

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

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## **EXPLANATORY NOTES**

### **OVERVIEW**

#### **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



*These notes relate to the Protection of Vulnerable Groups (Scotland)  
Act 2007 (asp 14) which received Royal Assent on 18 April 2007*

sufficient for the relevant period to be treated as not having expired until the application is determined.