

# **PROTECTION OF VULNERABLE GROUPS (SCOTLAND) ACT 2007**

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## **EXPLANATORY NOTES**

### **INTRODUCTION**

1. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Act. They do not form part of the Act and have not been endorsed by the Parliament.
2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

### **REFERENCES AND INTERPRETATIONS**

3. Throughout the Notes, certain expressions are used either as convenient abbreviations or as having the particular meaning given to them by section 97 of the Act, or in other sections in relation to particular Parts or sections of the Act. The most important of these expressions are as follows:
  - (a) “the Act” means the Protection of Vulnerable Groups (Scotland) Act 2007;
  - (b) “adults’ list” means the list of those individuals barred from regulated work with protected adults;
  - (c) “ASP Act” means the Adult Support and Protection (Scotland) Act 2007;
  - (d) “child” means any person under the age of 18;
  - (e) “children’s list” means the list of those individuals barred from regulated work with children;
  - (f) “Central Barring Unit” means the unit with responsibility for determining, on behalf of the Scottish Ministers, whether an individual should be included on the adults’ list and/or children’s list and for maintaining those lists;
  - (g) “Criminal Procedure Act” means the Criminal Procedure (Scotland) Act 1995;
  - (h) “disclosure of scheme membership” is a document which confirms an individual’s scheme membership in respect of one or both types of regulated work and whether the individual is under consideration for listing (set out at section 54);
  - (i) “Disclosure Scotland” is the organisation which, from 2002, has provided basic, standard and enhanced disclosures under the Police Act (see also Vetting and Disclosure Unit);
  - (j) “DWCL” means the Disqualified from Working with Children List as established by PoCSA;

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Act 2007 (asp 14) which received Royal Assent on 18 April 2007*

- (k) “ECHR” means the European Convention on Human Rights and references to Articles are to Articles of ECHR;
- (l) “IBB” means the Independent Barring Board established by the SVG Act, administratively known as the Independent Safeguarding Authority;
- (m) “PoCSA” means the Protection of Children (Scotland) Act 2003;
- (n) “Police Act” means the Police Act 1997;
- (o) “protected adult” means any person who has attained the age of 16 or over and who is in receipt of any of the services set out at section 94;
- (p) “regulated work” means work with children or adults of the type described in schedules 2 and 3, respectively. Work itself is defined at section 95;
- (q) “ROA” means the Rehabilitation of Offenders Act 1974;
- (r) “ROCA” means the Regulation of Care (Scotland) Act 2001;
- (s) “scheme member” means an individual who has successfully applied for scheme membership in respect of one or both of the children’s or adults’ workforces;
- (t) “scheme record” means the record including the scheme member’s statement of scheme membership and all vetting information (set out at section 48) held by the Scottish Ministers;
- (u) “scheme record disclosure” is a document which includes the scheme member’s statement of scheme membership and all vetting information disclosed to the individual and employing organisation (set out at section 52);
- (v) “Scotland Act” means the Scotland Act 1998;
- (w) “short scheme record disclosure” is a document which includes the scheme member’s statement of scheme membership, specifies the date of last disclosure of the scheme record, and indicates whether there is any new vetting information on that record since the last disclosure of it (set out at section 53);
- (x) “statement of scheme membership” is a document which confirms an individual’s scheme membership (and consequently that the individual is not barred) in respect of one or both types of regulated work and whether the individual is under consideration for listing (set out at section 46);
- (y) “SVG Act” means the Safeguarding Vulnerable Groups Act 2006; and
- (z) “Vetting and Disclosure Unit” means the unit responsible for undertaking vetting and disclosure checks under the Police Act and this Act on behalf of the Scottish Ministers.

## **SUMMARY AND BACKGROUND**

4. The Act follows the extensive review of child protection procedures in England and Wales carried out by Sir Michael Bichard and published as the Bichard Inquiry Report on 22 June 2004. Since that report was published, the Scottish Ministers and UK Government have accepted all the recommendations and have been working to implement them. This Act substantially implements the proposals set out in the Scottish Executive’s consultation paper, *Protecting Vulnerable Groups: Scottish Vetting and Barring Scheme*, published on 8 February 2006. The Act also makes provision to amend the definition of school care accommodation services.
5. It makes provision for the following matters concerning the protection of vulnerable groups:

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- establishing a list of individuals unsuitable to work with children and consequently repealing PoCSA (which established the DWCL), and establishing a separate list of individuals unsuitable to work with protected adults;
  - replacing enhanced criminal record certificates with new disclosure records for those working with vulnerable groups, whether paid or unpaid;
  - establishing a scheme for those working with vulnerable groups, membership of which enables the ongoing collection of vetting information and assessment for unsuitability to work with those groups;
  - amendments to the Police Act to ensure consistency with the provisions in this Act and to make a number of technical changes to facilitate vetting and disclosure;
  - transferring the staff of Disclosure Scotland to the Scottish Administration; and
  - amending the definition of school care accommodation.
6. The Act requires amendments to orders made under ROA so that employers can ask for and receive information about spent convictions in respect of regulated work (this is called asking the “exempted question” under that Act). The Act also requires cross-border information sharing for the scheme to operate effectively and additional provision will be sought at Westminster (through a section 104 order under the Scotland Act or other means) to put this in place.

***Safeguarding Vulnerable Groups Act 2006***

7. The Safeguarding Vulnerable Groups Act 2006 received Royal Assent on 8 November 2006. The legislation establishes a vetting and barring scheme for England, Wales and Northern Ireland similar to the scheme established by this Act for Scotland. This Act makes provision to: complement the 2006 Act; ensure that both schemes are properly connected; and avoid cross-border loopholes. In addition, section 87 of the Act provides a power to make further devolved provision by order for the purpose of giving full effect to the SVG Act or to any future distinct Northern Ireland legislation.

***Functions of the Scottish Ministers in the Act***

8. Many of the functions allocated to the Scottish Ministers will be undertaken on behalf of them by civil servants in an executive agency. The agency will be divided, administratively, into two separate elements: a Vetting and Disclosure Unit and a Central Barring Unit. The Central Barring Unit will exercise most of the functions allocated to the Scottish Ministers in Part 1 and the Vetting and Disclosure Unit will exercise most of the functions in Part 2 as well as the criminal record checks and other functions allocated from the Police Act. For the sake of clarity, these notes refer to the Central Barring Unit and the Vetting and Disclosure Unit, where appropriate, instead of the Scottish Ministers.

**OVERVIEW**

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

10. **Part 2** sets out provisions for the vetting element of the new vetting and barring scheme, creating three new forms of disclosure certificate as well as making provisions for a scheme detailing all those individuals working in regulated positions with children and/or protected adults. Mechanisms for obtaining and reviewing new information in relation to individuals on the scheme are also set out.
11. **Part 3** makes amendments to Part 5 of the Police Act other than for the immediate purposes of Parts 1 and 2. It provides for additional information to be included on criminal record (disclosure) certificates, allows application forms to be completed electronically, allows the Scottish Ministers to pay police forces for information provided and makes a number of technical amendments to provisions relating to registration.
12. **Part 4** amends the definition of “school care accommodation services” in the 2001 Act and disappplies some fire safety duties to individuals providing such services on domestic premises.
13. **Parts 5, 6 and 7** include supplementary and general provision, provision on interpretation of various terms used in the Act and provision specifying the powers to make Scottish statutory instruments.

## **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 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 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 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.

## **Part 2: Vetting and Disclosure**

### ***Sections 44 and 45. The scheme and participation in it***

84. **Section 44** establishes the scheme and **section 45** gives individuals the right to apply to the Scottish Ministers to join the scheme. In practice, the Vetting and Disclosure Unit administer the scheme on behalf of the Scottish Ministers. It is important to note that being a scheme member in relation to regulated work with children or protected adults is mutually exclusive to being barred from working with that same group. An individual cannot simultaneously be a scheme member and barred in respect of the same workforce. However, an individual can be barred from one workforce and a scheme member in respect of the other.
85. Participation in the scheme is not mandatory. There are no offences for undertaking regulated work whilst not a scheme member. However, the only way an employer can be sure that an individual is not barred from regulated work (and therefore be sure that they are not committing an offence in employing that individual) is by requesting a disclosure record. Enhanced disclosure checks will no longer be available for those undertaking regulated work with children or protected adults. The only way a disclosure record can be generated is through the individual applying to join the scheme or already being a member of the scheme.

### ***Section 46. Statement of scheme membership***

86. It is intended that application to join the scheme will be linked to an application for a disclosure request (either a disclosure of scheme record under section 52 or a disclosure of scheme membership under section 54). This can be achieved by combining the applications on one form.
87. The only exception is where an individual joins the scheme without any employer, for example in anticipation of taking up regulated work in the near future. In that case, the individual will receive a statement of scheme membership and no other person will receive any information.

### ***Sections 47 – 49. Scheme members, records and vetting***

88. Application by an individual to become a scheme member will lead the Scottish Ministers, as the Vetting and Disclosure Unit, to make enquiries to see whether any vetting information exists about that individual. Section 49 sets out what constitutes vetting information. Subsections (1)(a) and (c) relate to police information: conviction



information from the Criminal History System and the Police National Computer and relevant non-conviction information from chief constables. For enhanced disclosures under the Police Act, the test for relevance for non-conviction information is made against each post. Under this Act there are only two relevance tests: one for each type of regulated work. Subsection (1)(b) provides that whether an individual is on the sex offender's register will also constitute vetting information.

89. [Section 49\(1\)\(d\)](#) provides a power for the Scottish Ministers to prescribe other information as vetting information. The Scottish Ministers intend to use this power to prescribe certain information held by regulatory bodies and local authorities. For example, registration or de-registration with the General Teaching Council for Scotland may be vetting information.
90. Any vetting information which is found by the Vetting and Disclosure Unit will be passed to the Central Barring Unit for consideration. It is anticipated that in around 90% of cases no information will be found at all. In cases where vetting information is found, it will be included on the individual's scheme record. However, in many cases it will not be relevant for the Central Barring Unit and it will not be necessary to begin a formal consideration for listing. For example, a driving conviction would be classed as vetting information and would appear on the scheme record under section 48. However, in many circumstances, it will not be relevant information and would be discounted without any consideration for listing.
91. [Section 47\(2\)](#) requires the Scottish Ministers to make arrangements for the ongoing monitoring of vetting information for scheme members. As far as possible, this will be automated. The expectation is that the Scottish Ministers, as the Vetting and Disclosure Unit, will be reactive rather than proactive because the information provider will trigger action. A scheme member's scheme record will be linked to the Criminal History System and, eventually, the registers of members held by professional regulatory bodies. In the longer term, councils may also notify the Vetting and Disclosure Unit of vetting information. For example, when a child is added to the child protection register, the parents' names might be checked against the register of scheme members. This section allows the Scottish Ministers to make arrangements in this way.
92. Any new vetting information will be added to the scheme record. New relevant information will trigger a consideration for listing.
93. [Section 47\(4\)](#), among other things, provides protection against any breakdown in procedures or communications. If information does not show up when it should, it can be considered later. For example, if there is a delay in entering conviction information on to the Criminal History System, it can be treated as new vetting information when it is discovered.

### ***Section 50. Duty to notify certain changes***

94. This section makes it an offence for a scheme member to fail to notify the Scottish Ministers that they have changed name or gender within 3 months of these changes taking effect. Section 33 makes similar provision for listed individuals. For the scheme to work effectively, this information needs to be provided on an ongoing basis so that the Scottish Ministers can be sure of the individual's identity and continue to collect vetting information from the appropriate sources. Paragraph (1)(c) gives the Scottish Ministers the power to prescribe other information. This power could be used to prescribe change of address, although it is intended that such information will be captured through the disclosure application process.

### ***Section 51. Correction of inaccurate scheme record***

95. This section places a duty on the Scottish Ministers as the Vetting and Disclosure Unit to correct any scheme record where they are satisfied that the information included in it is inaccurate. This duty arises: following a request by a scheme member for

correction; notification of a change by a scheme member under section 50; or otherwise. A corrected scheme record should subsequently be provided to the individual that is the subject of the record as well as any organisation for which the individual is doing regulated work and to which a copy of the inaccurate record has previously been disclosed. Section 51(4) puts beyond doubt that a request by a scheme member for correction may relate to any non-conviction information that is provided by the police. Where such an application for review is made, the Scottish Ministers must, under section 51(5), request that the relevant Chief Constable reconsiders whether the information provided is still relevant. Section 51(6) puts beyond doubt that information is to be regarded as inaccurate whether it is found to have always been inaccurate or has subsequently become inaccurate.

96. This duty on Ministers will apply where, for example, information about the wrong John Smith was included in a scheme record or where John Smith changes his name to Joe Bloggs and notifies the Scottish Ministers under section 50.

### **Sections 52 – 55. Disclosure records**

97. The mechanism for disclosure of scheme records and short scheme records is designed to operate in much the same way as the disclosure of enhanced criminal record certificates under the Police Act. Organisational employers are to be able to request either a scheme record disclosure or a short scheme record disclosure provided that all the disclosure conditions (A-D) set out at section 55 are met. Personal employers are to be able to ask for a disclosure of scheme membership as at section 54. This is a new provision which is not provided for in the Police Act.
98. In all three cases (disclosure of scheme record, short scheme record and scheme membership), the scheme member must authorise the disclosure (condition A). In all cases, there is an employer who will receive a copy of the disclosure. Condition A prevents unauthorised disclosure (i.e. a request by an employer without the permission of the scheme member).
99. The scheme member must participate in the scheme in relation to the type of regulated work to which the disclosure request relates (condition B). For example, a scheme member cannot obtain a disclosure in respect of the children's workforce if she is only a scheme member in respect of the adults' workforce (unless she applies to join the scheme in respect of working with children).
100. The employer must declare that the disclosure is for employment in the relevant workforce (condition C). The involvement of the employer in the process is a deterrent to employers outside the regulated workforce coercing an individual to join the scheme. They would be making a false declaration and committing an offence under section 67. Amendments will be required to the [Exclusions and Exceptions Order \(S.S.I. 2003/231\)](#) made under the ROA to ensure that all posts within the definition of regulated work are exempted from the provisions of that Act.
101. Condition D applies only to scheme record disclosures and short scheme record disclosures because only they contain or make reference to vetting information. Condition D is rather like the requirement to countersign an application for an enhanced criminal record certificate.
102. It is expected that those individuals working for organisational employers (e.g. a teacher working for an education authority) will apply for scheme membership and a scheme record disclosure simultaneously. For any subsequent employment with any organisation, that individual can request a short scheme record disclosure which will identify whether there is any new information since the scheme record was disclosed. If that individual also wanted to do private work for personal employers (e.g. one-to-one language classes in the evenings), that individual could request disclosure of scheme membership for that purpose.

103. The only form of disclosure available to a personal employer is a disclosure of scheme membership. Although organisational employers are entitled to ask for a scheme record disclosure, they may ask for a disclosure of scheme membership instead and this would be sufficient to ensure they are not employing a barred individual (which is an offence under section 35).

#### **Section 56. Crown work**

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

#### **Section 57. Disclosure restrictions**

105. There are no restrictions on disclosure of information provided by the police to the Scottish Ministers since they will only provide information which they are content to be disclosed to the individual and any employer. All police information provided to the Scottish Ministers (as the Vetting and Disclosure Unit) will be used in any consideration for listing (by the Scottish Ministers as the Central Barring Unit).
106. [Section 57\(1\)](#) provides the Scottish Ministers with the flexibility to limit the content of scheme records and to exclude from the disclosure of a scheme record certain types of information which may be contained on it. This power enables the Scottish Ministers to keep sensitive information on the scheme record without disclosing it to employers. Such sensitive information would, of course, have to be disclosed to the individual as part of any consideration for listing.
107. [Section 57\(2\)](#) and (3) restrict the disclosure of information on, or information about additions or deletions to, a scheme record to information provided for the purpose of assessing the individual's suitability for that type of regulated work. In many cases, information will be relevant to both types of regulated work. However, there may be information, for example released by the police when applying the relevance test for working with protected adults, which they would not have released when applying the relevance test for working with children.

#### **Sections 58 – 61. Removal from scheme**

108. [Section 58](#) places a duty on the Scottish Ministers (as the Vetting and Disclosure Unit) to remove an individual from the scheme where that individual has been placed on the relevant list or is barred as a result of being listed in another jurisdiction. [Section 58\(2\)](#) provides a possible sanction for failing to pay an annual subscription, or other fee, if such arrangements were made under [section 70](#).
109. [Section 59](#) places a duty on the Scottish Ministers to remove an individual from the scheme if an individual asks to be removed and is no longer carrying out that type of regulated work. As a matter of administrative practice, the Scottish Ministers will remove individuals from the scheme on being informed of their death and satisfied that this is so.
110. [Section 60](#) concerns notice of removal. If an individual is listed or barred they will already be notified under [section 30](#). If they have withdrawn from the scheme at their own initiative under [section 59](#), they will know about it. However, this section covers other possible reasons for being removed from the scheme such as non-payment of fees, expiry of membership, or an irregularity which later comes to light concerning the application to join the scheme. In some circumstances, an individual might be removed from the scheme (but not listed) whilst still undertaking regulated work, in which case [section 60\(1\)\(b\)](#) allows for employers and regulatory bodies to be informed.
111. [Section 61\(1\)](#) gives the Scottish Ministers the power to retain scheme records in relation to individuals after removal from the scheme. [Section 61\(2\)\(a\)](#) prevents the Scottish Ministers from continuing to make enquiries in relation to vetting information about

an individual and section 61(2)(b) makes clear that a retained scheme record does not need to be kept up to date.

### **Sections 62 – 64. Evidence of identity**

112. In order to join the scheme or request disclosures, it will be necessary for the Vetting and Disclosure Unit to verify an individual's identity. If sufficient evidence is not provided, the Vetting and Disclosure Unit will not be obliged to consider such requests.
113. [Section 63](#) allows the Scottish Ministers to use fingerprints to check an applicant's identity. This provision builds on current provisions in Part 5 of the Police Act. It does not mean that every applicant will have to submit fingerprints in support of their application.
114. Fingerprints have only been required in around 0.03% of cases in the five years since Disclosure Scotland began in 2002. Disclosure Scotland carry out checks to ensure that the applicant is the person they claim to be. However, there are occasions where somebody might give another person's details when arrested or where the applicant has a very similar name, date of birth and address history as an entry on the Criminal History System. In these circumstances, a criminal record may potentially be attributed to the wrong person during a disclosure check. The Criminal History System uses fingerprints to link a criminal record to the individual. Disclosure Scotland can therefore use fingerprint identification to confirm whether or not the applicant is the same person as the one with the criminal record, thereby ensuring that a criminal record is not wrongly attributed. However, section 63(2) ensures that the taking of fingerprints will only be used as a method of last resort for establishing identity.
115. [Section 63\(3\)](#) ensures that any fingerprints taken for the purposes of confirming the identity of applicants to the scheme, or existing scheme members, must be destroyed as soon as is reasonably practicable after the prints have been used for their intended purpose.
116. [Section 64](#) gives the Scottish Ministers the power to use information held by: the Identity and Passport Service (formerly known as the UK Passport Agency); the Driver and Vehicle Licensing Agency; and the Department for Work and Pensions (National Insurance numbers) for the purposes of checking evidence of identity. Section 64(2) gives the Scottish Ministers the power to prescribe other persons holding data.

### **Sections 65 – 69. Offences relating to vetting information**

117. These offences are designed primarily for the purpose of protecting personal and sensitive information about individuals rather than the exclusion of barred individuals from the regulated workforces. Therefore, they attract an intermediate level of penalty as set out at section 69. They build on already existing penalties and offences for disclosure information under Part 5 of the Police Act, but focus on misuse of scheme information, i.e. information about individuals working or intending to work with children or protected adults.
118. [Section 65](#) creates the offence of falsifying a disclosure record. It mirrors the offences relating to falsifying criminal record certificates in the Police Act. Where a barred individual falsifies a disclosure record to access regulated work, that individual would be committing this offence *and* the offence at section 34. Reasons why an individual might attempt to falsify a disclosure record include to avoid the fee or because of embarrassment over some historic incident or conviction.
119. [Section 66](#) makes it an offence for a person to disclose to others disclosure records which have been disclosed under section 51, 52, 53 or 54. These offences are needed to ensure that the sensitive information contained in the scheme record is not shared unnecessarily. The section also recognises that it may be necessary to share the record with other employees, members and office holders within an organisation or where the

disclosure has been requested on somebody else's behalf, and the section exempts such sharing from the scope of the offence.

120. [Section 68](#) provides further clarification of the section 66 offence by setting out in subsection (1) the circumstances in which it is not an offence to disclose disclosure information. Subsection (2) makes clear that the record should only be shared for the purposes of enabling the employer to determine suitability for regulated work. This is an important safeguard to ensure that employers only share disclosure information for legitimate purposes.
121. [Section 68\(1\)\(a\)](#) makes clear that a scheme member may disclose their own disclosure record. So, for example, a disclosure of scheme membership obtained under section 54 by a scheme member in respect of one personal employer may be shown by that scheme member to other personal employers. For example, a private dance teacher who is teaching a class of 20 children each Wednesday evening might be asked to obtain a statement of scheme membership by one of the parents. There is nothing to prevent that dance teacher showing the statement of scheme membership to every parent; there is no requirement to generate 20 disclosures of scheme membership, one for each parent, although this would be permitted.
122. [Section 67](#) makes it an offence for anyone to attempt to see a disclosure record, or to use such a record other than for the purpose of checking an individual's suitability for regulated work. Section 67(1) creates an offence designed to prevent employers who cannot legitimately ask for a record because they are not engaged in regulated work from requiring an individual to share the information on the record. For example, it would normally be an offence for a garage owner to ask mechanics in his garage if he could see their disclosure records, if they had obtained them for other purposes, since car repair work is not (normally) regulated work. Section 67(4) limits the offences to the disclosure record itself and not information contained on the record.
123. [Section 67\(3\)](#) sets out the "permitted purposes" for which a disclosure record can be requested or viewed. Paragraph (a) allows organisational employers and personnel suppliers to request or seek sight of a disclosure record. Paragraph (b) allows regulations to specify circumstances in which a third parties may ask to see a disclosure record. I.e. these regulations can specify circumstances in which a person ('Z') who is not the employer of the individual can ask to see a disclosure record without committing an offence in respect of individuals who are doing regulated work for a contractor. For example, where a council contracts school bus services, the bus driver is employed by the bus company and Z is the council. Such regulations might allow the council to ask to see the bus driver's scheme record disclosure without committing an offence, although the request can be refused by the bus driver.

### **[Section 70. Fees](#)**

124. This section provides the Scottish Ministers with a flexible power to charge fees in respect of the scheme. The Scottish Ministers could charge different levels of fee for: joining the scheme; scheme records; short scheme records; and statements of scheme membership. Different levels of fee could be charged for the children's workforce, the adults' workforce and applications in respect of both workforces. Fees can be charged as application fees or as an annual subscription. The power at subsection (2)(a) puts it beyond doubt that the Scottish Ministers have the power to charge different fees in different circumstances, for example to offer some types of disclosure record at a discount if the scheme member has already paid for disclosure before. The power at subsection (2)(c) can be used to provide free checks for volunteers in voluntary organisations (or for the fee to be charged and then explicitly reimbursed). Section 70(4) allows the Vetting and Disclosure Unit to refuse to deal with applications unless and until the fee is paid.
125. The Scottish Ministers could, for example, make regulations distinguishing two levels of fee to be payable only when requesting a disclosure record (not for scheme



membership itself). A higher level of fee could be charged for any scheme record and any statement of scheme membership issued on joining the scheme. Short scheme records and subsequent statements of scheme membership could attract a lower level of fee. Scheme membership might expire 10 years after the later of (a) joining the scheme or (b) the last scheme record disclosure.

126. [Section 70\(3\)](#) requires the Scottish Ministers to have regard to a number of factors before prescribing fees. For example, Ministers should consider the ability of those undertaking regulated work to pay the different levels of fee when determining the different levels of fee. "Vetting, barring and disclosure functions" are defined at section 97(4) and encompass *all* the activities of both the Vetting and Disclosure Unit and the Central Barring Unit, i.e. including basic, standard and enhanced disclosures as well as disclosure records under this Act.

### ***Section 71. Forms***

127. This section allows the Vetting and Disclosure Unit to set out the forms for applications for scheme membership or a disclosure record administratively. Under the Police Act, the Scottish Ministers are required to make changes to the application form for criminal record certificates and enhanced criminal record certificates in regulations. Section 79 brings the Police Act into line with section 71.

### ***Section 72. Procedure***

128. This section gives the Scottish Ministers the power to make regulations governing the administration of the scheme. This power could be used, for example, to set the lifetime of scheme membership at 10 years.
129. The power at section 72(2)(c) is expected to be used to enable online disclosure requests. For example, the individual might log on to the the Vetting and Disclosure Unit website using their own password to begin the process of a disclosure request and generate a 16 digit PIN which they pass to the employer to authorise the employer to have once-only access to the disclosure information. This provision would allow the Scottish Ministers to specify that a 16 digit PIN generated by a scheme member constituted a request by the member as required by Disclosure Condition A in section 55.

### ***Section 73. Consideration of suitability: supplementary***

130. [Section 73](#) makes explicit what constitutes considering an individual's suitability to do, or to be offered or supplied for, any type of regulated work. In particular, this consideration goes beyond employment (paragraph (a)) and employment agencies and businesses (paragraph (b)). Paragraphs (c) to (e) allow the General Teaching Council for Scotland, the Scottish Commission for the Regulation of Care and the Scottish Social Services Council to request disclosure records. Paragraph (f) includes suitability to foster a child in terms of regulations made under section 5 of the Social Work (Scotland) Act 1968. Under the Fostering of Children (Scotland) Regulations 1996, councils and certain voluntary agencies approve foster carers with whom they will place children.
131. The power at section 73(g) provides further flexibility by giving the Scottish Ministers the power to prescribe further circumstances in which disclosure records can be obtained. This power can be used to prescribe certain contractual relationships. If used for this purpose, it would go beyond the power at section 67(3)(b) since it would allow a person (labelled 'Z' in section 67) who is not the employer of the individual to receive a disclosure record directly from the Vetting and Disclosure Unit.

### ***Section 74. Delegation of vetting and disclosure functions***

132. This section allows the Scottish Ministers to delegate their vetting and disclosure functions (as the Vetting and Disclosure Unit) in respect of Part 2 of the Act. The Scottish Ministers may not delegate their listing functions (as the Central Barring Unit)



under Part 1. Ministers may not delegate any order or regulation-making functions, the specification of forms under section 71 nor the power to determine the appropriate fee for information from police authorities under section 75(4). This section provides the flexibility to make contractual arrangements for routine information gathering functions but not any determinations in respect of individuals (because those are functions under Part 1 not this Part). The Scottish Ministers' intention is that the majority of their functions in both Parts 1 and 2 will be carried out by civil servants in the Vetting and Disclosure Unit and the Central Barring Unit, which does not require any formal delegation of functions.

### ***Section 75. Sources of information***

133. Subsection (1) has the effect of requiring the Scottish Police Services Authority to give the Scottish Ministers access to the Criminal History System. Subsection (2) requires police forces to provide non-conviction information as requested. Subsection (3) prevents vetting information (under section 49) from the police including information which should not be disclosed to the scheme member because it would be contrary to the interests of the prevention or detection of crime. Subsection (4) obliges the Scottish Ministers to pay police authorities for information. Section 75(5) ensures that the Scottish Ministers are not liable for erroneous information provided to them by the police.
134. This section will be extended (possibly by a section 104 order under the Scotland Act) to cover police forces in England and Wales and Northern Ireland in respect of the Police National Computer and other police information from non-Scottish forces.

### ***Section 76. Police access to scheme information***

135. **Section 76** requires the Scottish Ministers to share certain details relating to those individuals who have joined the scheme with Chief Constables of police forces and the Scottish Police Services Authority. Only scheme membership information which assists the police or Scottish Police Services Authority in identifying individuals will be passed on (i.e. not normally vetting information from other sources). The section restricts use of scheme membership information by the police to: the exercise of their functions under Part 2 in passing information to the Central Barring Unit re considering individuals for listing; preventing and detecting crime; or apprehending or prosecuting offenders.

### ***Section 77. Statements of scheme membership: disclosure of whether individual under consideration for listing***

136. **Section 77** places a six month limit on the disclosure of the fact that an individual is under consideration for listing. This six month period runs from either the date of the decision to consider for listing under section 10, 11, 12 or 13, or where the individual is subject to legal or disciplinary proceedings, the conclusion of those proceedings.
137. A statement of scheme membership (defined at section 46) normally includes whether the individual is subject to consideration for listing in respect of the type of regulated work to which the disclosure request relates.
138. PoCSA (section 7) required the Scottish Ministers to apply to the sheriff for an extension of a period of provisional listing beyond 6 months but did not limit the time taken to reach a decision. If the period expired without extension, the individual was removed from the list and the individual's enhanced disclosure would no longer state that he or she was provisionally listed. In practice, this had the effect of ensuring that cases were determined within this period.
139. **Section 77** therefore has a similar effect to section 7 of PoCSA in relation to the disclosure of whether an individual is being considered for listing. But subsections (4) to (8) ensure that more than one extension can be granted and that an application

for extension can be made right up to the expiry of the relevant period, and this is sufficient for the relevant period to be treated as not having expired until the application is determined.

### **Part 3: Amendment of Part 5 of the Police Act 1997**

#### ***Section 78. Information in criminal conviction and record certificates***

140. **Section 78** requires the Vetting and Disclosure Unit to state on certificates that are issued under Part 5 of the Police Act whether or not a person is subject to the notification requirements under Part 2 of the Sexual Offences Act 2003. Under the existing provision, this information can only be included as additional information on enhanced certificates at the discretion of the Chief Constable. Under this provision, there will be no discretion and this information will always be included on the face of a disclosure certificate whilst the notification requirements remain live.
141. In addition, the Scottish Ministers are given a power to prescribe civil orders that should be included routinely on standard and enhanced certificates. It is expected that this will be used for Sexual Offences Prevention Orders and Risk of Sexual Harm Orders in the first instance. Chief Constables will retain the discretion to disclose information about other civil orders on enhanced certificates (which will continue to be available for purposes other than regulated work).

#### ***Section 79. Form of Part 5 applications***

142. **Section 79** allows the Scottish Ministers to determine the application form for disclosures under Part 5 administratively. This brings procedures into line with those for disclosure records under Part 2 of the Act. It also allows standard and enhanced disclosure certificates (which require a countersignature) to be processed electronically which is in line with the wider policy for e-Government.

#### ***Section 80. Payment of fee for information from certain police forces***

143. **Section 80** amends Part 5 of the Police Act to make it clear that when the Vetting and Disclosure Unit make requests under subsection 113B(4) or (5) to: the States of Jersey Police Force; the salaried police force of the Island of Guernsey; the Isle of Man Constabulary; or a body outside the British Islands who are a police force and whom the Scottish Ministers prescribed for the purposes of Part 5, that the Vetting and Disclosure Unit must pay a fee in respect of information received.

#### ***Section 81. Regulations about registration***

144. **Section 81** makes further amendments to Part 5 of the Police Act in relation to the conditions that apply to the register held under section 120 of the Police Act. Firstly, the Vetting and Disclosure Unit can refuse to include a person on the register if they believe that that person is likely to countersign less than a minimum number of applications each year. Secondly, the Vetting and Disclosure Unit can remove a person who is already on the register if he or she countersigns less than a minimum number of applications each year. The figure for each circumstance would need to be prescribed in regulations.

### **Part 4: “School Care Accommodation Services”**

#### ***Section 82. Meaning of "school care accommodation service"***

145. **Section 82** makes amendments to the 2001 Act to change the definition of “school care accommodation service” as defined in that Act. Section 2(4) of that Act provided,

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

146. The effect of the changes is twofold. Firstly, where arrangements are made by an education authority or managers of an independent or grant aided school for the pupil to stay in someone’s home, the service will be regarded as being provided by the authority/managers. It will therefore be for the education authority/managers to register the service rather than the individual providing the accommodation. Secondly, the new definition makes clear that accommodation provided only in the holidays will also be covered by the definition, if it is provided for the purpose of, or in connection with, the pupil’s attendance at school.

### **Section 83. Application of fire safety rules to school care accommodation service**

147. Section 83 disapples the fire safety duties under Part 3 of the Fire (Scotland) Act 2005 to individuals providing a school care accommodation service to pupils on domestic premises under an arrangement with an education authority or managers of an independent or grant-aided school.

## **Part 5: Supplementary and General**

### **Section 84. Guidance**

148. This section places a duty on Ministers to provide guidance on such matters relating to the operation of Parts 1 and 2 of the Act as they think appropriate. Subsection (2) gives Ministers the power to vary or revoke such guidance issued at any time. Therefore there is a clear statutory duty to issue guidance but Ministers have discretion to decide on what matters they think it appropriate to issue guidance about.

### **Section 85. Annual report**

149. This section places a duty on Scottish Ministers to prepare, and lay before the Scottish Parliament, an annual report on the performance of the Scottish Ministers’ “vetting, barring and disclosure functions”. Vetting, barring and disclosure functions are defined at section 97(4) to include Ministers’ functions under Parts 1 and 2 of this Act and Part 5 of the Police Act 1997 (except for powers to make secondary legislation). The reporting year ends on 31 March and the report must be laid before the Scottish Parliament as soon as practicable after that date.

### **Section 86. Transfer of Disclosure Scotland staff etc.**

150. Disclosure Scotland was staffed in part by employees from Strathclyde Joint Police Board until 1 October 2007, when they transferred to the Scottish Administration. (The remaining staff were, and continue to be, contractors for BT plc.) This section sets out the arrangements for that transfer and enables the Scottish Ministers to make a “staff transfer order” to effect it. This section could be used to transfer other staff of the Strathclyde Joint Police Board (other than constables) but there is no intention to do so.
151. Subsections (4) to (9) concern employees of Strathclyde Joint Police Board who are subject to a staff transfer order. Subsections (4) to (6) provide that contract rights and obligations transfer from the former employer to the Scottish Ministers on the transfer date. Subsection (7) provides that employed staff may object in advance of their contract

being transferred to the Scottish Ministers, in which case their contract is terminated at the end of the day before the intended transfer day. This termination will not be treated as dismissal of a person. Subsection (8) provides that an employee can terminate their contract of employment if they can show that a substantial detrimental change has been made to their working conditions.

152. Previously, it had been intended that Disclosure Scotland staff would transfer to the Scottish Police Services Authority on 1 April 2007, together with the remainder of the Scottish Criminal Records Office. Paragraph 46 of schedule 4 repeals the provisions in the Police, Public Order and Criminal Justice (Scotland) Act 2006 that would have transferred the Scottish Ministers' functions under Part 5 of the Police Act (the functions carried out by Disclosure Scotland) to the Authority.

### ***Section 87. Power to give effect to corresponding legislation in England, Wales and Northern Ireland***

153. The power provided in section 87(1) can be used to make provision, including amendments to devolved legislation, to ensure that the equivalent scheme for England and Wales functions properly. Given the complexities of this Act and the SVG Act, it may be necessary to make some provision as the schemes develop.
154. The power included in section 87(2) provides Scottish Ministers with a similar power in respect of any future legislation establishing a similar scheme in Northern Ireland. The Scottish Ministers will be able to make provision responding to any legislation in Northern Ireland, that corresponds with this Act, in the same way that they can in respect of the SVG Act.

### ***Section 88. Modification of enactments***

155. [Section 88](#) introduces schedule 4 which makes modifies other Acts in consequence of this Act.

### ***Section 89. Offences by bodies corporate etc.***

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

### ***Section 90. Crown application***

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

## **Part 6: Interpretation**

### ***Section 91. Regulated work***

158. [Section 91](#) introduces schedules 2 and 3 which define regulated work with children and regulated work with adults, respectively. Schedule 2 to this Act supercedes schedule 2 to PoCSA; regulated work with children corresponds to "child care position" in that Act, although there are significant differences between the two.

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

159. There is a difference between being listed and being barred. Being listed means being included in the children's or adults' list. Being barred from regulated work in Scotland is a consequence of being listed, included in certain other lists in the UK or subject to a prohibition or disqualification in any other jurisdiction which the Scottish Ministers deem to correspond to being listed.
160. Subsections (1) and (2) mean that being included in the equivalent list in England and Wales or Northern Ireland, will result in being barred from regulated work with children and adults, respectively, in Scotland. Subsections (3) and (4) give the Scottish Ministers an order-making power to regard any other list abroad as being equivalent to a Scottish list and therefore leading to being barred from regulated work in Scotland. Subsections (5) and (6) make allowance for developments in England and Wales or Northern Ireland and enable the lists in subsections (1) and (2) to be updated accordingly.
161. The effect of section 92 is that a teacher working in England who is referred to the IBB (established under the SVG Act) and included on their children's barred list would be *listed* in England and Wales and *barred* from regulated work with children in Scotland and equivalent work across the UK. Although barred, the individual will not be *listed* in Scotland; it is expected that the IBB will retain that information and provide it to Scottish police forces and the Vetting and Disclosure Unit as necessary.

**Section 93. Harm**

162. This is discussed in the context of referral grounds under section 2 at paragraph 18 of these Notes.

**Section 94. Meaning of "protected adult"**

163. Section 94 defines a "protected adult" for the purposes of the Act. A protected adult is defined as an individual aged 16 or over who is provided with (and thus receives) a type of care, support or welfare service as set out in this section. This definition of protected adult supersedes the definition of "adult at risk" at regulation 10(3) of the Police Act 1997 (Criminal Records) (Scotland) Regulations 2006 for the purposes of eligibility for enhanced disclosure. To be classified as an adult at risk under those regulations, an individual has to meet three criteria: having a condition, in consequence of which they have a disability and receive a care service, all of which are set out in regulation 10. Section 94 replaces these 3 criteria with a test linked to the type of services being received by the individual. Individuals doing regulated work with protected adults (see the explanation of schedule 3 at paragraph 202 of these Notes) will no longer be eligible for enhanced disclosure but will be able to request disclosures under this Act.
164. Section 94(1)(b) allows for the Scottish Ministers to prescribe healthcare related services, whether provided by the NHS or by private suppliers. Section 94(1)(d) gives the Scottish Ministers the power to prescribe welfare services, receipt of which makes an individual a protected adult. Section 94(5) sets out that a welfare service includes any service which provides support, assistance, advice, or counselling to individuals with particular needs. The Scottish Ministers intend to make regulations prescribing welfare services to capture appropriate services provided by the voluntary sector. Section 94(2) gives the Scottish Ministers an order-making power to amend the definition of "protected adult" in subsection (1).
165. The equivalent term in the SVG Act is "vulnerable adult" and applies to persons who are 18 years of age or over.

**Section 95. Meaning of "work"**

166. Section 95 defines the meaning of work, of which regulated work is a subset defined through section 91 and schedules 2 and 3. Section 95(1) clarifies that work includes



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

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

## ***Section 96. Fostering***

### **Scope of foster carer in this Act**

168. [Section 96](#) sets out what constitutes “foster carer” for the purposes of the Act. Subsection (1) defines foster carer under the Act to cover:
- Public fostering arranged by councils under section 26(1)(a) of the Children (Scotland) Act 1995. This would cover many foster care placements and also include the situation where a looked after child is placed by the council with a relative or friend, even though that individual is not a career foster carer. It would thereby include some kinship care scenarios.
  - Private fostering under the Foster Children (Scotland) Act 1984. This covers the situation where a parent or guardian places a child in the care of another person who is not a close relative for more than 28 days. Parents have a duty to report the arrangement to the relevant council who must inspect and monitor the accommodation and other aspects of the arrangements, but the parent or guardian assesses and approves the carers.
  - Those looking after a child in pursuance of a permanence order (see paragraphs 170 to 172 below).
  - Those looking after a child under a supervision requirement (see paragraph 173 below).

### **Employers and referrals**

169. Subsection (2) deems who the ‘employer’ of the foster carer is considered to be, which is significant in terms of entitlement to disclosure records. For public fostering, the employer is deemed to be the council or voluntary agency who made the arrangements; for permanence orders and supervision requirements the employer is deemed to be the council; and for private fostering it is the person who made the fostering arrangements *and* has the power to terminate those arrangements. Subsection (3) disapplies the offences in sections 34 to 37 of the Act in relation to work as a foster carer under a permanence order or a supervision requirement.
170. Subsection (5) provides that section 3 (referral following disciplinary action) will apply to foster carers and ‘dismissing an individual’ in employment situations should be read as ‘terminating the fostering arrangements’ in the context of fostering.



## **Permanence orders**

171. Subsection (1) includes an individual who looks after children in pursuance of permanence orders, created by the Adoption and Children (Scotland) Act 2007, within the definition of foster carer. These orders can only be applied for by a council and are granted by a court. The order consists of:
- the mandatory provision, whereby the right to regulate the child's residence and the responsibility to provide guidance to the child are vested in the council;
  - the ancillary provisions, whereby other parental responsibilities and rights (PRRs) in respect of the child (as set out in sections 1 and 2 of the Children (Scotland) Act 1995) may be vested in the council or any other person or persons as the court considers appropriate. Ancillary provisions may also take these PRRs away from the birth parents; and
  - if appropriate, provision granting authority for the child to be adopted.
172. Since the child remains a looked after child and the responsibility for his or her care rests ultimately with the council, any carer of a child on a permanence order is regarded as doing regulated work so that disclosure records can be obtained and the carer is subject to continuous vetting. This will apply whether or not the carer is a relative or friend. The council is treated as an employer of the foster carer in this context.
173. The offences in sections 34 to 37 of the Act do not apply to carers of children on a permanence order, so that an administrative decision by the Central Barring Unit (on behalf of Scottish Ministers) cannot override a court decision made in the best interests of the child, by listing an individual who also happens to be the foster carer of a child on a permanence order. This is to avoid the individual and the council committing a serious offence by following the order of the court and allowing the child to remain with the individual beyond the date of the listing decision.

## **Supervision requirements**

174. An individual who looks after a child in pursuance of a supervision requirement, which cover other types of foster care arrangement, is also brought within the definition of foster carer. For the duration of the requirement, the child is a looked after child (in terms of the Children (Scotland) Act 1995) and the foster carer should be regarded as doing regulated work. This allows disclosure records to be obtained and continuous vetting of the carer. This applies whether or not the carer is a relative or friend.

## **Foster care and work**

175. Subsection (4) disapplies subsections (2) to (7) of section 95 of the Act (meaning of work). These subsections in section 95 concern 'work' done in the course of family or personal relationships which are excluded from the generality of work in section 95. Subsection (4) prevents any foster care relationships being excluded from regulated work by being interpreted as family or personal relationships. Section 95(9) could be used to specify in greater detail the boundary of what constitutes work in terms of family and personal relationships, if this proves necessary.

## **Definitions**

176. Subsection (8) imports into this section the meanings of "parental responsibilities", "parental rights", "permanence order" and "supervision requirement" as defined in the Children (Scotland) Act 1995 and the Adoption and Children (Scotland) Act 2007, as appropriate.

### **Section 97. General interpretation**

177. [Section 97](#) makes provision for general interpretation. Some of these terms were highlighted at paragraph 3 of these Notes. Some terms which appeared in PoCSA have changed their meaning, e.g. “harm” which is defined at section 93 and discussed at paragraph 18 of these Notes.

## **Part 7: Final Provisions**

### **Section 98. Ancillary provision**

178. [Section 98](#) provides the Scottish Ministers with the power to make supplementary, incidental, consequential, transitional, transitory or saving provision for the purposes of, or in connection with, or for the purposes of giving full effect to, any provision of this Act. This may include modifying any enactment, instrument or document.

### **Section 99. Saving: disclosure of information**

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

### **Section 100. Orders and regulations**

180. Subsection (3) provides that orders and regulations are to be made by negative resolution procedure except for those listed in subsection (4). Subsection (4) provides that the following matters require affirmative procedure:
- criteria leading to automatic listing, as set out in section 14;
  - amending schedule 1 to modify the list of "relevant offences";
  - organisations required to remove barred individuals from regulated work in section 35;
  - some powers to modify the provisions of this Act or any other enactment, as given at section 87 or 98;
  - any change to the meaning of "protected adult" in section 94; and
  - any modification to the definition of regulated work with children or regulated work with adults using the order making powers in schedules 2 and 3 respectively.

### **Section 101. Commencement**

181. [Section 101](#) provides flexibility for the Scottish Ministers to commence the various provisions of the Act at different times. Subsection (3) makes clear that the Scottish Ministers could bring the provisions into force on an area by area basis.

### **Schedule 1: Relevant Offences**

182. [Schedule 1](#) lists those offences for which the court must refer an individual for consideration for inclusion in the children’s list, following conviction (as provided for in section 7(1) and 11(2)). It replicates schedule 1 of PoCSA, updated to include new offences created by the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 and other offences under the Civic Government (Scotland) Act 1982 and the Sexual Offences (Amendment) Act 2000.

### **Schedule 2: Regulated Work With Children**

183. [Schedule 2](#) defines regulated work with children for the purposes of this Act. It supersedes the definition of child care position in schedule 2 to PoCSA, which is repealed by paragraph 42 of schedule 4.

184. “Work” is defined (in section 95) very broadly as “work of any kind” and specifically includes paid and unpaid work, work under a contract, carrying out statutory functions and caring for or supervising individuals participating in any organised activity. Regulated work in the schedules is therefore a subset of work generally. Work does not cover certain things done in the course of a family or personal relationship, which if done in other contexts, would constitute work.

## **Part 1: Preliminary**

185. [Paragraph 1](#) applies the “normal duties test” to the activities set out in Part 2 and the positions set out in Part 3. The concept of “normal duties” is extremely important in limiting the scope of Parts 2 and 3. Normal duties can be considered as something the individual might be expected to do as part of their post on an ongoing basis, for example appearing in a job description. Normal duties excludes one-off occurrences and unforeseeable events. No particular frequency for undertaking the work or duration of work are specified in the Act as these will depend on the context. For example, the specific plumber identified in a building firm as the individual who always does work on school premises because he has specialist knowledge of the central heating systems would be regarded as having that function as part of his “normal duties”, even if actual callouts occur quite infrequently. But a random plumber called in to a school for one emergency in respect of whom no prior arrangements had been made would not be regarded as working in a school as part of his “normal duties”.
186. [Part 4](#) explicitly identifies a number of positions which fall within the definition of regulated work with children; these are not qualified by any normal duties test.
187. [Paragraph 2](#) applies exceptions relating to children's employment and work to activities identified in paragraphs 3 to 7. Paragraph 2(a) excludes from regulated work all activities in paragraphs 3 to 7 carried out in relation to children aged 16 or 17 in the course of the children's *work*. This means, for example, that a shop manager recruiting or supervising children aged 16 or 17 as assistants (whether as employees or volunteers) is not within the scope of regulated work with children.
188. [Paragraph 2\(b\)](#) extends the exclusion from regulated work to work with children under the age of 16 in the course of the children's *employment* for being in sole charge of children (paragraph 5) and unsupervised contact with children (paragraph 6). “Employment” is defined in section 97. Employment means paid employment whether under a contract of service or apprenticeship or under a contract for services. Work is much wider than employment in the Act (see paragraph 164). This paragraph means that a shopkeeper employing a 14 year-old to do a paper round is outside the scope of regulated work but a scout leader supervising a group of 14-year-old scouts calling door-to-door to do odd jobs for money is within the scope of regulated work.

## **Part 2: Activities**

189. [Paragraphs 3](#) and [4](#) identify those instances in which an individual is or is not undertaking regulated work with children when caring for children or training, instructing, teaching or supervising children. They are qualified with an incidental test which narrows the scope of regulated work to exclude activities which are aimed at adults but incidentally include children. For example, a teacher in a school is doing regulated work with children by virtue of paragraph 4 (and possibly others) but a college lecturer running woodwork classes in the evening aimed at adults is outside the scope of regulated work even if one or two children attend his class.
190. [Paragraph 5](#) makes provision bringing individuals whose normal duties involve being in sole charge of children within the scope of regulated work. This paragraph would include a contracted taxi or minibus driver taking children to school or classes.
191. [Paragraph 6](#) includes unsupervised contact with children within the scope of regulated work. Paragraph 5(b)(iii) exempts from unsupervised contact any contact with the child

supervised by a person who has agreed to do so with the child's parent, guardian or any other adult with whom the child lives. The responsible person is the parent, guardian or adult resident and they must have agreed to the supervision of the contact by the friend or relative.

192. For example, suppose a voluntary organisation organises a pantomime trip by coach involving the organiser, adult A and the coach driver, adult B. If 30 children come along, 28 accompanied by a parent but two come unaccompanied, paragraph 5(b)(iii) provides where the parents of those two children to agree to nominate another person (perhaps another parent on the trip) to supervise their children in respect of contact with adults A and B that contact would not be unsupervised. This provision puts beyond doubt that no-one on the trip is doing regulated work with children, so long as each child is supervised either by a responsible person or by someone nominated by the responsible person for that child.
193. Family relationship and personal relationship, as used in paragraph 6, have the same meanings as in section 95 (meaning of "work") which insures consistency of interpretation in paragraph 6 and section 95.
194. [Paragraph 7](#) covers positions such as workers on telephone advice lines and children's magazine agony aunts. The provision does not cover general broadcasting to children, such as children's television or radio programmes. The words in parentheses narrow the scope of providing advice and guidance to children so as to exclude from regulated work those instances where advice or guidance is given to children which is incidental to the provision of advice and guidance to individuals who are not children, mirroring the exceptions in paragraphs 3 and 4. Advice or guidance in relation to spiritual matters or spiritual well-being is considered to be captured by advice on emotional well-being and so within the scope of paragraph 7.
195. [Paragraph 8](#) covers positions such as those involved in moderating Internet chat rooms intended for use by children where the individual has a role in protecting those children from harm. It does not cover incidental use by children of chat rooms intended for use by adults. It does not cover staff involved in maintaining and supporting such services whose function is not related to child protection, e.g. engineers.
196. [Paragraphs 9 and 10](#) make provision for care home services and independent healthcare services for children, as defined in ROCA. These definitions are qualified to limit the positions covered to those involving contact with children. A cleaner, for example, in the head office of an organisation providing care home services would not be regarded as doing regulated work with children.

### **Part 3: Establishments**

197. [Part 3](#) brings into the scope of regulated work with children all those whose normal duties involve working in establishments where children are being detained, treated, educated or looked after. The normal duties test applies but note that it does not matter what type of work the individual is doing in the establishment; the provision covers cleaners, gardeners, cooks etc as well as any individual involved in front-line care. There is no qualification by time of day, contact with children or purpose so a post is not exempt from this provision by virtue of being "after hours" or for a purpose unrelated to the purpose(s) of the establishment.
198. [Paragraphs 12 and 13](#) bring within the scope of regulated work with children anyone whose normal duties include working in a children's detention institution or children's hospital. Paragraph 14 brings within scope anyone whose normal duties include working in a school. Paragraph 15 covers further education institutions and provides the Scottish Ministers with the power to adjust the scope of further education institutions in the event of changes in the organisation of that sector. Paragraph 16 covers hostels for school pupils or those attending further education institutions. Paragraph 17

covers children's homes provided by councils, including residential accommodation for persons with mental disorder.

#### **Part 4: Positions**

199. Paragraphs 18 to 27 make provision to cover specific positions which might not otherwise be caught by provision in Parts 2 and 3. These are positions which, by their very nature, put the post-holder in a position of power and trust in respect of children and those who work with children and could enable the post-holder to demand access to children or sensitive information about them. Additionally, some of these positions give the post-holder the power to influence or determine recruitment decisions or organisational policy and practice. A post-holder of a position included in Part 4 is doing regulated work with children without exception (i.e. there is no normal duties test and it is immaterial whether or not the post-holder is or is not covered by any other provision).
200. In particular, paragraph 26 brings foster carers (as defined by section 96) within the scope of regulated work with children.
201. Paragraph 27 brings charity trustees of children's charity to the scope of regulated work with children. A charity whose main purpose is to provide benefits for children is a children's charity for the purposes of this Act (paragraph 27(b)). Additionally, a charity is a children's charity if its workers normally include persons doing regulated work and those workers are working under arrangements made for purposes which are not incidental to (i.e. which are for) the purposes for which the charity is established (paragraph 27(a)). Therefore, whether a charity is a children's charity by virtue of paragraph 27(a) is dependent on the scope of the other provisions of schedule 2.
202. Consider, for example, the trustees of Higher Education Institutions with charitable status. To determine whether they fall within the scope of regulated work with children, a two step process needs to be followed. The first step is to identify which of the charity's workers are doing regulated work. Having identified that there will be some doing regulated work (e.g. first year tutors with classes dominated by under-18's), the second step is to determine whether those workers are working under arrangements incidental to the purposes for which the charity was established. As an HEI is established to provide education, those workers doing regulated work with children by virtue of teaching children are doing so for the primary purpose for which the charity is established. Therefore, charity trustees of Higher Education Institutions do fall within the scope of regulated work with children.

#### **Part 5: General**

203. Paragraph 28 permits the Scottish Ministers to amend schedule 2 by order subject to affirmative procedure. Paragraph 29 clarifies that Ministers' power to make orders under paragraph 28 to modify this schedule, can include provision to disapply or otherwise modify the application of the offence provisions in sections 34 to 37 of the Act. Consequently, Ministers have the power to include new types of work within the scope of regulated work, or modify existing types of regulated work and, in addition, provide that the offences at sections 34 to 37 do not apply to certain types of regulated work or that the offences only apply in a modified way.
204. Therefore, Ministers could create classes of regulated work where the individual is subject to continuous vetting and disclosure records can be obtained but where the individual and / or the employer do not commit an offence if the individual is barred. This power could be used, for example to identify types of foster care not covered by section 96.



### **Schedule 3: Regulated Work With Adults**

205. Schedule 3 of the Act defines “regulated work with adults” and should be read in conjunction with the definition of protected adult at section 94, explained at paragraph 162 of these Notes. This replaces and expands the definition in regulation 10(2) of the Police Act 1997 (Criminal Records) (Scotland) Regulations 2006 for the purposes of eligibility for enhanced disclosure. The criteria in those Regulations is that the individual is working in a “*position... of a kind which enables[them] in the course of his or her duties to have contact with an adult at risk*”. Schedule 3 is directed at identifying those in the adult work force who should be scheme members due to the degree of contact they may have with protected adults or otherwise.

#### **Part 1: Preliminary**

206. **Part 1** sets out that it covers work in:
- a position whose normal duties include carrying out an activity mentioned in Part 2 or (if not already covered by Part 2) work in an establishment mentioned in Part 3;
  - a position whose normal duties include the day to day supervision or management of an individual working in one (or more) of the above positions; and
  - a position mentioned in Part 4.

#### **Part 2: Activities**

207. These are certain types of activity carried out by individuals in the course of performing their normal duties (e.g. caring, teaching, supervising, advising and guiding etc.), or carried out where the performance of an individual’s duties in particular establishments (e.g. care homes) permits or requires them to have contact with protected adults. Paragraphs 2 and 6 qualify the scope of regulated work with adults by excluding these activities where they are done with children only and the presence of protected adults is merely incidental. This would prevent, for example, teaching at a secondary school becoming regulated work with adults merely because a few of the sixth year students were receiving care services.
208. **Paragraphs 3, 4 and 5** qualify the scope of regulated work with adults by excluding these activities where they are merely incidental to carrying out the same activity in relation to other individuals who are not protected adults.

#### **Part 3: Establishments**

209. These are places in which individuals will do regulated work by virtue of performing their normal duties in a place providing accommodation for adults. Paragraph 8 clarifies the meaning of a care home by reference to the accommodation being occupied mainly or exclusively by adults in order to distinguish this from accommodation which is provided mainly for children.

#### **Part 4: Positions**

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

#### **Part 5: General**

211. **Paragraph 13** permits the Scottish Ministers to amend schedule 3 by order subject to affirmative procedure. Paragraph 14 clarifies that Ministers’ power to make orders under paragraph 13 to modify this schedule, can include provision to disapply or



otherwise modify the application of the offence provisions in sections 34 to 37 of the Act. These paragraphs mirror provision at paragraphs 28 and 29 of schedule 2.

#### ***Schedule 4: Minor and Consequential Amendments and Repeals***

212. This schedule is introduced by section 88. It makes amendments to the Teaching Council (Scotland) Act 1965, the Foster Children (Scotland) Act 1984, the Criminal Procedure Act and Police Act. Importantly, PoCSA is largely repealed.

#### **Teaching Council (Scotland) Act 1965**

213. Paragraphs 1, 3 and 4 allow the General Teaching Council for Scotland (GTCS) to investigate convictions and misconduct relating to individuals who have applied to be registered as teachers. They allow the GTCS to regulate trainee teachers in the same way as registered teachers, monitoring and considering their suitability to work as a teacher.
214. Paragraph 2 reflects the replacement of DWCL established by PoCSA with the children's list established by this Act.

#### **Education (Scotland) Act 1980**

215. Paragraphs 5 to 8 amend the Education (Scotland) Act 1980 to reflect the replacement of DWCL established by PoCSA with the children's list established by this Act.

#### **Foster Children (Scotland) Act 1984**

216. Paragraphs 9 to 12 make consequential amendments to sections 7, 15 and 21 of the Foster Children (Scotland) Act 1984. These make it an offence for a person, who lives in the same premises as a barred person, to foster a child. A defence is provided where the person proves that he or she did not know, or had no reasonable grounds for believing, that any other person in the premises was barred.

#### **Criminal Procedure (Scotland) Act 1995**

217. Paragraphs 13 to 26 make amendments to the Criminal Procedure Act consequential upon the repeal of PoCSA (effected by paragraph 42). These provisions in the Criminal Procedure Act were inserted by PoCSA and make provision relating to appeals against a court's decision to refer an individual to the Scottish Ministers for listing. The Act has changed the court's powers and duties to make such referrals. In addition the Scottish Ministers are also no longer obliged to list a person who is the subject of a court referral but at most to consider whether it is appropriate to list them. An appeal against any subsequent listing decision is provided for by section 21 or 22 of the Act. Consequently these provisions of the Criminal Procedure Act are no longer required.

#### **Police Act 1997**

218. Paragraph 27 identifies the following paragraphs as amending Part 5 of the Police Act. Paragraph 28 allows the Scottish Ministers to withhold a standard or enhanced disclosure certificate under Part 5 if a scheme record disclosure could be obtained. Individuals seeking disclosure to do regulated work should be requesting disclosure records under this Act and not certificates under the Police Act.
219. Paragraphs 29, 30, 31, 32 and 35 make a number of technical changes to Part 5 of the Police Act to allow for information about barred status (in terms of this Act) to be included on enhanced disclosure certificates in the few situations where it would not be appropriate for those individuals to become scheme members, but it is right that, as well as conviction information, the employer receives information about barred status, for example, where somebody is applying to adopt a child.

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- 220. Paragraphs 31 and 32 (and paragraph 41) also make provision for Crown work in the Police Act, mirroring section 56 of this Act.
- 221. Paragraph 33 makes amendments to section 117 of the Police Act which brings the provision for correcting an inaccurate disclosure in line with provision at section 51 of this Act.
- 222. Paragraph 34 makes amendments to section 118 of the Police Act which correspond to that made at section 63 of this Act in respect of use of fingerprints and updates the reference to the Identity and Passport Service (as at section 64 of this Act).
- 223. Paragraphs 36 and 39 make consequential amendments to provision in the Police Act for registered persons. These paragraphs supplement references to countersigning applications for standard or enhanced disclosure with references to making declarations in relation to disclosure requests for scheme record disclosure or short scheme record disclosure.
- 224. Paragraph 37 is a consequential amendment which updates references to some of the sources of information that will be checked when an assessment is being made about the suitability of an individual to become, or continue to be, a registered person under Part 5 of the Police Act. The existing references which are to the English lists and the DWCL (under PoCSA) are replaced with a reference to being barred under this Act.
- 225. Paragraphs 38 and 40 make provision for the Scottish Ministers to delegate their functions under Part 5 of the Police Act in the same way as section 74 of this Act makes provision for delegation of vetting and disclosure functions under this Act. Section 122B of the Police Act, exercised together with section 74 of this Act, would enable all types of disclosure to be contracted out to a third party.

**Protection of Children (Scotland) Act 2003**

- 226. Paragraph 42 substantively repeals PoCSA.

**Criminal Procedure (Amendment) (Scotland) Act 2004 (asp 5)**

- 227. Paragraph 43 repeals section 24(1) of the Criminal Procedure (Scotland) Act 2004 which made amendments to section 10 of PoCSA which is to be repealed by paragraph 42.

**Charities and Trustee Investment (Scotland) Act 2004 (asp 10)**

- 228. Paragraph 44 repeals paragraph 15 of schedule 4 to the Charities and Trustee Investment (Scotland) Act 2005. That provision made an amendment to paragraph 12 of schedule 2 to PoCSA which is also to be repealed by paragraph 42.

**Inquiries Act 2005 (c.12)**

- 229. Paragraph 45 repeals Part 2 of schedule 2 to the Inquiries Act 2005 which makes amendment to a section of PoCSA which is also to be repealed by paragraph 42.

**Police, Public Order and Criminal Justice (Scotland) Act 2006 (asp 10)**

- 230. Paragraph 46 repeals certain provisions of the Police, Public Order and Criminal Justice (Scotland) Act 2006 that would have transferred the Scottish Ministers' functions under Part 5 of the Police Act (the functions carried out by Disclosure Scotland) to the Scottish Police Services Authority.

**PARLIAMENTARY HISTORY**

- 231. The following table sets out, for each Stage of the proceedings in the Scottish Parliament on the Bill for this Act, the dates on which the proceedings at that stage took place, the

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references to the Official report of those proceedings, the dates on which Committee Reports and other papers relating to the Act were published, and references to those Reports and other papers.

<b><i>Proceedings and Reports</i></b>	<b><i>Reference</i></b>
<b>Introduction</b>	
25 September 2006	<a href="http://www.scottish.parliament.uk/business/bills/73-ProtVulGro/b73s2-introd.pdf">http://www.scottish.parliament.uk/business/bills/73-ProtVulGro/b73s2-introd.pdf</a>
<b>Stage 1</b>	
<b><i>(a) Subordinate Legislation Committee</i></b>	
28 <sup>th</sup> meeting, 24 October 2006	<a href="http://www.scottish.parliament.uk/business/committees/subleg/or-06/su06-2802.htm#Col2035">http://www.scottish.parliament.uk/business/committees/subleg/or-06/su06-2802.htm#Col2035</a>
<b><i>(b) Finance Committee</i></b>	
27 <sup>th</sup> Meeting, 7 November 2006	<a href="http://www.scottish.parliament.uk/business/committees/finance/or-06/fi06-2702.htm#Col4095">http://www.scottish.parliament.uk/business/committees/finance/or-06/fi06-2702.htm#Col4095</a>
<b><i>(c) Education Committee</i></b>	
24 <sup>th</sup> Meeting, 15 November 2006	<a href="http://www.scottish.parliament.uk/business/committees/education/or-06/ed06-2402.htm#Col3693">http://www.scottish.parliament.uk/business/committees/education/or-06/ed06-2402.htm#Col3693</a>
25 <sup>th</sup> Meeting, 22 November 2006	<a href="http://www.scottish.parliament.uk/business/committees/education/or-06/ed06-2502.htm#Col3747">http://www.scottish.parliament.uk/business/committees/education/or-06/ed06-2502.htm#Col3747</a>
26 <sup>th</sup> Meeting, 29 November 2006	<a href="http://www.scottish.parliament.uk/business/committees/education/or-06/ed06-2602.htm#Col3812">http://www.scottish.parliament.uk/business/committees/education/or-06/ed06-2602.htm#Col3812</a>
Stage 1 Report (Education Committee) published 21 December 2006.	<a href="http://www.scottish.parliament.uk/business/committees/education/reports-06/edr06-12-00.htm">http://www.scottish.parliament.uk/business/committees/education/reports-06/edr06-12-00.htm</a>
<b><i>(d) Consideration by the Parliament</i></b>	
Stage 1 debate, 17 January 2007	<a href="http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-07/sor0117-02.htm#Col31091">http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-07/sor0117-02.htm#Col31091</a>
<b>Stage 2</b>	
<b><i>(a) Education Committee</i></b>	
3 <sup>rd</sup> Meeting, 7 February 2007 (additional evidence session)	<a href="http://www.scottish.parliament.uk/business/committees/education/or-07/ed07-0302.htm#Col4005">http://www.scottish.parliament.uk/business/committees/education/or-07/ed07-0302.htm#Col4005</a>
4 <sup>th</sup> Meeting, 13 February 2007	<a href="http://www.scottish.parliament.uk/business/committees/education/or-07/ed07-0402.htm#Col4065">http://www.scottish.parliament.uk/business/committees/education/or-07/ed07-0402.htm#Col4065</a>
5 <sup>th</sup> Meeting, 20 February 2007	<a href="http://www.scottish.parliament.uk/business/committees/education/or-07/ed07-0502.htm#Col4135">http://www.scottish.parliament.uk/business/committees/education/or-07/ed07-0502.htm#Col4135</a>

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<b><i>Proceedings and Reports</i></b>	<b><i>Reference</i></b>
<b><i>(b) Subordinate Legislation Committee</i></b>	
8 <sup>th</sup> meeting, 27 February 2007	<a href="http://www.scottish.parliament.uk/business/committees/subleg/or-07/su07-0802.htm#Col2333">http://www.scottish.parliament.uk/business/committees/subleg/or-07/su07-0802.htm#Col2333</a>
Bill as passed at Stage 2	<a href="http://www.scottish.parliament.uk/business/bills/73-ProtVulGro/b73s2-stage2-amend.pdf">http://www.scottish.parliament.uk/business/bills/73-ProtVulGro/b73s2-stage2-amend.pdf</a>
<b>Stage 3</b>	
Stage 3 debate, 8 March 2007	<a href="http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-07/sor0308-02.htm#Col32912">http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-07/sor0308-02.htm#Col32912</a>
Bill as passed	<a href="http://www.scottish.parliament.uk/business/bills/73-ProtVulGro/b73s2-aspassed.pdf">http://www.scottish.parliament.uk/business/bills/73-ProtVulGro/b73s2-aspassed.pdf</a>
<b>Royal Assent, 18 April 2007</b>	