible models as a guide
- One of the main features of the proposals relating to the vetting and barring scheme is the creation of a new executive agency which will be made up of the new CBU and Disclosure Scotland. Under this model Scottish Ministers will be accountable for decisions made by the CBU to list an individual. In England and Wales an Independent Barring Board is to be set up and Ministers are not have any involvement in decisions as to whether to list an individual (Safeguarding Vulnerable Groups Act 2006)
- A number of respondents to the Scottish Executive's consultation stressed the importance of the Bill's compliance with human rights legislation. Aspects of the proposals which raise human rights issues include:
 - the decision making process of the CBU
 - the circumstances in which an individual will be automatically listed (ie where the CBU has no discretion)
 - the sharing of personal information about an individual between organisations
 - the circumstances in which an individual's fingerprints will be destroyed after their identity is confirmed
- Another key issue that arose during the Executive's consultation was whether to have one list of barred individuals or two. In deciding to have two lists the Executive felt the ability to respond proportionately to individual cases a particularly important consideration
- The issue of how to vet overseas workers effectively was raised by a number of respondents to the Executive's consultation

INTRODUCTION AND BACKGROUND

This briefing considers a selection of key issues associated with the [Protection of Vulnerable Groups \(Scotland\) Bill](#) ('the Bill').

This Bill was introduced in the Scottish Parliament on 25 September 2006 and its principal purpose is to create a new vetting and barring system for Scotland in relation to those individuals working with, or proposing to work with vulnerable groups, ie children under the age of 18 and 'protected adults' (defined in section 94).

BACKGROUND TO THE BILL

The Bill is based on recommendations made by the Bichard Inquiry in relation to England and Wales (which reported in June 2004). This Inquiry was set up to look at the failures which were highlighted by the deaths of Holly Wells and Jessica Chapman in Soham in 2003. Although the recommendations were aimed at England and Wales, Scottish Ministers were keen to take forward the recommendations and ensure there were no cross border loopholes in the UK that could be exploited.

MAIN PROPOSALS

Part 2 of the Bill creates the new vetting and barring scheme applicable to individuals working with, or intending to work with, vulnerable groups.

Part 1 of the Bill provides for the creation of two lists – a Children's List (which builds on the foundations laid by an existing list created by the Protection of Children (Scotland) Act 2003 (asp 5)) and a new Adults' List. If an individual appears on a list they will be barred from working in the relevant workforce to which the list applies. A key feature of the new lists is that an individual can be considered for listing on the basis of vetting information from various sources, including the police, which will be assessed as it arises.

A new executive agency will be created to be made up of [Disclosure Scotland](#), which will assemble information used to vet an individual and will provide disclosure records under the vetting and barring scheme, and the new Central Barring Unit (CBU) which will make determinations as to whether an individual should be included in either of the lists.

Part 3 of the Bill introduces provisions in relation to information sharing between organisations for child protection purposes. These proposals do not part of the vetting and barring scheme. However, the two are linked in the sense that the information used to vet an individual, the information provided on a disclosure record, and information about whether or not an individual is on the Children's List or Adults' List, could constitute child protection information for the purposes of Part 3.

APPROACH OF THIS BRIEFING

Key issues associated with the Bill which are discussed in this briefing are:

- the implementation of, and the costs associated with, the proposals
- the new governance arrangements and, in particular, the creation of a new executive agency
- compliance with human rights legislation

- whether there should be separate lists of those barred from working with children and those barred from working with protected adults, or a single list
- the approach to overseas workers

This briefing is not intended to be a comprehensive treatment of the provisions of the Bill. For a more detailed examination see the [Policy Memorandum to the Bill](#) ('the Policy Memorandum') and the [Explanatory Notes to the Bill \(and other Accompanying Documents\)](#) and the [Delegated Powers Memorandum](#).

For a useful summary of the current system in Scotland and the main proposals in the Bill see the separate SPICe Briefing entitled 'Protection of Vulnerable Groups (Scotland) Bill: Background and Key Proposals'.

For more information on the Scottish Executive consultation which preceded the Bill's introduction see the [Consultation Paper](#) (Scottish Executive 2006a), the [consultation responses](#) and the [Analysis of the Consultation Responses](#) carried out on behalf of the Scottish Executive by George Street Research (Granville and Mulholland 2006). For a useful collection of resources on the Bill see also the Scottish Executive's [webpage](#) on the Bill.

IMPLEMENTATION ISSUES

The need for streamlined procedures, guidance, training and an information/communications campaign was a key issue arising from the consultation. Many of these concerns were raised in light of experience of the current system of disclosures and implementation of the Protection of Children (Scotland) Act 2003 (asp 5). As one voluntary organisation stated:

"Voluntary organisations have already had to 'grapple' with the introduction of new procedures in terms of the Protection of Children (Scotland) Act. The Committee has a concern that yet another change is being introduced. Informing volunteers and re-training them to deal with further legislation change will be difficult, time-consuming and financially burdensome for the voluntary sector."

(quoted in Granville and Mulholland 2006, para 8.2)

The Executive has indicated in the [Policy Memorandum](#) (at paras 156 – 157) that guidance and training will also be provided prior to the implementation date.

There were particular implications raised by consultees on the issue of retrospective checking, ie checking for staff already in the relevant workforces. While the consultation analysis found that the majority of those who commented supported the need for retrospective checking in principle, there were many issues raised about its implementation. Key issues highlighted were the potential overload of the disclosure system, the cost and administrative implications on employers and potential confusion. A number of employers noted the need for employers to prioritise groups of employees needing to be checked in order to spread additional cost and administrative burden over a time period (Granville and Mulholland 2006, para 8.3).

The Bill provides Scottish Ministers with a flexible power to commence different parts of the legislation at different times, which includes the options of bringing the provisions into force by geographical area, by sector or by occupation (section 100; Explanatory Notes, para 171; Policy Memorandum, para 155). No decision has yet been made on the time period over which the new vetting and barring scheme will be phased in and further consultation is expected on this

issue in 2007 ([Policy Memorandum](#), para 155). However, the costs laid out in the Financial Memorandum assume a three year phasing in period (see below).

COSTS ASSOCIATED WITH THE PROPOSALS

The Financial Memorandum assesses the financial implications for the Scottish Executive, local authorities and other bodies, individuals and businesses. This section focuses particularly on the costs of fees for the new disclosures and the potential impact on individuals and employers.

THE CURRENT SYSTEM

Scottish Ministers have the power to set charges for disclosures under the current system. The current cost of a disclosure check is £20, having risen from £13.60 in April 2006. Responsibility for paying for checks rests with the individual, although in practice many employers will cover these costs. Disclosures for volunteers in the voluntary sector are paid by the Scottish Ministers. In 2005-06 this amounted to £700,000 ([Policy Memorandum](#), paras 21 and 23).

NEW FEES TO BE SET BY SECONDARY LEGISLATION

The Bill allows Ministers to set the level of fees for vetting and barring disclosures in secondary legislation (section 67). The level of fees will be the subject of further consultation in 2007 ([Policy Memorandum](#), para 63).

THREE POSSIBLE MODELS IN THE FINANCIAL MEMORANDUM

The Financial Memorandum (para 203) sets out the criteria that the fee structure would be expected to meet. For this purpose, it makes reference to 'Full Checks', which are the checks carried out on first joining the scheme (either a 'Scheme Record' check for organisational employers or a first 'Statement of Barred Status' if the individual is self-employed). It also makes reference to 'Nominal Checks' which are subsequent checks carried out when the individual is already a scheme member (a 'Short Scheme Record' check for organisational employers or subsequent 'Statements of Barred Status' for the self-employed).

As it is anticipated that the existing types of disclosure will still be available for some purposes (for example, for non-work related purposes, such as adoption) the Financial Memorandum also refers to Basic, Standard and Enhanced Disclosures under the existing vetting scheme (for details of the existing scheme see Part V of the Police Act 1997 (c 50) and the SPICe Briefing entitled 'Protection of Vulnerable Groups (Scotland) Bill: Background and Main Proposals' at pp 10-12).

The Financial Memorandum states (para 203):

"The current intention is to adopt a fee structure that has no impact on the fees charged for basic, standard and enhanced checks, and most accurately reflects the true cost of providing each of the full and nominal checks. This will achieve the twin objectives of being neutral to users of Disclosure Scotland who remain outside the new scheme, and minimising the financial impact should any of the figures in this memorandum prove to have been over or under-estimates"

Three potential models are provided in the Financial Memorandum:

- **model 1:** Basic, Enhanced and Standard Disclosures and Full and Nominal checks will all attract the same fee

- **model 2:** the fee for Basic, Standard and Enhanced Disclosures will be unchanged at £20. The fee for a Nominal Check will be set to zero and the fee for the Full Check will be set to balance costs
- **model 3:** the fee for Basic, Standard and Enhanced Disclosures will be unchanged at £20, the fee for a Full Check set to £26 and the fee for a Nominal Check will be set to balance costs

The model that the Executive thinks best meets the criteria outlined above is Model 3. As the Financial Memorandum notes, “For illustrative purposes only, setting the full fee at £26 would require a nominal fee of approximately £10 over the 10 year period” (para 220). It is expected that over a 10 year period the costs associated with checking each individual employee, volunteer and self worker would fall, although “the impact on particular individuals depends on how often they move to a new post and on the fee structure that is adopted” (para 193).

CONSULTATION RESPONSES

The analysis of the consultation responses found that in relation to costs:

“This was an issue that many respondents found difficult to discuss. While it was acknowledged that the costs of the new system were not known, there were concerns that the cost to implement the proposals as laid out could be significant. While there were some acknowledgments that removing the need for multiple disclosures could reduce long-term costs, it was felt that the cost of the initial disclosure could increase significantly”. (Granville and Mulholland 2006, p 4)

COSLA’s (2006) [response](#) to the consultation supported the “front-loading” costs of disclosures but warned that “employers may wish still to obtain a full check rather than simply information on whether the person is barred”. Furthermore, as many employers pay for checks rather than the individuals, “If either the cost increases substantially...or there are no additional resources made available, then it is likely that local authorities would have to review their current practices and require individuals to pay”.

It is proposed that the costs of the checks on volunteers working with children and vulnerable adults in the voluntary sector will continue to be paid for by the Scottish Executive ([Policy Memorandum](#), para 60). Consultation responses were supportive of this proposal. Some respondents suggested that free checks should be extended to those working in a voluntary capacity outwith voluntary organisations, eg volunteers working at an after-school club or a parent accompanying a class and their teacher on a school trip (Granville and Mulholland 2006, para 3.2.2).

GOVERNANCE ARRANGEMENTS

One of the main features of the proposals relating to the vetting and barring scheme is the creation of a new executive agency.

Executive agencies are typically established by Scottish Ministers as part of Executive departments, or as Executive departments in their own right, to carry out discrete areas of work. They are usually staffed by civil servants.

Executive agencies can be distinguished from Non Departmental Public Bodies (NDPBs), ie bodies which, as the name suggests, do not form part of central government departments and which enjoy a greater degree of operational autonomy from Scottish Ministers (whilst still being subject to their overall strategic direction). NDPBs also typically publish strategic or corporate plans, annual reports and annual accounts, which executive agencies typically do not. NDPBs also require legislation for their creation and abolition, executive agencies do not. These differences reflect the fact that executive agencies are part of the Executive.

For more information on the different types of bodies in Scotland forming part of the process of government in Scotland, see the Executive's useful [webpage](#) on the subject.

THE CURRENT ARRANGEMENTS

Under the current arrangements [Disclosure Scotland](#), which is a public/private partnership, forming part of and based in, the [Scottish Criminal Record Office](#) (a common police service), assembles vetting information and creates disclosure records.

Scottish Ministers are ultimately accountable for the decision as to whether to list an individual on the current children's list but, in practice, decisions are taken on behalf of Scottish Ministers by a 'determination panel' operating in the Education Department of the Scottish Executive ([Policy Memorandum](#), para 110; Scottish Executive 2004a).

The [Central Registered Body in Scotland](#) (CRBS) administers certain aspects of requests for free disclosures on volunteers in the voluntary sector wishing to volunteer to work with vulnerable groups. It was set up by the Scottish Executive and is run by [Volunteer Development Scotland](#). The [CRBS](#) liaises with [Disclosure Scotland](#) which also has a role in this regard.

WHAT IS PROPOSED

The new executive agency to be created will be made up of [Disclosure Scotland](#) (which will assemble vetting information and provide disclosure records) and the new Central Barring Unit (CBU) which will make determinations as to whether an individual will be included in either of the lists. Under this model Scottish Ministers will be accountable for decisions made by the CBU.

Note that, until recently, the intention was that [Disclosure Scotland](#) would be one of the existing bodies to become part of the new Scottish Police Services Authority (SPSA)(an NDPB) which will be directly responsible for providing a range of common services to Scottish police forces on a national basis (see further the [Review of Common Police Services](#) and the Police, Public Order and Criminal Justice (Scotland) Act 2006 (asp 10)). However, [Disclosure Scotland](#) will not now be included in the SPSA.

Details of the determination process of the CBU are to be made by secondary legislation and "are likely to reflect broadly those currently used", ie use of a determination panel to make decisions as to whether to list an individual ([Policy Memorandum](#), para 110).

Note that the CBU will make an initial decision as to whether to consider an individual for listing (leading to a panel determination) or take no further action, according to certain general criteria outlined in the Bill (supplemented in some instances by guidance or secondary legislation)(see further sections 10–13 of the Bill; the Policy Memorandum, paras 105–109 and the SPICe briefing (Harvie-Clark 2006) at pp 18–21). It is thought that this initial decision as to how to proceed may be taken by staff at the CBU (Scottish Executive 2006c). The precise nature of the

decision making process will be subject to further consultation in 2007 ([Policy Memorandum](#), para 110).

Note that there is no reference to the future role of the [Central Registered Body in Scotland](#) in the [Policy Memorandum](#) but it can probably be assumed, in the absence of any indication by the Executive to the contrary, that it is intended that its role and relationship with [Disclosure Scotland](#) will continue as before.

THE WIDER POLICY CONTEXT

Since devolution, the Scottish Executive has established a number of new public bodies and officeholders with some form of accountability to the Executive or to the Scottish Parliament.

The Scottish Parliament's [Finance Committee](#) has considered the estimated costs for each of these bodies in its scrutiny of the financial memoranda of the associated bills. During the course of this work the Committee has developed a wider interest in NDPBs and Executive agencies. The Committee (2006) recently published its [report](#) of its [Inquiry into Accountability and Governance](#). Although it was not the central focus for its report, the Committee did note that it:

“has become increasingly concerned about the total number of NDPBs and Executive agencies and the associated costs”

(Scottish Parliament Finance Committee 2006, para 181)

The Safeguarding Vulnerable Groups Act 2006, the equivalent piece of legislation for England and Wales which received Royal Assent on 8 November 2006, provides for the creation of an Independent Barring Board for England and Wales which is legally distinct from the Secretary of State (section 1 and schedule 1). This will mean that in England and Wales there will no longer be any ministerial role in deciding whether particular individuals should be barred from working with vulnerable groups (Peck and Keter 2006).

THE CONSULTATION PROCESS

In the consultation paper on the vetting and barring scheme (2006a, para 3.4.22) the Executive presented three possible models of governance for the new vetting and barring arrangements:

- an NDPB
- an executive agency
- a core civil service function

One hundred and forty consultees commented on the issue of future organisational structure (Granville and Mulholland 2006, para 5.1) and 93 consultees expressed an actual preference in this regard.¹ However, responses to the consultation are difficult to interpret, as some respondents appear to have conflated what are arguably two separate issues, namely which of the three models of governance described above should be adopted, with the issue of the future relationship between the new CBU and [Disclosure Scotland](#). As mentioned above, the latter body is currently part of a common police service (the [SCRO](#)) but, at the time of the consultation, proposals to make it part of a new NDPB (the SPSA) were publicly known.

¹ Additional information provided by Shona Mulholland of George Street Research on 1 November 2006.
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The relationship between the CBU and Disclosure Scotland

Thirty six respondents stated that the CBU should become part of [Disclosure Scotland](#) (or vice versa) making this the most popular option, albeit by a narrow margin (Granville and Mulholland 2006, para 5.1).

If this option went forward, seven consultees felt that while these two agencies should be closely linked, there would need to be clear lines of communication, responsibility and accountability between them. Additionally, three consultees also felt that the relationship between the [Central Registered Body for Scotland](#), [Disclosure Scotland](#) and the CBU also needed to be addressed (Granville and Mulholland 2006, para 5.1).

On the other hand, seven consultees felt [that Disclosure Scotland](#) and the CBU should remain separate as they felt that the investigating body should be totally separate from the decision making body (Granville and Mulholland 2006, para 5.1).

Governance model

Twenty nine respondents voiced support for the creation of a totally new NDPB with responsibility resting with a panel of experts. On the other hand, 19 respondents wanted the CBU to become a core civil service function and nine consultees felt that an executive agency would be the best model.

However, the figures from this part of the consultation should be treated with caution, as some consultees who only mentioned their preference in respect of the future relationship between the CBU and [Disclosure Scotland](#) and not their preferred governance model, nevertheless may have been making assumptions about the governance model that would be chosen. For example, they may have assumed that it would be an NDPB as was proposed for [Disclosure Scotland](#) at the time of the consultation.

Decision-making process

Consultees were also asked whether they thought decisions on barring should be made by a special panel, a 'case conference' (meaning greater involvement for agencies other than those currently on determination panels) or administrators (Scottish Executive 2006a, para 3.4.21). 159 consultees commented on this issue with a large majority favouring the special panel option. A large number of consultees also took the opportunity to comment on the qualities and abilities required by those undertaking decisions to list (in respect of which see further Granville and Mulholland 2006, para 5.3).

THE EXECUTIVE'S APPROACH

In the Policy Memorandum the Executive explained its decision to create a new executive agency as follows:

“This arrangement maintains decision-making on particular cases at a suitable distance from Ministers while allowing the Central Barring Unit and Disclosure Scotland to be housed in one single organisation, effectively creating a single location for all disclosure activity in Scotland” (Policy Memorandum, para 104)

As mentioned above, the separate role of the [Central Registered Body for Scotland](#) in providing free disclosure checks for volunteers is not referred to in the [Policy Memorandum](#).

HUMAN RIGHTS

A number of respondents to the Scottish Executive's consultation stressed the importance of the Bill's compliance with human rights legislation (see Granville and Mulholland 2006, p 5 and para 7.2).

For example, [Volunteer Development Scotland](#) said:

"The European Court of Human Rights has emphasised that children and other vulnerable individuals are entitled to State protection, in the form of effective deterrents, from interference with essential aspects of their lives. However, it is also essential to maintain compliance with human rights legislation to ensure other essential rights are not compromised...

It appears that the role outlined for the Vetting and Barring Unit entails a great deal of discretion in those charged with responsibility for making decisions. Therefore the availability of coherent guidance to explain barring decisions, the release and use of information and implications of refusal of appointment is essential"

([Volunteer Development Scotland 2006](#), para 15.4)

THE SCOTTISH EXECUTIVE'S APPROACH TO HUMAN RIGHTS ISSUES

The Executive considers that the main Articles of the European Convention on Human Rights ('ECHR') under which issues arise under the Bill are Article 6 (determination of civil rights), Article 8 (right to respect for private and family life) and Article 1 of Protocol 1 (protection of property). Furthermore, it considers that the Bill's provisions are compatible with these Articles ([Policy Memorandum](#), para 162).

Article 6 provides, in respect of the determination of an individual's civil rights and obligations that he or she is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Article 6 is therefore important when considering the detail of the determination process of the CBU and also opportunities for an individual to appeal a decision to list. The Executive acknowledges this in the [Policy Memorandum](#) (see further paras 162–164).

Article 8 provides that everyone has a right to respect for his or her private and family life and that any interference by a public authority with the exercise of this right must be "in accordance with law and necessary in a democratic society". Furthermore, any interference must be:

"in the interests of national security, public safety or the economic well-being of the country; for the prevention of disorder or crime; for the protection of health or morals; or for the protection of the rights and freedoms of others"

The Executive considers Article 8 to be relevant in relation to a number of aspects of the Bill including ([Policy Memorandum](#), paras 165–168):

- **effect of listing:** the placement of a person on either the Children's List or the Adults' List bars a person from engaging in regulated work and employers will be informed when a person is listed
- **information sharing:** the vetting and barring scheme permits, and indeed in many circumstances, requires, exchange of information about an individual between a

number of bodies and, as mentioned above, Part 3 of the Bill also contains provisions on information sharing between organisations for child protection purposes

- **non-conviction information:** for the purposes of producing a disclosure record, the police disclose information about an individual to [Disclosure Scotland](#), including notably non-conviction information (eg that the individual in question was charged with an offence but not prosecuted because key witnesses pulled out)

Article 1, Protocol 1 provides that persons are entitled to the peaceful enjoyment of their possessions and that no one shall be deprived of their possessions except in the public interest and subject to the conditions provided by law. The Executive considers that this Article may be engaged by barring determinations of the CBU where the consequence is to damage the individual's capacity to continue to work in a certain profession ([Policy Memorandum](#), para 169).

THE CONSULTATION RESPONSES

Some respondents to the Scottish Executive consultation preceding the Bill made general comments about the need for compliance with human rights legislation in relation to individual applicants (see, for example, [Edinburgh Telford College 2006](#), p 6).

Others raised more specific issues discussed by the Executive in its [Policy Memorandum](#). For example, [Children 1st](#) discussed human rights in the context of the information about an individual to be released to employers ([Children 1st 2006](#), p 7). [Dundee City Council](#) stressed the importance of the CBU giving reasons for its determination decisions to ensure compliance with human rights legislation ([Dundee City Council 2006, p 7](#)).

One or two respondents raised human rights issues not explicitly referred to by the Executive in its [Policy Memorandum](#):

Working whilst being considered for listing

The [Royal College of Anaesthetists](#) expressed its support for the decision to allow individuals to continue to work whilst they were being considered for listing, with reference to the human rights legislation ([Royal College of Anaesthetists 2006](#), p 9). (A discussion of all the policy considerations associated with the issue of an individual working whilst being considered for listing can be found in the [Policy Memorandum](#) at paras 113–117).

Personal employers

[Shetland Island Council](#) made the link between the human rights legislation and the approach to disclosure for the benefit of personal, as opposed to organisational, employers, (eg parents sending their children to the local piano teacher):

“Clarity will be required on what organisation will support [personal] employers in making relevant decisions. There will need to be very clear parameters on this to ensure no violation of human rights” (Shetland Island Council 2006, p 8)

A number of other respondents also stressed the need for an intermediary body in relation to personal employers (as indeed was proposed in the consultation paper – see Scottish Executive 2006a, para 3.4.3) without necessarily making explicit reference to human rights (Granville and Mulholland 2006, p 6).

In this regard it should be noted that the Executive has tackled the particular issues associated with personal employers in the Bill in a different way from that which was originally proposed. It

has created a special type of disclosure for the benefit of personal employers – the ‘Statement of Barred Status’ – which does not disclose any vetting information gathered about the applicant, but confirms that the individual is a scheme member (and therefore is not listed since scheme membership and listing are mutually exclusive). It also indicates if a scheme member is under consideration for listing. The intention is that the absence of vetting information will greatly reduce the opportunities for abuse of it (see further [Policy Memorandum](#), paras 82 – 84).

OTHER HUMAN RIGHTS ISSUES

Two other aspects of the Bill also raise potentially significant human rights issues:

Automatic listing (section 14)

Section 14 and schedule 1 of the Bill stipulate that there are certain offences against children which lead to automatic listing (as opposed to consideration for listing pending a final determination). However, section 14 also provides that Scottish Ministers (in practice, the CBU) must list a person on the Children’s List where it appears that the person satisfies certain criteria to be specified in regulations (section 14(1)(b)). Only limited examples of the relevant criteria appear in section 14(4).

The equivalent provisions in the [Safeguarding Vulnerable Groups Bill \[HL\]](#) for England and Wales (now the Safeguarding Vulnerable Groups Act 2006) gave the Westminster [Joint Committee on Human Rights](#) cause for concern as they considered that they were unable to properly assess the risk of incompatibility posed by the proposed scheme:

“We are seriously concerned that the list of criteria for automatic inclusion on the barred lists has not been included in the primary legislation. This lack of detail means that we cannot reach a conclusion on the risk of incompatibility posed by the proposed scheme. The inclusion of this list on the face of the Bill would increase legal certainty and reduce the risk that the list may be extended in a way which could seriously restrict the procedural rights of the individual, ie by restricting the right to make representations and the right of appeal.”

[\(UK Parliament Joint Committee on Human Rights 2006](#), para 1.28)

It should be noted that the equivalent provision at Westminster that the Committee were commenting on (ie schedule 2, Part 1, para 6) did not contain any listing of relevant offences and so much more detail was being left to secondary legislation than is proposed in Scotland.

Power to use fingerprints to check identity (section 60)

Section 60(1) allows Scottish Ministers to require a person who wishes to join the new vetting and barring scheme to provide fingerprints for the purposes of checking identity. Section 60(2) provides that “prescribed persons must destroy any such fingerprints in prescribed circumstances” (this is similar to the wording applicable in relation to the current vetting scheme found in section 118(3) of the Police Act 1997 (c 50)).

The possible application of, and potential contravention of, Article 8 of the ECHR (right to respect for private and family life) has previously arisen in connection with the retention of fingerprint samples. It was the basis for a legal challenge to a piece of Westminster legislation in 2004 and the case ultimately went to the House of Lords (S and Marper²). On that occasion, the House of Lords ruled that if Article 8 was applicable to the issue of the retention of fingerprint

² The full name of the case is R (on the application of S) v Chief Constable of South Yorkshire and R (on the application of Marper) v Chief Constable of South Yorkshire [2004] 1 WLR 2196, [2004] 4 All ER 193.

samples taken from suspects who were not subsequently convicted of a criminal offence, it was not contravened.

Note that the Scottish Parliament recently considered the issue of the retention of fingerprint samples in the context of the parliamentary passage of the Police, Public Order and Criminal Justice (Scotland) Act 2006 (asp 10) (the equivalent piece of legislation to the Westminster legislation which was at issue in *S and Marper*). For more information see the SPICe briefing entitled '[Police Retention of Prints and Samples – Updated](#)' (see pp 7–8 in relation to human rights). See also the [Bill Summary](#) produced by SPICe.

In the context of the current Bill, if the circumstances in which fingerprints will be destroyed are to be prescribed in secondary legislation, it will not be possible for the Education Committee scrutinising the Bill at Stage 1 to assess whether the Executive's approach will be compliant with Article 8. However, it is the responsibility of Scottish Ministers when making regulations under section 60(2) to ensure compliance with Article 8.

NUMBER OF LISTS AND RELATIONSHIP BETWEEN LISTS

Another key issue that arose during the Executive's consultation (despite the absence of a specific question on it in the consultation paper) and which the Executive gave "considerable thought to" ([Policy Memorandum](#), para 118) when it drafted the provisions of the Bill, was whether to have one list of barred individuals or two. In other words, should there be one list for children and another for protected adults, or simply one list? Furthermore, if there is to be two lists, what should be the effect of being on a list in relation to one workforce in relation to a job, or potential job, in the other workforce?

PROPOSALS IN THE BILL

As discussed above, the Bill proposes the creation of two lists (section 1). In addition, section 12 also makes provision for a determination by the expert panel as to whether to include an individual on one list (whether or not that individual was ultimately listed) to lead to consideration for listing in relation to the other list. This would in turn lead to a further panel determination in relation to the latter list (section 12) (see further Explanatory Notes, para 41). Furthermore, the intention is that, in any event, in many cases, an individual will be considered for listing on both lists from the outset because of vetting information that is considered relevant to both children and protected adults ([Policy Memorandum](#), para 122; Explanatory Notes, para 41).

SUMMARY OF THE CONSULTATION PROCESS

The consultation process, especially the consultation events, highlighted a wide range of views amongst a broad cross-section of consultees. Simple 'show of hands' voting at consultation events in April 2006 indicated a majority in favour of one list in some venues and a majority in favour of two lists at others ([Policy Memorandum](#), para 119).

Written responses as to whether there should be one or two separate lists were split. There were some individuals who perceived that inclusion on one list should lead to automatic barring on the other; others felt it was acceptable for an individual to be barred from one list but not the other (Granville and Mulholland 2006, p 4).

Many consultees and respondents said they would expect to be given information in a disclosure check as to whether or not an individual was on the barred list which did *not* relate to the post for which the individual in question held, or was applying for (Granville and Mulholland 2006, p 4). However, this is not what is proposed in the Bill, as the policy intention is to only

disclose barring information if it is specific to the workforce to which the disclosure check relates.

There were also some concerns that the maintaining of two separate lists could create further unnecessary expense. Consultees and respondents felt that if there were two separate lists these should be operated by the same body (as is proposed in the Bill) (Granville and Mulholland 2006, p 4).

The Executive acknowledged in the [Policy Memorandum](#) (at para 119) that the results of the consultation could be interpreted with more confidence if there had been an explicit discussion and question on the issue of whether there should be one list or two.

ONE LIST OR TWO?

A useful summary of arguments presented in favour of one list and arguments presented in favour of two lists by consultees and respondents is provided in the [Policy Memorandum](#), paras 120–121).

Arguments in favour of one list included that a breach of trust in respect of one group, even if the incident related to extortion or other non-violent abuse, should lead to barring from both groups ([Policy Memorandum](#), para 120). Arguments presented in favour of two separate lists included that this would ensure greater compatibility with the [Safeguarding Vulnerable Groups Bill \[HL\]](#) (applicable to England and Wales) where two lists are proposed ([Policy Memorandum](#), para 121).

In deciding on the approach to be taken in the Bill the Executive felt the ability to respond proportionately to individual cases a particularly important consideration. It concluded that not having the flexibility to distinguish between workforces could result in some individuals losing their livelihoods in circumstances where they could quite safely work in the other workforce ([Policy Memorandum](#), para 122).

OVERSEAS WORKERS

The current position is that convictions from other countries are only included on disclosures if the authorities in the convicting country notify a UK police force (Granville and Mulholland 2006, para 4.5.1).

The issue of how to ensure effective checking of overseas workers arose during the Scottish Executive's consultation process (despite the absence of discussion of it in the consultation paper)(Granville and Mulholland 2006, para 4.5.1; [Policy Memorandum](#), para 151). For example, [Children 1st](#) commented:

“we are concerned that the proposals do not mention the issue of vetting overseas workers. This is a difficult and complex area, as it is clear that an individual should not be prevented from working with children just because they are from a country that does not have the same level of checks as the UK.” ([Children 1st 2006](#))

Overall, the question of overseas workers was raised at “most” consultation events and in 10-15% of the written responses to the consultation ([Policy Memorandum](#), para 151).

This issue was also raised during the [Richard Inquiry](#) where Sir Michael heard concerns from teaching unions and others in this regard. In particular, in relation to teachers, he heard the suggestion that, in future years, potentially 40 per cent or more of the teaching workforce could

come from overseas (Bichard 2004, para 4.90). Recommendation 30 of the Bichard Report was that:

“Proposals should be brought forward as soon as possible to improve the checking of people from overseas who want to work with children and vulnerable adults”

Some respondents to the Scottish Executive consultation referred specifically to Recommendation 30. For example, the [Scottish Child Law Centre](#) commented as follows:

“Given the continuing rise in the number of overseas workers, what steps are being taken to take account of Bichard Recommendation 30, particularly when one of the stated objectives...is to reduce the burden on employers? Failure to take account of cross border issues will lead to a 2 tier system which will inevitably place children at risk and undermine public confidence in the child protection system, as well as operate to support discrimination in the childcare workforce” ([Scottish Child Law Centre 2006](#), p 6)

In the [Policy Memorandum](#) to the Bill the Scottish Executive states:

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

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