Education Committee

24th Meeting, 2006

Wednesday 15 November 2006

The Committee will meet at 10.00 am in Committee Room 6

1. Protection of Vulnerable Groups (Scotland) Bill: The Committee will take evidence at Stage 1 from—

   Tom Halpin, Deputy Chief Constable, Chair of the Association of Chief Police Officers in Scotland, Crime Business Area-Family Protection Portfolio, and Andrew Gosling, Detective Chief Inspector, ACPOS Bichard Implementation Team, Lothian and Borders Police;

   Lynn Townsend, Head of Service, West Dunbartonshire Council, Association of Directors of Education;

   Alex Davidson, Vice Chair of Area Community Care Standing Committee, Association of Directors of Social Work;

   Anna Fowlie, Team Leader, Children and Young People, Convention of Scottish Local Authorities;

   and then from—

   John Anderson, Head of Professional Practice, General Teaching Council;

   Una Lane, Assistant Director of Fitness to Practice, General Medical Council;

   Carole Wikinson, Chief Executive, and Val Murray, Legal Adviser, Scottish Social Services Council;

   Christina McKenzie, Head of Midwifery, Nursing and Midwifery Council;

   and then, not before 12.00 noon, from—

   George MacBride, Secretary of the Education Committee, Educational Institute of Scotland;

   David Watson, Scottish Organiser, and Steven Smellie, Chair of UNISON Scotland’s Social Work Issues Group, UNISON.
The following papers are enclosed for the meeting:

**Agenda item 1**
Submission from ACPOS  
Submission from COSLA/ADSW/ADES  
Submission from General Teaching Council  
Submission from General Medical Council  
Submission from Scottish Social Services Council  
Submission from Nursery and Midwifery Council  
Submission from Educational Institute of Scotland  
SPICE Briefing paper on background and main proposals  
SPICE Briefing paper on key issues  
Submission from UNISON Scotland
SUBMISSION FROM ACPOS

1. The Association of Chief Police officers in Scotland (ACPOS) remain committed to the assessment and implementation of the recommendations contained within Sir Michael Bichard's report, following on his 'Enquiry' into the murders of Jessica Chapman and Holly Wells in Soham, England, in 2002. In doing so, ACPOS has established a Scottish Bichard National Working Group, chaired by Deputy Chief Constable Tom Halpin, who holds the ACPOS Portfolio for ‘Family Protection’. This group manages and monitors activity through four 'work streams', and is responsible for driving the overall progress. The Scottish Executive is represented on this group.

2. A major section of the Bichard Recommendations refers to Vetting and Barring and ACPOS contributes to the consultation and scrutinisation process surrounding the introduction of The Protection of Vulnerable Groups (Scotland) Bill into the Scottish Parliament on 25th September 2006.

3. ACPOS is represented at Scottish Executive Bichard Implementation Group and Scottish Executive Working Groups looking specifically at the Bill implementation and systems and process surrounding the continuous update of the scheme, the information sharing protocols, the development of ICT solutions and other issues such as cross border information flow and the secondary legislation required to make the scheme enabled.

4. ACPOS believe the Bill will be a significant step towards improving public protection and specifically the protection of children and protected adults. The aim of the Bill is to prevent those who are unsuitable from gaining access to positions where they are able to cause harm to those who are least able to defend themselves. We know that many unsuitable individuals who would seek to gain this access are some of the most devious and dangerous and we must ensure that the proposals outlined in the Bill translate into real obstacles to this access.

5. The Bill refers to continuous update of the scheme so that as new and relevant information comes to light regarding an individual’s suitability to work in the regulated sectors, it is passed to the Central Barring Unit for consideration. This is not possible under the present scheme and is a welcome change.

6. There will have to be a major investment in training and awareness to ensure, particularly with regard to non conviction information, that there is knowledge and understanding of these processes by every operational police officer and that there are simple pathways to ensure that the scheme can be updated. This can only realistically be achieved with investment in IT systems to allow separate systems maintained by forces, Disclosure Scotland and the Criminal History System to update each other more or less automatically. It is also recognised that the Police Service will not be the only organisation with relevant information and that other agencies will have to develop similar business processes to ensure this information is made available to be considered.

7. We also note that there will be separate schemes for England and Wales and for Scotland and this presents us with some concerns. It is imperative
that there are no gaps present in the legislation which would allow a person who might be barred in one jurisdiction to be employed in another. We note the intention to introduce an offence of employing a person in the regulated workforce who is barred, in whatever jurisdiction, but this requires the thresholds for barring, other than automatic barring by virtue of offences contained in Schedule 1, to be identical in both jurisdictions. There needs to be a consistency in this decision making process to ensure that there is no safe haven for those who are not suitable to be employed in this sector.

8. We have raised some questions of how the continuous update of the scheme would work cross border. A person should not be able to come to the notice of the police, in circumstances which may affect their suitability to work in the regulated workforce, without their status as a scheme member being obvious, in whatever jurisdiction they are employed.

9. We welcome the introduction of a Code of Practice on sharing information related to the Protection of Children as a Schedule to the Bill. This may go some way to give effective guidance and confidence to many agencies who are concerned regarding potential breaches of client confidentiality. The focus sensibly remains on the risk of harm and balances the interests of the child with that of any concerns inherent in disclosure.

10. In terms of the sharing of relevant information held, or maintained, by police forces with the Central Barring Unit and potential employers where applicable, we note the intention to make all such information available to the applicant. We are concerned that some sensitive information may be made available to applicants in circumstances that may place sources of that information in great danger. While we can apply the test that the sharing of the information may be contrary to the interests of the prevention and detection of crime, this means that potentially information may not be shared and an unsuitable individual may be offered employment.

11. We consider that a process where an immunity from the sharing of the most sensitive information with the applicant, would, on balance, be in the best interests of the prevention of harm, as opposed to the interests of the applicant. These occasions happen rarely and as such could be treated as a special consideration.

12. We highlight the importance of understanding that a blank scheme record only indicates that nothing relevant is known about the applicant – it is not an indication that the individual is suitable. That test will continue to fall to the employer. This is a particular challenge in the case in migrant workers where there is a difficulty in obtaining vetting information from foreign jurisdictions. We feel that there is much work to be done in ensuring that there is an understanding and awareness of this amongst employers both in organisations and in the voluntary sector.

13. Finally we would like to emphasise our role in the layers of protection that we are building together to prevent harm to the most vulnerable in our society. We consider that we are part of a process in which we can contribute a significant amount in terms of information that should be considered in the context of vetting. The decisions regarding the suitability of those employed in the regulated sector are a matter for everyone involved to consider and there is a responsibility which does not stop at the point of an offer of employment. The proper supervision of employees, remaining vigilant and alert concerning
any inappropriate behaviour and any indicators of concern and the updating of scheme membership, needs to be firmly embedded in the day to day business processes of every organization and agency to ensure that we can, and continue to, protect the vulnerable.

Tom Halpin
Deputy Chief Constable
PROTECTION OF VULNERABLE GROUPS (SCOTLAND) BILL
WRITTEN EVIDENCE TO THE EDUCATION COMMITTEE

Introduction

The Convention of Scottish Local Authorities (COSLA) is the umbrella body representing 31 of Scotland’s 32 councils. We submit this written evidence jointly with the Association of Directors of Social Work, the Association of Directors of Education in Scotland and the Society of Personnel Directors in Scotland. We welcome the opportunity to give evidence to the Education Committee on the Protection of Vulnerable Groups (Scotland) Bill from a strategic perspective in relation to local government’s role as the key delivery agent of services to children and vulnerable adults, as the Employer’s Organisation for local government and from the perspective of professional associations. Individual local authorities will, of course, have their own distinct views.

Before getting into the detail of the Bill, we would like to make three general points that underpin the specifics of this submission. First, we question the need for two separate lists. If someone is unsuitable to work with one vulnerable group, it is difficult to conceive of circumstances in which he/she would be suitable to work with the other. Children are vulnerable because of their age and dependence, adults may be vulnerable for a wide range of reasons. The key issue is vulnerability, not age per se. The key issues are integrity, exploitation of vulnerability and the implied trust, which comes with working with children or vulnerable adults. In purely pragmatic terms, it complicates the legislation unnecessarily to have two separate lists.

Our second point is that it is disingenuous to imply that participation in the Scheme is voluntary – by the end of the transitional period, it will become impossible to work in the sector without scheme membership, so effectively it is compulsory and this should be transparent from the outset.

Finally, for consistency and to minimise the potential for concerns about what constitutes vulnerability, vulnerability should be expressed in the same terms as it is within the Adults with Incapacity (Scotland) Act 2000.

Detailed comment

Part 1

Section 1 (2) implies that the individual cannot be on both lists, “or on both lists” needs to be added before “only”.

Section 2: we are concerned that the Bill appears to have missed people who are suspended on disciplinary grounds. There should be a requirement of immediate referral of people suspended from employment in this category because they may be working in other areas, which are unknown to the suspending employer, or indeed they may apply for other work in the meantime.
In relation to both paragraphs (a) and (b) there needs to be some sort of definition of “inappropriate”. To leave it as it stands is too subjective and interpretation in the courts after implementation is not sufficient.

Section 3: In paragraphs (1) and (2), the word “relevant” needs to be inserted between “any” and “prescribed” to tighten up the provisions, and similarly, we are concerned about the use of the word “might”. “Might have been dismissed” is very vague and open to misinterpretation. In paragraph 8 (1) (b) the word “evidence” has appeared when throughout the rest of the section/bill the word “information” is used. Information is more accurate and therefore more appropriate as evidence carries connotations, which do not necessarily apply.

In paragraph 11, sections (2) (b) and 3 (b) we remain concerned about the phrase “likely to do regulated work”. How can we possibly know whether someone is likely to do regulated work? We would like to be reassured that relevant information will not be lost because the individual does not seem likely to do regulated work at any given time, and that it will resurface if the person does try to do regulated work, however, unlikely it had seemed at the time of the conviction. This applies equally in paragraph 12.

In paragraph 14 (4) (b), for the sake of clarification there needs to be a definition of what “an order of a specified description” actually means. Also in this paragraph, we are concerned about overseas convictions, both in relation to UK nationals who commit offences overseas and foreign nationals coming to work in this country. This is a very complex area, but there is evidence of UK nationals travelling to commit crimes, coupled with the well-documented influx of people from other parts of the world looking for work in Scotland and who potentially may fill skills gaps in the care sector.

In paragraph 17 (3) there needs to be a definition of what “to make representations” means. This may be clarified in guidance, but everyone concerned with the new vetting and barring scheme will need to know how it will work.

To ensure that the powers laid out in paragraph 18 are set within appropriate parameters, there needs to be an unambiguous statement at the start of the bill about children’s welfare being paramount. As it stands, the police are the only organisation able to withhold information and therefore a clear statement of shared priorities is essential. Paragraph 19 should contain a similar provision to allow council social work services to withhold information if release of the information would compromise a child’s safety. The release of social work information, and presumably also some medical information, could also compromise a police investigation, but that does not appear to have been taken into account. This may also apply at section 71.

We are concerned that paragraph 20 (2) (b) appears to conflict with existing advice from the Information Commissioner, and indeed Disclosure Scotland, about situations where someone is “not offered work”. Organisations are only permitted to hold information on unsuccessful applicants for a maximum of 6 months, and indeed are advised to destroy it as soon as the decision has been made (because the information can only be used for the purpose for which it was provided – ie recruitment). We support the intention of the bill, but it will be necessary to ensure that this is consistent with other advice.

We are concerned that there is no route by which an organisation, or person, making a referral can appeal if someone is not included on the list in paragraphs 21 - 24 relating to appeals. The bill is only concerned with the rights of the individual. Referring agencies such as local authorities do not do this lightly and our experience with the Disqualified from Working with Children List has shown that there will be times when such an appeal process would be in the interests of child protection. There needs to be an opportunity for the referring agency to get feedback about the decision and to challenge it if necessary.
If we retain two separate lists, it would be more helpful to have the statement contained in paragraph 25 (2) at the start of the bill, and for that to run throughout the bill. As it stands, it is full of duplication, which leads to confusion.

We are concerned about the human rights implications of paragraph 25 (3) in relation to historic court referrals. The applicant’s right of appeal relates only to changes in circumstances etc, *since the listing took place* or since there was other interaction with this new process. We need to consider whether this ought to apply to someone who has been automatically listed now for something which happened many years ago, where they have done nothing wrong since and have demonstrated a complete change in character or behaviour. The grounds for their application to be removed from the list would therefore relate to the period between the conviction and the listing and that does not seem to be allowed as it stands.

With regard to paragraph 25 (4), it is against the spirit of the rest of the bill to base a decision to remove someone from the list on the basis of a conviction being quashed – the decision should be made on an assessment of risk to child or vulnerable adults.

Again while supporting the intention of the bill to ensure safety of vulnerable people, paragraphs 31 (3) (a) combined with 31 (4) may be open to challenge in human rights terms – how can someone be assumed to have been convicted if they have only been charged? If (a) must be read in conjunction with (b) or (c) then that is acceptable, but if it can be read in isolation then it is not. The wording therefore needs to be clarified. The police will have the information when someone is charged and can notify the vetting and barring unit. Automatic listing at this stage may not be appropriate, requiring application to be removed from the list if the charges fail subsequently. There is no suggestion that it should not be possible to list someone on the balance of probabilities, rather than on evidence that is beyond reasonable doubt – merely that it should not be automatic.

At paragraph 37, we suggest adding a reference to an ongoing or current investigation into (a) and “where this is relevant to this act” or something similar into (b) to prevent accessing the list/vetting information when the investigation is nothing to do with the protection of children or vulnerable adults.

Part 2

Paragraph 42 is placed illogically; we think it would make more sense earlier on in the bill.

In relation to paragraph 43, if someone is listed, then subsequently removed from the list after a period of time, we think a record of their having been listed should remain. In the spirit of this bill, we believe that would be relevant information and should be kept (in the same way that spent convictions or expired disciplinary actions would be).

Paragraph 46 provides for information to be provided to the Vetting and Barring Unit by agencies other than those involved in the justice system. While we do not have a problem with the words in this paragraph, the intention for implementation is a minefield, which needs to be resolved as a matter of urgency. What information will councils be expected to provide, in what form, at what stage and to whom? If councils offload large quantities of information to the Vetting and Barring Unit, the Unit will be swamped, but if we do not provide the information when the action happens, when will it be provided? How will the Vetting and Barring Unit know to ask for it, and how will it know who to ask? It would not be practicable to contact all councils every time a new person applies to join the Scheme, but we cannot believe that the Vetting and Barring Unit would really want to hold boxes of information about anti-social tenants or children on the child protection register. There will be implications for secure IT systems to allow information to flow confidentially...
between the Vetting and Barring Unit and agencies, at a time when we are already developing IT systems to implement Getting It Right For Every Child and sex offender monitoring to name but two.

In the section headed up Disclosure, paragraph 52 should be moved to come before paragraph 49 – ie at the start of the Disclosure section as paragraphs 49 – 51 all refer to 52 and it seems illogical as it currently stands. Condition C needs to be tightened up at the section in brackets – we agree with the spirit as it allows delegation of responsibility, which will of course be necessary, but “any other person” is too broad. We suggest “any other nominated person” with a definition of nominated to allow for relevant officers of sufficient level of responsibility. This point also applies at paragraph 63 (2) (a) and (b); “any of the person’s employees” is far too broad and again we suggest inserting “nominated” with a definition. Similarly, paragraph 65 (1) (c) is far too broad as it could cover any civil servant or employee of the parliament. This should be limited in the same way as suggested for paragraphs 52 and 63. There needs to be some reassurance that those making the decisions will be competent to do so.

The Committee may be aware of concerns raised regarding vetting arrangements for people working in contracted services, such as school transport or catering in PPP schools. Paragraph 63 combined paragraph 52 Condition C should be amended to allow councils and other public bodies to undertake vetting of individuals working in contracted services. The growth in direct payments, which will be further emphasised with the increasing personalisation of services coming from the Changing Lives agenda, will increase still further the numbers of people providing services on behalf of local authorities who are not directly employed by them. For consistency, to maximise the protection of vulnerable groups, and to ensure public confidence in the system and in our agencies, the responsibility for vetting ought to lie with the council, or other contracting agency, rather than the employer such as a bus company as applies under the existing legislation.

We are concerned about paragraph 60. While we understand why this provision is included, is it really the intention that councils and other employers should be fingerprinting applicants for jobs? The resourcing, practical and other implications of this are concerning,

Paragraph 72 (2) appears to imply that the referral for listing will automatically fall if it is not completed within 12 months. This creates the potential for allow a procedural error to endanger vulnerable people by permitting a dangerous individual back into the workforce.

Part 3

Subsections (1) and (2) of paragraph 79 have their own internal logic, and are clearly designed to circumvent difficulties for other children. A consequence will be that by not disclosing information on this basis a child may be left to suffer unnecessarily. These subsections are too focused on issues of causality and place the burden of deciding on ‘lesser harm’ on one individual, which is both overbearing and unnecessary. The solution to the difficulty of a ‘chain-reaction’ being triggered by a disclosure is surely to require the agency passing on the information to raise the possibility of repercussions for another child and for the council to ensure the other child’s needs are also met. It is difficult to imagine the circumstances of a child being otherwise so satisfactory that they could be jeopardised to such an extent by the disclosure of information relating to another child. This section is contrary to the current Child Protection ethos.

Specific reference to physical neglect and failure to thrive should be included in the definition of harm at paragraph 93.
The definition of protected adult in paragraph 94 is problematic as the adult’s vulnerability is defined by their existing receipt of service, therefore it may miss people who are vulnerable, but are not “in the system” and similarly it may draw in people who are not vulnerable – e.g. some successful young care-leavers.

Paragraph 100 deals with commencement. Given the experience of the implementation of the Protection of Children Scotland Act, we would support the phasing in of the new vetting and barring arrangements, and would suggest that the length of time an individual has been in post should be the determining factor – i.e. start with those who have been in post without a check for the longest. Those most recently appointed, even to a new post within the same organisation, will have been vetted through the Disclosure Scotland system, so there should be less potential for issues to emerge. This approach would also prevent geographical or professional hiding places to be created. Further, it may be that we would request phasing of the provisions of paragraph 46 when we know what it actually entails. We are happy with the spirit of the paragraph, but the practicalities are at such an early stage that we cannot assess the implications.

Conclusion

COSLA, ADSW and the Society of Personnel Directors in Scotland are content with the spirit and intention of the bill, and generally happy that the lack of formal consultation on the bill itself has resulted in a more creative and inclusive approach by the Scottish Executive to engagement of stakeholders. This evidence, however, reflects our concerns about some of the details in the wording. We believe that with some minor amendments to the words and clarification of how it will be implemented, this bill will result in a more cohesive, consistent and simplified approach to vetting and barring than the situation which exists at present. For example, we are reassured that multiple checks will be significantly reduced and there will be more consistency. This streamlining would be greatly assisted by the confirmation of one list to cover those unsuitable to work with vulnerable groups.

COSLA has already submitted evidence to the Finance Committee, but it is worth reiterating to the Education Committee that there is a naiveté in the Scottish Executive’s assumption around costs of checks. The financial memorandum and supporting documentation to the bill state that there will be no costs to organisations because under the legislation it is the individual who is responsible for payment, but also state that there will be no costs to individuals as organisations normally pay. The bottom line is that most checks are not free, and the costs are generally met by employers. How the fees are structured is therefore significant and there will be associated costs. It is our view that the least disruptive and most efficient model ought to be adopted and we are currently in discussion with officials about that.
SUBMISSION FROM GTC SCOTLAND

The General Teaching Council for Scotland welcomes the opportunity to give written evidence to the Education Committee of the Scottish Parliament in connection with the Protection of Vulnerable Groups (Scotland) Bill and would be pleased to amplify any of the issues raised in this submission.

Background to the General Teaching Council for Scotland - its duties and functions

The General Teaching Council for Scotland (“GTC Scotland” or “the Council”) is the regulatory body for teachers in Scotland. Although an advisory Non-Departmental Government Body, the Council is funded entirely by the teacher registration fee (currently £40 per annum) and not by the Scottish Executive or other public funding source.

Established by the Teaching Council (Scotland) Act 1965 (“the 1965 Act”) (subsequently amended by the Standards in Scotland’s Schools etc Act 2000), the Council has some 40 years’ experience in adjudicating in matters of misconduct and criminal convictions of registered teachers and also vetting the suitability of those wishing to join the Profession of registered teacher from both within Scotland and elsewhere or to re-register.

Section 4(1) of The Requirements for Teachers (Scotland) Regulations 2005 renders it unlawful for a Scottish Local Authority to employ a teacher unless or until he/she is registered with GTC Scotland.

Current Vetting Process

For this purpose GTC Scotland relies upon the criminal record history information provided by Disclosure Scotland or the Criminal Records Bureau and supporting documents from other sources. The Council is required by section 1 of the 1965 Act to discharge its functions in the public interest. Therefore GTC Scotland is committed without reservation to the safety of children and young people and other vulnerable groups. Whilst accepting the proposed role of the Central Barring Unit (CBU) in connection with the suitability of persons to work with children, GTC Scotland wishes to retain its key role in deciding suitability to teach.

Once a teacher is admitted to the register, GTC Scotland continues to discharge its statutory duty in regard to teacher conduct through the adjudication of complaints received from employers and members of the public and also notification of criminal convictions and/or other relevant information from the Scottish Criminal Record Office (SCRO). The range of disciplinary sanctions open to GTC Scotland includes:

- Conditional registration order
- Reprimand
- Removal from the Register.

In certain circumstances the Council also has the ability to suspend a teacher ad interim until the individual’s case is finally disposed of through the GTC Scotland disciplinary process.

Protection of Children (Scotland) Act 2003
Under section 13 of the Protection of Children (Scotland) Act 2003 ("the 2003 Act") an individual placed on the Disqualified from Working with Children List ("DWCL") is not entitled to seek GTC Scotland registration or in the case of an existing teacher, to remain registered.

**Guidance/…**

**Guidance and Support for the Teaching Profession**

The Council supports teachers throughout their career in connection with professional conduct and professionalism in general by way of published guidance (available at [www.gtcs.org.uk](http://www.gtcs.org.uk)) and regular presentations to probationary and experienced teachers across the country within the framework of Continuing Professional Development.

GTC Scotland is also currently going through the process of updating its Code of Professional Practice and will be consulting upon this in the near future.

**Regulation and Employment**

GTC Scotland does not employ teachers but in effect grants a licence to teach. Closely linked with this is Section 4(1) of The Requirements for Teachers (Scotland) Regulations 2005 which makes it unlawful for a Scottish Local Authority to employ a teacher unless or until he/she is registered with GTC Scotland. The Council’s on-line checking process allows prospective employers to access the up-to-date registration status of any individual who professes to be a registered teacher in Scotland in compliance with the 2005 Regulations.

Therefore in its role as the regulatory body, from initial registration to retirement, the Council maintains an on-going relationship with all teachers on the register regardless of where, how regularly they may teach or their mobility within the Scottish teaching workforce.

The Council has a key role in the safety of children and young people and maintaining public confidence in teachers and teaching as a profession. We are therefore looking to this Bill as a means of strengthening the wider framework and in so doing enable GTC Scotland to maintain and enhance the role it already discharges.

**Protection of Vulnerable Groups (Scotland) Bill**

The Council welcomes many of the measures and changes proposed in the Bill which include:

- Sections 7 and 14 – Court Referrals and in certain circumstances an obligation upon Scottish Ministers to list together with section 31 relevant offences
- Section 19 whereby Scottish Ministers can require certain information from public authorities such as GTC Scotland together with the protection included at section 38
- Part 3 (sharing of Child Protection information) is also welcomed.

**Scheme Checks and Records**

However, much as the Council welcomes measures to reduce the need for multiple disclosures in our view this could go further and be made simpler. Suitability to work with children is of course paramount to GTC Scotland. However in addition the Council must be satisfied as to the applicant’s suitability to be a teacher. This means that the Council must be aware of all other criminal activity even though this may have no direct relevance to children (for example fraud or assault against an adult). Additionally a regulatory body such as GTC Scotland must
have knowledge of convictions/information which in the opinion of the Central Barring Unit may just fall short of the individual not being included in the scheme as suitable to work with children. It is recognised that for registration purposes in the future it may be feasible for GTC Scotland to accept a full scheme record obtained previously for another post or position together with a fresh short scheme record. However it would be simpler and cheaper to make the full scheme record available on line to regulatory bodies under a password code system proposed for the on-line disclosure request. This would provide all the up-to-date information instantly and hopefully at a greatly reduced cost to the scheme member in question.

Nevertheless…

Nevertheless, should the proposed scheme record and short scheme record system proposal prevail, there must be robust authenticity structures in place to prevent fraud and/or uttering of false full scheme certificates and documentation.

**Sharing of Information and Notifiable Occupations**

The Council welcomes the proposals contained in the Bill to share information with other competent bodies; this is particularly the case regarding the plans to include de-registrations by regulatory bodies as part of disclosures.

Under current **non-statutory** arrangements (SED Circular 5/1989), SCRO informs GTC Scotland when any person they believe to be a teacher is convicted of a criminal offence. This process is essential to the current ability of the Council to regulate both in relation to child protection and other matters which might call into question an individual’s suitability to be a teacher who is in a unique position of trust. In the consultation which preceded this Bill mention was made that upon being charged a person would have to inform the police of their occupation. Clearly this would be fraught with practical difficulties in addition to the individual’s right to silence. This Bill offers the opportunity to place the functions of the above Circular on a **statutory basis** and moreover could go further and allow on-line cross-checks by SCRO against the registers of regulatory bodies such as GTC Scotland and the Scottish Social Services Council (SSSC). Given their “licensing” function, regulatory bodies are thus uniquely placed to take matters forward where for example convictions are non-child related or just fall short of CBU removal from the proposed scheme. This is regardless of the registrant’s current work status or whereabouts in the respective workforce.

**The Matter of Two Lists – Children and Vulnerable Adults**

The Council accepts that there may be an ECHR issue in relation to combining the two lists together. GTC Scotland understands that as the Council’s workforce will only be working with children, disclosures would only give information about the children’s list. It is unthinkable that GTC Scotland could in practice unknowingly register an individual who is listed as unsuitable to work with vulnerable adults. Notwithstanding that the Bill is concerned with regulated work and not contact, GTC Scotland would wish to press strongly that information is disclosed to the Council concerning both lists.

**Registration of Trainee Teachers**

The 1965 Act does not permit GTC Scotland to register any person unless and until he/she has been recommended for registration, that is to say that they have successfully completed a 4 year undergraduate programme or a postgraduate programme in teacher education. A trainee teacher undertaking a 4 year programme is required to spend at least 30 weeks in the classroom setting. Trainee teacher registration could be encompassed within the notifiable occupation scheme discussed above and enable registration formalities with GTC Scotland to be concluded as part of the application process to the University concerned. In addition to removing worry and uncertainty for the student concerned, such a change would bring GTC
Scotland in line with the SSSC and some of the thinking contained in the Foster and Donaldson reports in connection with the health professions.

In the Council’s view the current Bill could offer the legislative vehicle to make some minor amendments to the 1965 Act in this which would be very much in keeping with the spirit and purpose of this Bill.

John Anderson
Head of Professional Practice
SUBMISSION FROM THE GENERAL MEDICAL COUNCIL

1. We thank the committee for the opportunity to provide oral evidence on the Protection of Vulnerable Groups (Scotland) Bill and hope that this submission is useful in providing context to our discussions.

Comments on Parts 1 and 2 of Protection of Vulnerable Groups (Scotland) Bill

2. We are pleased to see that many of the comments made in the initial consultation on the vetting and barring scheme have been taken on board in the drafting of the bill and in the accompanying Policy Memorandum and Explanatory Notes. We welcome the intention by the Executive to consult on a system of panels which will make decisions on whether to list individuals. We welcome the proposal at Section 17(1)(a) to give individuals who are under consideration for listing the opportunity to make representations. We also welcome the extension of the appeals mechanism.

3. We are concerned that so much of that which is vital to the working of any resulting legislation, is being left to the consultation on the Code of Practice.

4. The existence of separate lists regarding children and protected adults is problematic. Under the standards set by us a person may be deemed unsuitable to work as a doctor because of their conduct towards any patient or person. It would appear to us that it is difficult to foresee the circumstances in which an individual may be barred from working with one group while remaining able to work with the other. It is likely, of course, that many individuals will be included under both lists, but not all will be. We look forward to the consultation on how decisions about listing are made. If two lists are established then it will be important that regulators such as the GMC are made aware of an individual’s listing on either list, regardless of the apparent applicability or otherwise to their job role.

5. We would require to be made aware of any information that might have an impact on the status of a doctor’s registration with the GMC. To be certain that this was the case we would need access to information held by the agency, (again, with regard to both lists), in order to make judgements on whether information warranted action by us. The regulators are best placed to make decisions on whether information might be relevant to their function.

6. The GMC would also wish to be made aware when one of our registrants who is also a member of the scheme leaves the scheme, as this would amount to the blocking of a route by which important information about that registrant could reach us.

7. Relying on a Scheme Record, which may only be updated every 10 years, may not provide adequate safeguards. The availability of Short Scheme Records does not fully address this problem as, if new vetting information has been added since the existing Scheme Record was issued, the organisation in question will then be required to obtain a full Scheme Record. This system is potentially complicated and time consuming. Organisations may find that in most cases the new information is less relevant to the role concerned. For example, minor road traffic offences or fixed penalty notices would generally be concluded by our Registrar at an early stage and not engage our procedures. The issuing of a Scheme Record to inform an organisation of this may
not be the best use of resources. A more efficient system would be to allow certain organisations, including regulators, to have direct access to the information held by the CBU which would be included on a full Scheme Record.

8. Many Scheme members would have to pay for their full Scheme Record on top of their Short Scheme Record. Where the payment is simply to disclose the kind of information described in the previous paragraph, this might be viewed as unfair. It is important that the fee structure is designed to be affordable and fair.

9. As is clear from the discussion above, the scheme will only be successful if information sharing is made as efficient as possible. The effective use of IT will be vital. Discussions have taken place on access to data via secure online registers, (including the GMC List of Registered Medical Practitioners). A key task for the Executive will the co-ordination of efforts by all relevant bodies, (including bodies operating at UK level), to ensure the compatibility of databases and information.

10. Robust checking of scheme member identity will be key. The scheme might incorporate photographic identification in its identity checking procedures, as the GMC does. The proposal to include the possibility of fingerprint information in identity checking is worthy of consideration. We look forward to proposals on this matter to be included in the Code of Practice.

11. A basis for referral listed at Section 2 is ‘inappropriate medical treatment’. The definition of this ground is, naturally, of great significance to the GMC and we would be keen to be involved in defining the ground so that it is compatible with the standards which we set for doctors. Any incompatibility might lead to different standards being set by the CBU and the GMC. This would be a recipe for confusion and should be avoided in the interests of patient safety.

12. More generally we look forward to further consultation on the precise mechanisms and grounds required for referral and consideration for listing; in particular, the level of ‘soft’ information which may be accepted as evidence by the CBU. Again, the GMC would wish to be involved in defining this so that the standards used by the CBU are compatible with the standards which we set for doctors.

13. The bill is designed to dovetail with an equivalent vetting and barring scheme for the other countries of the UK. Compatibility between this scheme and the Scottish scheme will

Protection of Vulnerable Groups Bill - Evidence 2

be vital to the success of both, as workers will cross borders. We understand that the Executive is working to ensure mutual recognition of both schemes and effective transfer of information between them on workers who move from one geographical jurisdiction to another.

14. Our understanding is that the intention is for regulators operating at UK level to work directly with both schemes, and to be required to provide relevant information to Ministers of the Scottish Executive. Compatibility will thus also help to avoid confusion and delay. This is especially true with regard to the kinds and level of information required of regulators by the respective schemes.
15. The functioning of the scheme as proposed in the bill rests to an extent on the responsibilities of employers. Although the Policy Memorandum usefully addresses the category of ‘personal employment’, (e.g. a parent taking a child for lessons from a music teacher), it is unclear how the bill will relate to other categories of self-employment. A doctor working independently, for example, would not have the same incentive to join the scheme as he or she would not have to gain a Scheme Record to satisfy an employer. Further thought might usefully be given to how the bill impacts on such categories of independent workers.

Comments on Part 3 of Protection of Vulnerable Groups (Scotland) Bill

16. Part 3 has elements which are of value, and will help professionals. We have some significant concerns, however, both about part 3 as a whole, and on points of detail.

17. It is not clear why part 3 relates exclusively to children, whereas the Bill as a whole includes other vulnerable groups. Part 3 also fits uncomfortably with the main provisions of the Bill. By combining provisions about information sharing confusion arises, such as how guidance to relevant persons (health boards, for example) affects doctors (and others) employed or contracted by them.

18. Doctors cannot lawfully disclose confidential health information to the bodies that employ or contract them without consent or where disclosure is otherwise required by statute or a judge, or is in the public interest. The explanatory notes suggest that the Code of Practice will include guidance on the types of information to be treated as child protection information and the ways in which the relevant person and their workers should share information. It will be important that the Code of Practice is consistent with professional guidance, including that which we publish for doctors, to avoid professionals receiving conflicting advice.

19. Part 3 is certainly presented in unequivocal terms, which may be unhelpful. No qualification to harm is made, for example by reference to serious or significant harm. Such a qualification would make clear that any potential disclosure must be balanced against requirements of confidentiality. The referral of information from relevant persons to the agency as proposed in part 2 of the bill does not raise the same issues of confidentiality and the definition of ‘harm’ in that case would not require the same qualification.

20. In our guidance for doctors on confidentiality, we advise doctors that they must weigh the possible harm (both to the patient, and the overall trust between doctors and patients)

Protection of Vulnerable Groups Bill - Evidence 3

against the benefits which are likely to arise from the release of information. Ultimately, the ‘public interest’ can be determined only by the courts; but the GMC may also require doctors to justify their actions if a complaint is made about the disclosure of identifiable information without a patient’s consent. Children have the same rights to a confidential medical service as adults. In the case of child neglect or abuse, the onus is
on doctors to justify a decision not to disclose. Decisions to disclose should remain a matter for professional judgement, and legislation compelling such sharing without reference to a public interest test (including the child’s interests) may cause confusion and lead to harmful sharing of information.

21. In the Policy Memorandum accompanying the bill it is stated (under the heading Human Rights) that the duty to share child protection information is in accordance with the law. Our understanding is that disclosures of confidential information must be necessary and proportionate if they are to comply with the human rights conventions and thereby be lawful. A blanket requirement to share confidential information without reference to a public interest test (including the child’s interests) risks offending against Article 8.

22. We are concerned that doctors who disclose confidential information may be given immunity from disciplinary action by virtue of 78(2). While doctors can and should disclose information to protect children from serious harm, there should be no blanket exemption from our regulatory powers, through which it can be assessed whether a disclosure was justified. This proposal is particularly unwelcome in the absence of a qualification on seriousness of harm. The explanatory note on section 78 that ‘a person disclosing information and relying on this provision will have to consider other potentially relevant rules of law’ also confuses us. There are clearly limits on the exemption proposed (such as contempt of court) and an explanation of those limits is needed. There should be no exemption for malicious or otherwise inappropriate disclosure under the guise of protecting a child from harm. In addition, the breadth of this proposal is such that, to be workable it would in all likelihood require amendments to other legislation.

23. Section 79 allows for consideration of harm to other children arising from disclosure to be set against the harm to the first child, which is welcome; but that same consideration needs to be made for the first child’s best interests in the round, as explained above. While 79(2)(a) refers to the interests of the first child, this consideration is not made explicit.

24. No reference is made to the importance of consent in information sharing. Consented sharing must be the preferred option, even when there’s a public interest in sharing without consent.

25. We recognise that many of these issues will be consulted on in drafting the Code of Practice to accompany the bill. However, we are concerned that the bill as it currently stands is worded in such a way that unintended consequences are a real danger. These issues should be dealt with, as far as is possible, within the bill itself. Given the significance of the Code of Practice to the legislation it should be subjected to some form of Parliamentary scrutiny.

26. We hope that the committee finds these comments useful and we look forward to being involved in the further development of the bill.
SUBMISSION FROM SCOTTISH SOCIAL SERVICES COUNCIL

1. The Scottish Social Services Council (SSSC) welcomes the opportunity to make this submission to the Education Committee.

2. It is important to set out the role and context of the SSSC.

2.1 The SSSC was established in October 2001 as part of the UK-wide drive to raise standards in social services.

2.2 The SSSC is responsible for establishing a Register of social workers, students and other social service workers in Scotland and for making sure that the education and training of the social service workforce meet the needs of the sector now and for the future.

2.3 In terms of section 59 of the Regulation of Care (Scotland) Act 2001 we are required to undertake our functions in accordance with the principle that the safety and welfare of all persons who use, or are eligible to use care services are to be protected and enhanced.

2.4 It is with this principle in mind that we comment on the Bill.

2.5 The Bill represents some progress in the vital area of public protection notably the creation of the adults’ list, the updating provisions on listing and removal from the Scheme and the duty to share child protection information, but we have the following concerns: -

3. Part 1 – The Lists

3.1 Clause 1 - We have no difficulty with there being two lists and with individuals only being on one list. Our view is, however, that an individual listed on either list is not suitable for registration with the SSSC because they have been assessed as presenting a current risk to children and protected adults.

3.2 It is vital that the SSSC is informed of listing on either list even if the individual is registered with the SSSC as a worker whose functions relate to the other group. When a Scheme Record is sought for registration with the SSSC, both lists must be checked, notwithstanding the category for which registration is sought. The nature of social service work is that it is undertaken with individuals within their family and social context. Therefore, for example, an adult psychiatric worker will work with children of service users who suffer from mental ill health and a child care social worker will work with the adult members of the child’s family.

3.3 If regulatory bodies and employers are not given the full information in order to make an informed decision regarding the suitability of an individual for registration or employment and that individual goes on to do harm to a child or adult then the failure to share relevant information will be seen to be the responsibility of the listing body.
3.4 We would wish to see statutory provision for the SSSC similar to that to be made available to the GTC Scotland – at Schedule 4, the Bill provides that an individual on the children’s list may not be registered with the General Teaching Council Scotland.

3.5 It should be a statutory requirement that individuals provisionally listed should be suspended from the SSSC’s Register. If an individual is barred he/she should automatically be removed from the Register. Any alternative will produce the risk of competing determinations, which could result in loss of public confidence. An individual may appeal to the Sheriff against the decision of the SSSC not to register or remove from the Register. The appeal to the Sheriff will be heard in public and the listing decision and the reasons for it will be open to public scrutiny. The Sheriff may grant the appeal notwithstanding that the individual is listed. There is likely to be huge public concern if an individual is listed, but allowed to be on the SSSC’s Register.

3.6 Clause 2 – It is a matter of concern that the “referral ground” is restricted to an act or omission by an individual who is or has been doing or has been offered or supplied for regulated work (except in the case of referral by a Court). This is illustrated by the example of an individual who has never done regulated work and who decides in middle age to become a social service worker in residential child care. The individual decides on a career change because he has been dismissed by his former employer. The dismissal was for harming a child. Nobody informed the police. (There is no requirement that the police be informed.) The matter is not referred to Scottish Ministers – there is no “referral ground” within the terms of the Bill. If there had been a “referral ground”, failure by the employer to refer would have been an offence (Clause 9). When a Scheme Record is sought for registration with the SSSC there is no “vetting information”. The likelihood is that the SSSC will remain in ignorance of the harm to the child, despite undertaking the check.

3.7 Clause 2 and Clause 91 - We are concerned that the definition of “regulated work” is not appropriate in that it does not cover some positions/employment in respect of which an Enhanced Disclosure Scotland Certificate can lawfully be sought at present. It is not clear at all that everyone who is entitled to be on the SSSC’s Register can be a Scheme Member, or is eligible to be listed.

3.8 In addition, the positions covered should be extended to include people holding an office or employment with certain specified regulatory bodies, such as the SSSC. This is in the spirit of the proposals; in particular the principle that those with indirect contact with children and protected adults should be included. The definition of “regulated work” should reflect the exceptions which have already been made under the Rehabilitation of Offenders Act 1974.

3.9 Clauses 3-8 – Referral may be made only by certain persons as set out in Clauses 3-8. Any person should be entitled to make a referral. We recognise that this is likely to increase the workload of the Central Barring Unit (CBU), but to restrict those who can make a referral is to create an artificial barrier leaving a gap in the protection of vulnerable people.

3.10 Clause 29 – We would hope that the SSSC will be notified of listing/consideration of listing/decisions not to list under Clause 29 although notification will only be to such
relevant regulatory bodies as Ministers think appropriate. The SSSC should be notified of a listing decision about a social service worker on either list.

3.11 We note that we will not be given reasons for listing/consideration of listing. If suspension/removal from the SSSC Register is not to be made automatic where an individual is listed, this will present the SSSC with a major difficulty as we will not have full information on which to act. The Bill should provide for the reasons to be given to relevant regulatory bodies. That said, being notified on an ongoing basis of a change to an individual’s listing status is an enormous step in the right direction.

3.12 Clause 37 – the Police are to be given access to prescribed information contained in each list. It would represent an immense advance in public protection if the SSSC were to be given direct access to the lists in relation to Scheme Members (Clause 42) who are registered with the SSSC. Access could be given electronically with PIN safeguards. We had envisaged at the consultation stage that this provision would be included in the Bill and are disappointed that it has not been.

4. Part 2 – Vetting and Disclosure

4.1 Part 2 requires the CBU to make enquiries to see whether vetting information exists and to consider any vetting information in relation to anyone who has applied to join the Scheme. A substantive decision on whether to begin a formal consideration for listing will therefore be required in every relevant case. This has the potential to build delays into the current system and it is important that this is addressed by making sufficient resources available.

4.2 Clause 46(1)(d) – We would like information held by relevant regulatory bodies to be prescribed as “vetting information” so that Ministers can seek such information under Clause 44 when making enquiries about Scheme Members.

4.3 Clause 49 – We would suggest the amendment of Clause 49(2) so that it reads: - “Ministers must send a copy of a record disclosed under subsection (1) to the scheme member, the employer and any relevant regulatory body.” We would request a similar amendment at Clause 50. This is because we have sometimes received “soft information” through the Disclosure Scotland system, which in our view is relevant for the protection of the public, but which we cannot disclose to a social service worker’s employer without the consent of the relevant individual. On occasion such consent has been refused.

4.4 Clauses 49 and 50 – We had anticipated that the Bill would significantly improve the existing system; currently Disclosure Scotland Certificates are only a snapshot in time. However, the Bill disappoints on this. The Scheme Record will be a snapshot in time, obtained with the consent of the individual. A Short Scheme Record can be obtained also with the consent of the individual, where a Scheme Record has already been disclosed.

4.5 The Short Scheme Record will disclose if an individual’s barred status has changed, but it will not include vetting information, but only, if relevant, state the fact that some new vetting information has been included in the Scheme Record since the Scheme Record was disclosed. It will not show new convictions.

4.6 All convictions are of interest to the SSSC even, depending on the circumstances, driving convictions. There is little point in knowing that there is new vetting
information, if there is no mechanism for being told the content of the new information. This will mean for the purpose of registration with the SSSC, a Short Scheme Record would not be sufficient. In these circumstances the individual would require a Scheme Record.

4.7 The Bill therefore does not address the current unsatisfactory situation where duplicate Disclosure Scotland checks can be required within a short period.

4.8 Clause 52 – Condition C requires that disclosure is made for a particular type of regulated work. Somebody may be registered with the SSSC as a residential child care worker, but we would want to know if they are on the adults’ list, for the reasons set out at paragraph 3.2 above.

4.9 Enhanced Disclosure Scotland checks will no longer be available for people doing “regulated work” – see Explanatory Notes, paragraph 83. “Soft information” will go instead to Ministers, but will not be shared with relevant regulatory bodies (see comments on Clause 29); this is a step backwards and is of great concern.

4.10 The systems must be aligned across the UK and the issue of checks on workers outwith the UK must be addressed, given the demography of the workforce.

5. Part 3 – Sharing Child Protection Information

5.1 Clause 73 – As a regulatory body, we sometimes receive information about “historic” abuse, harm done to children who do not disclose the information until they have grown up. Where the alleged perpetrator is currently a member of the social service workforce, working with children, the SSSC would like express statutory power to disclose this information to the child protection authorities. However, it is arguable from the terms of Clauses 73 and 74 that the “harm” must relate to an existing child. An amendment of the wording may be required.

5.2 We would want assurance that parallel provision is to be made for sharing information on protected adults. It would seem logical to include such provision in this Bill.

5.3 It is very important to be sure that Part 3 when enacted, will provide a statutory “gateway” which will mean that the personal data may be disclosed in terms of the Data Protection Act 1998.

6. Conclusion

6.1 It is important that the human rights of individuals are respected, but we must ensure that these rights are balanced with the safety of children and protected adults, which was understood to be the principal aim of the Bill. As the regulatory body for the social service workforce in Scotland, we need full access to the information held as a consequence of the listing process and the Scheme in terms of Part 2, and the power to share information which we hold for the purposes of the protection of the public. We think the Bill could be improved as set out above to ensure this aim is met.

6.2 We have appreciated our opportunities to be involved in the consultation process to date and we look forward to attending the meeting of the Committee on 15 November.
Scottish Parliament Education Committee inquiry on the general principles of the Protection of Vulnerable Groups (Scotland) Bill: Evidence from the Nursing and Midwifery Council (NMC).

Introduction.
The Nursing and Midwifery Council (NMC) is the UK regulator for two professions, nursing and midwifery. The primary purpose of the NMC is protection of the public. It does this through maintaining a register of all nurses, midwives and specialist community public health nurses eligible to practise within the UK and by setting standards for their education, training and conduct. Currently the number of registrants exceeds 682,000. The Nursing and Midwifery Order 2001 (The Order), sets out the NMC’s role and responsibilities.

The NMC welcomes the introduction of the Protection of Vulnerable Groups (Scotland) Bill as a mechanism for the protection of vulnerable groups.

What is the NMC already doing to protect vulnerable groups?
The NMC sets standards for pre-registration nursing, midwifery and specialist community public health nursing education. It also sets the standards for entry to the register and for maintenance and renewal and for removal from the register. The NMC always refers details of those removed from the register to relevant agencies with responsibility for the protection of vulnerable groups.

Standards and guidance
“The NMC Code of professional conduct: standards for conduct, performance and ethics” informs the nursing and midwifery professions of the standard of conduct required of them in the exercise of their professional accountability and practice. It also informs the public, other professions and employers of the standard of professional conduct they can expect of a registered nurse or midwife. It is the benchmark against which allegations of lack of competence and impaired fitness to practise against nurses and midwives are measured.

Within the standards and associated guidance documents are a number of factors that strengthen public protection, in particular for vulnerable groups.

These include the following:
1. Standards of proficiency for pre-registration nursing, midwifery and specialist community public health nursing education. These standards require nurses, midwives and specialist community public health nurses to co-operate with others and to share information in order to safeguard vulnerable groups.

2. “The NMC Code of professional conduct: standards of conduct, performance and ethics”. The Code requires nurses, midwives and specialist community public health nurses to act at all times in accordance with local and national policy where there is an issue of child protection. It also requires them to act quickly to protect patients and clients from risk if they have good reason to believe that someone may not be fit for practise for reasons of conduct, health or competence.
3. Guidance on good health and good character. This is being developed to provide further guidance to those applying for pre-registration programmes, students on such programmes, students applying for entry to the register and for registered nurses, midwives and specialist community public health nurses. It is anticipated that this work will be completed by Spring 2007.

**Fitness to practise**

The NMC ensures that those nurses and midwives on the register are fit to practise and investigates allegations of impaired Fitness to Practise. The NMC has a number of sanctions available to it in response to allegations of misconduct. These include: no action, caution for 1 – 5 years, suspension or removal from the register and imposition of conditions of practice order. In addition, the NMC has the power (under Article 31 of the Nursing and Midwifery Order 2001) to make an Interim Order if it is satisfied that it is necessary for the protection of the public or is otherwise in the public interest or is in the interest of the person concerned.

If the allegation is so serious that it would be appropriate to consider issuing an Interim Order, the NMC is required under The Nursing and Midwifery Council (Fitness to Practise) Rules Order of Council 2004 (Statutory Instrument 2004 No. 1761) to serve notice on the registrant “in such time in advance of the hearing as may be reasonable in all the circumstances of the case”. Thus Interim Orders for a serious allegation could be issued quickly.

Although the registered nurse or midwife is advised to inform their employer once the initial allegation is made, the NMC is only able to disclose information to employers once a hearing has taken place and the allegations have been upheld or if there is a police conviction. It would be helpful for the Bill to enable more open communication at an early stage in the interests of the protection of vulnerable groups.

All decisions from Fitness to Practise hearings are reported to the Department of Health on a monthly basis. These are forwarded to other bodies who may have a legitimate interest in the outcomes. The Council for Healthcare Regulatory Excellence (CHRE) also receives notification of all decisions and can require the regulatory body to reconsider their decision when the CHRE considers that the sanction has been too lenient.

**How effective is the bill likely to be in providing children and protected adults with additional protection from harm?**

At present, the Bill (section 42) states that: “an individual may apply to Ministers to join the scheme in relation to –

a) regulated work with children
b) regulated work with protected adults, or
c) both types of regulated work.

The NMC considers that this should be strengthened so that individuals wanting to work with these groups “must” apply to the scheme.

The NMC believes that the measures proposed in the Bill will provide additional protection for children and protected adults. It would, however, be helpful to have clarified the “prescribed services” provided by a health body under the NHS as this will enable health bodies to refer appropriately.
As the regulator for nurses and midwives across the United Kingdom, the NMC is keen to see that the Protection of Vulnerable Groups (Scotland) Bill articulates with the Safeguarding Vulnerable Groups Bill currently going through Westminster and that there is no confusion resulting from the different processes which may result in a failure to enhance the protection of children and protected adults.

The NMC notes that none of the healthcare regulatory bodies is named in the Bill. The NMC considers that the role of all healthcare regulatory bodies needs to be made explicit in relation to the Bill. Indeed, the Bill should promote a proactive relationship with healthcare regulatory bodies so communication links are open to share information. Whilst it can reasonably be expected that the employing organisation will have informed Ministers at the point of referral to the regulatory body, Ministers will also need to be informed of the outcome of the investigation and hearing by that regulatory body. Furthermore, an allegation may be made outside the area of employment (for example in voluntary or independent work) and it must be absolutely clear that Ministers will inform the appropriate regulatory body if a registrant is listed.

The NMC considers that it will be necessary to consider the issue of the protection of vulnerable groups more widely than just in relation to those individuals who work with either children or protected adults. For example, if an individual is considered to be unsuitable to work with children and is therefore on the children’s list, they may continue to work with an adult where there are children in a family and thus those children are at risk, although the individual is deemed to be working with the adult.

If the NMC was investigating a registered nurse or midwife’s fitness to practise as a result of being placed on either the children’s or adult’s list, they would consider this within the context of their registration as a whole rather than specific to their field of practise. This is because most nurses and midwives will have access to both children and adults, even though their primary role may be with one or the other. It is therefore important for the NMC to receive all information held by the police and other agencies on an individual in order to determine their fitness to practise as a registered nurse or midwife.

The NMC welcomes the requirement to share child protection information and to co-operate in order to protect children from harm. The NMC has been involved in the initial consultation leading towards the development of the code of practice for sharing child protection information and considers that this will provide additional clarity for nurses, midwives and specialist community public health nurses. The NMC considers the strengthening of the legal position in respect of a duty to share information is vital to the protection of children. The duty will enable agencies to disclose information necessary to protect children even when the individual concerned does not give their consent.

The NMC consider that the proposals could be strengthened by specifically requiring the sharing of information in the antenatal and perinatal periods where there is identified risk in order to act early to support families where children are at risk of harm.
What are the likely impacts of the bill on employers, employees and volunteers who work with children and protected adults?
The NMC considers that the measures proposed in the bill will clarify for employers and employees their respective duties in relation to the protection of children and protected adults. Furthermore, we consider that the measures will enhance the motivation, effectiveness and reputation of the workforce.

We observe that the requirements to apply for vetting and disclosure may deter some individuals from voluntary work and some organisations from providing services to children or protected adults if the cost is too high or if the process is cumbersome.

Are there any other issues raised by the Bill's provisions?
The NMC considers that it will be important for a representative from the health sector to sit on each of the adult's and children's Panels in order to complement the knowledge and experience of the other Panel members.

The NMC further considers that the scheme must be dynamic, with live updating to enable any current or prospective employer to check that an individual is suitable for employment and that they remain so.

How helpful do you find the policy memorandum and financial memorandum accompanying the Bill?
The NMC considers the information accompanying the bill was comprehensive and readily available.

Do you have any comments on the consultation the Scottish Executive carried out prior to the introduction of the bill?
The NMC were pleased to respond to the consultation and have been informed of the outcome. We continue to be involved in the consultation to develop the code of practice regarding sharing child protection information.

Cathy Cairns
Professional Advisor Children’s Nursing
Nursing & Midwifery Council

10th November 2006
1 Introduction

1.1 The EIS welcomes the opportunity to provide evidence on this Bill which will, once enacted, have major impacts on the work of teachers.

1.2 Our comments apply only to those sections of the Bill which deal with children and young people. We do not refer specifically to those sections of the Bill which apply to vulnerable adults.

2 General

2.1 The EIS as an organisation is committed to ensuring that the needs and rights of all children are recognised and met: these include the right to work in environments which are safe. EIS members are often among those most directly involved in cases where this right has not been met.

2.2 Therefore the EIS recognises fully the serious concerns which have given rise to the introduction of this Bill. We recognise the need to learn from experience and the value of so doing. We have therefore welcomed the enactment of the legislation establishing joint inspection of children’s services which has been the consequence of reflection on evidence gained from several sources over time. However we are concerned that drafting major legislation in response to an individual case may not always result in the most effective means of addressing the issues which have arisen from this case or incident.

3 Issues of concern

3.1 We consider that there are three major areas of concern raised by the introduction of this Bill.

3.2 The first of these is that this legislation and the related public debate continues to focus attention on one single aspect of child safety and diverts attention from other aspects. The statistics recently published by the Scottish Executive on Child Protection demonstrate that in 2005/06 there were 10,527 child protection referrals; 38 per cent of which resulted in an inter-agency case conference. Over 80 per cent of children who were subject to a case conference were living at home prior to being referred. These cases, sadly, arise from action (or lack of action) on the part of those closest to the children whether their parents, carers or other family members. Teachers, of course, will often be directly involved dealing with the prevention of and response to such cases.

3.3 While we do not have the figures (indeed they may not be collected) we believe that the number of children harmed by adults responsible for
them in the course of their work, as defined in the Bill, is more likely to be counted in single digits rather than in the tens of thousands.

3.4 This legislation will, by design, not deal with the great majority of cases in which children who are subject to harm or the risk of harm. We recognise the steps which have been taken by Parliament and the Executive to address such cases, both through the establishment of inspection frameworks by legislation, the encouragement of joint working across children’s services, and the provision of resources to support individual practice. The EIS is concerned that the introduction of this Bill in its present form may divert attention from this broader issue and confirm the view fostered by some in the media that the main sources of harm and danger to children are persons, unknown to them, who will seek access to young people by whatever means are available and that children will be safe provided only that there is robust and rigorous legislation such as this.

3.5 We are further concerned that this clear focus on legal routes to protection will divert attention away from the need to ensure that children are brought up and educated so that they themselves can make informed choices about what is potentially dangerous, can develop the skills of avoiding such situations and can deploy appropriate responses when faced with such situations. Whatever the legal protection afforded to children there will be occasions on which children will need to draw on such knowledge and skills. It would be regrettable if there any complacency were to be fostered by a view that robust legislation has made such knowledge and skills superfluous.

3.6 Finally in this section we would argue that the Bill provides a ‘one size fits all’ approach to the need to ensure that those who work with children, whatever the conditions of this work, are prevented from causing them harm. We would argue that there is a considerable difference between the liability of a teacher with responsibility for a class with all the opportunities that this may afford for unsupervised contact with children and the liability of a parent who has volunteered to accompany a teacher and a classroom assistant with their class on a visit to a local museum, who will at all times be in the company and under the supervision of other adults in a public place. There is an issue of proportionality here. We would argue that the development of a more proportionate system, through amendment, would be valuable in ensuring legislation that is more effective and does not imperil provision for children.

4 The List and the Scheme

4.1 We think it appropriate that a Scheme and List such as those proposed here are introduced. In particular we believe that it is appropriate that teachers and lecturers should be members of the Scheme and subject to being placed on the List of those barred from working with children.
4.2 In general we believe that these proposals have been designed to ensure the rights of children to be protected from harm, the rights of adults to have their privacy and rights to employment safeguarded, and the accuracy of information contained within the Scheme and leading to inclusion on the List.

4.3 We have one general concern about the presentation of these proposals. We regret that the order of the two main sections of the Bill is such as to focus attention on the negative rather than on the positive. We believe that a clear articulation of the Scheme should both for reasons of logic and for reasons related to the establishment of an appropriate proportionate approach to this issue precede the creation of the List.

5 Particular concerns

5.1 We have a number of particular concerns which we believe could be readily met through appropriate amendment.

5.2 We are concerned at the number of occasions on which the Bill delegates powers to Ministers to extend the provision of the legislation; this concern is exacerbated by the determination that secondary legislation will in almost all cases involve negative procedures in the Parliament. We would point to such sub-sections as 14(3), 17(2)(c), 17(5)(f), or 29(6) and (7). Given the importance for any individual involved of any decision to place her or him on the List, we believe that the powers delegated to Ministers should be kept to a minimum and should be subject to affirmative procedures in the Parliament.

5.3 We note that the Scottish Ministers are protected from any action for damages arising from actions taken within the powers afforded them by this legislation. We recognise the reasons for this but would argue that this protection should be qualified by some such phrase as that used in sub-section 38(2)(a) to apply to other persons. Given the potential effects (both in terms of employment and in terms of her/his life in society) on an employee of being placed on the List of those barred from working with children, it is important that the public can be confident that the List is maintained with due care.

5.4 We believe that the responsibility placed on the Scottish Ministers to manage and administer the List and Scheme should be carried out by a body responsible to them: this would most likely be an Executive Agency. There should be no outsourcing of the work of this Agency to any other body or organisation. We argue this because of the sensitivity of the data involved, the efficiency of Scottish public administration, and the growing evidence, such as that recently published by BBC Scotland, that private sector information management groups are inefficient, less accountable than the public services and even open to criminal infiltration. These data are too important to be put at risk of unauthorised publication or at risk of being accessed by unauthorised persons.
5.5 It will be the hope of all those involved in the Scheme that it operates with more consistent efficiency than appears to have always been the case with Disclosure Scotland. The proposals should facilitate this. Again this is a further argument for ensuring accountability through placing the body responsible for the Scheme and the List firmly within the public service.

5.6 We find the list of positions to be included within the Scheme (Schedule 2, Part 4) somewhat puzzling and illogical. It appears to have been drawn up on the basis of two different principles. The first of these seems to have been a determination of those positions holders of which are likely to come into contact with children. All those included on the list fall into this category. However there are many other such posts which are not so included. As one example we note that while the Director of Education is included other senior education staff and quality improvement officers are not included although they are as likely or perhaps more likely to be in contact with school pupils. It appears to us as though the inclusion of positions in this list may have been determined in order to demonstrate that all, whatever their position, are subject to these procedures. This is reasonable but there is a need for consistency of approach.

6 Sharing Child Protection Information

6.1 We welcome these sections of the Bill. We have consistently argued the importance of sharing such information.
PROTECTION OF VULNERABLE GROUPS 
(SCOTLAND) BILL: 
BACKGROUND AND MAIN PROPOSALS 
SARAH HARVIE-CLARK AND KATE BERRY

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

Consequently, in 2004 Sir Michael Bichard headed an urgent inquiry into the child protection procedures, as instructed by David Blunkett, the then Home Secretary. Sir Michael published his report in June 2004. Although the Bichard report contained recommendations directed at England and Wales, Scottish Ministers were keen to bring forward proposals in Scotland, to ensure that there were no cross-border loopholes that could be exploited.

The Protection of Vulnerable Groups (Scotland) Bill is the Scottish Executive’s response to recommendation 19 of the Bichard Report. This briefing outlines the current system in Scotland and the main proposals in the Bill. For a discussion of a selection of key issues associated with the Bill see the separate SPICe Briefing entitled ‘Protection of Vulnerable Groups (Scotland) Bill: Key Issues’ (Harvie-Clark 2006).
# CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>KEY POINTS OF THIS BRIEFING</strong></td>
<td>4</td>
</tr>
<tr>
<td><strong>INTRODUCTION AND BACKGROUND</strong></td>
<td>5</td>
</tr>
<tr>
<td>The Soham Murders and the Bichard Inquiry</td>
<td>5</td>
</tr>
<tr>
<td>England and Wales: Safeguarding Vulnerable Groups Act 2006</td>
<td>6</td>
</tr>
<tr>
<td>The Scottish Executive's Response to the Bichard Report</td>
<td>6</td>
</tr>
<tr>
<td><strong>CHILD PROTECTION IN SCOTLAND</strong></td>
<td>6</td>
</tr>
<tr>
<td>Audit and Review and a Three Year Reform Programme</td>
<td>6</td>
</tr>
<tr>
<td>Scottish Parliament Education Committee Inquiry</td>
<td>7</td>
</tr>
<tr>
<td>Protection of Children (Scotland) Act 2003</td>
<td>7</td>
</tr>
<tr>
<td>The process of considering an individual for addition to the DWCL</td>
<td>7</td>
</tr>
<tr>
<td>Effect of inclusion on the DWCL</td>
<td>8</td>
</tr>
<tr>
<td>Guidance and Implementation</td>
<td>8</td>
</tr>
<tr>
<td>Operation in practice</td>
<td>8</td>
</tr>
<tr>
<td><strong>ADULT PROTECTION IN SCOTLAND</strong></td>
<td>8</td>
</tr>
<tr>
<td>The current legislative framework</td>
<td>8</td>
</tr>
<tr>
<td>No list for adults</td>
<td>9</td>
</tr>
<tr>
<td>Adult Support and Protection (Scotland) Bill</td>
<td>9</td>
</tr>
<tr>
<td>Other Scottish Executive initiatives</td>
<td>10</td>
</tr>
<tr>
<td><strong>THE CURRENT VETTING AND DISCLOSURE SYSTEM IN SCOTLAND</strong></td>
<td>10</td>
</tr>
<tr>
<td>Part V of the Police Act 1997</td>
<td>10</td>
</tr>
<tr>
<td>The role of Disclosure Scotland</td>
<td>10</td>
</tr>
<tr>
<td>Volunteers and the Central Registered Body in Scotland</td>
<td>10</td>
</tr>
<tr>
<td>Types of Disclosure</td>
<td>10</td>
</tr>
<tr>
<td>Use of Disclosure Information</td>
<td>12</td>
</tr>
<tr>
<td><strong>RELEVANT LEGISLATION RELATING TO SEX OFFENDERS</strong></td>
<td>12</td>
</tr>
<tr>
<td>Registration of sex offenders</td>
<td>12</td>
</tr>
<tr>
<td>Civil Court Orders</td>
<td>12</td>
</tr>
<tr>
<td>Sexual Offences Prevention Orders</td>
<td>12</td>
</tr>
<tr>
<td>Risk of Sexual Harm Orders</td>
<td>13</td>
</tr>
<tr>
<td><strong>PROPOSALS IN THE BILL: THE NEW VETTING AND BARRING SYSTEM</strong></td>
<td>13</td>
</tr>
<tr>
<td>Policy objectives of the bill</td>
<td>13</td>
</tr>
<tr>
<td>Some key definitions</td>
<td>13</td>
</tr>
<tr>
<td>Main features of the new vetting and barring scheme</td>
<td>14</td>
</tr>
<tr>
<td>Types of check and the information that will be disclosed</td>
<td>15</td>
</tr>
<tr>
<td>The vetting function</td>
<td>17</td>
</tr>
<tr>
<td>The role of Disclosure Scotland</td>
<td>17</td>
</tr>
<tr>
<td>Vetting information (section 46)</td>
<td>17</td>
</tr>
<tr>
<td>No relevant vetting information</td>
<td>18</td>
</tr>
<tr>
<td>Delegation of functions</td>
<td>18</td>
</tr>
<tr>
<td>The barring function</td>
<td>18</td>
</tr>
<tr>
<td>The role of the Central Barring Unit (CBU)</td>
<td>18</td>
</tr>
<tr>
<td>Possible courses of action</td>
<td>18</td>
</tr>
<tr>
<td>Automatic listing (section 14)</td>
<td>19</td>
</tr>
<tr>
<td>Consideration whether to list (sections 10–13)</td>
<td>20</td>
</tr>
<tr>
<td>Decision to take no further action</td>
<td>21</td>
</tr>
<tr>
<td>Barring function cannot be delegated</td>
<td>21</td>
</tr>
<tr>
<td>Appeals against listing (sections 21–24)</td>
<td>22</td>
</tr>
<tr>
<td><strong>PROPOSALS IN THE BILL: SHARING OF INFORMATION</strong></td>
<td>22</td>
</tr>
<tr>
<td>Stakeholders' views</td>
<td>22</td>
</tr>
<tr>
<td>Key provisions of Part 3</td>
<td>23</td>
</tr>
<tr>
<td>Definition of 'child protection information'</td>
<td>23</td>
</tr>
</tbody>
</table>

providing research and information services to the Scottish Parliament
KEY POINTS OF THIS BRIEFING

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

- Part V of the Police Act 1997 established the current statutory framework in Scotland to allow for criminal record checks to be carried out in relation to those individuals applying for particular posts. Since 2002 these criminal record checks have been carried out in Scotland by Disclosure Scotland, a public/private partnership between Scottish Ministers and BT.

- In addition, the Protection of Children (Scotland) Act 2003 created a ‘Disqualified from Working with Children List’ (DWCL). Inclusion on this list is part of the disclosure information available to Disclosure Scotland. There is no equivalent list for adults in Scotland.

- The Bill makes provision for the creation of two lists – a Children’s List (which builds on the foundations laid by the DWCL) and a new Adults’ List. If an individual is on a list then he or she will be barred from working in the workforce to which the list in question pertains. A key feature of the new lists is that they will be continuously updated on the basis of information from various sources, including the police.

- Under the Bill a barred individual will commit an offence if he or she seeks to do, agrees to do, or undertakes, regulated work in the relevant workforce (section 33). An organisation (defined very broadly to cover charities, businesses, voluntary groups, faith groups, sports clubs and social clubs) will commit an offence if it makes an offer of regulated work (which includes voluntary work) to someone who is barred from the relevant workforce, permit them to do such work, or fail to remove them from such work (section 34).

- The Bill also introduces a new system for vetting and disclosure of individuals who work, or wish to work, with vulnerable groups (ie children under the age of 18 and ‘protected adults’). There are three new types of disclosure record that can be generated – a Scheme Record, a Short Scheme Record and a Statement of Barred Status.

- For the first time personal employers (eg a parent taking his or her child to the local piano teacher), as well as organisations acting as employers, will be able to confirm that an individual is not barred.

- The Scottish Executive anticipates that in practice the vetting function (ie the assembling of the relevant information) is to be carried out by Disclosure Scotland and the barring function (ie deciding whether an individual is unsuitable to work with vulnerable groups) is to be carried out by the new Central Barring Unit (CBU). It is intended that Disclosure Scotland and the CBU will be placed together under the auspices of a new executive agency.

- Part 3 of the Bill imposes duties on specified organisations (mainly public sector ones) to share information with councils for child protection purposes and a duty on Scottish Ministers to prepare a code of practice relating to information sharing. These duties are not part of the vetting and barring scheme and were not consulted on as part of the main consultation.
INTRODUCTION AND BACKGROUND

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

- **the current system in Scotland**: this includes an introduction to the existing systems of child protection and adult protection, relevant legislation associated with sex offenders and, most importantly, the existing vetting and disclosure system

- **the main proposals in the Bill**: including a new vetting and barring system (Parts 1–2 of the Bill) and provision for sharing of information for child protection purposes (Part 3 of the Bill)

This briefing is not intended to be a comprehensive treatment of the provisions of the Bill. For a more detailed examination see the Policy Memorandum to the Bill (‘the Policy Memorandum’) and the Explanatory Notes to the Bill (and other Accompanying Documents) and the Delegated Powers Memorandum. For discussion of a selection of key issues associated with the Bill see the separate SPICe Briefing entitled ‘Protection of Vulnerable Groups (Scotland) Bill: Key Issues’ (Harvie-Clark 2006). For more information on the Scottish Executive consultation which preceded the Bill’s introduction see the Consultation Paper (Scottish Executive 2006a), the consultation responses and the Analysis of the Consultation Responses carried out on behalf of the Scottish Executive by George Street Research (Granville and Mulholland 2006). For a useful collection of resources on the Bill see also the Scottish Executive’s webpage on the Bill.

The background to the Bill is summarised below.

THE SOHAM MURDERS AND THE BICHARD INQUIRY

On 17 December 2003, Ian Huntley was convicted of the murders of Jessica Chapman and Holly Wells in Soham (for an example of the level of associated media coverage surrounding this case see The Soham Trial on the BBC News website). Following the conviction, it became apparent that Huntley had been known to the authorities over a period of years. However, this relevant information did not emerge during the vetting check carried out prior to Huntley’s employment as school caretaker.

Consequently, in 2004 Sir Michael Bichard headed an urgent inquiry into the child protection procedures, as instructed by David Blunkett, the then Home Secretary. The remit of the inquiry was to:

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

Sir Michael (2004) published his report on 22 June 2004 (‘the Bichard Report’) and Mr Blunkett made a statement in the House of Commons in which he indicated that:
“Sir Michael's report uncovers serious failures in recording and managing information. These failures include local systems for recording, retaining and accessing data. They include national frameworks for inspection and information exchange, and the systems that underpin them.”

(UK Parliament 2004)

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

ENGLAND AND WALES: SAFEGUARDING VULNERABLE GROUPS ACT 2006

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

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

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

THE SCOTTISH EXECUTIVE’S RESPONSE TO THE BICHARD REPORT

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

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

(Scottish Executive 2006a, p 3)

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

CHILD PROTECTION IN SCOTLAND

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

AUDIT AND REVIEW AND A THREE YEAR REFORM PROGRAMME

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

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

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

SCOTTISH PARLIAMENT EDUCATION COMMITTEE INQUIRY

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

PROTECTION OF CHILDREN (SCOTLAND) ACT 2003

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

The process of considering an individual for addition to the DWCL

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

Section 11(3)(b) also makes it an offence for an organisation to fail to remove an individual who is disqualified from working with children from such work. This section was never implemented possibly because it raises the need for checks on existing staff and volunteers and it was anticipated that there would be significant resource implications associated with that. However, checks on the existing workforce are something that will be required under the new legislation,
although this is likely to be phased in over a 3-5 year period (see Policy Memorandum, paras 153–155 and further below).

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

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

**Effect of inclusion on the DWCL**

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

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

**Guidance and Implementation**

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

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

**Operation in practice**

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

**ADULT PROTECTION IN SCOTLAND**

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

**THE CURRENT LEGISLATIVE FRAMEWORK**

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

- a power to demand admission to premises where a mentally disordered person is...
• a power of forcible entry to premises where a mentally disordered person is and removal of that person to a place of safety

• a power to take mentally disordered people found in a public place and in need of care to a place of safety

• a power to enter premises in order to take a person over 16 who has, or appears to have, a mental disorder to any place authorised under the 2003 Act

• a power to enter premises to remove to a place of safety a person over 16 with a mental disorder who is at risk and is likely to suffer significant harm if not removed to a place of safety

• a power to remove a person reasonably suspected of having a mental disorder from a public place to a place of safety

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

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

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

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

Note that the Executive did also consider including the provisions relating to the list of individuals barred from working with protected adults now contained in the Protection of Vulnerable Groups Bill in the Adult Support and Protection Bill. It ultimately decided against this for reasons including the need for a consistent approach to both children and protected adults (see further Policy Memorandum, para 29).
For more information on the protection measures in the Adult Support and Protection Bill see the recent SPICe briefing ‘Adult Support and Protection (Scotland) Bill Part 1 – Protection of Adults at Risk of Abuse’.

OTHER SCOTTISH EXECUTIVE INITIATIVES
The Scottish Executive is undertaking a number of other initiatives designed to improve services in the field of adult protection. For more information see the webpage of its Adult Support and Protection Unit.

THE CURRENT VETTING AND DISCLOSURE SYSTEM IN SCOTLAND

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

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

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

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

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

In this regard, it is important to be aware of the role of the Rehabilitation of Offenders Act 1974 (c 53) (‘the 1974 Act’) and the distinction between ‘spent’ and ‘unspent’ convictions. The 1974
Act is a specific piece of legislation affecting ex-offenders employment opportunities. Under certain circumstances, it enables them to ‘wipe the slate clean’ of their criminal record once a specified period of time has lapsed from the date of conviction. Provided they have not been re-convicted of another offence, their conviction is said to become ‘spent’ and for employment purposes it can be treated as if it never existed.

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

Table 1: Types of Disclosure

<table>
<thead>
<tr>
<th>Type of Disclosure</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Basic Disclosure</strong>&lt;br&gt;(a ‘criminal conviction certificate’ under Part V of the Police Act 1997)</td>
<td>This type of Disclosure is available to any person for any purpose. It only provides information on convictions which are ‘unspent’ under the Rehabilitation of Offenders Act 1974 or states that there are no such convictions.</td>
</tr>
<tr>
<td><strong>Standard Disclosure</strong>&lt;br&gt;(a ‘criminal record certificate’ under Part V of the Police Act 1997)</td>
<td>Categories of posts for which a Standard Disclosure may be required include those involving regular contact with children and adults at risk, although such positions are normally eligible for Enhanced Disclosure. This type of Disclosure provides information on convictions which are both ‘spent’ and ‘unspent’ under the 1974 Act and, in instances where an individual is applying for a job working with children, whether the individual is on the DWCL (or other equivalent lists in other UK jurisdictions)</td>
</tr>
<tr>
<td><strong>Enhanced Disclosure</strong>&lt;br&gt;(an ‘enhanced criminal record certificate’ under Part V of the Police Act 1997)</td>
<td>This type of Disclosure is available to various categories of individuals including those who apply for work that regularly involves caring for, training, supervising or being in sole charge of children or adults at risk. In addition to the details included in Standard Disclosures, Enhanced Disclosures may contain non-conviction information which the police consider relevant to the position being considered.</td>
</tr>
</tbody>
</table>
For more information about the different types of disclosure see Types of Disclosure on the Disclosure Scotland’s website. For more information on the 1974 Act and the 2003 Order see The Rehabilitation of Offenders Act 1974 (a publication by Apex Scotland).

USE OF DISCLOSURE INFORMATION

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

RELEVANT LEGISLATION RELATING TO SEX OFFENDERS

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

REGISTRATION OF SEX OFFENDERS

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

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

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

CIVIL COURT ORDERS

Sexual Offences Prevention Orders

The Sexual Offences Act 2003 (c 42) created the ‘Sexual Offences Prevention Order’ (SOPO). These replaced ‘Sex Offender Orders’ introduced under section 20 of the Crime and Disorder Act 1998 (c 37).
order has effect for a fixed period which must not be less than 5 years. The Protection of Children and Prevention of Sexual Offences (Scotland) 2005 (asp 9) ('the 2005 Act') extended the use of SOPOs so that the sentencing judge can impose a SOPO on those convicted of sex offences by the court when they are sentenced, without the need – as previously – for further evidence of threatening behaviour following conviction.

**Risk of Sexual Harm Orders**

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

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

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

**PROPOSALS IN THE BILL: THE NEW VETTING AND BARRING SYSTEM**

**POLICY OBJECTIVES OF THE BILL**

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

**SOME KEY DEFINITIONS**

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

<table>
<thead>
<tr>
<th>Definition</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>‘Child’</td>
<td>means an individual under the age of 18 (section 96).</td>
</tr>
<tr>
<td>‘Protected adult’</td>
<td>means an individual aged 16 or over and who is in receipt of any of the services set out in section 94. The services covered include those relating to health, community care, housing support and care homes. The term ‘vulnerable adult’ was used in the Scottish Executive consultation that preceded the Bill, however it was not used in the Bill because some service users considered it to be inappropriate and discriminatory (Policy Memorandum, para 52)</td>
</tr>
<tr>
<td>‘Harm’ and ‘risk of harm’</td>
<td>are defined in section 93. The definition of harm goes wider than physical harm, including threatening behaviour (a type of psychological harm) or harm to the interests of the individual. The definition of risk of harm is wide enough that the individual does not need to be the direct agent of harm nor does it matter if the individual’s actions are ineffective (Explanatory Notes, para 21). Note that some of the circumstances in which organisations are obliged to refer an individual to Scottish Ministers (in practice the CBU – see further below) under sections 2–6 of the Bill rely on ‘harm’ and ‘risk of harm’.</td>
</tr>
</tbody>
</table>
‘Work’ includes paid or unpaid work. It does not include work done for an individual in the course of a family relationship or in the course of a personal relationship with no commercial consideration (section 95). Note the term is used in the definitions below.

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

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

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

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

MAIN FEATURES OF THE NEW VETTING AND BARRING SCHEME

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

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

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

- **the Adults’ List**: the creation of a new list relating to protected adults (section 1)

- **barring**: the effect of being on the Children’s List or the Adults’ List (or a corresponding list in another part of the UK) is that an individual is barred from undertaking the type of
regulated work (ie with children or protected adults) that the list in question is associated with

- **offences:** a barred individual will commit an offence if he or she seeks to do, agrees to do, or undertakes, regulated work in the relevant workforce (section 33). Organisations will commit an offence if they make an offer of regulated work to someone who is barred from the relevant workforce, permit them to do such work, or fail to remove them from such work (section 34)

- **a new body:** the Central Barring Unit (CBU) will be created which will make a determination of unsuitability to work with vulnerable groups (the barring function). Disclosure Scotland will assemble the conviction and non-conviction information for applicants (the vetting function). The two bodies will be joined together to create a new executive agency (see further Policy Memorandum, paras 42, 101–104)

- **scheme membership:** once an individual is a member of the new scheme the intention is that subsequent disclosure checks will be less bureaucratic to administer than under the current arrangements

- **the existing workforce:** retrospective checking of the existing relevant workforces, which is likely to be phased in over a 3–5 year period (Policy Memorandum, paras 153–155)

- **continuous updating:** information used to vet an individual will be continuously updated on the basis of information from various sources, including the police, courts, organisations who are employers, regulatory bodies and local authorities. New relevant information will lead to an individual being considered for listing. The aim is to address a recognised problem with the current system that Disclosures are only valid on the day of issue and new information is only picked up at the next disclosure request. Continuous updating means that, if an individual who has had a disclosure check becomes unsuitable, their employer can be notified (see further Scottish Executive 2006a, para 2.3.5; Policy Memorandum, paras 38, 64, 89 – 99; and sections 2–9 of the Bill)

- **personal employers:** it will be possible for ‘personal employers’, ie private individuals as opposed to organisations, such as parents taking their children to the local piano teacher, to check a person’s barred status. At present, it is not possible for personal employers to request a Standard or Enhanced Disclosure (see further Scottish Executive 2006a, para 3.4.3; Policy Memorandum, paras 44 and 58 and section 51 of the Bill)

**TYPES OF CHECK AND THE INFORMATION THAT WILL BE DISCLOSED**

To join the vetting and barring scheme described above, individuals will be required to apply for a new form of check. The bill provides for three types of check, all of which require an individual to become a scheme member, if not already one. Table 2 provides information about the circumstances in which a particular type of check is appropriate and the information which will ultimately be disclosed in relation to that type of check.
| Type of check          | Circumstances where appropriate form of check                                                                                                                                                                                                                                                                                                                                akeup for | Information disclosed                                                                                                                                                                                                                                                                                                                                                     |
|-----------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Scheme Record         | Where the relevant post is with an organisation and one of the following circumstances apply:  
• where the applicant is joining the scheme for the first time – either entry to one workforce (ie children or protected adults) or simultaneous entry to both workforces  
• where the applicant is joining the other workforce for the first time  
• where the applicant is renewing scheme membership. The lifetime of the scheme membership is to be prescribed by secondary legislation but the Policy Memorandum suggests it is likely to be ten years  
• on request, following discovery of new information through a Short Scheme Record disclosure (see further below)  
• as a registration requirement by a professional regulatory body  
• any other time agreed by the individual and employer                                                                                                                                                                                                                                                                                                                                 | confirmation of scheme membership for the relevant workforce (ie that the individual is not barred by virtue of being on the relevant list for the post in question)  
• whether the individual is currently being considered for inclusion on the list relevant for the post in question  
• convictions, ‘spent’ and ‘unspent’  
• inclusion on the Sex Offenders Register  
• certain civil court orders that are to be prescribed by secondary legislation  
• relevant information from the police, regulatory bodies and, in the longer term, local authorities |
| Short Scheme Record   | Where the relevant post is with an organisation and either of the following circumstances apply:  
• taking up a position with a new employer when already a scheme member in respect of that workforce                                                                                                                                                                                                                                                                                                                                                     | confirmation of scheme membership for the relevant workforce (ie that the individual is not barred by virtue of being on the relevant list for the post in question) |
• as part of a periodical check requested by the current employer
• whether the individual is currently being considered for inclusion on the list relevant for the post in question
• date of the last Scheme Record disclosure
• Indication of whether there is any new information which would have been included on a Scheme Record disclosure since the above date

| Statement of Barred Status | Where there is no organisational employer and either of the following circumstances apply:
| | • the applicant is joining the scheme for the first time
| | • taking up a new position with a personal employer when already a scheme member
| | • confirmation of scheme membership for the relevant workforce (ie that the individual is not barred by virtue of being on the relevant list for the post in question)
| | • whether the individual is currently being considered for inclusion on the list relevant for the post in question

THE VETTING FUNCTION

*The role of Disclosure Scotland*
As mentioned above, the Scottish Executive anticipates that Disclosure Scotland will be responsible for assembling what is referred to in the Bill as 'vetting information' (see below) (*Policy Memorandum*, para 42).

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

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

In relation to civil court orders, the *Policy Memorandum* (at para 75) states that Scottish Ministers intend to prescribe by secondary legislation that all ’Risk of Sexual Harm Orders’ and
‘Sexual Offences Prevention Orders’ (discussed above under ‘Relevant Legislation Relating to Sex Offenders’) will always be considered relevant civil court orders and should always be included in a Scheme Record Disclosure. In relation to other civil court orders the Scottish Executive states:

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

**Distinction between information disclosed and vetting information**

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

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

**No relevant vetting information**

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

**Delegation of functions**

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

**THE BARRING FUNCTION**

**The role of the Central Barring Unit (CBU)**

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

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

**Possible courses of action**

It is intended that, on receipt of relevant vetting information about the applicant, the CBU will either \(\text{(Policy Memorandum, paras 77 and 107)}\):

\[\text{providing research and information services to the Scottish Parliament}\]
• list the individual immediately (automatic barring) (section 14)

• consider whether to list the individual, leading to a determination by an expert panel (consideration for listing is the equivalent of ‘provisional listing’ under the 2003 Act) (section 12)

• take no further action (section 12)

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

• consider whether to list the individual, leading to a panel determination (sections 2–5)

• take no further action (sections 2–5)

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

**Automatic listing (section 14)**

**Relevant offences**

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

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

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

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

**Criteria to be specified in secondary legislation**

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

**Role of the expert panel**

The Scottish Executive Bill Team has indicated that, whilst nothing is finalised pending the 2007 consultation on the decision making process, the expert panel that will make determinations when an individual is being considered for listing (see below) is likely to also have some role in
verifying decisions made by CBU staff that an individual meets the criteria for automatic inclusion on the list (Scottish Executive 2006c).

**Consideration whether to list (sections 10–13)**

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

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

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

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

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

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

- **referral by an organisation**: referral by an organisational employer, employment agency or ‘employment business’ (the latter is similar to an employment agency except the staff remain directly employed by the employment business itself) (sections 10 and 96(1)). These types of bodies are under a duty to refer where certain grounds for referral are met and failure to do so is a criminal offence (sections 2–5)

- **discretionary court referral**: where an individual commits an offence against a child (other than that which requires automatic listing) or an offence against a protected adult, a court has a discretion to refer an individual for listing (section 7)

- **vetting information**: as mentioned above, if the CBU become aware of vetting information from Disclosure Scotland about an individual, who has done, does or is likely to do work with children or protected adults, this will trigger a consideration for listing (section 12). As a key feature of the new scheme is that vetting information is to be

---

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

*providing research and information services to the Scottish Parliament*
continuously updated, there is the prospect of new information about a scheme member coming to light at any point

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

**Decision to take no further action**

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

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

**Organisational referral**

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

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

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

**New vetting information**

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

**Barring function cannot be delegated**

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

---

³ The types of inquiry covered are those carried out by Scottish Ministers or the Scottish Parliament; those held under the Inquiries Act 2005 (c 12) (inquiries are held where there is either public concern about the occurrence, or possible occurrence of, particular events) and those prescribed by Scottish Ministers in secondary legislation (section 30).
in this context (but of course does not preclude the creation of an executive agency to carry out the barring function, as indeed is envisaged by Scottish Ministers in the form of the CBU) (Policy Memorandum, para 70).

**Appeals against listing (sections 21–24)**

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

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

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

**PROPOSALS IN THE BILL: SHARING OF INFORMATION**

Part 3 of the Bill introduces provisions in relation to information sharing for child protection purposes. It is not part of the vetting and barring scheme discussed above. However, the two are linked in the sense that vetting information (see above at pp 17–18 for definition), information on a disclosure record and information about whether or not an individual is on the Children’s List or Adults’ List, could constitute child protection information for the purposes of Part 3.

**STAKEHOLDERS’ VIEWS**

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

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

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

---

4 However, it should be noted that no finding of fact on which a conviction is based may be challenged on appeal under sections 21–23.
• professionals working with adults: conflicting interests may arise for some professionals whose relationship is with an adult rather than with the child. It was suggested that this led to difficulties in striking the right balance between sharing information for child protection purposes whilst not compromising the trust and confidentiality of the service provided to the adult

• voluntary sector: concern was expressed that the impact of the new provisions may impact adversely on the voluntary sector by having the unintended consequence of deterring volunteers

**KEY PROVISIONS OF PART 3**

**Definition of ‘child protection information’**

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

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

**Duties and powers**

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

• **information sharing with councils**: section 74 places a duty on specified organisations (defined in section 80 – see further below) to share child protection information with councils

• **co-operation with enquiries**: to assist councils considering whether to take action in order to protect a child from harm, section 75 places a duty on specified organisations to co-operate with councils and with each other where such co-operation is likely to help a council making enquiries

• **code of practice**: section 76 (1) requires Scottish Ministers to prepare and publish a code of practice about child protection information. Section 76(2) provides that specified organisations must have regard to the code of practice when deciding whether any information is child protection information (as defined in section 73) and also to comply with their other statutory duties under Part 3

• **duty relating to workers**: specified organisations must take reasonable steps in order to enable, encourage and help its workers to share child protection information both amongst themselves and with other specified organisations. Reasonable steps include promoting awareness and understanding of the code of practice and ensuring that workers have regard to it in the course of their employment (section 77)

• **power of disclosure**: aside from the duties described above applicable to the specified organisations, there is a power available to any person to disclose child protection information to a specified organisation (section 78). The person disclosing the information...
will be relieved of any applicable legal sanction or other remedy if they do so, provided that the information is disclosed only for the purpose of protecting a child from harm

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

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


Scottish Criminal Record Office [online]. Available at: http://www.scro.police.uk/

Scottish Executive. *Adult Support and Protection* [online]. Available at: http://www.scotland.gov.uk/Topics/Health/care/VAUnit/Home

Scottish Executive. *Adult Support and Protection Bill* [online]. Available at: providing research and information services to the Scottish Parliament
http://www.scotland.gov.uk/Topics/Health/care/VAUnit/ProtectingVA

Scottish Executive. *Child Protection – Audit and Review* [online]. Available at: http://www.scotland.gov.uk/Topics/People/Young-People/children-families/17834/10234

Scottish Executive. *Child Protection – Child Death and Significant Case Reviews* [online]. Available at: http://www.scotland.gov.uk/Topics/People/Young-People/children-families/17834/23012


Scottish Executive. *Children’s Services – Information Sharing and Assessment* [online]. Available at: http://www.scotland.gov.uk/Topics/People/Young-People/children-services/18058/11525

Scottish Executive. *People and Society – Child Protection* [online]. Available at: http://www.scotland.gov.uk/Topics/People/Young-People/children-families/17834/12076


Scottish Executive. *Protection of Vulnerable Groups (Scotland) Bill* [online]. Available at: http://www.scotland.gov.uk/Topics/People/Young-People/children-families/pvglegislation/Info


Scottish Executive. (2006c) Email from Scottish Executive Bill Team to SPICe dated 3 November 2006. Edinburgh: Scottish Executive.

Scottish Executive. (2006d) Email from the Scottish Executive Bill Team to SPICe dated 8 November 2006. Edinburgh: Scottish Executive.


PROTECTION OF VULNERABLE GROUPS (SCOTLAND) BILL: KEY ISSUES

SARAH HARVIE-CLARK AND KATE BERRY

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

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

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

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

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

Scottish Parliament Information Centre (SPICe) Briefings are compiled for the benefit of the Members of the Parliament and their personal staff. Authors are available to discuss the contents of these papers with MSPs and their staff who should contact Sarah Harvie-Clark on extension 85392 or email sarah.harvie-clark@scottish.parliament.uk. Members of the public or external organisations may comment on this briefing by emailing us at spice@scottish.parliament.uk. However, researchers are unable to enter into personal discussion in relation to SPICe Briefing Papers. If you have any general questions about the work of the Parliament you can email the Parliament’s Public Information Service at spinfo@scottish.parliament.uk.

Every effort is made to ensure that the information contained in SPICe briefings is correct at the time of publication. Readers should be aware however that briefings are not necessarily updated or otherwise amended to reflect subsequent changes. www.scottish.parliament.uk
KEY POINTS OF THIS BRIEFING

- The Protection of Vulnerable Groups (Scotland) Bill (‘the Bill’) introduces a new system for vetting and barring of individuals who work, or wish to work, with vulnerable groups (ie children under the age of 18 and ‘protected adults’).

- The Bill makes provision for the creation of two lists – a Children’s List (which builds on the foundations laid by an existing children’s list) and a new Adults’ List. A key feature of the new lists is that they will be continuously updated on the basis of information from various sources, including the police. Decisions as to whether to list an individual will be taken by the new Central Barring Unit (CBU).

- The need for streamlined procedures, guidance, training and an information/communications campaign was another key issue arising from the Scottish Executive consultation. Some respondents felt that they were just getting to grips with the existing system which had been significantly reformed by the Protection of Children (Scotland) Act 2003 (asp 5).

- Concern has been expressed by some organisations about what the cost will be of obtaining a disclosure check for their employees under the new system, particularly as the existing workforce will have to be retrospectively checked. The fees for obtaining a disclosure check are not yet known and will be set by secondary legislation, although the Financial Memorandum outlines a number of possible models as a guide.

- One of the main features of the proposals relating to the vetting and barring scheme is the creation of a new executive agency which will be made up of the new CBU and Disclosure Scotland. Under this model Scottish Ministers will be accountable for decisions made by the CBU to list an individual. In England and Wales an Independent Barring Board is to be set up and Ministers are not have any involvement in decisions as to whether to list an individual (Safeguarding Vulnerable Groups Act 2006).

- A number of respondents to the Scottish Executive’s consultation stressed the importance of the Bill’s compliance with human rights legislation. Aspects of the proposals which raise human rights issues include:
  - the decision making process of the CBU
  - the circumstances in which an individual will be automatically listed (ie where the CBU has no discretion)
  - the sharing of personal information about an individual between organisations
  - the circumstances in which an individual’s fingerprints will be destroyed after their identity is confirmed

- Another key issue that arose during the Executive’s consultation was whether to have one list of barred individuals or two. In deciding to have two lists the Executive felt the ability to respond proportionately to individual cases a particularly important consideration.

- The issue of how to vet overseas workers effectively was raised by a number of respondents to the Executive’s consultation.
INTRODUCTION AND BACKGROUND

This briefing considers a selection of key issues associated with the Protection of Vulnerable Groups (Scotland) Bill (‘the Bill’).

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

BACKGROUND TO THE BILL

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

MAIN PROPOSALS

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

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

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

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

APPROACH OF THIS BRIEFING

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

- the implementation of, and the costs associated with, the proposals
- the new governance arrangements and, in particular, the creation of a new executive agency
- compliance with human rights legislation
• whether there should be separate lists of those barred from working with children and those barred from working with protected adults, or a single list

• the approach to overseas workers

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

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

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

IMPLEMENTATION ISSUES

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

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

(quoted in Granville and Mulholland 2006, para 8.2)

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

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

The Bill provides Scottish Ministers with a flexible power to commence different parts of the legislation at different times, which includes the options of bringing the provisions into force by geographical area, by sector or by occupation (section 100; Explanatory Notes, para 171; Policy Memorandum, para 155). No decision has yet been made on the time period over which the new vetting and barring scheme will be phased in and further consultation is expected on this
issue in 2007 (Policy Memorandum, para 155). However, the costs laid out in the Financial Memorandum assume a three year phasing in period (see below).

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

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

NEW FEES TO BE SET BY SECONDARY LEGISLATION
The Bill allows Ministers to set the level of fees for vetting and barring disclosures in secondary legislation (section 67). The level of fees will be the subject of further consultation in 2007 (Policy Memorandum, para 63).

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

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

The Financial Memorandum states (para 203):

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

Three potential models are provided in the Financial Memorandum:

• model 1: Basic, Enhanced and Standard Disclosures and Full and Nominal checks will all attract the same fee
• **model 2**: the fee for Basic, Standard and Enhanced Disclosures will be unchanged at £20. The fee for a Nominal Check will be set to zero and the fee for the Full Check will be set to balance costs

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

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

**CONSULTATION RESPONSES**

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

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

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

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

**GOVERNANCE ARRANGEMENTS**

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

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

For more information on the different types of bodies in Scotland forming part of the process of government in Scotland, see the Executive’s useful webpage on the subject.

**THE CURRENT ARRANGEMENTS**

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

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

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

**WHAT IS PROPOSED**

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

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

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

Note that the CBU will make an initial decision as to whether to consider an individual for listing (leading to a panel determination) or take no further action, according to certain general criteria outlined in the Bill (supplemented in some instances by guidance or secondary legislation)(see further sections 10–13 of the Bill; the Policy Memorandum, paras 105–109 and the SPICe briefing (Harvie-Clark 2006) at pp 18–21). It is thought that this initial decision as to how to proceed may be taken by staff at the CBU (Scottish Executive 2006c). The precise nature of the
decision making process will be subject to further consultation in 2007 (Policy Memorandum, para 110).

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

THE WIDER POLICY CONTEXT

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

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

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

(Scottish Parliament Finance Committee 2006, para 181)

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

THE CONSULTATION PROCESS

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

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

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

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

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

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

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

Governance model

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

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

Decision-making process

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

THE EXECUTIVE’S APPROACH

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

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

As mentioned above, the separate role of the Central Registered Body for Scotland in providing free disclosure checks for volunteers is not referred to in the Policy Memorandum.
HUMAN RIGHTS

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

For example, Volunteer Development Scotland said:

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

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

(Volunteer Development Scotland 2006, para 15.4)

THE SCOTTISH EXECUTIVE’S APPROACH TO HUMAN RIGHTS ISSUES

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

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

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

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

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

- **effect of listing**: the placement of a person on either the Children’s List or the Adults’ List bars a person from engaging in regulated work and employers will be informed when a person is listed

- **information sharing**: the vetting and barring scheme permits, and indeed in many circumstances, requires, exchange of information about an individual between a
number of bodies and, as mentioned above, Part 3 of the Bill also contains provisions on information sharing between organisations for child protection purposes

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

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

**THE CONSULTATION RESPONSES**

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

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

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

**Working whilst being considered for listing**

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

**Personal employers**

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

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

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

In this regard it should be noted that the Executive has tackled the particular issues associated with personal employers in the Bill in a different way from that which was originally proposed. It...
has created a special type of disclosure for the benefit of personal employers – the ‘Statement of Barred Status’ – which does not disclose any vetting information gathered about the applicant, but confirms that the individual is a scheme member (and therefore is not listed since scheme membership and listing are mutually exclusive). It also indicates if a scheme member is under consideration for listing. The intention is that the absence of vetting information will greatly reduce the opportunities for abuse of it (see further Policy Memorandum, paras 82 – 84).

OTHER HUMAN RIGHTS ISSUES

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

Automatic listing (section 14)

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

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

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

(UK Parliament Joint Committee on Human Rights 2006, para 1.28)

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

Power to use fingerprints to check identity (section 60)

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

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

2 The full name of the case is R (on the application of S) v Chief Constable of South Yorkshire and R (on the application of Marper) v Chief Constable of South Yorkshire [2004] 1 WLR 2196, [2004] 4 All ER 193.
samples taken from suspects who were not subsequently convicted of a criminal offence, it was not contravened.

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

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

NUMBER OF LISTS AND RELATIONSHIP BETWEEN LISTS

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

PROPOSALS IN THE BILL

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

SUMMARY OF THE CONSULTATION PROCESS

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

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

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

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

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

ONE LIST OR TWO?

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

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

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

OVERSEAS WORKERS

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

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

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

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

This issue was also raised during the Bichard Inquiry where Sir Michael heard concerns from teaching unions and others in this regard. In particular, in relation to teachers, he heard the suggestion that, in future years, potentially 40 per cent or more of the teaching workforce could
come from overseas (Bichard 2004, para 4.90). Recommendation 30 of the Bichard Report was that:

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

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

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

In the Policy Memorandum to the Bill the Scottish Executive states:

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


Bichard Inquiry [online]. Available at: http://www.bichardinquiry.org.uk/

Central Registered Body in Scotland [online]. Available at: http://www.crbs.org.uk/

Children 1st [online]. Available at: http://www.children1st.org.uk/


COSLA [online]. Available at: http://www.cosla.gov.uk/


Disclosure Scotland [online]. Available at: http://www.disclosurescotland.co.uk/

Disclosure Scotland. *Types of Disclosure* [online]. Available at: http://www.disclosurescotland.co.uk/typesofdis.htm

Dundee City Council [online]. Available at: http://www.dundeecity.gov.uk/

Edinburgh Telford College [online]. Available at: http://www.ed-coll.ac.uk/


Royal College of Anaesthetists [online]. Available at: http://www.rcoa.ac.uk/


Scottish Child Law Centre [online]. Available at: http://www.sclc.org.uk/


Scottish Criminal Records Office [online]. Available at: http://www.scro.police.uk/

Scottish Executive. Adult Support and Protection [online]. Available at: http://www.scotland.gov.uk/Topics/Health/care/VAUnit/Home

Scottish Executive. Adult Support and Protection Bill [online]. Available at: http://www.scotland.gov.uk/Topics/Health/care/VAUnit/ProtectingVA


Scottish Executive. People and Society – Child Protection [online]. Available at: http://www.scotland.gov.uk/Topics/People/Young-People/children-families/17834/12076


Scottish Executive. Protection of Vulnerable Groups (Scotland) Bill [online]. Available at: http://www.scotland.gov.uk/Topics/People/Young-People/children-families/pvglegislation/info


*providing research and information services to the Scottish Parliament*
Scottish Executive. (2006c) Email to SPICe from Scottish Executive Bill Team dated 3 November 2006.


Shetland Islands Council [online]. Available at: http://www.shetland.gov.uk/


UK Parliament Joint Committee on Human Rights [online]. Available at: [http://www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights.cfm](http://www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights.cfm)


SUBMISSION FROM UNISON SCOTLAND

Introduction
UNISON Scotland welcomes the opportunity to respond to the call for evidence from the Scottish Parliament’s Education Committee regarding the above Bill.

UNISON Scotland represents over 160,000 members working in the public sector including staff from the NHS and social services throughout Scotland, many of whom work with children and vulnerable adults.

UNISON Scotland Response

Overview
UNISON Scotland generally welcomes the Bill (particularly Parts 1 and 2) as a further step towards protecting the community and raising confidence in the staff who work with these vulnerable groups. Experience has shown that people within this sector who have been dismissed from one employer can secure employment with another. The creation of the lists and the requirement of employers, agencies, etc to inform the Minister of their concerns will help to prevent this happening in future.

We understand the purpose of the provisions that create a duty to share child protection information. In a number of inquiries where information was held by other agencies but not shared with social work departments this has been a key recommendation. However, we have a number of concerns over this part of the bill as set out below.

Part 1
UNISON Scotland welcomes this part of the Bill. It sits well with improved regulation of the care workforce and the importance of protecting vulnerable persons.

We have some concern that the protections from actions for damages (s38) exemption where an information provider “knowingly or recklessly” provide misleading information may be an inadequate test. Whilst we recognise the public policy objective of not discouraging the provision of information we have some experience of employers, particularly in the private care sector, making untrue or misleading complaints to regulatory bodies when an employee leaves their employment. By the time the appeals process is completed the employee has lost their new job and potentially damaged their future employment prospects.

The reference requirements (s3) only to apply to ‘organisations’ (s96) and certain specified businesses. A significant number of carers are employed by individuals not organisations and this appears to be an important loophole in
the provisions. The development of direct payments could be relevant in this regard.

**Part 2**

UNISON Scotland generally welcomes the creation of “The Scheme” for people who wish to work in this field and believe that the guidance on vetting, notification and disclosure is broadly acceptable.

However, section 63 is too open when it states that a person is not committing an offence...’by disclosing information (a) to any of the person’s employees etc’. We believe that this is too open. An employer who receives information on a prospective employee should only be allowed to share this information with relevant staff, not any staff. This would be consistent with good data protection arrangements.

UNISON Scotland has some concerns over the issue of fees to join the scheme. It is our view that fees are a disincentive to individuals to join the scheme, particularly low paid workers, and therefore these should be waived or a salary limit set below which the fee would be waived. It is worth noting that social care staff are or will be required to pay a fee for registration and for a disclosure check at this point. Adding yet another fee to pay for the administration of this scheme is an unfair tax on people working in this field. There is an additional concern that while volunteers may have their fees waived (or effectively paid by the Scottish Executive) many small voluntary and community organisations will be facing substantial bills for checking employees’ suitability to work with either children or protected adults.

We are unclear as to how the system will deal with workers from outside the UK other than the vague references in the policy memorandum. The free movement of labour within the EU and the extensive use of non-EU overseas workers in the care sector need to be addressed. Equally such provisions should not discriminate against refugees who often have difficulty in establishing past employment records when they have fled from persecution in their home nation state. They can also be the subject of malicious accusations from their home nation state particularly when fleeing from political persecution.

This section does not appear to have any appeal mechanisms. This should cover the relevance and accuracy of the information on which a statement of barred status is based and the failure to correct an inaccurate scheme record.
Part 3

UNISON Scotland recognises the importance of sharing child protection information. There are at present both statutory provisions covering this area as well as many examples of good practice.

The definition of relevant persons in s80 requires further clarification. For example are all independent or private contractors covered by the provisions? Salaried GPs would be covered by Health Boards but are contracted GPs? The voluntary sector is covered when it is providing a ‘public function’ but there are voluntary organisations that provide similar services without a direct relationship with a public authority.

The definition of ‘Child Protection Information’ (s73) is also very widely drawn. When taken with the statutory duty to share could lead to a very large amount of information being transmitted and having to be managed by the council for the area. We have serious doubts over the capacity of councils and other agencies to manage the potential scale of information, particularly in terms of staffing resources and common ICT systems.

There are related issues with regards the threshold of information to be shared and consultation or consent of the child to certain information being shared. This also impacts on other statutory requirements such as the Human Rights Act that don’t appear to be fully addressed in the policy memorandum.

There will be concerns that this approach will encourage overly defensive professional practice. Whilst the balance, one way or the other, sometimes needs correction, the Bill may have unintended consequences in this regard.

Equally the duty to cooperate (s75) is very widely drawn and there are concerns over how wide the information requirements made might be, particularly when they impact on other vulnerable clients.

Section 79 of the Bill states that a relevant person need not share child protection information if they consider that to do so would be contrary to the interests of another child. UNISON Scotland is uncomfortable with this and believes that the relevant person should report but part of that report should include concerns regarding another child. The relevant authority, not individual members of staff, would then be able to decide what would be the appropriate action.

UNISON Scotland would also like further information on who within an organisation would be held responsible for any failure to refer relevant information.

From the above it can be seen that whilst the Bill’s objective may be desirable the provisions could be difficult to apply and have other unintended consequences. There is already much good practice in this field developed in partnership with the different agencies that reflect appropriate differences in profession practice and the capabilities of the organisations concerned. A
better approach may well be to have a lighter statutory touch in terms of duties and place greater emphasis on development of good practice. This might include a statutory duty on local authorities to develop and maintain such good practice, influenced by the code of practice provisions in the Bill.

Other provisions

UNISON Scotland believes that the meaning of “protected adult” within this Bill is generally acceptable. However, it does raise questions as to whether adults in receipt of services for care and/or support are necessarily vulnerable and therefore need protection. If they have a full intellectual capability, they would be able to assess risk even if they are physically in need of support. However, we would view people who can be at risk of harm from another person due to their physical disability to be vulnerable within the context of this bill. Therefore, we believe that it is appropriate for the people wishing to work with/for such a person to be subject to the membership of the Scheme.

Conclusion

UNISON Scotland generally welcomes Parts 1 and 2 of the Bill as a further step towards protecting the community and raising confidence in the staff who work with these vulnerable groups. There are some modest changes required to protect individuals from breach of confidence and from malicious claims as set out above.

With regards Part 3 of the bill the Committee may wish to consider the consequences the bill might have and whether further prescriptive legislation is the right approach.