# EXECUTIVE NOTE

# THE PROTECTION OF VULNERABLE GROUPS (SCOTLAND) ACT 2007 (PRESCRIBED SERVICES) (PROTECTED ADULTS) REGULATIONS 2010 SSI/2010/161

## Powers under which Instrument is made

1. The Protection of Vulnerable Groups (Scotland) Act 2007 (Prescribed Services) (Protected Adults) Regulations 2010 ("the Protected Adults Regulations") are made by the Scottish Ministers in exercise of powers conferred by section 94(1)(b) and (d) of the Protection of Vulnerable Groups (Scotland) Act 2007 ("the 2007 Act").

## Parliamentary procedure

2. This Scottish Statutory Instrument is a class 5 instrument subject to the negative resolution procedure at the Scottish Parliament.

## Summary of policy proposals

The Protection of Vulnerable Groups (Scotland) Act 2007

3. Under Part 5 of the Police Act 1997 ("the 1997 Act"), the Scottish Ministers may carry out criminal record checks. There are currently three levels of checks: the criminal conviction certificate (basic disclosure); the criminal record certificate (standard disclosure); and the enhanced criminal record certificate (enhanced disclosure). Most enhanced checks are carried out for the purpose of assessing the suitability of a person for working with vulnerable groups. Around 700,000 people in Scotland work with vulnerable groups, either through their paid employment or as volunteers. Since April 2002, the Scottish Government and BT have worked in partnership as Disclosure Scotland to provide criminal record checks for Scotland. Since then, over 4.6 million applications have been made for basic, standard and enhanced disclosures. In the 2008/09 financial year, 360,000 enhanced disclosures were processed for the purposes of working with vulnerable groups.

4. Since 10 January 2005, Scottish Ministers have kept a list of individuals who are considered unsuitable to work with children - the Disqualified from Working with Children List - introduced by the Protection of Children (Scotland) Act 2003. It is an offence for anyone on the list to work in a child care position in Scotland. In the first five years of operation, 393 individuals have been listed on DWCL.

5. The 2007 Act (when fully commenced) will provide for a new vetting and barring scheme. This means that the use of disclosure checks under the 1997 Act for work with children and protected adults will end. They will be replaced by new types of disclosure requests under the 2007 Act. For ease of reference, the Scottish Government is referring to this as the PVG Scheme. The PVG Scheme will ensure that those who either have regular contact with vulnerable groups through the workplace, or who are otherwise in regulated work, do not have a history of abusive behaviour. It will exclude people who are known to be unsuitable, on the basis of past behaviour, from working with children and/or protected adults and detect those who

become unsuitable while in the workplace. Scottish Ministers will continue to keep a list of individuals who are considered to be unsuitable to work with children ("the children's list"). Under the 2007 Act, Scottish Ministers will, for the first time in Scotland, keep a list of those who are barred from working with protected adults ("the adults' list").

6. The PVG Scheme will be managed and delivered by Disclosure Scotland as an executive agency, which will also continue to deliver the other types of disclosure (which will still be available under the 1997 Act for checks which are not for the purposes of work with children or protected adults). A new team within Disclosure Scotland will receive and consider referrals and take decisions, on behalf of Scottish Ministers, about those people who may be unsuitable to work with children or protected adults. The team will gather and assess all relevant information to make listing decisions.

7. For more information about how the PVG Scheme will work, see the draft guidance and FAQs which have been published on the Scottish Government website: www.scotland.gov.uk/pvglegislation

The Protected Adult Regulations

8. The intention of the PVG Scheme is to make sure that those people who need protection are protected, without bringing all sorts of people into the Scheme who have no real opportunity to pose a risk to vulnerable groups. Unlike children, who are inherently deemed vulnerable and in need of protection, most adults are able to make their own choices and decisions, and are more able to protect themselves from harm. So not all adults will need the protection that the 2007 Act delivers. This means that there must be a proportionate approach to requiring scheme membership in relation to work with "protected adults".

9. The 2007 Act does not specify a list of positions, as the roles and duties that people undertake are flexible and any list would became out of date very quickly. What the 2007 Act does is provide information to allow individuals and organisations to establish which posts constitute regulated work. Individuals undertaking regulated work with protected adults should become a member of the PVG Scheme.

10. Section 94 defines a "protected adult" for the purposes of the 2007 Act. A protected adult is defined as an individual aged 16 or over who is provided with (and thus receives) a type of care, support or welfare service as set out in this section. Section 94(1)(b) allows the Scottish Ministers to prescribe healthcare related services, whether provided by the NHS or by private suppliers. Section 94(1)(d) gives the Scottish Ministers the power to prescribe welfare services, receipt of which makes an individual a protected adult. Section 94(5) sets out that a welfare service includes any service which provides support, assistance, advice, or counselling to individuals with particular needs. The Protected Adult Regulations are made under the powers at section 94(1)(b) and (d).

11. As the term "protected adult" under the 2007 Act is a service-based definition, it does not label adults on the basis of having a specific condition or disability. A person will only be a protected adult for the duration that they are receiving the service, therefore

some adults will be protected for longer periods than others (e.g. care home residents whilst in the care home) whereas others with only be protected for short periods (e.g. whilst receiving dental treatment at the dentist).

12. A person is only a protected adult in the context of the service they receive or the setting in which they are situated. In other words, an adult does not carry protected status around with them. The definition will therefore assist organisations to easily identify which of their own services make an adult protected. This also means that there will be no need to ask intrusive questions about an adult's personal circumstances.

13. As most adults are likely to be a protected adult at some time in their lives, section 94, which defines the exact nature of the services that make an adult protected, must be read with schedule 3, which specifies what constitutes regulated work. This will ensure that only those people in positions that would give them the opportunity to harm protected adults come within the scope of the scheme.

*Background - regulated work with adults*

14. Schedule 3 of the 2007 Act specifies particular positions as being within scope of regulated work. This is because the holder has a particular position of responsibility, performs certain activities as part of their normal duties (or supervises the performance of such activities) or because the work is being undertaken within certain establishments where it can be assumed that people who are protected under the 2007 Act will be present.

15. With positions other than those specified as holding certain responsibility or performed within a specified establishment, as a first step an employer must identify the type of service that makes an adult "protected".

16. The second step will be to assess which posts are undertaking regulated work by looking at the range of activities in schedule 3. The employer must then consider if the activity constitutes part of the position's normal duties and whether contact with protected adults is merely "incidental" in the course of the activity. (Broadly speaking, incidental contact is where the contact is fleeting or protected adults are not the target audience or client base.)

17. The Protection of Vulnerable Groups (Scotland) Act 2007 (Modification of Regulated Work with Adults) Order 2010 modifies the current provisions relating to regulated work with adults to ensure that those who have little or no contact with protected adults are not needlessly brought within scope. The Executive Note accompanying that order provides information which may be usefully considered alongside this Executive Note.

*Prescribed Services*

18. The 2007 Act provides that receipt of certain health, care or welfare services confer protected status on an adult. The purpose of this instrument is therefore to prescribe certain services, receipt of which will confer protected adult status on an individual for the purposes of the 2007 Act.

*Healthcare related services*

19. Section 94(1)(b) allows Scottish Ministers to prescribe healthcare related services which are provided to an adult that confer protected status.

20. Only those services provided by a health body acting in exercise of functions conferred by the National Health Service (Scotland) Act 1978 concerning the treatment, care and support of, and provisions of advice and assistance in relation to their health and well-being are prescribed services for the purposes of the 2007 Act.

21. The key requirement is to capture those services which involve workers delivering relevant NHS Scotland services. This will encompass those who do regulated work in hospitals, work in local general practices, or within the community and also ensure that non-specific services such as accident and emergency, the ambulance service and NHS 24 are also included.

22. This instrument also prescribes that receipt of any independent health care services as defined by sections 2(5) and 77 of the Regulation of Care (Scotland) Act 2001 ("the 2001 Act") whose principle purpose is the treatment, care and support of, and provision of advice and assistance in relation to their health and well-being will also confer protected status on an adult.

23. This will also ensure similar coverage of private or independent health care services.

*Welfare services*

24. In order to assist voluntary and private sector organisations that provide a range of non-statutory services to individuals, these regulations define what constitutes a welfare service. This will enable such organisations to know the provision of which of their own services, will make the adult receiving the service protected.

25. The definition of a welfare service in section 94(1)(d) of the Act includes "any service which provides support, assistance, advice or counselling to individuals with particular needs" (see section 94(5)). The policy is therefore that a welfare service must be provided in the course of work to one or more adults, be delivered on behalf of an organisation (as defined in section 97), require training to be undertaken by the person delivering the service, and to have a frequency and formality attached to the service. All four of these criteria are mandatory. In addition, a welfare service must either have an agreed contract in place between the organisation providing the service and the recipient or the service must be personalised to meet an individual adult's needs.

26. This definition is similar to the definition of social care service under the existing disclosure scheme, so there should be little or no disruption to established procedures.

27. The Protected Adult Regulations prescribe only health services and welfare services for the purposes of the 2007 Act. Section 94 outlines other services the receipt or which confers protected adult status. These are: a support service, an adult placement service, a care home service, or a housing support service (section 94(1)(a)); community care services provided or secured by a council under the Social Work

(Scotland) Act 1968 or the Mental health (Care and Treatment) (Scotland) Act 2003, or in respect of which a council has made a direct payment (section 94(1)(c )).

**Consultation**

28. A Scottish Government consultation "*Protection of Vulnerable Groups (Scotland) Act 2007 Scottish Vetting and Barring Scheme - Consultation on Policy Proposals for Secondary Legislation"* took place between 1 November 2007 and 12 February 2008. The purpose of the written consultation was to allow respondents to inform the detail of policy proposals for secondary legislation. It set out a number of options for each major issue as well as seeking general comments on the proposals. The Scottish Government received 199 responses to the consultation.

29. The consultation was supported by seven PVG consultation events in cities across Scotland attended by 875 people and nine events provided by the Central Registered Body in Scotland (CRBS) attended by 176 people from November 2007 through to January 2008. The CRBS events were not formal consultation events, but were supported by the Scottish Government and intended to complement the PVG consultation events. The CRBS events reached rural communities and delegates were primarily from the voluntary sector.

30. The analysis of the consultation was published in the "*Protection of Vulnerable Groups (Scotland) Act 2007, Scottish Vetting and Barring Scheme, Analysis of consultation on policy proposals for secondary legislation*" on 27 June 2008 and the Scottish Government's response was published in the "*Scottish Government response to the analysis of consultation on policy proposals for secondary legislation*" on 6 October 2008.

31. In June 2009, the Scottish Government hosted a series of eight information events to bring organisations up to speed with implementation activities and provide an opportunity to consider and discuss aspects of the PVG Scheme. The events were attended by around 1300 people from organisations that are registered with Disclosure Scotland, have a regulatory role, or that represent groups and/or organisations that work with vulnerable groups. Although not part of a formal consultation exercise, the opportunity was taken to seek feedback on policy developments around regulated work and the structure of the guidance.

32. During consideration of the Protection of Vulnerable Groups (Scotland) Bill at the Scottish Parliament, the previous administration gave commitments to consult on a number of the more significant SSIs in draft. The current administration reaffirmed this commitment in the consultation paper published in November 2007. This SSI is one of those more significant SSIs and the Scottish Government consulted on a draft of it from 10 November 2009 to 2 February 2010. Some 108 responses were received to the consultation, and this SSI has been finalised taking account of those views. The Scottish Government's response to the 2009 consultation was published in the "*Scottish Government response to the consultation on significant draft SSIs, RIA and guidance*".

*Issues specific to the Protected Adult Regulations*

33. The consultations explored the proposals for identifying the health and welfare services, receipt of which make an individual a protected adult for the purposed of the 2007 Act. There was broad support for the policy intention of designating an individual as a protected adult while in receipt of an NHS or independent health care service.

34. The majority of those who responded also supported defining welfare services by the nature and purpose of the service provided. It was considered that this would be the simplest option for providers of services who do not contract with any health body or council (and is not a care service listed in section 94(1)(a), (b) or (c)). It was also considered that this provision should also be extended to commercial providers. The majority sector was in favour of a service based definition of "protected adult" as it avoids stigmatising an adult by reason of disability or characteristics.

35. Scottish Ministers agreed that defining a category of adult to be protected in this way was viewed as the most appropriate means to ensure employers operate the 2007 Act as intended. It places no obligations or expectations on adults to demonstrate vulnerability and avoids categorising adults solely by a condition or disability. Proportionality is also achieved through application of the tests relating to regulated work that are outlined in schedule 3 of the 2007 Act.

36. There is a clear policy intention to achieve a proportionate balance in scheme coverage and it is not intended therefore that every aspect of an NHS or independent healthcare provider's service should be brought within the ambit of the scheme, for example staff solely involved in research or delivering IT or financial loan type functions. Moreover, as the type and nature of care and welfare services, and those who provide and deliver these, continues to adapt as more innovative and flexible services are designed, there was a need to ensure that the provision of a welfare service would itself make an adult a protected adult.

37. In finalising this SSI, the Scottish Government sought views during the 2009 consultation on whether the proposals to ensure that adults are only protected when in receipt of the specified services are considered to be proportionate. The health services definition was considered to be straight forward. The vast majority considered that a protected adult will be easier to identify in practice as a result of the "welfare service" definition rather than considering the individual characteristics of a person. This approach was viewed as fair and proportionate.

38. A few respondents misunderstood that in the scope of the protection afforded by the 2007 Act: the 2007 Act is solely about keeping adults receiving health, care or welfare services safe from individuals who might do them harm through their work in providing such services. So it does not apply to personal relationships, for example family carers or people popping round to make sure that an elderly neighbour is keeping well. Most significantly, the 2007 Act does not apply to normal adult social or day to day activities aimed at the general population, such as participating in evening classes or sporting activities. For example, a tutor is not undertaking regulated work just because someone using a wheelchair joins an evening class advertised for the general public. Neither does it apply where a group of like minded people decide to come together to provide each other with support.

39. Some respondents requested clarification of the terms used for the prescribed welfare services.

40. For clarity, the 2007 Act applies to working with vulnerable groups. Welfare organisations should therefore consider which "particular needs" the adult(s) has and whether these indicate some form of vulnerability.

41. It is also reasonable to expect that employers who provide workers for sensitive and responsible welfare roles should take responsibility for those they recruit and, as a matter of good practice, ensure that the workers have some form of induction. Some examples of training would be: that the worker is aware of what their duties are; of the client's needs; whether there are any standards of conduct; who to approach for guidance or if they have any concerns, or whether there are any legal obligations etc. The requirement for training is therefore not necessarily specialist or professionally based and allows for employer flexibility.

42. It should be borne in mind that while the 2007 Act is designed to assist employers to make safer recruitment and appointment decisions, it would be inappropriate to rely wholly on PVG Scheme membership as an indicator of an individual's overall suitability for a particular position. This is more likely to be secured through proper recruitment procedures, effective management, supervision and staff training and ensuring that robust safeguarding procedures in are place.

43. The "frequency and formality" attached to the service means that the worker delivering it should not be merely doing so on an informal, unforeseen or ad hoc basis.

44. In addition, a welfare service must either have an agreed contract in place between the organisation providing the service and the recipient or, where no formal contract exists, the service must be personalised to meet an individual adult's needs or a group of adults who share the same type of needs.

45. As the definition of a welfare service under the 2007 Act is similar to the definition of a "social care service" under the existing disclosure legislation, there should be little or no disruption to established procedures for the voluntary and commercial sectors.

**Financial effects and Regulatory Impact Assessment**

46. The *Protection of Vulnerable Groups (Scotland) Act 2007 - Secondary Legislation - Partial Regulatory Impact Assessment (RIA No. 2007/40)* was published on 15 November 2007 to accompany the consultation on secondary legislation. Although comments were invited, no specific comments were made in respect of the RIA. A revised draft RIA (RIA No. 2009/03) was published to accompany the significant draft SSIs published for consultation on 10 November 2009. Responses to the consultation exercise have been taken into account in finalising the RIA. The final RIA (also RIA No. 2009/03) can be found at: www.scotland.gov.uk/pvglegislation

**Scottish Government**
**Primary and Community Care Directorate**

# PROTECTION OF VULNERABLE GROUPS (SCOTLAND) ACT 2007:

# SECONDARY LEGISLATION

# REGULATORY IMPACT ASSESSMENT

## THE SCOTTISH GOVERNMENT

## Published April 2010

This RIA supersedes the previous draft RIA published on 10 November 2009 (RIA No. 2009/03) and its predecessor of 15 November 2007 (RIA No. 2007/40).

**CONTENTS**

**Section** **Page**

**Title of proposal** **3**

**Purpose and intended effect** **3**

Objectives 4

Background 4

Rationale for government intervention 5

**Consultation** **7**

Within government 7

Public consultation 7

**Options (for secondary legislation)** **8**

The seven significant draft SSIs 9

SSIs directly informed by the 2007 consultation 14

"Technical" SSIs 15

Retrospective checking regulations 17

**Costs and benefits** **18**

Sectors and groups affected 18

Benefits 19

Costs (and cash benefits) 19

Social costs 25

Environmental costs 26

**Small firms impact test** **26**

**Legal aid impact test** **28**

**"Test run" of business forms** **29**

**Competition assessment** **30**

**Enforcement, sanctions and monitoring** **30**

**Implementation and delivery plan** **32**

**Post-implementation review** **33**

**Summary and recommendation** **33**

**Annex A: Costs and benefits: detailed modelling assumptions** **35**

## TITLE OF PROPOSAL

1. This Regulatory Impact Assessment ("RIA") relates to the Scottish Statutory Instruments (SSIs) to be made under powers in the Protection of Vulnerable Groups (Scotland) Act 2007, the Rehabilitation of Offenders Act 1974 and the Police Act 1997. The most significant of these are those which relate to:

   - the scope of regulated work with children and adults;
   - contractors' access to disclosure records;
   - offences which lead to automatic listing or automatic consideration for listing;
   - the arrangements for retrospective checking; and
   - fees for disclosures and scheme membership.

2. A draft RIA was published on 15 November 2007 (RIA No. 2007/40) to accompany the Scottish Government consultation "*Protection of Vulnerable Groups (Scotland) Act 2007 Scottish Vetting and Barring Scheme -Consultation on Policy Proposals for Secondary Legislation"* which took place between 1 November 2007 and 12 February 2008 ("the 2007 consultation").

3. During consideration of the Protection of Vulnerable Groups (Scotland) Bill at the Scottish Parliament, the previous administration gave commitments to consult on a number of the more significant SSIs in draft. The current administration reaffirmed this commitment in the 2007 consultation. The 2007 RIA was updated and published as RIA No. 2009/03 alongside seven of the significant draft SSIs and the draft guidance for consultation over the period 10 November 2009 to 2 February 2010 ("the 2009 consultation"). This RIA has been updated to take account of comments made during the 2009 consultation. The Scottish Government's response to the 2009 consultation was published in the "*Scottish Government Response to the Consultation on Significant Draft SSIs, RIA and Guidance*" in April 2010

## PURPOSE AND INTENDED EFFECT

4. The primary purpose of the Protection of Vulnerable Groups (Scotland) Act 2007 ("the Act") is to establish a membership scheme for people working with children and/or protected adults and this RIA is concerned with the secondary legislation proposed to be made under powers in that Act, and the related Acts (see paragraph 1). This RIA covers the requirements of the Act, the proposed secondary legislation and guidance and has been published prior to any of the secondary legislation being laid at the Scottish Parliament.

5. This RIA is designed to stand alone but indicates where further information may be found.

### Sources of further information

6. The Protection of Vulnerable Groups (PVG) (Scotland) Bill was introduced to the Scottish Parliament on 25 September 2006 together with its accompanying documents: Policy Memorandum, Explanatory Notes and Financial Memorandum (one document) and Delegated Powers Memorandum. The Bill was amended during its parliamentary passage so some explanation in the accompanying documents is no longer accurate. The Bill and accompanying documents are available on the Scottish Parliament website at:

www.scottish.parliament.uk/business/bills/73-ProtVulGro/index.htm

7. The Act can be found on the Office for Public Sector Information website at:

   www.opsi.gov.uk/legislation/scotland/s-acts2007a.htm

8. Links to the 2007 and 2009 consultation documents and reports, previous versions of the RIA, Frequently Asked Questions and other related documents can be found on the Scottish Government website at:

   www.scotland.gov.uk/pvglegislation

**Objectives**

9. The Scottish Government has proposed a new PVG membership scheme with the following aims:

   - to ensure that people who *are unsuitable* do not gain access to children or protected adults**1** through work;
   - to ensure that people who *become unsuitable* are detected early and prevented from continuing to work, or seeking to work, with children or protected adults; and
   - so far as practicable, ensure the underlying processes minimise bureaucracy.

10. In support of these aims, the Scottish Government has the following objectives:

    - those who have a history of behaviour that indicates they are unsuitable to work with children or protected adults are prevented from doing so and those who become unsuitable are quickly removed from such work;
    - employers have an improved tool to assess suitability and make safe and informed recruitment and retention decisions;
    - the scheme is fair, consistent and easy for people to understand and use;
    - the underlying processes are as streamlined, responsive and efficient as possible; and
    - the scheme dovetails with arrangements and the rest of the UK to ensure that cross-border loopholes do not develop which could be exploited by those who would harm children and protected adults.

**Background**

11. The PVG scheme established by the Act was developed in response to recommendation 19 of the Bichard Inquiry Report published in June 2004 by Sir Michael Bichard following his inquiry into the murder of two schoolgirls in Soham in 2002. Recommendation 19 states that *new arrangements should be introduced requiring those who work with children or vulnerable adults to be registered*. Following a feasibility study by the Home Office, the UK Government proposed an agency operating a scheme by which individuals would, where appropriate, be barred from working with children or vulnerable adults. Sir Michael

**1** Protected adult is the term used in the Act, and consequently this RIA, for adults protected by the scheme by virtue of receiving a care service. For the purposes of enhanced disclosure, they are currently known as "adults at risk".

Bichard was satisfied that this proposal met with the material requirements of his recommendation and endorsed the approach.

12. Sir Michael Bichard's report was directed at England and Wales but the significance of the underlying issues prompted the then Scottish Ministers to agree that the recommendations should also be considered in a Scottish context and acted upon where appropriate. In response to the report, and to policy developments in England and Wales, three options were considered:

    (1) do nothing;

    (2) a single, unified UK-wide membership scheme; or

    (3) a Scottish membership scheme, dovetailing with the scheme for England, Wales and Northern Ireland.

13. This latter option was pursued and led to the Act.

14. For more details about the operation of the PVG scheme, refer to the Explanatory Notes to the Act and the draft guidance.

15. The PVG scheme offers the following improvements on the current system:

- **effective barring** - Disclosure Scotland will not just collect vetting information, it will also assess it so that individuals who are considered unsuitable on the basis of vetting information are prevented from entering the workforce;
- **the adults' list** - a new list of individuals who are unsuitable to work with protected adults;
- **continuous updating** - continuing to collect vetting information about an individual after the initial disclosure check has been made so that new information indicating that they might be unsuitable can be acted upon;
- **streamlined disclosure processes** - recognising that some people may have several roles (for example, a supply teacher in several different locations and a scout leader in their spare time) and that people move and change jobs over time; and
- **access to disclosure for personal employers** - they can check that the person they are seeking to employ is not unsuitable, e.g. a parent employing a sports coach for their child or someone buying a care service directly.

**Rationale for government intervention**

16. The Bichard Inquiry Report identified a need to develop an improved system of vetting the workforce in order to ensure that those individuals who are or become unsuitable to work with children and protected adults are prevented from doing so. The Act and proposed secondary legislation aims to enhance and support, not replace, existing recruitment processes.

17. The main difficulties for organisations in vetting individuals for employment are access to vetting information itself and, in some cases, the assessment of that information. The nature of the information under consideration is primarily sensitive information that would not generally be available to employers without a disclosure process and, even where it was available, it would be costly to gather and interpret.

18. Without government intervention, it is likely that there would be widely varying practice across the workforce depending on the employer's assessment of the balance between the following competing tensions:

    - keeping recruitment costs down, which points to minimising data collection;
    - minimising barriers to recruitment (applicants will be attracted to the least bureaucratic employer) which points to minimising data collection; and
    - minimising risks to clients (a moral good but also important to protect the employer's reputation and avoiding compensation to injured parties) which points to gathering as much relevant data as possible.

19. Government intervention through a membership scheme has two elements: firstly, legal requirements and sanctions for failing to comply (e.g. offences around employing a barred individual) and, secondly, providing a straightforward mechanism for employers to meet these legal requirements and ensure compliance.

20. It is not proposed that the scheme is funded by general taxation or by employers but by fees charged to individuals for outputs (scheme membership and/or disclosure certificates). The exception is volunteers working for voluntary organisations**2** in respect of which no fee will be charged. Employers may choose to pay the fees for their employees but this is a matter of choice for them. This builds on the existing operation of the enhanced disclosure system currently used by individuals working with vulnerable groups. There are a number of reasons for taking this approach:

    - to reflect the principal beneficiaries of the system. The vulnerable groups are better protected. The employer gets information to assist them in recruitment and risk management much more fully, cheaply and easily than would be the case without government intervention. The individual has a means of confirming their criminal history and relevant information about them which facilitates the recruitment process (although in some cases the individual may not be appointed). Although the aggregate effect of the system as a whole is a widespread benefit to society, the benefits of any particular check are localised;
    - to manage demand for disclosure, since a system which was free at the point of use could result in inappropriate overuse; and
    - as a part of the deterrent for requesting disclosure when it is not appropriate (there are also offences to protect the system from abuse).

21. It is intended that the individual (as opposed to the other beneficiaries, the employer and vulnerable groups) will pay the fee but the scheme will allow flexibility: the only requirement will be that a fee is paid. In any event, nothing prevents the employer from reimbursing the individual or from adjusting remuneration accordingly. The availability of free scheme membership for volunteers working for voluntary organisations recognises the wider public good derived from such activity and is in support of the Scottish Government policies towards encouraging volunteering.

22. In summary, the rationale for government intervention is that it:

    - improves the protection for vulnerable groups through the changes set out at paragraph 15;

**2** Defined as “qualifying voluntary organisations” in the Fees Regulations.

- gives controlled access to information relevant to recruitment decisions and continued employment which would otherwise be unavailable to employers;
- means that a single body can consistently interpret relevant information in relation to potentially unsuitable individuals on entry to the workforce and through continuous vetting thereafter;
- offers economies of scale and scope for greater automation;
- allows the burden of the process to be spread evenly across individuals in the affected workforce, ensuring that a set cost is incurred by each individual irrespective of the information held about them; and
- minimises the transaction costs of providing consistency across all UK jurisdictions with a similar scheme also being introduced in England, Wales and Northern Ireland as a result of Sir Michael Bichard's recommendations.

## CONSULTATION

### Within government

23. The following government agencies, departments and public bodies have been involved in the development of the scheme and the 2007 and 2009 consultations:
    - Relevant Directorates of the Scottish Government;
    - Scottish regulatory bodies: Scottish Social Services Council (SSSC), Care Commission and General Teaching Council for Scotland;
    - UK-wide health regulatory bodies, e.g. the General Medical Council;
    - Mental Welfare Commission;
    - Office of the Public Guardian;
    - Disclosure Scotland;
    - Central Registered Body in Scotland (CRBS); and
    - Registrar of Independent Schools.

### Public consultation

24. A public consultation on proposals for the Bill was undertaken between 8 February and 2 May 2006 in which the then Executive sought views from a wide range of organisations and individuals on all aspects of the proposed scheme. Details of the consultation process can be found in the Policy Memorandum at paragraphs 14 to 19 and by topic throughout the document. The consultation report was published on 18 August 2006 and is available on the Scottish Government website.

25. The 2007 consultation took place between 1 November 2007 and 12 February 2008. The purpose of the written consultation was to allow respondents to inform the detail of policy proposals for secondary legislation. It set out a number of options for each major issue as well as seeking general comments on the proposals. The previous partial RIA (RIA No. 2007/40) was also produced as part of the 2007 consultation. The Scottish Government received 199 responses to the consultation.

26. The consultation was supported by seven PVG consultation events in cities across Scotland attended by 875 people and nine events provided by the Central Registered Body in Scotland (CRBS) attended by 176 people from November 2007 through to January 2008. The CRBS events were not formal consultation events, but were supported by the Scottish Government and intended to complement the PVG consultation events. The CRBS events reached rural communities and delegates were primarily from the voluntary sector.

27. The analysis of the consultation was published in the "*Protection of Vulnerable Groups (Scotland) Act 2007, Scottish Vetting and Barring Scheme, Analysis of consultation on policy proposals for secondary legislation*" on 27 June 2008 and the Scottish Government's Response was published in the "*Scottish Government response to the analysis of consultation on policy proposals for secondary legislation*" on 6 October 2008.

28. In June 2009, the Scottish Government hosted a series of eight information events to bring organisations up to speed with implementation activities and provide an opportunity to consider and discuss aspects of the PVG Scheme. The events were attended by around 1300 people from organisations that are registered with Disclosure Scotland, have a regulatory role, or that represent groups and/or organisations that work with vulnerable groups. Although not part of a formal consultation exercise, the opportunity was taken to seek feedback on policy developments around regulated work and the structure of the guidance.

29. During consideration of the Protection of Vulnerable Groups (Scotland) Bill at the Scottish Parliament, the previous administration gave commitments to consult on a number of the more significant SSIs in draft. The current administration reaffirmed this commitment in the consultation paper published in November 2007. This RIA was published along with those significant SSIs for consultation from 10 November 2009 to 2 February 2010. Some 108 responses were received and the RIA has been finalised taking account of views expressed. The Scottish Government's response was published in the "*Scottish Government Response to the Consultation on Significant Draft SSIs, RIA and Guidance*" in April 2010.

## OPTIONS FOR SECONDARY LEGISLATION

### Overview

30. This section summarises the development of the secondary legislation. Note that this RIA has been published before most of these Scottish Statutory Instruments (SSIs) have been laid at the Scottish Parliament. This means that they are not immediately available and that the names of the SSIs may change as they are finalised and reviewed prior to laying. Each SSI will be published with a comprehensive accompanying Executive Note which will cover the impact of the consultation process on its development.

31. Seven significant SSIs were published in draft in the 2009 consultation:
    (i.) The Protection of Vulnerable Groups (Scotland) Act 2007 (Modification of Regulated Work with Children) Order 2010
    (ii.) The Protection of Vulnerable Groups (Scotland) Act 2007 (Modification of Regulated Work with Adults) Order 2010
    (iii.) The Protection of Vulnerable Groups (Scotland) Act 2007 (Prescribed Services) (Protected Adults) Regulations 2010
    (iv.) The Protection of Vulnerable Groups (Scotland) Act 2007 (Unlawful Requests for Scheme Records) (Prescribed Circumstances) Regulations 2010

(v.) The Protection of Vulnerable Groups (Scotland) Act 2007 (Automatic Listing) (Specified Criteria) Order 2010
(vi.) The Protection of Vulnerable Groups (Scotland) Act 2007 (Relevant Offences) (Modification) Order 2010
(vii.) The Protection of Vulnerable Groups (Scotland) Act 2007 (Fees for Scheme Membership and Disclosure Requests) Regulations 2010

32. The following SSIs have been *directly* informed by the 2007 consultation:
- The Police Act 1997 (Registration) (Scotland) Regulations 2010
- The Protection of Vulnerable Groups (Scotland) Act 2007 (Referrals by Organisations and Other Bodies) (Prescribed Information) Regulations 2010
- The Protection of Vulnerable Groups (Scotland) Act 2007 (Consideration for Listing) Regulations 2010
- The Protection of Vulnerable Groups (Scotland) Act 2007 (Applications for Removal from Lists and Late Representations) (Procedure Etc.) Regulations 2010
- The Protection of Vulnerable Groups (Scotland) Act 2007 (Vetting Information) Regulations 2010

33. There are also a number of SSIs which have not been the subject of direct consultation because they are either: technically necessary in a particular form; the logical consequence of making the changes which *have* been subject to consultation; or respond to very recent policy developments. Of these, the more significant are as follows:
- The Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) Amendment Order 2010
- The Police Act 1997 (Criminal Records) (Scotland) Regulations 2010
- The Protection of Vulnerable Groups (Scotland) Act 2007 (Power to Refer) (Information Relevant to Listing Decisions) Order 2010
- The Protection of Vulnerable Groups (Scotland) Act 2007 (Removal of Barred Individuals from Regulated Work) Order 2010
- The Protection of Vulnerable Groups (Scotland) Act 2007 (Administration of the Scheme) Regulations 2010
- The Protection of Vulnerable Groups (Scotland) Act 2007 (Referrals by Courts) (Prescribed Information) Regulations 2010

34. There will also be regulations for retrospective checking and this legislation will be subject to consultation in draft. But as the process of retrospective checking will not begin until late 2011, no SSIs have yet been prepared to make provision for it. This RIA does not cover the detail of how the process of retrospective checking will be managed but work is ongoing between Disclosure Scotland and registered bodies to determine the best approach.

35. Each of the named SSIs above is reviewed briefly in the following sections.

**The seven significant draft SSIs**

36. This section summarises the development of the seven significant SSIs which were published in draft for consultation in 2009.

<u>The Protection of Vulnerable Groups (Scotland) Act 2007 (Modification of Regulated Work with Children) Order 2010</u>

37. Chapter 2.2 of the 2007 consultation paper did not make proposals to change the scope of regulated work with children. The 2009 consultation proposed narrowing the scope in

respect of work in establishments and as charity trustees but expanding it in respect of host parents. As a result of that consultation, the provision in respect of charity trustees has been revised and the provision in respect of host parents has been made discretionary. The Protection of Vulnerable Groups (Scotland) Act 2007 (**Modification of Regulated Work with Children**) Order 2010 and its accompanying Executive Note set out the detail of the proposed amendments to schedule 2 to the Act. The Executive Note also contains a full amended version of schedule 2 for ease of reference. The 2007 consultation paper set out proposals for developing detailed guidance to help individuals and organisations be as clear as possible about the scope of such work. The 2009 consultation included draft guidance which reflected the proposed amendments to Schedule 2, and used real-world examples to help illustrate who should be a scheme member. Feedback from the 2009 consultation will inform the final guidance.

The Protection of Vulnerable Groups (Scotland) Act 2007 (Modification of Regulated Work with Adults) Order 2010

38. The scope of regulated work with adults affects the number of workers in the adult care workforce who should be scheme members. The scope is affected by both the positions and activities which constitute regulated work (set out at schedule 3 of the Act) and the scope of the definition of protected adult, i.e. the individuals requiring protection (see paragraphs 40 and 41 below).

39. As with regulated work with children, chapter 2.3 of the 2007 consultation paper did not make proposals to change the scope of regulated work with adults. The 2009 consultation proposed narrowing the scope in respect of work in establishments and as charity trustees. As a result of that consultation, the provision in respect of charity trustees has been revised and mirrors that in respect of regulated work with children. The Protection of Vulnerable Groups (Scotland) Act 2007 (**Modification of Regulated Work with Adults**) Order 2010 and its accompanying Executive Note set out the detail of the proposed amendments to schedule 3 to the Act. The 2009 consultation included draft guidance which used real-world examples to help illustrate who should be a scheme member. Feedback from the 2009 consultation will inform the final guidance.

The Protection of Vulnerable Groups (Scotland) Act 2007 (Prescribed Services) (Protected Adults) Regulations 2010

40. It has always been the intention to use the powers in the Act to prescribe certain health, care or welfare services, the receipt of which make an adult a protected adult. This was signalled during the parliamentary passage of the Bill. Chapter 2.3 of the 2007 consultation paper set out options for the scope of health care and welfare services.

41. The 2007 consultation paper proposed that the definition of a protected adult should encompass any individual receiving *any* NHS service or *any* private or independent healthcare service. The 2007 consultation sought views on this approach and asked whether there were services which should not be so included. There was broad support for narrowing the services to those health services which concern the treatment, care and support of, and provision of advice and assistance to individuals in relation to their health and well-being. These proposals continued through the 2009 consultation. NHS services will be prescribed by reference to those provided or secured by health boards in exercise of functions conferred by parts II, III, IV and VII of the National Health Service (Scotland) Act 1978. Private or independent healthcare services are defined in the Regulation of Care (Scotland) Act 2001. The 2007 consultation also sought views on the definition of a

welfare service. The majority of respondents considered that this should be based upon the nature of the service provided. These proposals were consulted on during the 2009 consultation and received broad support. This is reflected in the Protection of Vulnerable Groups (Scotland) Act 2007 (Prescribed Services) (**Protected Adults**) Regulations 2010, which have not been substantively altered following the 2009 consultation.

The Protection of Vulnerable Groups (Scotland) Act 2007 (Unlawful Requests for Scheme Records) (Prescribed Circumstances) Regulations 2010

42. Currently, a successful application for an enhanced disclosure leads to a copy of the disclosure being sent to the individual and the registered body who countersigned the application. This may be an employer, voluntary sector organisation or regulatory body. Nobody else has the right to ask to see the disclosure certificate, in order to protect the individual's privacy and promote the rehabilitation of offenders. Chapter 2.4 of the 2007 consultation paper sought to identify what, if any, circumstances exist in which a third party should be able to request to see disclosures obtained by a contractor to that party. The issue provoked mixed views from respondents to the consultation. It had originally been raised in order to produce a consistent approach to practice in relation to transport service contractors. The majority of those responding were in favour of sharing disclosure information relating to contracting for transport services. There was much less support for third party disclosure in other circumstances as it was seen by many as disproportionate and intrusive.

43. The Protection of Vulnerable Groups (Scotland) Act 2007 **(Unlawful Requests for Scheme Records)** (Prescribed Circumstances) Regulations 2010 makes provision for the sharing of disclosure information between contractors and commissioners in respect of transport services for children and/or protected adults in particular circumstances. Information can only be shared with the explicit consent of the individual who is the subject of the disclosure.

44. Comments from the 2009 consultation were mixed, split between those who felt the Regulations did not go far enough in their coverage (mainly statutory sector) and those who were relieved that the Regulations were restricted to transport services (mainly voluntary sector). As a result no major change has been made to the Regulations but they have been tidied up by making a modest extension of coverage to include the transporting of protected adults to educational institutions.

The Protection of Vulnerable Groups (Scotland) Act 2007 (Automatic Listing) (Specified Criteria) Order 2010

45. The Act provides the power to set criteria for automatic listing. Automatic listing means listing an individual without any determination process and without the opportunity for the individual to make representations. The purpose of automatic listing is to prevent people who are clearly unsuitable from doing regulated work without unnecessary procedure or delay (i.e. when it is clear-cut). Chapter 3.4 of the 2007 consultation paper proposed that convictions for certain types of particularly serious offences lead to automatic listing and asked for views on the details of how this is applied and whether there are other offences which should be included. Respondents were strongly in favour of prescribing automatic listing offences. The Protection of Vulnerable Groups (Scotland) Act 2007 (**Automatic Listing**) (Specified Criteria) Order 2010 defines a short list of very serious offences conviction on indictment for which will lead to automatic listing. The majority of respondents to the 2009 consultation exercise who considered this order considered the list

of proposed offences to be appropriate and proportionate. Following the 2009 consultation, provision now includes equivalent offences committed in the Channel Islands or Isle of Man. It also makes provision for individuals charged on indictment for an automatic listing offence, but deemed unfit to stand trial or acquitted on the grounds of insanity, to be automatically listed.

The Protection of Vulnerable Groups (Scotland) Act 2007 (Relevant Offences) (Modification) Order 2009

46. Automatic consideration for listing occurs when a court makes a referral about a serious offence against a child. The Act contains a list of these serious offences (which it calls "relevant offences") and when a court convicts an individual of a relevant offence, it must make a referral and the individual must be considered for listing on the children's list. Chapter 3.5 of the 2007 consultation paper proposed that further offences also lead to automatic consideration for listing and asked for views on these further offences and whether there were any other offences which should be included. The Protection of Vulnerable Groups (Scotland) Act 2007 (**Relevant Offences**) (Modification) Order 2009 modifies the existing list of offences in schedule 1 to include some new serious offences makes other adjustments. The majority of respondents to the 2009 consultation exercise who considered this order considered the changes to be appropriate and proportionate. Following the 2009 consultation, one further sexual offence has been added to the schedule.

The Protection of Vulnerable Groups (Scotland) Act 2007 (Fees for Scheme Membership and Disclosure Requests) Regulations 2010

47. Chapter 5.3 of the 2007 consultation paper set out two basic options for charging fees for disclosure:
    - a two-tier charging regime with fees payable *per disclosure* (currently a flat rate of £23 is charged per disclosure); and
    - an annual subscription with fees payable for *membership*.

    Either option would have had to operate across the entire workforce (i.e. the two options were mutually exclusive) otherwise charges for individuals moving around the workforce or holding several positions would be extremely difficult to determine.

48. In the two-tier charging regime, the application to join the scheme (combined with any disclosure at that time) is charged at the higher tier and subsequent scheme disclosures are charged at the higher or lower tier depending on the circumstances. In the annual subscription charging regime, scheme membership would be funded through an annual subscription, paid either by the individual or employer and all disclosure checks are provided at no further cost. The level of fees set out in the 2007 consultation paper were significantly lower than those now proposed. This is because they were based only on initial estimates and preliminary modelling and since then there has been much more detailed calculations carried out following the outcome of the consultation and further work on system design. The reasons for this are explored in more detail later in this RIA.

49. The Scottish Government response to the 2007 consultation confirmed that the two-tier charging regime with fees payable per disclosure would be used. The Protection of Vulnerable Groups (Scotland) Act 2007 **(Fees for Scheme Membership and Disclosure Requests)** Regulations 2010 sets out that the higher tier fee will be **£59** and the lower tier will be **£18** and the precise circumstances in which each fee is payable and provides for the waiver of fees for volunteers working for voluntary organisations.

50. The Executive Note accompanying the SSI sets out a detailed explanation but the key points to note for understanding the financial data in this RIA and the impact on organisational employers are as follows:
    (i.) Scheme Records (a.k.a. scheme record disclosure) will cost £59.
    (ii.) Scheme Record Updates (a.k.a. short scheme record disclosure) will cost £18.
    (iii.) Upgrading from a Scheme Record Update to a Scheme Record will cost the difference (£41) to bring the total to £59.
    (iv.) Scheme membership is for life unless an individual is barred or chooses to leave the scheme (i.e. there is no recurrent charge or renewal requirements for scheme membership itself).
    (v.) The fees will be the same regardless of whether the application is in respect of one or both workforces.
    (vi.) An application in respect of an individual who is a member of the scheme in respect of one workforce only who subsequently seeks to join the scheme in respect of the other workforce would attract a further £59 fee.

51. The **fees are unchanged** following the 2009 consultation. Most comments concerned the overall level of fees but did not suggest any rebalancing between the £59 and £18 fee. The Scottish Government has noted the comments on fees and will keep these carefully under review as the PVG Scheme settles. As has been the case since Disclosure Scotland began operating in 2002, there will continue to be a three yearly review of the impact of inflation and other cost changes on Disclosure Scotland. Any further change to fees, whether an increase or decrease, would require approval by the Scottish Parliament.

52. Many organisations wanted the 14 day time **period to "upgrade" from a Scheme Record Update** to a Scheme Record to be extended from 14 days to 30 days and this change has been made in the regulations.

53. Some respondents argued that all volunteers should be entitled to **free checks** and others wanted to the cost of doing so to be included in this RIA. Disclosure Scotland data suggests that around 18,000 enhanced disclosure applications were made in financial year 2008/09 for volunteer positions other than for voluntary organisations, i.e. for volunteers in respect of whom a fee was paid. The majority of these applications came from local authorities and Health Boards. Assuming a similar rate of application during the first year of the PVG Scheme, the additional cost to the Scottish Government would be just over £1 million and this would increase over the period of retrospective checking.

54. Several respondents indicated that their organisation would not use the **Scheme Record Updates** because of concern about information that would be missed. However, this stems from a misunderstanding of how the Scheme Record Disclosure and Scheme Record Update work together. Proper use of a Scheme Record Update, especially online, will be very cost-effective for most organisations. The guidance, and other supporting materials, will take care to explain the benefits of using the Scheme Record Update.

55. Twelve responses were received to the 2009 consultation from **colleges** or their representative bodies. Those respondents highlighted current practice whereby colleges meet the cost of enhanced disclosure for students who need it to go on work placements as part of their course. Scotland's Colleges estimated the additional cost of moving from enhanced disclosure at £23 to Scheme Record Disclosure at £59 at £3.5 million per annum. Respondents highlighted that many of the students come from less affluent backgrounds

and will be taking up work on modest salaries after qualifying. Therefore, it was highly undesirable to pass the cost on to the students themselves.

56. Based on data from disclosure applications, the Scottish Government estimates the cost to be nearer £1-2 million per annum. The figure will be further reduced by any students already being scheme members through, for example paid work or volunteering for a voluntary organisation prior to taking up a college place which is more likely in the case of mature students. That said, the Scottish Government acknowledges that this is a real issue thrown up by the consultation. Given the cyclical nature of disclosure applications from colleges, the change is not anticipated to impact significantly until financial year 2011/12. In the meantime, the Scottish Government will be giving further consideration to this issue.

**SSIs directly informed by the 2007 consultation**

The Police Act 1997 (Registration) (Scotland) Regulations 2010

57. Registered bodies are organisations (including voluntary sector organisations) registered with Disclosure Scotland to countersign applications for standard or enhanced disclosures now and who will countersign scheme record disclosures in future. It is not desirable to have a large number of registered bodies requiring very few disclosures each year. The Act allows a minimum number of disclosure applications in any 12 month period to be specified as a requirement of registration. The 2007 consultation paper sought views on what this minimum number of disclosure applications might be but there was little support for that proposal from respondents. Instead, the Scottish Government decided and announced that registered bodies would be subject to an annual subscription charge for registration.

58. The announcement of the fees for PVG Scheme disclosures in November 2009 prompted many respondents to the 2009 consultation to express concern about the possible level of these registration fees and to request that more information being made available now. Subject to the necessary amendment of the Police Act 1997 being made at the Scottish Parliament, the Scottish Government is proposing an *annual* registration charge of £15 per counter signatory with a minimum annual charge of £75. Current registration charges are a *one-off* charge of £150 plus £10 per counter signatory. The purpose of introducing a recurring charge is to place a duty on organisations on an annual basis to confirm the registration of all of their counter signatories, which will allow Disclosure Scotland to maintain accurate records and so reduce the possibility of fraudulent disclosure requests from individuals who are no longer employed in that capacity. Applying a small charge to the re-registration will provide an incentive to organisations to remove inactive counter signatories while the overall cost of re-registrations should for most organisations be small (89% of organisations currently registered with Disclosure Scotland have four or less counter-signatories).

59. The new charging regime has the effect of reducing costs for small organisations who need to register for a short period, e.g. for a one-off event. But, for organisations who have a large number of counter signatories and / or remain registered for more than two years, the cost of registration is increased. However, voluntary organisations requiring free checks for volunteers can continue to use CRBS to obtain those checks without a disclosure application fee or registration charge. For larger organisations, the recurring registration charge will be modest compared to the ongoing cost of paying for disclosure applications.

The Protection of Vulnerable Groups (Scotland) Act 2007 (Referrals by Organisations and Other Bodies) (Prescribed Information) Regulations 2010

60. A range of organisations have either a duty or a power to refer individuals for consideration for listing: organisational employers, employment agencies, employment businesses and regulatory bodies. The 2007 consultation set out the basic identity information and information about the incident(s) which it is proposed should be provided as part of a referral from all these bodies. Organisations are only required to provide the prescribed information which they hold. These regulations implement the proposals in the 2007 consultation, with minor modifications.

The Protection of Vulnerable Groups (Scotland) Act 2007 (Consideration for Listing) Regulations 2010

61. The 2007 consultation proposed extending the time limit for individuals to make representations when placed under consideration for listing and organisations to respond to those representations. It proposed: increasing the length of time afforded to individuals to submit initial observations from 21 days at present (under the 2003 Act) to 28 days; and providing a similarly extended period for referring organisations to respond. These regulations implement these changes.

The Protection of Vulnerable Groups (Scotland) Act 2007 (Applications for Removal from Lists and Late Representations) (Procedure Etc.) Regulations 2010

62. Once an individual is listed, they will not normally be removed from the list(s) unless or until they make an application for removal. An individual may apply for removal from the list(s) if their circumstances have changed. In addition to the right to make an application on the basis of change of circumstances, the listed individual also has the right to make an application after a certain period of time has elapsed. The 2007 consultation explored how this period should be determined and the regulations implement the policy in the Scottish Government's response to the 2007 consultation. They do not have a significant impact on organisations.

The Protection of Vulnerable Groups (Scotland) Act 2007 (Vetting Information) Regulations 2010

63. Vetting information currently included on an enhanced disclosure for an individual working with children or adults at risk includes: all convictions; relevant non-conviction information from the police; and any exclusion from doing that type of work through being listed in Scotland or in England and Wales. The Act expands vetting information to include the fact that an individual is on the Sex Offenders Register, so that this will always be disclosed and considered. The 2007 consultation paper examined what further information should be prescribed as vetting information: the policy intention was then to prescribe certain regulatory body and council information. The Scottish Government response indicated that vetting information would be extended to include regulatory body information. However, for various reasons, this is not feasible at the present time and not included in these regulations.

64. At the moment, most civil orders are disclosed only on enhanced disclosure if the police consider that they are relevant on case-by-case basis. The 2007 consultation proposed that some civil orders should be routinely disclosed on standard and enhanced disclosures and Scheme Records:

- risk of sexual harm order (or interim order) under the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 and under the Sexual Offences Act 2003;
- sexual offences prevention order (or interim order) under the Sexual Offences Act 2003;
- foreign travel order under the Sexual Offences Act 2003; and
- notification order (or interim order) under the Sexual Offences Act 2003.

65. These regulations implement the policy in the Scottish Government's response to the 2007 consultation for these civil orders to be included in Scheme Record Disclosures. (The Police Act 1997 (Alteration of the Meaning of Suitability Information relating to Children and Protected Adults) (Scotland) Order 2010 makes provision for these civil orders to be included on enhanced disclosures with suitability statements, also in line with the Scottish Government's response.)

**"Technical" SSIs**

<u>The Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) Amendment Order 2010</u>

66. This order makes consequential changes to the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) Order 2003 so that the positions within the scope of the PVG Scheme are also positions for which the exempted question under ROA may be asked. I.e. to allow the employer to ask about spent convictions. This order also makes modest adjustments to the eligibility for standard disclosure in line with policy developments since 2003.

<u>The Police Act 1997 (Criminal Records) (Scotland) Regulations 2010</u>

67. These regulations make consequential changes to the entitlement for enhanced disclosure, following introduction of the PVG Scheme. They also make provision for the fee for basic, standard and enhanced disclosures ("Police Act Disclosures") to rise from £23 to £25 at the same time as the introduction of the PVG Scheme.

68. When the fee for Police Act Disclosures was increased to £23 on 1 August 2009, it was intended that this would meet increases in Disclosure Scotland's operating costs in the financial year 2009/10. Disclosure Scotland is now preparing for the introduction of the PVG Scheme in late 2010 and the cost modelling underpinning PVG Implementation requires an additional fee increase of £2 for Police Act Disclosures to be introduced at the same time.

69. The introduction of the PVG Scheme in-year will mean that it will mainly be basic disclosure applicants who will bear the burden of this increase. Only a small number of standard and enhanced disclosure applications will be made to Disclosure Scotland once the PVG Scheme goes live. After PVG go-live, around 570,000 basic applications, 5,000 standard and 10,000 enhanced applications are anticipated to be made each year. The part-year effect of the increase in 2010-11 is that around 150,000 applications will be at the new £25 fee, which will bring additional income of £300,000 to Disclosure Scotland. This will have a modest impact on businesses across the UK who use Disclosure Scotland's basic service and who meet the cost of the disclosure themselves, rather than requiring the individual to pay.

The Protection of Vulnerable Groups (Scotland) Act 2007 (Power to Refer) (Information Relevant to Listing Decisions) Order 2010

70. This order makes provision to allow the NHS Tribunal to make referrals to Disclosure Scotland. The impact of this order is limited to the NHS Tribunal administration.

The Protection of Vulnerable Groups (Scotland) Act 2007 (Removal of Barred Individuals from Regulated Work) Regulations 2010

71. These regulations only affect organisations who are informed by Disclosure Scotland that one of their workers has become barred. They require the organisation to remove that individual from the regulated work from which they have been barred.

The Protection of Vulnerable Groups (Scotland) Act 2007 (Administration of the Scheme) Regulations 2010

72. These regulations only affect individuals, not organisations. They allow Disclosure Scotland to ask for evidence to back up notification by an individual of a change of name or gender. They also require individuals to make any request for correction of inaccurate vetting information on a scheme record within three months of the information being disclosed. Note that there is no time limit for PVG Scheme membership but, had a lifetime of 10 years been set for membership, as proposed in the 2007 consultation, the provision could have been made in these regulations.

The Protection of Vulnerable Groups (Scotland) Act 2007 (Referrals by Courts) (Prescribed Information) Regulations 2010

73. These regulations prescribe the information to be provided by courts when making a referral to Disclosure Scotland. They do not impact on organisations other than the Scottish Court Service and Crown Office and Procurator Fiscal Service. The Scottish Court Service has estimated the costs for searching and providing copies of documentation associated with an individual's conviction, sentence or final disposal to Disclosure Scotland at approximately £250,000 for the initial four-year period following the introduction of the PVG Scheme and thereafter approximately £26,250 per annum.

**Retrospective checking regulations**

74. From day 1, all individuals new to the regulated workforce will become PVG Scheme members. Retrospective checking is the process whereby the existing workforce is brought onto the PVG Scheme. Basic questions around retrospective checking were explored in chapter 5.2 of the 2007 consultation paper. The Scottish Government plans to phase in PVG Scheme membership using a managed process over a three year period commencing one year after the scheme goes live. Disclosure Scotland is currently working with a representative group of registered bodies on the most effective approach to retrospective checking. Private, public and voluntary sector organisations are helping to ensure the approach balances their needs with the operational need to ensure a smooth flow of applications into Disclosure Scotland. In view of comments made in the 2009 consultation, the Scottish Government is considering whether to extend the period for retrospective checking beyond three years for smaller organisations, but no final decision has been made.

## COSTS AND BENEFITS

### Sectors and groups affected

Paid employees

75. At most 438,000 individuals are expected to be scheme members through their paid employment and we have taken this upper limit as our estimate so that we do not underestimate costs to employers. This figure is based on the breakdown by sector shown in table 1. It is difficult to be precise about every sector because it is not possible to access sufficiently detailed information on specific job titles and responsibilities to gauge what proportion of work is regulated work. Note that the paid employees of voluntary organisations are included in this group.

| **Paid employment** | **Scheme members** |
|---|---|
| Healthcare (including ambulance) | 171,000 |
| Paid voluntary sector workers | 71,000 |
| School teachers and support staff | 75,000 |
| Social work and social care | 86,000 |
| Miscellaneous (self-employed, faith groups, transport etc) | 35,000 |
| **Total** | **438,000** |

**Table 1**. Breakdown by sector of individuals in paid employment which might be within the scope of regulated work.

Volunteers

76. We estimate that 800,000 volunteers undertake some form of voluntary work in the child care / adult care sector. Just over half of these individuals (443,000) are assumed to undertake voluntary work within the scope of regulated work, with remainder undertaking activities such as administrative tasks or door-to-door collections. Of these, around 175,000 individuals are estimated to be doing regulated work through paid employment as well as through volunteering, leaving 268,000 volunteers doing regulated work exclusively as volunteers. These 268,000, together with the 438,000 paid employees, comprise the best estimate of 706,000 scheme members.

| **Paid employment and volunteering** | **Scheme members** |
|---|---|
| Paid employment only | 263,000 |
| Paid employment and voluntary work | 175,000 |
| Voluntary work only | 268,000 |
| **Total** | **706,000** |

**Table 2**. Individuals whose work (paid or unpaid) might be within the scope of regulated work.

Numbers of scheme members and numbers of disclosure checks

77. The Scottish Government estimates that somewhere around 900,000 individuals have received standard or enhanced disclosure to work with vulnerable groups since they were made available in 2002 (see Annex A). There have been many more disclosures than this because some individuals have applied for more than one disclosure for the same or different posts. These individuals and the remainder of the 706,000 individuals doing regulated work who have never had a disclosure check are expected to join the scheme.

78. The Protection of Children (Scotland) Act 2003 ("the 2003 Act") effectively made enhanced disclosure checks for new posts working with children a requirement from 10 January 2005 (because of the offence of offering work in a child care position to a barred

individual). However, many organisations would have been undertaking checks before then and, similarly, many organisations are already checking posts for working with adults at risk even though there is currently no disqualified from working with protected adults list in Scotland. The 2003 Act also envisaged retrospective disclosure checks of existing staff, although implementation of this was deferred and has not been brought into effect to date.

79. The latest modelling suggests that once the whole workforce has been brought into the scheme, there would be around 240,000 applications per annum for PVG disclosures But only 32,000 of these will be Scheme Records (based on new people joining the workforce and existing scheme members acquiring new vetting information). The remainder of the 240,000 checks will be Scheme Record Updates. For simplicity in this RIA, we are ignoring the comparatively modest number of (entirely optional) Scheme Membership Statements which may be requested by personal employers.

**Benefits**

80. The scheme as a whole offers the benefits set out at paragraph 15 (above). The principal benefits of the scheme are holistic and problematic to quantify: for example, the improved safety for vulnerable groups is difficult to measure and assess in a cost-benefit analysis. However, there should also be some quantifiable cash benefits in terms of reduced administrative costs over the longer term. These quantifiable benefits are discussed in conjunction with the costs discussion below.

**Costs (and cash benefits)**

81. By far the most significant costs to individuals, employers and voluntary organisations will be:
    - **administrative costs** (e.g. completing the application form); and
    - **fee costs**.

    These costs will be greater during any period of retrospective checking since the number of checks will exceed the normal turnover rate for that organisation.

82. There will also one-off **set-up costs** in transitioning to the new system (e.g. retraining countersigning staff etc).

<u>Administrative costs</u>

83. During the parliamentary passage of the Bill, SCVO suggested a unit administration cost of £21.50 per volunteer or paid staff member in the voluntary sector to undertake enhanced disclosure now or join the scheme for the first time. This administrative cost derives from: time spent by the employee, administrative staff and management staff in completing and countersigning the application; ID checking; and postage, stationery, telephone and office overheads. It is almost certainly an over-estimate for larger statutory and private sector employers with dedicated HR staff and processes in place. For the purpose of this RIA, this unit cost is used.

84. Once an individual is a scheme member, subsequent checks will be much easier. Scheme Record Updates will be available on-line and should be capable of being requested very simply and easily by the individual and authorised and accessed equally easily by the countersigning body. Even where the application is completed on paper, it will be a lot more straightforward. For the purpose of this RIA, we estimate the *administrative* cost of

Scheme Record Update to be £5. This estimate derives from comparing the activity at paragraph 83 for an enhanced disclosure or in joining the scheme with the activity required for an online Scheme Record Update. Where the process is completed electronically by both the individual and the organisation, the time spent completing the form will be greatly reduced as there will be relatively few fields to complete (because Disclosure Scotland already has most of the data it needs) and the system will validate the data as it is entered helping to avoid obvious mistakes which can sometimes lead to paper forms being returned. Furthermore, there will be no postage or stationery cost. In the overwhelming majority of cases where the individual has no information on their scheme record and the Scheme Record Update reveals that there was no new information (instantly), the whole process should be capable of completion within minutes.

Fee costs

85. The principal ongoing cost for individuals and organisations derives from the fees charged. These have been calculated to cover the cost of Disclosure Scotland's operations. The details of the charging regime affect how the costs divide between individuals and organisations with different user profiles. For example, individuals who require frequent checks because they change employer often will benefit most from the proposed two-tier charging regime with its relatively large differential (£59 to £18) because subsequent checks will be cheaper than enhanced disclosure now (£23).

86. The fee levels have been set in accordance with the requirements of section 70(3) of the Act which states:

> *"(3) Before prescribing fees under this section, Ministers must have regard to-*
> *(a) the circumstances in which those fees are payable, and*
> *(b) the desirability of maintaining an appropriate balance among -*
> *(i) the quality of the performance of their vetting, barring and disclosure functions,*
> *(ii) the cost of that performance, and*
> *(iii) the fees paid to them in respect of that performance."*

87. In order to assess the required fee levels to meet the above requirements a cost model has been developed using best estimates of future volumes, running costs and revenues. It is based on the following assumptions:
    (a.) There will be 700,000 PVG scheme members, of these approximately 440,000 are in the employed workforce and so either they or their employers would pay for PVG applications.
    (b.) After going live anyone joining the workforce for the first time or changing jobs would join the scheme.
    (c.) The remainder of the workforce would join as part of a retrospective checking of existing employees. This would take place over a three year period to ensure a steady volume of work and minimise the burden on employers.
    (d.) The number of applications for basic disclosures will continue to grow slowly from a baseline of 570,000 applications per year. Currently, Disclosure Scotland provides this service for England and Wales as well as Scotland and it is assumed that this will continue for foreseeable future.
    (e.) The fee for basic disclosures (and residual standard and enhanced disclosures) will rise from £23 to £25 at the same time as the scheme goes live.
    (f.) Applications for scheme membership for volunteers working for voluntary organisations will be free of charge.

88. The proposed fee levels are significantly higher than envisaged in the financial memorandum accompanying the Bill. There are a number of reasons for this which can be summarised as:
    (a.) The earlier assumption that the original IT system could be upgraded to handle ongoing monitoring was incorrect and a new, robust and secure system had to be developed. Undertaking ongoing monitoring either requires a more sophisticated solution or significantly more staff.
    (b.) Disclosure Scotland had no Disaster Recovery or Business Continuity arrangements meaning that any loss of the main site would mean a loss of the service. For Disclosure Scotland's current operations (providing a point-in-time disclosure check), a loss of service would cause frustration and backlogs but, once up and running again, would not impact the quality of the data provided. However, for a membership scheme where the scheme record must be continuously kept up-to-date, a loss of service could have serious consequences for the accuracy and reliability of the scheme records with a very time-consuming and expensive effort required to correct the data after the system is recovered. Going forward, then, the lack of Disaster Recovery or Business Continuity arrangements is not acceptable, but providing it has resulted in significant additional operating costs.
    (c.) The change from the current disclosure process which is purely transactional – an applications is received and a disclosure dispatched - towards one where following the initial application there is an ongoing relationship with the applicant, means that significant additional overheads for ongoing monitoring and the determination processes around listing need to be added to the cost. The full implications of this were not properly understood at the time when the Bill was introduced.
    (d.) The additional costs associated with operating Disclosure Scotland as an executive agency rather than part of the police service were not properly reflected in early consideration of costs.
    (e.) New requirements have been placed on Disclosure Scotland since the Bill's Parliamentary passage, including the requirement to provide scheme membership information to Scottish police forces and the requirement to meet rising costs for access to police information systems.

89. However there are some important points that should be noted in relation to fee levels:
    (a.) In committing to ensure a robust protection system for Scotland, the Scottish Government has fully funded the development costs for both the IT system and other aspects of implementation.
    (b.) In the vast majority of cases, once the person has joined the scheme there will be no need to pay the higher fee again, with organisations able to confirm the individual's membership of the scheme via a Scheme Record Update.
    (c.) The scheme offers significant additional benefits to organisations as well as the vulnerable groups it seeks to protect. Unsuitable people will be blocked at first application and people who become unsuitable during their employment will be quickly identified.
    (d.) Once in the scheme, the administrative process for subsequent applications will be significantly easier and, from 2011, online functionality will be available for applications for disclosures and to view Scheme Record Updates.

<u>Modelling the costs of introducing the scheme</u>

90. The costs of introducing the scheme for any given individual or organisation is the difference in fee costs for applications they would have anyway made (e.g. for new

employees) and the fee and administration costs for applications they would not have otherwise made (e.g. as part of retrospective checking). I.e. the cost over and above business as usual. The overall costs of introducing the scheme for any given organisation will depend on the method used to prioritise retrospective checking. Following the 2007 consultation, the Scottish Government decided to run a managed programme of phasing in over a period of three years from one year after go-live and is currently discussing with registered bodies how best to achieve this.

91. We assume that the entire workforce of 706,000 individuals will be bought onto the scheme over three years in three equal tranches after the first year of natural turnover (i.e. 100% compliance). Note that this does not translate into equal numbers of checks in each of the first three years because of the complex interaction between attrition (i.e. checks for new entrants), turnover and retrospection. The fee costs for the four years during which the scheme membership approaches steady-state are shown in table 3, together with data for subsequent years (which are assumed to be the same), compared with a baseline cost.

92. The baseline is the cost of the existing standard and enhanced disclosure regime, had it continued. This baseline assumes that the current level of standard and enhanced disclosure for adult and child care positions would continue indefinitely, i.e. at 360,000 standard and enhanced disclosure checks per annum (of which 300,000 are paid checks).

*Fee costs and savings*

93. Table 3 shows that the additional fee cost for organisations is expected to be £15 million spread over the four year period in which the scheme approaches steady-state. Following this period there would be an annual saving of £2.5 million per annum. However, these benefits are not evenly spread between organisations and the 2009 consultation has highlighted a particular issue for colleges, see paragraph 55.

94. As explained at paragraph 54, several respondents to the 2009 consultation indicated that their organisation would not use the Scheme Record Updates. If all organisations insisted on using a Scheme Record Disclosure in all circumstances, rather than making use of the Scheme Record Update, this would cost organisations an *additional* £18 million spread over the four year period in which the scheme approaches steady-state, over and above the £15 million identified above. Following this period there would be an *additional* annual cost of £8.5 million per annum, which would wipe out the annual saving of £2.5 million per annum identified above. Quite apart from being an <u>unnecessary</u> additional expense for organisations at a time when finances are tight, the excessive revenue for Disclosure Scotland would almost inevitably trigger the review of the charging regime under the contract with BT plc. A review of fee levels is triggered if the actual disclosure volumes vary by more than 20% from the model.

*Administrative savings*

95. The administrative savings will also be significant, especially following the introduction of on-line accounts in 2011. This is expected to become the preferred approach for most organisations. All application types can be submitted via this route and scheme record updates will also be issued electronically. The full benefits of this will be most apparent when the current workforce has been phased into the scheme.

96. In circumstances where individuals received their check for free, the administrative saving is an immediate net benefit (since they are not paying the higher initial fee). Table 4 shows

the drop in administrative costs over the four years over which the scheme is rolled out for organisations where a fee is required. This will help to offset the increased fee cost over the first four years. For comparative purposes, we compare this with the administrative burden of the current paid standard and enhanced disclosure checks for working with children and protected adults. This is estimated at £6.5 million per annum (being 300,000 x £21.50, see paragraph 83). Once the scheme is fully rolled out, the administrative cost this sector should be no more than £1.4 million per annum. With a steady state level of Scheme Record Updates of 170,000 this would equate to an administrative saving of £5.2 million per annum for the paying sector. The administrative costs fall as the number of short scheme record updates increases and the volumes of scheme records decreases. The usefulness of the continuous updating element, in terms of cost savings as well as protection, becomes apparent.

Set-up costs

97. There will also one-off **set-up costs** in transitioning to the new system (e.g. retraining countersigning staff etc). Many respondents to the 2009 consultation requested assistance in preparing for the launch of the PVG Scheme. The Scottish Government is preparing guidance and training materials for organisations to use in preparing for the PVG Scheme. Furthermore, the Scottish Government will provide a helpline, interactive guidance, focussed assistance for voluntary groups through CRBS and undertake general awareness-raising activity.

98. However, the Scottish Government does not believe the set-up costs for most organisations will be very significant for the following reasons:
    (a.) The process of applying to join the PVG Scheme and obtaining the first disclosure will be very similar to the enhanced disclosure application process now. The application form will be similar as will the process of authenticating the individual. (Subsequent disclosure applications will be different, but easier and simpler.)
    (b.) The responsibility on organisations in respect of obtaining disclosures and handling and interpreting disclosure information appropriately will not change very much from current arrangements.
    (c.) Organisations who ask people to work in child care positions should already be familiar with the duty to make referrals in certain circumstances; best practice in respect of which is not changed much by the PVG Scheme. The possibility of making a referral to the adults' list is new and some organisations employing individuals exclusively to work with protected adults will need to become familiar with the referral process. But many of these organisations will already be familiar with the concept of making referrals through their dealings with regulatory bodies.
    (d.) Organisations who ask people to work with children or protected adults should consider and review their child / adult protection arrangements from time to time and provide any necessary training and support to staff. In that context, preparation for the PVG Scheme should, where possible, be incorporated into planned training and support activities.
    (e.) Organisations who are notified that one of their staff has been placed under consideration for listing or listed will need to consider carefully how to respond appropriately. However, for any given organisation, this will be a relatively rare occurrence.

| Year | Number of Scheme Record Updates | Number of Paid Scheme Record Updates | Total Cost at £18 each | Number of Scheme Records | Number of Paid Scheme Records | Total cost at £59 each | Total cost for Scheme Records & Updates | Baseline cost of enhanced disclosures at £23 each | Additional cost to the sector of PVG applications |
|---|---|---|---|---|---|---|---|---|---|
| Y1 | 28,000 | 23,000 | £ 410,000 | 250,000 | 200,000 | £12,000,000 | £12,000,000 | £7,000,000 | £ 5,200,000 |
| Y2 | 93,000 | 74,000 | £1,300,000 | 250,000 | 200,000 | £12,000,000 | £13,000,000 | £7,000,000 | £ 6,100,000 |
| Y3 | 140,000 | 110,000 | £2,000,000 | 200,000 | 160,000 | £ 9,400,000 | £11,000,000 | £7,000,000 | £ 4,500,000 |
| Y4 | 180,000 | 140,000 | £2,600,000 | 72,000 | 57,000 | £ 3,400,000 | £ 6,000,000 | £7,000,000 | £( 1,000,000) |
| **Total** | | | | | | | | | **£ 15,000,000** |
| **Y5+** | 210,000 | 170,000 | £3,000,000 | 32,000 | 25,000 | £ 1,500,000 | £ 4,500,000 | £7,000,000 | **£( 2,500,000)** |

**Table 3.** The **fee costs and savings** (brackets denote a negative number) for paying organisations over the four-year introduction of the scheme and in steady state. See Annex A for detailed modelling assumptions. This table shows that the additional fee cost over the four-year introduction of the scheme is £14.8m but thereafter there is an annual saving of £2.5m. *Numbers have been rounded to two significant figures.*

| | | Number of Paid Scheme Record Updates | Admin cost (£5 each) | | Number of Paid Scheme Records | Admin cost (£21.50 each) | Total admin costs | Baseline admin cost of enhanced disclosures | Additional cost to the sector of PVG applications |
|---|---|---|---|---|---|---|---|---|---|
| Y1 | | 23,000 | £110,000 | | 200,000 | £4,300,000 | £4,400,000 | £6,500,000 | £( 2,100,000) |
| Y2 | | 74,000 | £370,000 | | 200,000 | £4,300,000 | £4,700,000 | £6,500,000 | £( 1,900,000) |
| Y3 | | 110,000 | £570,000 | | 160,000 | £3,400,000 | £4,000,000 | £6,500,000 | £( 2,500,000) |
| Y4 | | 140,000 | £720,000 | | 57,000 | £1,200,000 | £2,000,000 | £6,500,000 | £( 4,600,000) |
| | | | | | | | | | **£(11,000,000)** |
| Y5+ | | 170,000 | £830,000 | | 25,000 | £ 550,000 | £1,400,000 | £6,500,000 | **£( 5,200,000)** |

**Table 4.** The **administrative costs and savings** (brackets denote a negative number) for paying organisations over the four-year introduction of the scheme and in steady state. This table shows that there is an administrative saving over the four-year introduction of the scheme of £11m and thereafter there is an annual saving of £5.2m. This table does not take account of the fact that on-line accounts will not be available until part way through Year 1 but, even using a paper form, a Scheme Record Update will be much more straightforward. *Numbers have been rounded to two significant figures.*

**Social costs**

Rehabilitation of offenders

99. The scheme will have social costs in terms of its impact on the rehabilitation of offenders. Some individuals who are unsuitable because of their criminal convictions will be prevented from doing regulated work by the PVG scheme (this is the principal aim of the scheme). The Scottish Government considers that the restriction on the employment options for these offenders and others whose conduct indicates a propensity to harm vulnerable groups is legitimate and can be justified on the grounds of crime prevention, public safety and protects the rights of vulnerable people.

100. The scheme safeguards the rights of ex-offenders in two important ways: firstly by protecting sensitive information (confidentiality) and secondly by focusing regulated work on the types of activity that really need to be within the scope of the scheme (proportionality). Confidentiality is achieved by limiting access to disclosure information, scheme membership information and the lists of unsuitable individuals to those who need to know for the purposes of protecting vulnerable groups. This means that employers who do not need this information are not able to access it and it cannot prejudice the employment opportunities in other sectors for individuals who are unsuitable to work with vulnerable groups.

Effect on volunteering numbers

101. During the parliamentary passage of the Bill, some stakeholders suggested the disclosure system was deterring volunteers. It is difficult to determine volunteering numbers, especially since there is no clarity around the number of individuals and the number of volunteering opportunities: one individual may volunteer in more than one context. We have used the best evidence available to make a reasonable estimate of numbers of volunteers in the child care / adult care sectors and numbers of those within the scope of the scheme.

102. There are many and varied reasons why people start and stop volunteering and no clear evidence that current or proposed disclosure arrangements are detrimental to volunteering Any decline may be due to an increased fear of litigation if anything goes wrong or the general demands of modern life, rather than the disclosure process. Indeed, the episodic nature of volunteering, where people dip in and out of volunteering at various times of their lives, needs to be taken into account. Various studies have shown that a variety of different influences are at play with regard to the involvement of young people in volunteering.

103. Evidence presented during to the Education Committee during passage of the Bill suggested that the bureaucracy associated with the disclosure process and particularly the requirement for repeat disclosures was more of a constraint on volunteering than the principle of requiring a disclosure for certain types of work. The PVG scheme addresses many of these concerns making the process simpler and more accessible.

104. The Scottish Government will continue to work with the voluntary sector to ensure that the scheme is rolled out in such a way that it does not adversely affect voluntary organisations and the level of participation in volunteering. We recognise that there will always be some individuals who may object to obtaining a disclosure as a matter of principle or because of concerns about information which may be disclosed. We will work

to allay unfounded concerns and to emphasise that not everyone with a criminal history is unsuitable to do work with children and/or protected adults. However, there will be people whose past suggests that they are not suitable and the scheme is designed to identify and exclude these people from regulated work.

**Environmental costs**

105. The introduction of on-line functionality, allowing online applications and viewing of Scheme Record Updates, in 2011 will mean a reduction of paper use both by individuals and Disclosure Scotland as fewer paper forms and paper certificates will be required. There will also be a reduction in envelopes and associated postage and transport costs for Disclosure Scotland, organisations, employers and individuals.

## SMALL FIRMS IMPACT TEST

106. For the purposes of this test we have identified small businesses as those with 250 employees or less, in accordance with Cabinet Office guidance.

107. The small firms most likely to be affected are smaller care homes, NHS primary care practices, voluntary organisations and charities. It is expected that there will be minimal adverse impact on small firms as a result of the new scheme, particularly as there is an ongoing expectation on all employers to follow good HR practice in recruitment. These smaller, less visible stakeholders have been identified as part of an Insight Gathering exercise and there will be a targeted marketing campaign to reach these smaller groups in the run up to go-live. They will benefit from the new application forms being very similar to the current forms, as commented by stakeholders in the test run.

**Duty to refer**

108. The duty to refer individuals for consideration for listing may have an administrative impact on smaller firms in terms of preparing the referral and including the requisite information. The main additional burden will be the extension of the duty to the adult care workforce, since there is already a duty to refer individuals for provisional listing in respect of work in child care positions under the 2003 Act. The experience of the children's list established by the 2003 Act to date is that the administrative impact on smaller firms is minimal. Indeed, larger and smaller organisations can have similar issues in preparing a referral. However, we do recognise that some small community-based organisations are not aware of the 2003 Act and are not, therefore, making referrals when perhaps they should. We are working to address this in relation to both the 2003 Act and the PVG Scheme through working with umbrella bodies, registered bodies and especially the Central Registered Body in Scotland.

**Consideration for listing**

109. There may also be some impact on a business if they decide to take any action when informed that a member of staff is being considered for listing, a process which may take several months. The main additional impact will be the extension of the provisions to the adult care workforce (since there is already a notification of provisional listing in respect of work in child care positions under the 2003 Act). It is entirely a matter for the employer as to what action, if any, to take, given the particular circumstances of the case. Some employers may decide to increase supervision, suspend them on full pay, or move them

away from regulated work. Some options, such as moving an employee to other duties outside the scope of regulated work, may not be practicable for smaller firms.

**Countersigning disclosure applications**

110. The activity level should not increase (apart from any new posts covered by regulated work which were not previously subject to enhanced disclosure). Recruitment will still require a disclosure check but it may not be necessary to require subsequent checks as often as under current arrangements because continuous vetting provides reassurance that the individual is not unsuitable. Furthermore, even if the activity level is not diminished (i.e. the number of checks requested is not reduced), the new system should make the process of obtaining a subsequent disclosure check faster, cheaper and simpler for PVG Scheme members. Once an individual is a PVG Scheme member, a Scheme Record Update will be all that is required in the vast majority of cases to confirm that there is no new information about the individual.

**Providing disclosure information**

111. Small firms may incur a cost in providing information to assist with a listing decision (e.g. about an ex-employee) but this would not be a significant amount.

**Consultation**

112. Small firms had the opportunity to comment on proposals for the Bill through the consultation exercise discussed at paragraph 24. Over 850 individuals and organisations were sent copies of the 2007 consultation paper, including the Federation of Small Businesses Scotland, and just over 200 written responses were received of which around 40 were submitted by small businesses. Some small businesses expressed concern about the fees for disclosure under the new system during that consultation exercise. Small businesses were concerned that a higher up-front fee for disclosure was potentially a deterrent for joining the workforce and would be a particular problem for charities that have a small number of paid staff.

113. The 2007 consultation exercise provided an opportunity for small firms to engage with policy development on the basis of much more detailed options for fees and other issues. The Scottish Government actively sought the views of small firms in both the private and voluntary sector during the 2007 consultation exercise through:

- the Voluntary Sector Issues Group, at which a number of voluntary sector organisations, large and small, meet with Scottish Government officials on a regular basis;
- engagement with the Central Registered Body in Scotland, which countersigns disclosure applications on behalf of a wide range of voluntary organisations; and
- engagement with registered bodies (i.e. employers requesting disclosure certificates in respect of their employees).

114. The 2009 consultation provided a further opportunity for small firms to comment on drafts of the seven significant SSIs, guidance and this RIA. However, the vast majority of the 108 responses received were from the public or voluntary sector, although one response was received from the Recruitment and Employment Confederation, the UK trade association for recruitment agencies.

## LEGAL AID IMPACT TEST

115. Demands on the legal aid fund may arise from the three procedures in the Act set out in table 5.

| **Procedure in the Act** | **Use of similar procedure in 2003 Act in period from 10 January 2005 to 9 January 2010 (first five years of operation)** |
|---|---|
| Appeal to the court against a decision by the Scottish Ministers to list an individual; | 1 case, withdrawn before court hearing. See paragraph 116(iii) |
| Appeal to the court against a decision by the Scottish Ministers to refuse an application for removal from a list; and | 0 cases. See paragraph 116(iv) |
| Objection to an application to the court by the Scottish Ministers to extend the period of consideration for listing. | 3 objections to 9 extensions. See paragraph 116(v) |

**Table 5.** Procedures in the Act which may lead to demands on the legal aid fund.

116. These procedures are similar to those which are already established by the 2003 Act in respect of the DWCL. However, the demands on the legal aid fund might be expected to change as a result of the following developments:

(i.) The scope of regulated work with children as defined in the Act is different to the scope of child care position in the 2003 Act. Some new positions have been included and the scope of some existing provision has been narrowed and the overall effect is difficult to quantify precisely but unlikely to have a significant effect on legal aid.

(ii.) The Act establishes a list of individuals barred from doing regulated work with adults for the first time in Scotland and so all the procedures which now only relate to the children's workforce will apply to the adult care workforce too. This is potentially a significant increase in the demand on the procedures at paragraph 115 as the adult care workforce is at least as large as the children's workforce and could lead to many new cases being considered by Scottish Ministers.

(iii.) The procedure for appeals against listing has been adjusted compared to current procedure under the 2003 Act. In the period to 9 January 2010, only one listing was appealed and this was withdrawn by the individual concerned (although a second appeal has been lodged since then and is still in progress at the time of publication). In future, appeals can only be made from the sheriff principal to Inner House on a point of law only (appeals on fact are also admissible under the 2003 Act). The effect of this change is a theoretical reduction in demand for legal aid but for practical purposes the effect is negligible.

(iv.) The procedure for application for removal from the list differs from current procedure under the 2003 Act. These will be made to the Scottish Ministers in the first instance and not directly to the sheriff as now. This change will, if anything, reduce the need for legal aid since it would be expected that a significant number of cases will be resolved without going to court and without the appellant requiring representation from a solicitor. Since January 2005, when the children's list was established, there have been no applications for removal from the list so there is no way of quantifying any potential saving. Under the 2003 Act, most of the 393 individuals listed in the period to 9 January 2010 cannot apply for removal until 10 years have elapsed since they were included on the list or their circumstances change in a material fashion. The conditions regarding removal from the list are set out in regulations and specific transitional provisions will be made to cover those individuals who transfer from DWCL to the PVG children's list.

(v.) The procedure for extensions of periods of consideration for listing has been nuanced compared to current procedure under the 2003 Act. The changes are more

to do with providing the Scottish Ministers and the courts with greater flexibility rather than any change in scope which affects legal aid. Under the 2003 Act, this procedure has been used on 9 occasions so far and contested on 3 of these. With the extension of this provision to the adult workforce, the numbers can be expected to increase accordingly.

**"TEST RUN" OF BUSINESS FORMS**

117. The Act provides that the forms for applications to join the vetting and barring scheme or disclosure requests will be determined administratively (i.e. not set out in regulations). In contrast to having a statutory procedure, this enables forms to be revised and improved quickly if the need arises. However, the forms for the scheme are being developed in conjunction with registered bodies and rigorously tested by Disclosure Scotland to try to avoid the need for any early revisions.

118. Employees, employers and Disclosure Scotland share a strong interest in well-designed forms. Form-filling is the principal administrative burden arising from disclosure on employees and employers. Difficulties in completing forms lead to difficulties for Disclosure Scotland through increased calls to the helpdesk and failed applications (e.g. because a mandatory field was not completed correctly). Historically, around 7% to 10% of applications received are returned to the sender almost immediately because preliminary checks indicate a problem (e.g. missing data). The remainder are scanned onto the system but may cause an exception, creating additional work and possible delay, if the application contains a more sophisticated error (e.g. the National Insurance number is present and in the right format but there is a typographical error so it does not match the applicant). Disclosure Scotland has plenty of experience from having processed over 4.6 million applications since 2002, which has been brought to bear on developing the new forms.

119. During the application form development process, Disclosure Scotland have involved a representative group of stakeholders from 23 organisations covering a variety of sectors including: regulatory bodies, NHS boards, the voluntary sector, further education institutions, local authorities, care home employers and recruitment specialists. Five draft forms were issued to them on 19 October for consultation until 11 January 2010. The draft forms issued were:

(i.) Application to join PVG Scheme;
(ii.) Existing Scheme member application;
(iii.) Disclosure registration modification - for existing registered bodies to change their registration;
(iv.) Disclosure registration application - for new registered bodies to become registered; and
(v.) Sub-account application - for registered bodies to manage their countersignatories and invoicing requirements.

120. Ten organisations responded and the feedback from these organisations has been used to assist in form design and in developing clear, focussed guidance which will accompany the application forms. Several respondents commented that the similarity with the existing forms for disclosures would make the change easier for users.

## COMPETITION ASSESSMENT

121. The principal sectors affected will be education, health, social care, faith groups, sport and leisure, with some impact on transport, supported housing, the prison service and the part of the retail sector which employs children.

122. The Act and proposals for secondary legislation are not expected to have any significant impact upon competition regardless of which of the options discussed above are pursued. For most organisations, disclosure costs are only a small part of recruitment costs but the Scottish Government will be sensitive to smaller voluntary sector organisations for whom compliance with disclosure requirements could be a burden. An Insight Gathering exercise has been carried out to help in reaching less visible stakeholders. A programme of activities is planned to raise public awareness using a variety of methods. A key route into the small voluntary sector groups will be through CRBS. CRBS have recently undertaken research to help them develop a communications strategy that will complement the communications from the PVG Programme.

123. In developing proposals for retrospective checking in the coming months, care will be taken to ensure that *competing* service providers are treated in the same way so that the cost burden falls equally. For example, there is no impact on competition by putting Edinburgh social workers onto the scheme before Glasgow social workers since this is a public service and anyway there is no overlap in the client group. In theory, it would not be fair to bring workers at one group of Edinburgh care homes onto the scheme before another because the first group would potentially face higher costs although, in practice, the effect on competition between businesses is minimal.

124. Fees must be paid in respect of individuals who are not exempt (i.e. because they are not volunteers in the voluntary sector). The fee may be paid by the individual or the employer. Clearly, all employers offering the same type of service are affected equally by the level of fee. In the case that the employer does not reimburse the individual, the individual may regard the fee as a barrier to entry to regulated work, as opposed to other types of work for which no disclosure is required. I.e. there could be a very modest labour market distortion in comparison to other sectors. The proposed fees (which are unrelated to the individual's income) will obviously be more significant to individuals in lower paid parts of the regulated workforce. This effect is considered to be slight given that many employers in other sectors will ask for basic disclosure for which a £25 fee will be payable.

## ENFORCEMENT, SANCTIONS AND MONITORING

### Offences

125. The primary means for enforcement of the terms of the PVG scheme is through offences created by the Act, and their corresponding penalties. These will be enforced by the police and by compliance work done by Disclosure Scotland.

### Serious offences

126. There are three serious offences which relate to an individual doing regulated work when they are barred, employing/supplying someone to do regulated work when they are barred and failing to refer an individual for consideration for listing. These offences are the most serious because they relate directly to unsuitable individuals getting access to

vulnerable groups through the workforce. These offences attract a maximum penalty of a fine or 5 years imprisonment on conviction on indictment or, on summary conviction, to 12 months imprisonment or to a fine not exceeding the statutory maximum:

- Section 34 creates the offence of working or seeking to regulated work when barred.
- Sections 35 and 36 make it an offence to employ or supply a barred individual for regulated work.
- Section 9 creates the offence of failing to refer an individual for consideration for listing.

**Intermediate offences**

127. Three offences centre around protecting personal, sensitive information and attract a maximum penalty of a level 5 fine or 6 months imprisonment on summary conviction only:

- Section 65 makes it an offence to falsify vetting records.
- Section 66 makes it an offence to disclose scheme records unlawfully.
- Section 67 makes it an offence to request scheme records unlawfully.

128. Additionally, there are two offences in relation to a failure to provide information with potentially serious consequences which attract the same penalty:

- Section 33 makes it an offence for an individual who is listed or under consideration for listing to fail to notify the Scottish Ministers (Disclosure Scotland) of a change of name, address or gender.
- Section 20 makes it an offence for any regulated work provider to fail to provide vetting information to the Scottish Ministers in response to a request.

**Minor offences**

129. There is one offence attracting a maximum penalty of a level 3 fine on summary conviction only:

- Section 50 makes it an offence for scheme members to fail to notify the Scottish Ministers of a change of name, gender or other prescribed information.

**Offences by bodies corporate**

130. Section 89 extends the liability for offences committed by bodies to those responsible for controlling or managing those bodies: officers of the body, members of the body if they manage it, an officer or member of a council, a partner or an individual concerned with the management of an association.

**Administrative enforcement measures**

131. First of all, it should be noted that where Disclosure Scotland become aware that any of the offences described above may have been committed, this will be reported to the police. Potential offences may come to light through, for example, PVG Scheme membership applications which turned out to be from a barred individual. They may also come to light through the work of the compliance team at Disclosure Scotland with organisations to ensure that disclosure applications are only made in respect of posts for which the level of disclosure sought is appropriate and that organisations are complying with the terms of the *Code of Practice for Registered Persons, their Nominees and Other Recipients of Disclosure Information*.

132. In terms of administrative enforcement measures, Disclosure Scotland provides a service to organisations and individuals and failure to comply with the terms and conditions of that service may lead to the service being suspended or withdrawn. The principal administrative enforcement issue will be the collection of fees and charges.

133. Subject to the enactment of the amendment referred to at paragraph 58 above, the Registration Regulations will provide for an annual subscription for registered bodies and their counter signatories. Failure to pay the right subscription will lead to some or all counter signatories being removed or the organisation being de-registered, depending on the circumstances of the case. In preparation for the PVG Scheme and new registration requirements, the registration team at Disclosure Scotland are reviewing existing registrations and identifying stale registered bodies or counter signatories for possible removal. In cases of doubt, the organisation concerned will be contacted. The annual subscription for registration will help ensure that Disclosure Scotland has up-to-date contact details for organisations and that redundant counter signatories are removed by those organisations.

134. The Act does not specify who should pay any fees associated with the PVG Scheme but failure to include the right fee with a disclosure application will mean that the disclosure certificate will not be issued and the individual will not become a PVG Scheme member (in cases where the application also related to becoming a PVG Scheme member).

135. The introduction of the on-line functionality for the PVG Scheme in 2011 will bring fresh challenges around the use of on-line accounts by both individuals and organisations. Access to on-line services will be granted at no extra charge to users but is a privilege which can and will be withdrawn on a case-by-case basis if there is any attempt to misuse the service.

## IMPLEMENTATION AND DELIVERY PLAN

136. A rolling programme of implementation began with the transfer of Disclosure Scotland staff to the Scottish Government on 1 October 2007. To support the implementation and delivery of the scheme, the Scottish Government has developed a detailed implementation plan, more information about which can be found on the Scottish Government website. The PVG Programme comprises eight projects:

(1.) **Secondary legislation** - delivering all the secondary legislation required to support implementation.
(2.) **Infrastructure** -preparing Disclosure Scotland's ICT for the PVG Scheme.
(3.) **IT programme** - delivering the new IT system to run the PVG Scheme.
(4.) **Internal business change** - preparing and training Disclosure Scotland staff and designing the new business processes to support the PVG Scheme.
(5.) **External business change** – preparing CRBS and registered bodies for go-live.
(6.) **Information exchange** - putting in place arrangements with external data providers to obtain and provide the necessary information to support the PVG Scheme.
(7.) **Stakeholder communications** - delivering the guidance, training, capacity building and communications with stakeholders to ensure the PVG Scheme is known about and understood before go-live.
(8.) **Programme management** – controlling governance, finance, risk and ensuring the PVG Scheme delivers the intended benefits.

137. Projects 1 and 8 are run by project managers based in the Scottish Government with the remainder being delivered by Disclosure Scotland. At the time of publication, the go-

live date has not been finally determined but is expected to be late in 2010. The go-live date will be announced 5-6 months in advance, giving stakeholders plenty of time to prepare.

## POST-IMPLEMENTATION REVIEW

138. An important measure of the impact of the legislation is through the identification and review of performance targets for the PVG Scheme. Whilst measures have yet to be identified, it is envisaged that they will build on the existing performance measures used by Disclosure Scotland with new measures appropriate for the determinations and listing work.

139. Potential indicators could include:

- time taken to process applications for scheme membership and scheme disclosures, as well as for existing disclosures (basic, standard and enhanced);
- volume and nature of complaints received by Disclosure Scotland and appeals against listing decisions;
- and outcome-based indicators will be developed to compliment the above, e.g. stakeholder satisfaction (ease of use, fairness, accessibility).

140. The principal objective is to keep unsuitable people out of the workforce or prevent them from continuing to work in the sector(s) once relevant information is identified. Whilst this does not mean that everyone else in the workforce is suitable, an important longer term indicator must be developed to measure the anticipated reduction in harm to vulnerable groups by those who work with them if progress towards this objective is to be quantified.

141. Section 85 of the Act requires the Scottish Ministers to prepare an annual report on the performance of their vetting, barring and disclosure functions, and to lay a copy of each such report before the Scottish Parliament. The first reporting period after the substantive commencement of the Act ends on 31 March 2011 and that report will cover the first months of operation of the PVG Scheme. The report will provide a good opportunity for stakeholders, the Scottish Government and the Scottish Parliament to see whether the PVG Scheme is on track to deliver the intended benefits or whether any fine tuning is required.

## SUMMARY AND RECOMMENDATION

142. This RIA identifies the risks, costs and benefits associated with the secondary legislation implementing the PVG Scheme. The starting point for this RIA is that the PVG Scheme set out in the Act must be delivered. Whether or not to have such a scheme is a matter which was fully explored at the time that the Act went through the Scottish Parliament under the previous administration and re-examined by the incoming administration in May/June 2007. Having committed to deliver the PVG Scheme, the Scottish Government has given great consideration as to how to deliver the PVG Scheme in a way which is proportionate (i.e. only capturing the posts which need to be included) and efficient, effective and fair.

143. An essential part of this consideration has been extensive engagement with stakeholders through the 2007 consultation, 2009 information events, 2009 consultation, ongoing stakeholder newsletters and the quarterly meetings of the Voluntary Sector Issues

Group. It is simply not possible to deliver a scheme that meets everyone's requirements as there are many varied and conflicting views as to how the protection of vulnerable groups is best achieved. But the Scottish Government believes that the PVG Implementation Programme and supporting secondary legislation will deliver a scheme which strikes the right balance between the competing demands of: the protection of vulnerable groups; the minimising of unnecessary bureaucracy and financial burdens; and the rehabilitation of offenders.

## DECLARATION AND PUBLICATION

*I have read the Regulatory Impact Assessment and I am satisfied that the benefits justify the costs.*

Signed ***Adam Ingram***

***25 March 2010***

**Adam Ingram MSP, Minister for Children and Early Years**

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**ANNEX A**

## COSTS AND BENEFITS: DETAILED MODELLING ASSUMPTIONS

Numbers of scheme members and numbers of disclosure checks

1. In 2008/09, Disclosure Scotland received 882,000 applications for disclosure of which 380,000 were for standard or enhanced disclosure. Of these some 360,000 applications were for the purpose of working with children or vulnerable adults.

2. The Scottish Government estimate that around 2 million standard or enhanced disclosure checks have been carried out for posts involving work with adults at risk or children in the period from April 2002, when Disclosure Scotland began operating, to November 2009. With around 55% of applications being duplicates**3**, this means that somewhere around 900,000 individuals have now been checked for posts that are likely to fall within the scope of the scheme since 2002. Therefore, around 900,000 individuals have already been through the disclosure process in six years compared to the 706,000 individuals who we estimate will become scheme members. But some of these "checked" individuals will have left the workforce over these six years and there will be some individuals in both the child care and adult care workforces who have not been disclosure checked to date. Some of these, especially those in the public sector, may have been checked by the non-statutory arrangements which were in place prior to the establishment of Disclosure Scotland.

3. The latest modelling suggests around 240,000 applications for checks per annum by individuals joining or on the scheme once the whole workforce has been brought on stream. But only 32,000 of these will be Scheme Records like enhanced disclosure**4**. This means the number of full checks required per year will fall to just under 10% of the current value. The remainder of the 240,000 checks will be simpler Scheme Record Updates. The total number of checks will be lower (240,000 compared with 360,000 in financial year 2008/09) because some of the repeat checks made by employers and regulators under current arrangements may no longer take place.

Modelling the costs of retrospective checking

4. We have made the following assumptions based on the best evidence readily available:

(i.) We have separated the 120,000 paid employees of the voluntary sector from volunteers and the voluntary sector for the purposes of dividing up fee and administration costs.

(ii.) There is an overlap of 175,000 individuals who should eventually become scheme members as a result of both volunteering in the voluntary sector and paid employment. The smallest unit of time in the modelling is one year. Where the modelling anticipates that individuals will join the scheme as a result of both activities *in the same year*, it is assumed that the individual will join through paid employment. This may or may not be the case in practice but could, in part, be controlled by the level of detail in the programme for retrospective checking.

**3** In 2008/09 alone, some 41,000 individuals made more than one disclosure application to Disclosure Scotland. This included 34,100 individuals making two applications, 5360 making three, 1,100 making four and ranging up to a few extreme cases where individuals made 10 or more applications.

**4** These figures are significantly less than the 330,000 checks and 60,000 Scheme Records estimated in the financial memorandum (paragraph 207). There was a degree of double counting of workforce turnover in the modelling which has now been eliminated.

(iii.) We have assumed administrative costs of joining the scheme (normally in conjunction with the issuing of a Scheme Record) to be £21.50 (paragraph 83) and any subsequent check (normally a Scheme Record Update) to be £5 (paragraph 84).

(iv.) The workforce structure is static, i.e. there will not be large changes in the numbers of posts in each type of work (e.g. 10,000 new social worker posts).

(v.) We have assumed an attrition rate of around 4-5% per annum for paid employees and volunteers in the voluntary sector. These are individuals entering the workforce for the first time, replacing individuals leaving the workforce (e.g. retiring).

(vi.) We have assumed a turnover rate of around 16% per annum amongst volunteers and 19% in paid employment. These are individuals changing posts within the scope of regulated work.

(vii.) The principal costs of operating the scheme are: the costs of the initial vetting when an individual joins the scheme; the ongoing costs of continuous monitoring for each scheme member, potentially for life with no further fee income derived from that member; the costs of consideration for listing a relatively small number of individuals; and the costs of producing subsequent disclosure certificates. The scheme costs have been modelled through transaction costs depending on the type of disclosure request which, although not strictly accurate, does generate plausible data and mimic the likely behaviour of the system sufficiently.

(viii.) The costs are quoted in 2009 cash terms. That is to say, they are not discounted because the benefits of joining the scheme and disclosure checks are also deferred.

<u>Baseline: no scheme - continuing with standard and enhanced disclosure</u>

5. This baseline assumes:
   - the administrative cost of standard and enhanced disclosure is £21.50 (see paragraph 83);
   - the fee for standard and enhanced disclosure would have remained at £23;
   - the number of applications for standard and enhanced disclosure in respect of child and adult care positions would have remained at around 360,000 per annum; and
   - of these 72,000 are free checks for volunteers in the voluntary sector.

   It is difficult to predict what would be the future evolution of the *current rates of enhanced disclosure* because we are still in a transitional period from its go-live in 2002. For this reason, the most recent application data is used without extrapolation.