

PROTECTION OF VULNERABLE GROUPS (SCOTLAND) BILL: BACKGROUND AND MAIN PROPOSALS

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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 the current system in Scotland and the main proposals in the Bill. For a discussion of a selection of key issues associated with the Bill see the separate SPICe Briefing entitled 'Protection of Vulnerable Groups (Scotland) Bill: Key Issues' (Harvie-Clark 2006).

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KEY POINTS OF THIS BRIEFING

- The Protection of Vulnerable Groups (Scotland) 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 into the failures which were highlighted by the deaths of Holly Wells and Jessica Chapman in Soham in 2003. Scottish Ministers were keen to take forward the recommendations and ensure there were no cross border loopholes in the UK that could be exploited
- Part V of the Police Act 1997 established the current statutory framework in Scotland to allow for criminal record checks to be carried out in relation to those individuals applying for particular posts. Since 2002 these criminal record checks have been carried out in Scotland by [Disclosure Scotland](#), a public/private partnership between Scottish Ministers and BT
- In addition, the Protection of Children (Scotland) Act 2003 created a 'Disqualified from Working with Children List' (DWCL). Inclusion on this list is part of the disclosure information available to Disclosure Scotland. There is no equivalent list for adults in Scotland
- The Bill makes provision for the creation of two lists – a Children's List (which builds on the foundations laid by the DWCL) and a new Adults' List. If an individual is on a list then he or she will be barred from working in the workforce to which the list in question pertains. 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
- Under the Bill a barred individual will commit an offence if he or she seeks to do, agrees to do, or undertakes, regulated work in the relevant workforce (section 33). An organisation (defined very broadly to cover charities, businesses, voluntary groups, faith groups, sports clubs and social clubs) will commit an offence if it makes an offer of regulated work (which includes voluntary work) to someone who is barred from the relevant workforce, permit them to do such work, or fail to remove them from such work (section 34)
- The Bill also introduces a new system for vetting and disclosure of individuals who work, or wish to work, with vulnerable groups (ie children under the age of 18 and 'protected adults'). There are three new types of disclosure record that can be generated – a Scheme Record, a Short Scheme Record and a Statement of Barred Status
- For the first time personal employers (eg a parent taking his or her child to the local piano teacher), as well as organisations acting as employers, will be able to confirm that an individual is not barred
- The Scottish Executive anticipates that in practice the vetting function (ie the assembling of the relevant information) is to be carried out by Disclosure Scotland and the barring function (ie deciding whether an individual is unsuitable to work with vulnerable groups) is to be carried out by the new Central Barring Unit (CBU). It is intended that Disclosure Scotland and the CBU will be placed together under the auspices of a new executive agency
- Part 3 of the Bill imposes duties on specified organisations (mainly public sector ones) to share information with councils for child protection purposes and a duty on Scottish Ministers to prepare a code of practice relating to information sharing. These duties are not part of the vetting and barring scheme and were not consulted on as part of the main consultation

INTRODUCTION AND BACKGROUND

This briefing considers the [Protection of Vulnerable Groups \(Scotland\) Bill](#) introduced in the Scottish Parliament on 25 September 2006. The principal purpose of the Bill is to create a new vetting and barring system for Scotland in relation to those individuals working with, or proposing to work with, children and 'protected adults' (see below for a description of who is covered by these terms). Specifically, the briefing outlines:

- **the current system in Scotland:** this includes an introduction to the existing systems of child protection and adult protection, relevant legislation associated with sex offenders and, most importantly, the existing vetting and disclosure system
- **the main proposals in the Bill:** including a new vetting and barring system (Parts 1–2 of the Bill) and provision for sharing of information for child protection purposes (Part 3 of the Bill)

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 discussion of a selection of key issues associated with the Bill see the separate SPICe Briefing entitled 'Protection of Vulnerable Groups (Scotland) Bill: Key Issues' (Harvie-Clark 2006). 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.

The background to the Bill is summarised below.

THE SOHAM MURDERS AND THE BICHARD INQUIRY

On 17 December 2003, Ian Huntley was convicted of the murders of Jessica Chapman and Holly Wells in Soham (for an example of the level of associated media coverage surrounding this case see [The Soham Trial](#) on the BBC News website). 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 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. The remit of the inquiry was to:

"Urgently enquire into child protection procedures in Humberside Police and Cambridgeshire Constabulary in the light of the recent trial and conviction of Ian Huntley for the murder of Jessica Chapman and Holly Wells. In particular to assess the effectiveness of the relevant intelligence-based record keeping, the vetting practices in those forces since 1995 and information sharing with other agencies" (Bichard 2004)

Sir Michael (2004) published his [report](#) on 22 June 2004 ('the Bichard Report') and Mr Blunkett made a [statement](#) in the House of Commons in which he indicated that:

“Sir Michael's report uncovers serious failures in recording and managing information. These failures include local systems for recording, retaining and accessing data. They include national frameworks for inspection and information exchange, and the systems that underpin them.”

(UK Parliament 2004)

The report made 31 recommendations to a range of public services and UK Government Departments, which the UK Government accepted and agreed to act upon (UK Parliament 2004).

ENGLAND AND WALES: SAFEGUARDING VULNERABLE GROUPS ACT 2006

The Safeguarding Vulnerable Groups Act 2006, which received Royal Assent on 8 November 2006 is the UK Government's response to Recommendation 19 of the Bichard Report in relation to England and Wales. Recommendation 19 provided that:

“New arrangements should be introduced requiring those who wish to work with children, or vulnerable adults, to be registered. This register – perhaps supported by a card or licence – would confirm that there is no known reason why an individual should not work with these client groups” (Bichard 2004)

The Act is scheduled for implementation in 2008 ([Home Office 2006](#)).

THE SCOTTISH EXECUTIVE'S RESPONSE TO THE BICHARD REPORT

While the Bichard Report was mainly directed to England and Wales, Scottish Ministers made clear:

“that they would learn the lessons and also that we should seek to streamline current systems and ensure there are no cross border loopholes across the UK that could be exploited by those who might do harm to vulnerable people”

(Scottish Executive 2006a, p 3)

The [Protection of Vulnerable Groups \(Scotland\) Bill](#) (hereafter referred to as ‘the Bill’) is the Scottish Executive's response to Recommendation 19 of the Bichard Report. Other recommendations from the Bichard Report are “being taken forward as required in Scotland through a variety of actions” (Scottish Executive 2006a, p 5).

CHILD PROTECTION IN SCOTLAND

This section of the briefing provides a brief introduction to the child protection policy and a summary of the legislation relating to the current list of individuals banned from working with children. The operation of the existing vetting and disclosure scheme is considered separately later in the briefing.

AUDIT AND REVIEW AND A THREE YEAR REFORM PROGRAMME

On [20 March 2001](#) the then Minister for Education, Europe and External Affairs, Jack McConnell MSP, announced a review to improve child protection arrangements in Scotland (see the Executive's webpage on the [Audit and Review](#)). A multi-disciplinary team carried out the review and published its report, [“It's Everyone's Job to Make Sure I'm Alright” – Report of the Child Protection Audit and Review](#), on 25 November 2002.

In November 2002, as part of the response to the above report, the First Minister announced a [three year reform programme](#) for the protection of children in Scotland. The [aims and objectives](#) of the programme were drawn up with the overall goal of improving the protection of children at risk of neglect and abuse and reducing the number of children who need protection. A [steering group](#) was established to oversee the reform programme. Projects of the reform programme include:

- the development of the [Framework for Standards](#) which applies to all agencies, [inter-agency child protection training](#) and [multi-agency inspection](#) for all agencies involved in child protection
- [raising community awareness](#) of child protection
- [child death and significant case reviews](#)
- implementation of the list for unsuitable adults under the Protection of Children (Scotland) Act 2003 (asp 5) (see below)

Key agencies have been expected to review their own procedures in relation to child protection and to work with the Scottish Executive in implementing the reform programme.

SCOTTISH PARLIAMENT EDUCATION COMMITTEE INQUIRY

The [Education Committee](#) of the Scottish Parliament undertook an inquiry into child protection in 2004. The main focus of the inquiry was to examine the implementation of the recommendations of the [It's Everyone's Job to Make Sure I'm Alright](#) report. Since their report ([Scottish Parliament Education Committee 2004](#)) was published in July 2004 the Committee has received regular updates on progress from the Minister. The most recent update was received on 17 May 2006 ([Scottish Executive 2006b](#)). In this the Minister noted the consultation on the proposals for a new vetting and barring scheme.

PROTECTION OF CHILDREN (SCOTLAND) ACT 2003

The [Protection of Children \(Scotland\) Act 2003](#) ('the 2003 Act') aimed to plug a gap in the existing safeguards which allowed unsuitable people to move from one child care post to another without detection if they had not been convicted of an offence. The Act introduced new statutory duties and offences which apply equally to the statutory, private and voluntary sectors and which cover work in both paid employment and unpaid voluntary service. Section 1 of the 2003 Act obliges Scottish Ministers to set up the Disqualified from Working with Children List ('DWCL') which came into operation on 10 January 2005.

The process of considering an individual for addition to the DWCL

Organisations have a duty to refer an individual to Scottish Ministers for possible inclusion on the DWCL in certain specified circumstances (2003 Act, section 2). Failure to make a referral in those circumstances is an offence under the Act (2003 Act, section 2(2)). Furthermore, it is an offence for an organisation to offer work in a child care position to an individual who is disqualified from working in such a position (2003 Act, section 11(3)(a)).

Section 11(3)(b) also makes it an offence for an organisation to fail to remove an individual who is disqualified from working with children from such work. This section was never implemented possibly because it raises the need for checks on existing staff and volunteers and it was anticipated that there would be significant resource implications associated with that. However, checks on the existing workforce are something that will be required under the new legislation,

although this is likely to be phased in over a 3-5 year period (see [Policy Memorandum](#), paras 153–155 and further below).

The DWCL also includes those convicted of an offence against a child, when the court has referred them because it considers them unsuitable to work with children (2003 Act, section 10).

Appeal mechanisms, to safeguard the rights of the individual, are built in the process of determining whether a person should be included on the DWCL.

Effect of inclusion on the DWCL

Those individuals on the DWCL (other than a ‘provisional listing’ under section 7 of the 2003 Act, ie a listing pending a final determination as to whether an individual should be included on the DWCL), are disqualified from working with children and commit a criminal offence if they apply for, offer to do, accept or do any work with children (2003 Act, section 11(1)).

The fact that someone is on the DWCL will be highlighted in two of the types of Disclosure available through [Disclosure Scotland](#) (see further below under ‘The Current Vetting and Barring System in Scotland’).

Guidance and Implementation

The Scottish Parliament [Education Committee](#) has taken an interest in the implementation of the 2003 Act. During the second half of 2004 the Committee heard concerns from organisations, particularly from some in the voluntary sector, concerning confusion over what the Act meant in practice for volunteers and voluntary organisations.

The Scottish Executive responded by producing additional guidance for the voluntary sector. They also deferred the offence element (of not making a check) for three months. For more information on the 2003 Act see the Scottish Executive’s [webpage](#) which lists all guidance published by the Executive.

Operation in practice

As at 25 August 2006, 101 individuals were fully listed on the DWCL (77 through court referrals and 24 on decision by the determination panel). There were also 31 people provisionally listed, ie going through the information gathering phase of the process for panel consideration in the future (Scottish Parliament Information Centre 2006).

ADULT PROTECTION IN SCOTLAND

This section provides a brief introduction to the policy context and legislative framework associated with adult protection in Scotland to date.

THE CURRENT LEGISLATIVE FRAMEWORK

Traditionally, adults in need of protection have been regarded as those suffering from mental health disorders. Consequently, existing statutory protection provisions available to public authorities exist mainly through mental health legislation, with the most recent Act being the Mental Health (Care and Treatment)(Scotland) Act 2003 (asp 13). Powers include ([Policy Memorandum to the Adult Support and Protection \(Scotland\) Bill](#), paras 6–7):

- a power to demand admission to premises where a mentally disordered person is

- a power of forcible entry to premises where a mentally disordered person is and removal of that person to a place of safety
- a power to take mentally disordered people found in a public place and in need of care to a place of safety
- a power to enter premises in order to take a person over 16 who has, or appears to have, a mental disorder to any place authorised under the 2003 Act
- a power to enter premises to remove to a place of safety a person over 16 with a mental disorder who is at risk and is likely to suffer significant harm if not removed to a place of safety
- a power to remove a person reasonably suspected of having a mental disorder from a public place to a place of safety

In addition, section 47 of the National Assistance Act 1948 (c 29) (as amended) provides for a power to remove a person suffering from chronic disease or living in unsanitary conditions who lacks proper care and attention from home to a hospital or other place. Finally, section 6 of the Social Work (Scotland) Act 1968 (c 49) provides for a power of entry and inspection of residential and other accommodation provided by a local authority, voluntary organisation or other person.

NO LIST FOR ADULTS

At present, in contrast to the position with children, there is no list of individuals who are designated as being unsuitable to work with adults who might be regarded as in need of protection.

ADULT SUPPORT AND PROTECTION (SCOTLAND) BILL

The [Adult Support and Protection \(Scotland\) Bill](#) was introduced into the Scottish Parliament on 30 March 2006, with the [Health Committee](#) being designated the lead committee. Stage 1 of its parliamentary consideration is due to be completed on 24 November 2006.

This Bill was, in part, a policy response to a growing awareness that there are groups in need of protection which extend beyond those suffering from a mental health disorder, for example, the elderly or those suffering from an illness other than a mental health disorder. The Bill seeks to protect and benefit adults at risk of being abused. It aims to do so by introducing investigative rights and duties as well as a range of post-assessment interventions. It is intended that these measures will be underpinned by the creation of local multi-disciplinary Adult Protection Committees to both oversee and coordinate the work of various agencies involved in abuse investigations and to develop prevention strategies ([Policy Memorandum to the Adult Support and Protection \(Scotland\) Bill](#), para 2).

Note that the Executive did also consider including the provisions relating to the list of individuals barred from working with protected adults now contained in the Protection of Vulnerable Groups Bill in the Adult Support and Protection Bill. It ultimately decided against this for reasons including the need for a consistent approach to both children and protected adults (see further [Policy Memorandum](#), para 29).

For more information on the protection measures in the Adult Support and Protection Bill see the recent SPICe briefing '[Adult Support and Protection \(Scotland\) Bill Part 1 – Protection of Adults at Risk of Abuse](#)'.

OTHER SCOTTISH EXECUTIVE INITIATIVES

The Scottish Executive is undertaking a number of other initiatives designed to improve services in the field of adult protection. For more information see the webpage of its [Adult Support and Protection Unit](#).

THE CURRENT VETTING AND DISCLOSURE SYSTEM IN SCOTLAND

PART V OF THE POLICE ACT 1997

Part V of the Police Act 1997 (c 50) contains a statutory framework to allow for criminal record checks to be carried out in relation to those individuals applying for particular posts (whether paid positions or voluntary posts). To this end Part V provides for the issue of 'criminal conviction certificates', 'criminal record certificates' and 'enhanced criminal record certificates'. In practice, these certificates are known as Basic, Standard and Enhanced Disclosures respectively.

THE ROLE OF DISCLOSURE SCOTLAND

Since 2002 these criminal record checks have been carried out in Scotland by [Disclosure Scotland](#), a public/private partnership between Scottish Ministers and BT ([Disclosure Scotland](#) is currently part of the [Scottish Criminal Record Office](#)). Since the date Disclosure Scotland came into operation, just under 1.5 million applications for checks have been made ([Policy Memorandum](#), para 23). It is the responsibility of the individual to pay the disclosure fee, although in practice this cost is sometimes met by employers.

VOLUNTEERS AND THE CENTRAL REGISTERED BODY IN SCOTLAND

The Scottish Executive also established the [Central Registered Body in Scotland](#) (CRBS). As one of its two main functions, the CRBS administers requests for free Standard/Enhanced Disclosures on those in the voluntary sector wishing to carry out voluntary work with children, young people and adults at risk.

The CRBS carries out various checks (eg checking that a voluntary organisation is bona fide) and then passes the application onto [Disclosure Scotland](#) for processing. Once processed, [Disclosure Scotland](#) will pass the result back to CRBS and also to the individual applicant concerned. CRBS in turn will inform the voluntary organisation in question. Scottish Ministers are committed to providing free checks for volunteers and in 2005/2006 paid just under £700,000 for around 50,000 such applications ([Policy Memorandum](#), para 23).

TYPES OF DISCLOSURE

Table 1 below provides more information about each type of Disclosure under the current system.

In this regard, it is important to be aware of the role of the Rehabilitation of Offenders Act 1974 (c 53) ('the 1974 Act') and the distinction between 'spent' and 'unspent' convictions. The 1974

Act is a specific piece of legislation affecting ex-offenders employment opportunities. Under certain circumstances, it enables them to ‘wipe the slate clean’ of their criminal record once a specified period of time has lapsed from the date of conviction. Provided they have not been re-convicted of another offence, their conviction is said to become ‘spent’ and for employment purposes it can be treated as if it never existed.

Various kinds of employment, occupations and professions are exempted from the 1974 Act under the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions)(Scotland) Order 2003 (SSI 2003/231) (‘the 2003 Order’) including work which brings the person in contact with certain vulnerable groups. If the job applied for is exempt from the 1974 Act then, provided the employer states clearly that this is the case on the application form or at the interview, the applicant must disclose information about his or her ‘spent’ convictions.

Table 1: Types of Disclosure

Type of Disclosure	Description
<p align="center">Basic Disclosure</p> <p>(a ‘criminal conviction certificate’ under Part V of the Police Act 1997)</p>	<p>This type of Disclosure is available to any person for any purpose.</p> <p>It only provides information on convictions which are ‘unspent’ under the Rehabilitation of Offenders Act 1974 or states that there are no such convictions.</p>
<p align="center">Standard Disclosure</p> <p>(a ‘criminal record certificate’ under Part V of the Police Act 1997)</p>	<p>Categories of posts for which a Standard Disclosure may be required include those involving regular contact with children and adults at risk, although such positions are normally eligible for Enhanced Disclosure.</p> <p>This type of Disclosure provides information on convictions which are both ‘spent’ and ‘unspent’ under the 1974 Act and, in instances where an individual is applying for a job working with children, whether the individual is on the DWCL (or other equivalent lists in other UK jurisdictions)</p>
<p align="center">Enhanced Disclosure</p> <p>(an ‘enhanced criminal record certificate’ under Part V of the Police Act 1997)</p>	<p>This type of Disclosure is available to various categories of individuals including those who apply for work that regularly involves caring for, training, supervising or being in sole charge of children or adults at risk.</p> <p>In addition to the details included in Standard Disclosures, Enhanced Disclosures may contain non-conviction information which the police consider relevant to the position being considered.</p>

For more information about the different types of disclosure see [Types of Disclosure](#) on the [Disclosure Scotland](#)'s website. For more information on the 1974 Act and the 2003 Order see [The Rehabilitation of Offenders Act 1974](#) (a publication by [Apex Scotland](#)).

USE OF DISCLOSURE INFORMATION

The aim of the current disclosure process is to provide organisations with access to information about criminal convictions and, in the case of Enhanced Disclosures, relevant non-conviction information, which assists them in making informed decisions about suitability for employment. Unless somebody is included on the DWCL (or its equivalents in other parts of the UK), decisions on who is or is not unsuitable are taken locally by employers (Scottish Executive 2006a, paras 2.3.4–2.3.5).

RELEVANT LEGISLATION RELATING TO SEX OFFENDERS

In Scotland, sex offences are created either by the common law (ie case law) or prescribed in statute. In addition, much of the law relating to the prevention and monitoring of sex offenders is contained in statute. In the context of the subject matter of the Bill, two aspects of the system for prevention and monitoring of sex offenders are of particular relevance. These are discussed in the following two sections of this paper.

REGISTRATION OF SEX OFFENDERS

The Sex Offenders Act 1997 (c 51) introduced a requirement for those who had committed certain serious sexual offences since 1997, or who were in custody at that time, to register their name and address with the police for a specified period, if ordered by a court. This is what is often referred to as the 'Sex Offenders Register' (although, in fact, there is no single register). Under this Act, offenders were required to register with their local police whenever they moved residence throughout the period when registration was required, and failure to register was a criminal offence.

This Act was repealed and re-enacted in amended form by the Sexual Offences Act 2003 (c 42). Changes introduced included a new power to check the fingerprints and take a photograph of a sex offender each time they notified the police of their details, and a requirement that registered offenders reconfirm the accuracy of the information provided on an annual basis (2003 Act, sections 85 and 87(4)).

At present, inclusion on the Sex Offenders Register is normally, but not always, disclosed on an Enhanced Disclosure under Part V of the Police (Scotland) Act 1997 (see above in relation to Enhanced Disclosures). The new vetting and barring system proposed in the Bill contains proposals relating to the Sex Offenders Register which strengthen the link between the vetting and barring system and the Sex Offenders Register, in respect of which see further below.

CIVIL COURT ORDERS

Sexual Offences Prevention Orders

The Sexual Offences Act 2003 (c 42) created the 'Sexual Offences Prevention Order' (SOPO).¹ Broadly speaking, a court may make this order in order to protect the public or any particular members of the public from serious sexual harm from the individual named in the order. The

¹ These replaced 'Sex Offender Orders' introduced under section 20 of the Crime and Disorder Act 1998 (c 37).
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order has effect for a fixed period which must not be less than 5 years. The Protection of Children and Prevention of Sexual Offences (Scotland) 2005 (asp 9) ('the 2005 Act') extended the use of SOPOs so that the sentencing judge can impose a SOPO on those convicted of sex offences by the court when they are sentenced, without the need – as previously – for further evidence of threatening behaviour following conviction.

Risk of Sexual Harm Orders

The 2005 Act introduced the Risk of Sexual Harm Order (RSHO) which can be used to restrict the movements of an adult whose behaviour indicates that he or she may pose a risk of sexual harm to a child or children. There are four categories of behaviour that can trigger an RSHO, including, for example, engaging in sexual activity involving, or in the presence of, a child.

The intention is that secondary legislation will be made under an enabling provision in the Bill relating to these two types of civil court order, in respect of which see further below.

For more information on the Sex Offenders Register, SOPOs and RSHOs see pages 3–5 and 9–10 of the recent briefing by the Scottish Parliament Information Centre (2006b) entitled 'Overview paper: Sex Offenders in Scotland' found in the [Meeting Papers](#) of the Justice 2 Sub-Committee for 5 September 2006.

PROPOSALS IN THE BILL: THE NEW VETTING AND BARRING SYSTEM

POLICY OBJECTIVES OF THE BILL

The [Policy Memorandum](#) to the Bill (at para 30) states that the underpinning objectives of the new vetting and barring scheme are 1) people who are unsuitable do not gain access to children and protected adults through work; 2) people who become unsuitable are detected early and prevented from continuing to work, or seeking to work, with children or protected adults; and 3) so far as practicable, the underlying processes minimise bureaucracy.

SOME KEY DEFINITIONS

The following are some of the key definitions used in the Bill:

'Child' means an individual under the age of 18 (section 96).

'Protected adult' means an individual aged 16 or over and who is in receipt of any of the services set out in section 94. The services covered include those relating to health, community care, housing support and care homes. The term 'vulnerable adult' was used in the Scottish Executive consultation that preceded the Bill, however it was not used in the Bill because some service users considered it to be inappropriate and discriminatory ([Policy Memorandum](#), para 52)

'Harm' and **'risk of harm'** are defined in section 93. The definition of harm goes wider than physical harm, including threatening behaviour (a type of psychological harm) or harm to the interests of the individual. The definition of risk of harm is wide enough that the individual does not need to be the direct agent of harm nor does it matter if the individual's actions are ineffective (Explanatory Notes, para 21). Note that some of the circumstances in which organisations are obliged to refer an individual to Scottish Ministers (in practice the CBU – see further below) under sections 2–6 of the Bill rely on 'harm' and 'risk of harm'.

‘Work’ includes paid or unpaid work. It does not include work done for an individual in the course of a family relationship or in the course of a personal relationship with no commercial consideration (section 95). Note the term is used in the definitions below.

‘Regulated work with children’ is defined in section 91 and schedule 2 of the Bill. The Bill creates a scheme which those undertaking or wishing to undertake regulated work with children should join (see further below)

‘Regulated work with adults’ is defined in section 91 and schedule 3 of the Bill. Individuals undertaking or wishing to undertake regulated work with adults should join the new vetting and barring scheme provided in the Bill (see below)

‘Organisation’ is defined very broadly in section 96. The Scottish Executive Bill Team has indicated that the definition will cover, amongst others, local authorities, charities, businesses, voluntary groups, faith groups, sports clubs and social clubs (Scottish Executive 2006d). Organisations commit an offence if they employ a person (including as a volunteer) who is barred (section 34)

A fuller explanation of key terms in the Bill can be found in para 4 of the [Explanatory Notes](#) and paras 46–54 of the [Policy Memorandum](#). Schedule 5 of the Bill also provides a useful index of terms.

MAIN FEATURES OF THE NEW VETTING AND BARRING SCHEME

It is intended that people undertaking regulated work with children and/or regulated work with adults should join the new vetting and barring scheme. Participation is not mandatory but it is the only mechanism for organisations to be sure that they are not employing a barred person (and thereby committing an offence under section 34).

The key features of the new scheme can be summarised as follows:

- **the Children’s List:** the creation of the Children’s List (section 1), which builds on the DWCL by:
 - expanding and clarifying definitions found in the 2003 Act, in particular what is classified as ‘regulated work with children’ (in relation to the latter see section 91 and schedule 2)
 - updating the offences for which courts must refer an individual on conviction, to include offences created in recent legislation (see sections 14 and 31 and schedule 1)
 - enabling police forces to access the Children’s List (and the Adults’ List – see below) for the purposes of preventing and detecting crime and the apprehension and prosecution of offenders (section 37)
- **the Adults’ List:** the creation of a new list relating to protected adults (section 1)
- **barring:** the effect of being on the Children’s List or the Adults’ List (or a corresponding list in another part of the UK) is that an individual is barred from undertaking the type of

regulated work (ie with children or protected adults) that the list in question is associated with

- **offences:** a barred individual will commit an offence if he or she seeks to do, agrees to do, or undertakes, regulated work in the relevant workforce (section 33). Organisations will commit an offence if they make an offer of regulated work to someone who is barred from the relevant workforce, permit them to do such work, or fail to remove them from such work (section 34)
- **a new body:** the Central Barring Unit (CBU) will be created which will make a determination of unsuitability to work with vulnerable groups (the barring function). [Disclosure Scotland](#) will assemble the conviction and non-conviction information for applicants (the vetting function). The two bodies will be joined together to create a new executive agency (see further [Policy Memorandum](#), paras 42, 101–104)
- **scheme membership:** once an individual is a member of the new scheme the intention is that subsequent disclosure checks will be less bureaucratic to administer than under the current arrangements
- **the existing workforce:** retrospective checking of the existing relevant workforces, which is likely to be phased in over a 3–5 year period ([Policy Memorandum](#), paras 153–155)
- **continuous updating:** information used to vet an individual will be continuously updated on the basis of information from various sources, including the police, courts, organisations who are employers, regulatory bodies and local authorities. New relevant information will lead to an individual being considered for listing. The aim is to address a recognised problem with the current system that Disclosures are only valid on the day of issue and new information is only picked up at the next disclosure request. Continuous updating means that, if an individual who has had a disclosure check becomes unsuitable, their employer can be notified (see further Scottish Executive 2006a, para 2.3.5; [Policy Memorandum](#), paras 38, 64, 89 – 99; and sections 2–9 of the Bill)
- **personal employers:** it will be possible for ‘personal employers’, ie private individuals as opposed to organisations, such as parents taking their children to the local piano teacher, to check a person’s barred status. At present, it is not possible for personal employers to request a Standard or Enhanced Disclosure (see further Scottish Executive 2006a, para 3.4.3; [Policy Memorandum](#), paras 44 and 58 and section 51 of the Bill)

TYPES OF CHECK AND THE INFORMATION THAT WILL BE DISCLOSED

To join the vetting and barring scheme described above, individuals will be required to apply for a new form of check. The bill provides for three types of check, all of which require an individual to become a scheme member, if not already one. Table 2 provides information about the circumstances in which a particular type of check is appropriate and the information which will ultimately be disclosed in relation to that type of check.

Table 2: Types of check

Type of check	Circumstances where appropriate form of check	Information disclosed
Scheme Record	<p>Where the relevant post is with an organisation and one of the following circumstances apply:</p> <ul style="list-style-type: none"> • where the applicant is joining the scheme for the first time – either entry to one workforce (ie children or protected adults) or simultaneous entry to both workforces • where the applicant is joining the other workforce for the first time • where the applicant is renewing scheme membership. The lifetime of the scheme membership is to be prescribed by secondary legislation but the Policy Memorandum suggests it is likely to be ten years • on request, following discovery of new information through a Short Scheme Record disclosure (see further below) • as a registration requirement by a professional regulatory body • any other time agreed by the individual and employer 	<ul style="list-style-type: none"> • confirmation of scheme membership for the relevant workforce (ie that the individual is not barred by virtue of being on the relevant list for the post in question) • whether the individual is currently being considered for inclusion on the list relevant for the post in question • convictions, ‘spent’ and ‘unspent’ • inclusion on the Sex Offenders Register • certain civil court orders that are to be prescribed by secondary legislation • relevant information from the police, regulatory bodies and, in the longer term, local authorities
Short Scheme Record	<p>Where the relevant post is with an organisation and either of the following circumstances apply:</p> <ul style="list-style-type: none"> • taking up a position with a new employer when already a scheme member in respect of that workforce 	<ul style="list-style-type: none"> • confirmation of scheme membership for the relevant workforce (ie that the individual is not barred by virtue of being on the relevant list for the post in question)

	<ul style="list-style-type: none"> • as part of a periodical check requested by the current employer 	<ul style="list-style-type: none"> • whether the individual is currently being considered for inclusion on the list relevant for the post in question • date of the last Scheme Record disclosure • Indication of whether there is any new information which would have been included on a Scheme Record disclosure since the above date
Statement of Barred Status	<p>Where there is no organisational employer and either of the following circumstances apply:</p> <ul style="list-style-type: none"> • the applicant is joining the scheme for the first time • taking up a new position with a personal employer when already a scheme member 	<ul style="list-style-type: none"> • confirmation of scheme membership for the relevant workforce (ie that the individual is not barred by virtue of being on the relevant list for the post in question) • whether the individual is currently being considered for inclusion on the list relevant for the post in question

THE VETTING FUNCTION

The role of Disclosure Scotland

As mentioned above, the Scottish Executive anticipates that [Disclosure Scotland](#) will be responsible for assembling what is referred to in the Bill as ‘vetting information’ (see below) ([Policy Memorandum](#), para 42).

Vetting information (section 46)

Vetting information comprises any criminal convictions, spent and unspent, and other non-conviction evidence considered relevant by the police. In addition, inclusion on the Sex Offenders’ Register will always be regarded as vetting information (section 46(1)(b)). At present, inclusion on the Sex Offenders Register is normally, but not always, disclosed on an Enhanced Disclosure under the current system ([Policy Memorandum](#), para 72).

Section 46 also allows Scottish Ministers to prescribe by way of secondary legislation what constitutes vetting information. The [Policy Memorandum](#) (at para 73) states that Scottish Ministers intend to prescribe in secondary legislation that vetting information will also include relevant civil court orders and relevant information held by regulatory bodies and (in the longer term) by local authorities.

In relation to civil court orders, the [Policy Memorandum](#) (at para 75) states that Scottish Ministers intend to prescribe by secondary legislation that all ‘Risk of Sexual Harm Orders’ and

'Sexual Offences Prevention Orders' (discussed above under 'Relevant Legislation Relating to Sex Offenders') will always be considered relevant civil court orders and should always be included in a Scheme Record Disclosure. In relation to other civil court orders the Scottish Executive states:

"some civil orders may not be relevant in all cases and Chief Constables will have a discretion to disclose them. For example, an Anti Social Behaviour Order might be relevant if the order was given as a result of antisocial behaviour involving children or protected adults. (...) the police will have the power to disclose other relevant information and this might include information about other civil court orders that have not been prescribed by Scottish Ministers" ([Policy Memorandum](#), para 75)

Distinction between information disclosed and vetting information

It is important to remember that vetting information is not always disclosed to the applicant. Instead it depends on the type of check that is being carried out.

A Scheme Record discloses the vetting information, a Short Scheme Record discloses the fact that new vetting information exists since the date of the last check (but not what that information is) and a Statement of Barred Status, as its name suggests, is limited to an indication of whether a person is barred or not.

No relevant vetting information

Where no vetting information is found, or information which is not relevant to unsuitability to undertake regulated work (eg a driving conviction) is found when an individual joins the scheme, the Disclosure record is issued by [Disclosure Scotland](#), with no involvement of the CBU ([Policy Memorandum](#), para 76). On the other hand, if relevant vetting information is found, the application will be passed to the CBU (see below).

Delegation of functions

Section 70 of the Bill provides a power for delegation of Scottish Ministers' functions in respect of vetting and disclosure to "such person as they may determine". This means that, at some future date, a private contractor could take a greater role in the vetting and disclosure function than exists under the current set-up where BT and Scottish Ministers operate in a public/private partnership as [Disclosure Scotland](#) ([Policy Memorandum](#), para 70).

THE BARRING FUNCTION

The role of the Central Barring Unit (CBU)

Part 1 of the Act refers to the determination of unsuitability to work with children or protected adults to be the responsibility of Scottish Ministers. However, the [Policy Memorandum](#) (at para 42) states that in practice this function will be carried out the Central Barring Unit (CBU), part of a new executive agency. The remainder of this section of the briefing refers to the CBU, not Scottish Ministers, in keeping with the Executive's anticipated approach.

Note that the many of the details of the determination process of the CBU are to be made by secondary legislation and further consultation on this issue is expected in 2007 ([Policy Memorandum](#), para 110).

Possible courses of action

It is intended that, on receipt of relevant vetting information about the applicant, the CBU will either ([Policy Memorandum](#), paras 77 and 107):

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- list the individual immediately (automatic barring) (section 14)
- consider whether to list the individual, leading to a determination by an expert panel (consideration for listing is the equivalent of ‘provisional listing’ under the 2003 Act) (section 12)
- take no further action (section 12)

If an individual is referred to the CBU by an organisation (see sections 2–5 and further below) the CBU will either ([Policy Memorandum](#), paras 105–106):

- consider whether to list the individual, leading to a panel determination (sections 2–5)
- take no further action (sections 2–5)

These possible courses of action are examined in greater detail below.

Automatic listing (section 14)

Relevant offences

There are some offences committed against children, listed in schedule 1 (and referred to as ‘relevant offences’ in section 31) for which a court must refer an individual for listing on the Children’s List. Furthermore, the CBU *must* list an individual who commits such an offence – it has no discretion in this regard (sections 14(1)(a), (5) and 31(1)(a) and schedule 1).

The list of offences in schedule 1 of the Bill has been expanded, largely to take account of new sexual offences created under the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 9).

The Bill itself does not specify any offences against adults in respect of which an individual committing them will be automatically listed “because it is more difficult to identify relevant offences” ([Policy Memorandum](#), para 112). However, section 14(2) does give power to Scottish Ministers to prescribe by way of secondary legislation specific offences relating to protected adults which would lead to automatic listing, to leave future flexibility in this regard ([Policy Memorandum](#), para 112).

In addition to the circumstances where the court is under a duty to refer an individual for listing under section 14, the court also has a discretionary power under section 7 to refer an individual for listing. This is considered further below.

Criteria to be specified in secondary legislation

Section 14 of the Bill also provides that the CBU must list a person on the Children’s List where it appears that the person satisfies certain criteria to be specified in secondary legislation (section 14(1)(b)). No further details of the likely content of these criteria are known at this time.

Role of the expert panel

The Scottish Executive Bill Team has indicated that, whilst nothing is finalised pending the 2007 consultation on the decision making process, the expert panel that will make determinations when an individual is being considered for listing (see below) is likely to also have some role in

verifying decisions made by CBU staff that an individual meets the criteria for automatic inclusion on the list (Scottish Executive 2006c).

Consideration whether to list (sections 10–13)

As discussed above, one of the courses of action that the CBU has open to it is considering an individual for inclusion on either or both of the lists.

In terms of timescales, the Policy Memorandum states that “normally” a determination will be made within 6 months of the start of the period of consideration for listing, whatever triggered the consideration for listing ([Policy Memorandum](#), para 117).

During the period an individual is being considered for listing he or she will be able to continue to undertake regulated work or seek regulated work, subject to three safeguards ([Policy Memorandum](#), para 116):

- **disclosure records:** a pending determination will appear on disclosure records
- **notification:** any organisation for which the individual is undertaking regulated work will be informed (section 29)
- **guidance:** there is a power for Scottish Ministers to prepare general guidance for what organisations should do when an individual is under consideration for listing which will be sent to an organisation when it is notified that an employee is under consideration for listing (section 29(4))

The CBU (in practice the expert panel) must list an individual on the relevant list if “after considering whether to do so they are satisfied by information relating to the individual’s conduct that the individual is unsuitable to work with” either children or protected adults (sections 15 and 16). It is not known at this time whether this criterion will be fleshed out in any way by secondary legislation or guidance.

There are four main categories of event which may result in consideration for listing by the CBU (two have already been referred to above):

- **referral by an organisation:** referral by an organisational employer, employment agency or ‘employment business’ (the latter is similar to an employment agency except the staff remain directly employed by the employment business itself) (sections 10 and 96(1)). These types of bodies are under a duty to refer where certain grounds for referral are met and failure to do so is a criminal offence (sections 2–5)²
- **discretionary court referral:** where an individual commits an offence against a child (other than that which requires automatic listing) or an offence against a protected adult, a court has a discretion to refer an individual for listing (section 7)
- **vetting information:** as mentioned above, if the CBU become aware of vetting information from [Disclosure Scotland](#) about an individual, who has done, does or is likely to do work with children or protected adults, this will trigger a consideration for listing (section 12). As a key feature of the new scheme is that vetting information is to be

² Note also that professional regulatory bodies have the power to refer (but are not under a duty to do so) (section 8). The Explanatory Notes (at para 28) state that this provision is designed to enable regulatory bodies to make a referral where employer(s) could not, or negligently did not, make a referral in respect of a registered professional.

continuously updated, there is the prospect of new information about a scheme member coming to light at any point

- **inquiries:** where an inquiry report names a particular individual who has been doing regulated work and it appears to the CBU that the person who held the inquiry found that a ground for an organisational referral was met at the time that individual was doing regulated work, they can consider that individual for listing (sections 2 and 13)³

Decision to take no further action

The sections of the Bill relating to consideration for listing (ie sections 10–13) require the CBU to consider an individual for listing (involving a formal determination by an expert panel) where certain criteria are met. The criteria which appear on the face of the bill are somewhat general in their nature, although the Scottish Executive has indicated that, in some instances, more detail will appear in guidance or secondary legislation (see further below) (Scottish Executive 2006c). If the criteria are not met then the CBU will take no further action (Policy Memorandum, para 77 and 107).

The Scottish Executive Bill Team has indicated that the decision as to whether the criteria are met is likely to be taken by staff at the CBU (Scottish Executive 2006c).

Organisational referral

In the case of a referral by an organisation (sections 2–5) the decision to proceed to consider an individual for listing will be based on the CBU deciding that ([Policy Memorandum](#), para 105):

- the matters contained in the referral are not vexatious or frivolous
- that the information submitted in the referral indicates that it may be appropriate for the individual to be listed

The grounds for a referral by an organisation contained in section 2 are broadly framed, presumably to allow for the possible capture of a wide range of potentially problematic behaviour, but in consequence relying on the exercise of significant discretion by any decision maker (initially the referring organisation and latterly the CBU). Some grounds are based on harm or risk of harm but overall they go wider than that, encompassing other forms of inappropriate conduct.

New vetting information

Section 12 of the Bill indicates that the CBU must consider the individual for listing where they are satisfied that “the information indicates that it may be appropriate for the individual to be included on the...[relevant] list”. The Scottish Executive Bill Team has indicated that additional criteria for enabling the CBU to decide whether to consider an individual for listing or take no further action will be detailed in either guidance or secondary legislation (made under section 36) (Scottish Executive 2006c).

Barring function cannot be delegated

Unlike the vetting and disclosure function (see above and section 70), the Bill gives no power to Scottish Ministers to delegate the barring function. This rules out the use of private contractors

³ The types of inquiry covered are those carried out by Scottish Ministers or the Scottish Parliament; those held under the Inquiries Act 2005 (c 12) (inquiries are held where there is either public concern about the occurrence, or possible occurrence of, particular events) and those prescribed by Scottish Ministers in secondary legislation (section 30).

in this context (but of course does not preclude the creation of an executive agency to carry out the barring function, as indeed is envisaged by Scottish Ministers in the form of the CBU) ([Policy Memorandum](#), para 70).

Appeals against listing (sections 21–24)

The Bill provides that an individual who has been listed can appeal to a sheriff against this decision (sections 21 and 22). Thereafter there is a right of appeal from the sheriff to the sheriff principal available to both Scottish Ministers or the individual concerned and thereafter (on a point of law only) to the Inner House of the Court of Session (section 23).

This part of the Bill broadly reproduces the equivalent provisions in the 2003 Act, with two significant departures:

- appeals to the Court of Session can be on a point of law only (as opposed to on a finding of fact on which the decision to list is based) (section 23(2))⁴
- court proceedings in respect of any appeal can take place in private (section 24(2))

PROPOSALS IN THE BILL: SHARING OF INFORMATION

Part 3 of the Bill introduces provisions in relation to information sharing for child protection purposes. It is not part of the vetting and barring scheme discussed above. However, the two are linked in the sense that vetting information (see above at pp 17–18 for definition), information 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.

STAKEHOLDERS’ VIEWS

Part 3 of the Bill was not consulted on in the consultation paper on the vetting and barring scheme (Scottish Executive 2006a). However, three stakeholder events were held in June 2006 “covering major organisations, professional bodies, inspectorates and the voluntary sector” ([Policy Memorandum](#), para 179).

Key points emerging from stakeholders included ([Policy Memorandum](#), para 180):

- **lack of clarity:** there is currently felt to be a lack of clarity about when to share information
- **data protection:** uncertainty about how information sharing interacts with data protection legislation
- **differences of approach:** different professional groupings use different language about risk and thresholds for intervention which is seen by some as a barrier to a consistent approach to information sharing
- **within organisations:** sharing information within organisations (eg between local authority departments) may also be inconsistent

⁴However, it should be noted that no finding of fact on which a conviction is based may be challenged on appeal under sections 21–23.

- **professionals working with adults:** conflicting interests may arise for some professionals whose relationship is with an adult rather than with the child. It was suggested that this led to difficulties in striking the right balance between sharing information for child protection purposes whilst not compromising the trust and confidentiality of the service provided to the adult
- **voluntary sector:** concern was expressed that the impact of the new provisions may impact adversely on the voluntary sector by having the unintended consequence of deterring volunteers

KEY PROVISIONS OF PART 3

Definition of ‘child protection information’

“Child protection information” is defined broadly in section 73 as information relating to a child which the holder considers, or should reasonably consider, to be relevant for the purposes of protecting the child, or any other child from harm.

The inclusion of ‘or’ in the wording of section 73 suggests that information may be passed on if the holder considers it relevant, ie a subjective test can be applied. However, the [Explanatory Notes](#) (at para 136) and the [Policy Memorandum](#) (at para 195) suggest that a reasonableness test is always to be applied to the information holder’s actions (ie an objective test). Further clarification on this point at Stage 1 may be helpful.

Duties and powers

The main duties and powers created by Part 3 are as follows:

- **information sharing with councils:** section 74 places a duty on specified organisations (defined in section 80 – see further below) to share child protection information with councils
- **co-operation with enquiries:** to assist councils considering whether to take action in order to protect a child from harm, section 75 places a duty on specified organisations to co-operate with councils and with each other where such co-operation is likely to help a council making enquiries
- **code of practice:** section 76 (1) requires Scottish Ministers to prepare and publish a code of practice about child protection information. Section 76(2) provides that specified organisations must have regard to the code of practice when deciding whether any information is child protection information (as defined in section 73) and also to comply with their other statutory duties under Part 3
- **duty relating to workers:** specified organisations must take reasonable steps in order to enable, encourage and help its workers to share child protection information both amongst themselves and with other specified organisations. Reasonable steps include promoting awareness and understanding of the code of practice and ensuring that workers have regard to it in the course of their employment (section 77)
- **power of disclosure:** aside from the duties described above applicable to the specified organisations, there is a power available to *any* person to disclose child protection information to a specified organisation (section 78). The person disclosing the information

will be relieved of any applicable legal sanction or other remedy if they do so, provided that the information is disclosed only for the purpose of protecting a child from harm

Organisations subject to the duties contained in Part 3

Organisations which are subject to the duties contained in Part 3 are referred to in Part 3 of the Bill as “relevant persons”. The initial list is contained in section 80 and consists of mainly public sector organisations. Examples of specified organisations include the [Mental Welfare Commission for Scotland](#), the [Common Services Agency for the Scottish Health Service](#) and local councils. Section 80 provides that Scottish Ministers can add to the list by way of secondary legislation.

Child’s welfare is the paramount consideration

In relation to compliance with the statutory duties contained in Part 3 of the Bill, a child’s welfare is to be the paramount consideration (section 79).

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