

PROTECTION OF VULNERABLE GROUPS (SCOTLAND) ACT 2007

EXPLANATORY NOTES

OVERVIEW

Part 1 – the Lists

Section 1. Duty of the Scottish Ministers to keep lists

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

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

15. **Section 2** sets out the grounds for a referral by an employer, employment agency, employment business or professional regulatory body to one or other of the lists. Sections 3, 4 and 5 place duties on organisational employers, employment agencies (including nurse agencies) and employment businesses to make a referral when certain criteria are met.
16. A referral can only take place if at least one of the grounds set out in section 2 has been met. An organisation can only make a referral in respect of the type of regulated work which the individual does. For example, a teacher who is undertaking regulated work with children can only be referred by the education authority, for consideration for inclusion in the children’s list, on a ground in section 2(a). But the incident(s) which trigger the referral are not limited to workplace incidents.
17. The referral grounds at section 2 are identical for both the children’s and adults’ lists. Note that referrals can be made where there has been inappropriate conduct but no harm. A referral can be made on the basis of inappropriate conduct in relation to pornography or inappropriate conduct of a sexual nature involving a child or a protected adult. The conduct criteria ensure that a referral can be made where an individual has, for example, accessed child pornography. The criterion in respect of inappropriate medical treatment encompasses, for example, the sedation of children or protected adults in order to make it easier to manage them, rather than for their own benefit.
18. Some of the grounds for referral rely on the meaning of “harm” and “risk of harm”. Section 93 defines harm and risk of harm. The definition of harm makes clear that harm goes wider than physical harm; for example, including threatening behaviour (one type of psychological harm) or harm to the interests of an individual. The definition of risk of harm ensures that the individual does not need to be the direct agent of harm nor does it matter if the individual’s actions are ineffective. For example, the firing of a gun at a child which the individual did not know was unloaded would be an attempt to harm under section 93(2)(a) and, therefore, would constitute placing the child at risk of harm.
19. With organisational referrals under section 3, the intention is that a referral should be triggered by an organisation permanently removing an individual from regulated work. Provision is made at section (1)(b)(i) to accommodate referral grounds being identified

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after the individual has otherwise stopped doing regulated work for the organisation, for example of their own accord. A temporary removal, such as a suspension whilst circumstances are investigated, should not lead to a referral and this is made clear by subsection (3).

20. Sections 3, 4, 5 and 8 give the Scottish Ministers the power to prescribe the information which constitutes a referral. The Scottish Ministers will use this power to ensure that all necessary information is included in a referral to expedite the processing of a case and minimise the need to correspond with employers for clarification.
21. Section 6 gives employers and employment organisations the power to make referrals in respect of incidents which took place prior to the Act being commenced.

Section 7. Reference by court

22. Section 7(1) requires that, where a court convicts an individual of a relevant offence (as defined by schedule 1), the court must provide any information, as prescribed by the Scottish Ministers, that relates to the convicted individual. Section 11(2) requires that Ministers must consider an individual for listing in the children's list where that individual has been referred by a court, following a conviction for a relevant offence (relevant offences are only applicable to the children's list and not the adults' list). The prescribed information provided by the court will be used for the purposes of these considerations.
23. Section 7(2) gives the courts a power to refer an individual for consideration for listing where that individual commits any offence other than a relevant offence. The court is required to be satisfied that it may be appropriate for the individual to be listed on one or other or both lists. The Scottish Ministers, as the Central Barring Unit, will consider the court referral (under section 11) as they would any other referral. Note that section 7(2) of this Act only requires the court to be satisfied that it may be appropriate for the individual to be listed; there is no re-offending test and the court is not expected to reach any definitive conclusion.
24. In all cases of a court referral, the individual can only be listed following a consideration: very serious offences leading to automatic listing are those prescribed by order under section 14. So court referrals will always allow the full circumstances of the case to be considered by the Central Barring Unit before making a determination.

Section 8. Reference by certain other persons

25. Section 8 gives the professional regulatory bodies a power to make a referral. It is expected that any incident or behaviour which should trigger a referral will result in the employer, or employing organisation, making the referral. However, there are circumstances in which a proper referral might not be made, for example a negligent employer failing to refer or where an individual has a number of employers and no individual employer is in a position to make a referral. For example, if several education authorities raise concerns with the General Teaching Council for Scotland (GTCS) about a locum teacher, the GTCS may make a referral on the basis of the aggregate information available. Section 8 is therefore designed to enable relevant professional bodies operating in Scotland or on a UK-wide basis to make a referral where the employer(s) could not, or negligently did not, make a referral in respect of a registered professional.
26. Note that vetting information from regulatory bodies can be prescribed under section 49(1)(d) and regulatory bodies placed under a duty to provide this information by section 49(2). Such regulations, to the extent that they overlap with the power at section 8 in respect of scheme members, would supervene that power. But the power at section 8 is not restricted to scheme members.

Section 9. Failure to refer: offence

27. Organisations, employment agencies, nurse agencies and employment businesses commit an offence if they fail to discharge their duty to refer within 3 months from the date that the duty arose. This offence attracts a penalty of up to 12 months imprisonment and /or a fine not exceeding the statutory maximum on summary conviction. On conviction on indictment, the penalty is up to 5 years imprisonment and / or an unlimited fine. The severity of the penalty reflects the fact that this offence has potentially very serious consequences: a failure to refer means that an individual, who might have been barred had their case been considered, can continue to undertake regulated work with children and/or protected adults.
28. Section 89 of the Act makes provision for particular individuals to be held accountable where an offence is committed by an organisation.

Sections 10 – 13. Consideration whether to list

29. There are four triggers for consideration for listing by the Central Barring Unit. These are an organisational referral or court referral being received, new relevant vetting information coming to light (usually under arrangements made under section 42(2)) and the individual being named in a relevant inquiry report.
30. The Act establishes two lists and provides flexibility for triggers in respect of an individual's conduct in one workforce to lead to consideration in respect of listing on the other. For example, a referral in respect of a health worker undertaking regulated work with protected adults could, depending on the facts and circumstances of the case, result in consideration for listing in the children's list.
31. Organisational referrals lead to consideration for listing where the criteria set out at section 10 are met. Firstly, the organisation must have provided the requisite information (as prescribed under sections 3 to 6 and 8). The reason for this is to ensure that the Scottish Ministers have sufficient identity information to be sure of whom they are considering for listing and also the basic facts of a *prima facie* case against that individual. Secondly, the Scottish Ministers must be satisfied that the information was not given for vexatious or frivolous purposes. For example, the referral was not made out of malice or spite (vexatious) or over a trivial incident where nothing really untoward took place (frivolous).
32. A referral which passes these tests is said to be a competent referral. But before a competent referral leads to consideration for listing, the Scottish Ministers must be satisfied that it may be appropriate for the individual to be included in the relevant list. This will normally be the case, but depends on a caseworker assessment of the information provided by the organisation. The "may be appropriate" test is more easily met than the test for inclusion on the lists at sections 15 and 16.
33. Court referrals lead to consideration for listing where the criteria set out at section 11 are met. Section 11(2) means that Ministers must consider listing an individual convicted of a relevant offence (relevant offences are set out in schedule 1). This duty to consider an individual for listing is commonly referred to as "automatic consideration for listing", although there is no such wording in the Act. There is no schedule of relevant offences for protected adults nor any corresponding automatic consideration for listing for that list.
34. [Section 11\(3\)](#) links back to a court referral under section 7(3). Note that the Scottish Ministers must be satisfied as to the same matter as the court (compare section 7(2)(b) with sections 11(3)(a) and 11(4)(a)) and, additionally, that the individual does, has done or is likely to do regulated work. This latter element of the test before consideration for listing brings the focus onto the workforce but allows the Scottish Ministers to consider for listing individuals who are not scheme members.

35. The process following a court referral is independent of any appeal against conviction. If the appeal against conviction is successful, it does not follow that the individual will be removed from the list, although the individual could make an application for removal under section 25 on the basis of change of circumstances. Where the individual had been a scheme member prior to conviction, there may be other information on the retained scheme record (retained by the Scottish Ministers using their power at section 61) which should be taken into account.
36. Vetting information leads to consideration for listing where the criteria set out at section 12 are met. When new vetting information (as defined at section 49) about scheme members comes to light through arrangements made under section 47(2), it will be assessed against the criteria in section 12. That is to say, vetting information gathered by the Scottish Ministers in their capacity as the Vetting and Disclosure Unit (under Part 2), will be considered by them in their capacity as the Central Barring Unit (under Part 1). The tests at section 12(1)(b) and 12(2)(b) are met by the individual having had, having or applying for scheme membership in respect of that type of regulated work. They can also be met where there is other evidence of involvement with that type of regulated work outside of scheme membership. The “may be appropriate” test filters out new vetting information (e.g. driving convictions) which have no bearing on unsuitability to do regulated work.
37. **Section 12** also makes provision for a determination relating to one list (whether or not the individual was listed) to lead to consideration for listing in relation to the other list, provided that there is evidence of involvement in regulated work in that workforce. A case may be referred for consideration in relation to the other list at any stage in the consideration process from the beginning of the process (sections 10 to 13) to the final determination (section 15 or 16). It is expected that information which would lead to consideration for both lists would be identified early in the process but, in some cases, information may only emerge at a late stage or the need for referral to the other list may only become apparent when the determination panel considers specific information or aggregate vetting information.
38. A relevant inquiry report leads to consideration for listing where the criteria set out at section 13 are met. The types of inquiry to which this section relates are set out in section 31. Firstly, the individual must be named in a relevant inquiry report. Secondly, it must appear to the Scottish Ministers from the report that the person who held the inquiry found that the referral ground was met when the individual was doing regulated work. Note that the test centres on the view of the person who held the inquiry, rather than the Scottish Ministers, in respect of the referral ground being met. Thirdly, the Scottish Ministers must apply the “may be appropriate” test before considering the individual for listing. It is expected that persons conducting relevant inquiries will highlight named individuals potentially within scope of this section to the Central Barring Unit at the earliest opportunity.
39. A listed individual must not undertake regulated work (see section 34). But an individual under consideration for listing (i.e. in the period between a competent trigger under sections 10 to 13 and a determination under sections 15 or 16) may continue to do regulated work without committing any offence. Section 30 provides for organisational employers and relevant regulatory bodies to be notified of an individual being placed under consideration for listing and it is expected that they will take any appropriate action to mitigate any risk.

Section 14. Automatic listing

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

41. The Scottish Ministers intend to use the order making power at section 14(3) to capture historic, serious offences picked up if such an individual applies for scheme membership under section 45. This would prevent the need for a determination process in relation to, for example, an individual convicted of child rape in 1980 who applies to join the scheme. It is also intended that the order cover any contemporary conviction for such serious offences (whether or not individual is a scheme member).
42. [Section 14\(4\)](#) puts beyond doubt that an individual may be listed automatically following conviction for an offence elsewhere in the UK or as a result of them having been made subject to an order of a specified description imposing requirements about an individual's conduct.

Sections 15 and 16. Inclusion in the lists

43. [Section 15](#) deals with inclusion in the children's list and [section 16](#) deals with inclusion in the adults' list. There is one test no matter what triggered consideration for listing.
44. The nature of the tests in sections 15 and 16 take account of three important aspects of the listing process. Firstly, there is a wide range of triggers for consideration for listing: organisational referrals, court referrals, vetting information and inquiries. The information available from each of these triggers is likely to differ quite significantly. Secondly, the referral ground at [section 2](#) is fairly wide and extends outside of the workplace (although organisational referrals require to meet work-related criteria in subsequent sections). Thirdly, an individual can be considered for listing for one type of regulated work because of an incident which took place in respect of the other (as provided for by [section 12\(1\)\(a\)\(ii\)](#) and [\(2\)\(a\)\(ii\)](#)). For example, an individual may be included on the children's list under [section 15](#) because their conduct indicated that they were unsuitable to work with children but the incident(s) may relate exclusively to protected adults (e.g. abuse of an elderly resident in a care home).
45. For the reasons given in the preceding paragraph, the tests for inclusion on either list cannot be very specific. However, it is important to note that both tests rely on past conduct, i.e. an individual can only be listed on the basis of things they have done (evidenced through convictions, police intelligence, other vetting information, workplace incidents etc). No individual can be listed solely on the basis of anticipation of future conduct. It is also important to note that there is a margin of appreciation around the threshold for "unsuitability", although this must be exercised in a manner compliant with ECHR. The test applied at sections 15 and 16 is that used in civil proceedings, i.e. that *on the balance of probabilities* the individual is unsuitable.

Sections 17 – 20. Information relevant to listing decisions

46. The Central Barring Unit may use a number of sources of information as part of considering an individual for listing. An important principle enshrined in the Act is that the individual being considered for listing should have the opportunity to comment on all information which will be considered by the determination panel. [Section 17](#) of the Act sets out the individual's right to make representation on all the information which will be used in making a listing decision. It is intended that regulations under [section 42](#) will set out the detailed determination procedure and set time limits for making representation etc.
47. [Section 17\(2\)\(b\)](#) and (c) provide for the Scottish Ministers to consider information beyond that which led them to begin their consideration. Most importantly, the Scottish Ministers can consider vetting information about a scheme member ([section 17\(2\)\(b\)\(ii\)](#)) alongside any referral. It is intended that any listing decision is made on the basis of all relevant information about an individual and, for scheme members, this will include all relevant information from their scheme record.
48. [Section 18](#) effectively allows the Scottish Ministers as the Central Barring Unit to ask the Scottish Ministers as the Vetting and Disclosure Unit to provide police information

about an individual who is not a scheme member for the purposes of making a determination. Subsections (1) and (2) give the Scottish Ministers access to relevant non-conviction information and subsection (4)(a) will, in practice, be used to access criminal convictions on the Criminal History System (operated by the Scottish Police Services Authority since 1 April 2007) and information relating to convictions and cautions on the Police National Computer.

49. The Act does not allow the Scottish Ministers to pass vetting information received in their capacity as the Vetting and Disclosure Unit to employers only (i.e. without also providing it to the individual). This differs from provision in the Police Act in respect of enhanced disclosures, whereby the police can provide the Vetting and Disclosure Unit with a sealed envelope to go to an employer, but not an individual. The Act does not allow this because the Scottish Ministers need to be able to use all the information they receive from the police when considering an individual for listing and all such information must be shared with the individual so that they can make representation or appeal a decision to list effectively.
50. [Section 19](#) gives the Scottish Ministers the power to obtain information from other Scottish and UK-wide public bodies when deciding whether to list an individual. For example, a referral about a doctor from a Health Board might cause the Scottish Ministers to require further information from the General Medical Council. Subsection (2) gives the Scottish Ministers the flexibility to ask about the individual's performance of his or her duties (paragraph (a)) and to put that in the context of, for example, more general child protection policies (paragraph (b)). Consideration of an individual's case should take into account the organisational context: in assessing a member of staff whose behaviour is inappropriate, it may be relevant to take into account whether such behaviour was endemic or unique to that individual.
51. [Section 20](#) gives the Scottish Ministers the power to obtain information from employers and employment agencies with an involvement with the individual. There is an offence for these persons of failing to provide the required information because they might otherwise choose not to cooperate. This compares with section 19 where there is no equivalent offence and this is because public bodies are subject to other remedies (e.g. judicial review) for failing to comply with statutory duties.

Sections 21 – 24. Appeals against listing

52. [Sections 21](#) and [22](#) provide for a three-month time limit for appealing to the sheriff after being placed on either list. This time limit may be extended by the sheriff on cause shown. [Section 23](#) provides for appealing the sheriff's decision to the higher courts. Appeal to the Court of Session is restricted to points of law at [section 23\(2\)](#) of the Act. [Section 24\(2\)](#) provides that any court proceedings in respect of these appeals may be heard in private.
53. [Section 24\(1\)](#) makes clear that no finding of fact on which a conviction is based may be challenged on appeal under the preceding sections. This means that the behaviour or conduct of the individual, as found by the convicting court, cannot be re-opened during an appeal against listing.

Sections 25 – 27. Removing individuals from the lists

54. [Section 25](#) gives the listed individual the power to apply to the Scottish Ministers for removal from the list(s). Such an application is only competent if the individual has been listed for a prescribed period or if the individual's circumstances have changed.
55. The Scottish Ministers intend to make regulations under [section 25\(3\)\(a\)](#) which will specify the time period after which an individual can apply to be removed from the list(s). [Section 25\(3\)\(a\)](#) makes clear that this time period may begin on a date other than the date of listing itself (for example with the event which led to inclusion on the list). The power to prescribe a minimum time period, before an application for removal is

competent, may be used to allow individuals who were relatively young when listed to apply for removal from the list after a shorter period compared to those listed as mature adults. Section 25(4) puts beyond doubt that general rules on time limits are to apply to all cases; individuals are not to be "sentenced" to a tailored listing period.

56. **Section 26** provides that the Scottish Ministers must remove the individual from the list if satisfied that the individual is no longer unsuitable to undertake that type of regulated work. The process undertaken by the Scottish Ministers in respect of an application for removal mirrors that for a listing determination. Section 26(3) allows the Scottish Ministers to gather the same types of information as would be gathered for a listing determination and the same tests at section 15 and 16 are applied. That is to say, an individual will be removed from the list if it is no longer the case that, on the balance of probabilities, they are unsuitable to do that type of regulated work. This is not the same as saying the original decision to list was wrong (which would need to be contested through an appeal).
57. **Section 27** sets out the procedure for appealing the Scottish Ministers' decision in relation to application for removal from the list. This procedure mirrors that at section 23 in respect of appeals against initial listing decisions and, again, any such court proceedings may be held in private.

Section 28. Late representations

58. Where an individual could not engage with the consideration for listing process because the Scottish Ministers could not locate him or her (and they thereby forfeited the right to make representation at the time, see section 17(1) and (6)), the Scottish Ministers must consider late representations from that individual. The details of the determination procedures will be set out in regulations made under section 42.

Section 29. Removal from list

59. **Section 29(1)(a)** provides for removing individuals from the list following successful appeals or applications for removal. Subsection (1)(b) makes provision which enable an administrative mistake to be corrected, for example including the wrong John Smith on the list. Whether directed by the court, or on application from the individual or following internal review identifying an error, it is the Central Barring Unit which maintains the lists and does the "removing".

Section 30. Notice of listing etc.

60. All individuals included on a list under this Act are barred from undertaking that type of regulated work. However, an individual may be barred from regulated work because of inclusion on another list in a different jurisdiction deemed to be equivalent by the Scottish Ministers (see section 92). Section 30 requires the Scottish Ministers to notify an individual, all relevant employers and regulatory bodies of the fact that the individual is barred from undertaking regulated work (whether or not that barring originates from being included on a list under this Act). Details may also be provided relating to the circumstances that led to the individual being barred, as the Scottish Ministers think appropriate. The same duties apply to consideration for listing and any subsequent determination not to list the individual.
61. It is anticipated that the list of relevant regulatory bodies at section 30(7) will be expanded to cover the eight health regulatory bodies identified at section 8(2), 17(5)(c) and 19(3) through a section 60 order under the Health Act.

Section 31. Relevant inquiries

62. This section sets out the inquiries that are deemed relevant under section 13. Section 17(5)(b) of the Act allows an individual under consideration for listing to challenge

findings of fact made by an inquiry held by the Scottish Parliament, but not other relevant inquiries as defined by this section.

Section 32. Relevant offences etc.

63. **Section 32(1)** defines "relevant offence" for the purposes of Part 1. A relevant offence is one included in schedule 1. Offences listed in paragraph 1 of the schedule are those where the offence is defined in statute as offences against a child whereas offences listed in paragraph 2 of the schedule are not necessarily against children but are qualified for the purposes of the schedule as having a child victim.
64. Under section 7(1), a court is required to refer to the Scottish Ministers an individual who is convicted of a relevant offence and under section 11(2) the Scottish Ministers are required to consider that individual for listing. (Under section 7(3), the courts also have a power to make a referral in respect of a conviction for any other offence.)
65. **Section 32(2)** provides the Scottish Ministers with an order-making power to amend schedule 1 so as to modify the list of offences which constitute relevant offences. (Note that some very serious offences may be prescribed by order under section 14 to lead to automatic listing.)
66. **Section 32(3) and (4)** provides that a court referral should be made even if the court: acquitted the individual on the grounds of insanity; makes a finding under section 55(2) of the Criminal Procedure Act; or makes an order mentioned in section 57(2)(a) to (d) of the Criminal Procedure Act. An order under section 57 would include, for example, compulsion orders made under the Mental Health (Care and Treatment) (Scotland) Act 2003. The individual is to be treated as having been convicted of the offence for the purposes of making representation under section 17 as part of consideration for listing. Furthermore, as with convictions, a finding of fact as part of a court order under section 57(2)(a) to (d) of the Criminal Procedure Act cannot be challenged as part of an appeal against any listing decision (by reference to section 24).

Section 33. Duty to notify certain changes

67. Individuals on either list are required to provide the Scottish Ministers with any change in the individual's name, address or gender or any other prescribed change within one month of such change taking place. It is an offence to fail to do so. This is intended to help to prevent a listed individual from changing their identity and attempting to re-enter the workforce. (Section 50 places a similar duty on scheme members but with a longer timeframe, a lower penalty and no requirement to notify change of address.)

Sections 34 – 37. Offences relating to regulated work

68. **Sections 34 to 36** specifies the offences committed by individuals, organisations and personnel suppliers in respect of barred individuals undertaking regulated work. Section 37 sets out the penalty for committing any of these offences. This offence attracts a penalty of up to 12 months imprisonment and /or a fine not exceeding the statutory maximum on summary conviction. On conviction on indictment, the penalty is up to 5 years imprisonment and / or an unlimited fine. The penalty is in line with that for failing to refer under section 9. These are the most serious offences in relation to the scheme since they concern unsuitable individuals accessing vulnerable groups through their work, which is what the Act is designed to prevent.
69. **Section 34** deals with offences committed by the barred individual. It is an offence for them to undertake any regulated work. It is a defence for that individual if they did not know, and could not reasonably know, that they were barred. This defence covers scenarios such as the individual never receiving notification of being barred. The defence of not knowing that the work was regulated work is designed to protect the individual where it is difficult to determine whether the work is regulated work or not and an employer falsely reassures the individual that the work was not regulated work.

70. Sections 35 and 36 deal with offences committed by organisations and personnel suppliers in using or supplying barred individuals for regulated work. Section 35(1) makes it an offence to *offer* regulated work to a barred individual. Section 35(2) provides a regulation-making power (subject to affirmative procedure) to specify organisations required to *remove* barred individuals from regulated work. Until such time as such regulations come into force, an organisation can *continue to employ* a barred individual in regulated work without committing an offence (although the individual would be committing an offence). It is a defence for an organisation not to know that the individual was barred from undertaking regulated work. Such a defence might be used if an individual presented them with a forged certificate and ID, perhaps impersonating a different individual. Note that the defence of not knowing that the work was regulated work does not apply here.
71. Section 36(1)(b) protects a personnel supplier from being misled by the organisation to which it is supplying workers. For example, if an events organiser asks a personnel supplier to provide kitchen staff for a conference, those positions would not normally be considered regulated work. If the events organiser then diverts one of the people provided by the personnel supplier to work in the creche (normally regulated work with children), then the personnel supplier is not responsible for the consequences if it transpires that the individual is barred from regulated work with children. This is provided, of course, that the personnel supplier did not know, or have reason to believe, that the individual supplied would be used for regulated work with children.
72. The offences in sections 34 to 37 apply to barred individuals, organisations and personnel suppliers. Note that they do not apply to personal employers, meaning private citizens who make arrangements for an individual to do regulated work for them. For example, a parent employing an individual to give their child tuition is a personal employer. The Act provides a mechanism for personal employers to ensure they do not employ a barred individual through disclosure of scheme membership under section 54. It is entirely discretionary whether personal employers make use of such a facility (which may, for example, depend on their prior knowledge of the individual) but the barred individual *would* be committing an offence by seeking or accepting such work.

Section 38. Police access to lists

73. Section 38 gives the police access to the lists and any other information, contained in the lists, which Ministers consider should be disclosed. Information that is likely to be disclosed is information which helps confirm the identity of the individual included on the lists. The police might, for example, store information about the addition or removal of an individual from either list on the Criminal History System. It is intended that police access to the lists will make it easier for them to investigate suspected offences under this Act.

Section 39. Restriction on listing in children's list

74. Section 39 covers the cross-border interaction with the Independent Barring Board (IBB) established by the SVG Act where an individual would, in the absence of the SVG Act, be considered for listing or listed in children's list in Scotland. This section gives the Scottish Ministers the discretion not to consider for listing or list an individual in certain circumstances. It is likely that detailed rules for exercising this discretion will be set out administratively by the Central Barring Unit in consultation with the IBB. The SVG Act makes corresponding, but not identical, provision at paragraph 6 of schedule 3 to that Act.
75. Where an individual is already included on the children's barred list maintained under section 2 of the SVG Act, they are barred from undertaking regulated work with children in Scotland by virtue of section 92. Section 39(1) allows the Scottish Ministers not to include an individual in the children's list where that individual is already barred. Listing an individual who is already barred has no benefit in terms of protection but

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would create difficulties for both administrations and the listed individual in handling any appeal or application for removal.

76. In some cases, it will be more appropriate for the individual be considered for listing by the IBB under the SVG Act rather than in Scotland. For example, where the individual does regulated work both in Scotland and elsewhere in the UK and the incident which triggers consideration for listing occurs outside Scotland. In these circumstances, section 39(2) allows the Scottish Ministers not to consider an individual for inclusion on the children's list, but section 39(4) ensures the necessary notifications are made to organisational employers and regulatory bodies.
77. In other cases, the IBB may have already considered whether the individual should be included in the children's list under the SVG Act, and decided not to include the individual. In such cases, it only makes sense for the Scottish Ministers to consider the individual for listing if there is new information available which was not available to the IBB at the time the IBB considered whether to list the individual. Section 39(3) allows the Scottish Ministers not to consider an individual for listing in the children's list where the IBB has already considered the case.
78. Finally, there may be instances where an individual meets the automatic listing criteria under this Act and the SVG Act at more or less the same time. For example, conviction for a very serious offence, whether or not the individual is a scheme member in either jurisdiction. Again, it makes sense for the individual to be listed by one jurisdiction only, since that has the desired effect of barring the individual from regulated work across the UK. Section 39(5) allows the Scottish Ministers not to list an individual who meets the criteria prescribed by order under section 14 where the IBB will automatically list that individual.

Section 40. Restrictions on listing in adults' list

79. **Section 40** makes similar provision to section 39, except in respect of the adults' list. The SVG Act makes corresponding, but not identical, provision at paragraph 12 of schedule 3 to that Act.

Section 41. Protections from actions for damages

80. **Section 41** ensures that the decision to list, or not to list, an individual or information provided for such consideration cannot be the subject of proceedings for loss or damage. This means, for example, that a teacher who loses their job after being listed cannot sue the Scottish Ministers for loss of earnings, whether or not the decision to list is upheld on appeal. However, an information provider who, knowingly or recklessly, provides untrue or misleading information is not protected from actions for damages. For example, an employer who makes malicious claims in support of a referral is not protected under section 41(1).

Section 42. Power to regulate procedure etc.

81. This section allows for the details of the determination procedure that will be undertaken by the Central Barring Unit to be set out in secondary legislation. Subsection (1)(b) enables the regulations to deal with the maintenance of the lists (e.g. the updating of the lists in consequence of information received under section 33).

Section 43. Transfer from DWCL

82. This section provides for all individuals currently listed on the Disqualified from Working with Children's List under PoCSA to be transferred to the children's list established in section 1 without any further determination. However, any listed individual can make an application to the Scottish Ministers under section 25(1) to the effect that their circumstances had changed, if they considered that the transfer made a material difference. The only individuals who would be immediately affected by such a

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transfer are those currently in a post which is not regarded as a child care position under PoCSA but is regulated work with children under this Act. There were 244 individuals listed as at 18 March 2008 (after 38 months of operation) and it is unlikely that many will be so affected.

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