The Public Records (Scotland) Bill is a technical Bill introduced by the Scottish Government on 7 October 2010. The Bill seeks to introduce an obligation, on named Scottish public authorities, to produce and implement a Records Management Plan. It also seeks to amend the provisions of the Public Records (Scotland) Act 1937 in relation to Scottish Court records.

The Bill is seen as a means of improving record keeping in Scotland by named public authorities and private and voluntary bodies which provide functions on their behalf. Good record keeping underpins lawful access to public records of organisations which provide public services. The Bill is also seen as a means of improving public services through better management of public records and the information those records contain.

This briefing gives an overview of the various reviews which led to the Bill and to the responses to the consultation on proposed legislation, and how the Bill has addressed those responses.
CONTENTS

EXECUTIVE SUMMARY ................................................................................................................................................. 3

PUBLIC RECORDS (SCOTLAND) BILL BRIEFING .............................................................................................................. 4

Bill .................................................................................................................................................................................. 4
Background .................................................................................................................................................................... 4
Shaw report ...................................................................................................................................................................... 4
Review of Public Records Legislation ................................................................................................................................. 5
Consultation on the proposed public records legislation ................................................................................................... 7
Public Records (Scotland) Bill ........................................................................................................................................... 8
Part 1 – Records Management Plans .................................................................................................................................. 8
Schedule 1 ........................................................................................................................................................................... 11
Part 2 – Court Records .................................................................................................................................................... 12
Part 3 – General .................................................................................................................................................................. 12
Financial implications of the Bill ......................................................................................................................................... 12

SOURCES ........................................................................................................................................................................... 13

RELATED BRIEFINGS ..................................................................................................................................................... 16
EXECUTIVE SUMMARY

The Public Records (Scotland) Bill seeks to strengthen the records management in named Scottish public authorities by:

- Requiring those authorities to produce Records Management Plans (RMPs) covering all their public records
- Defining ‘public records’ for the purposes of the Bill, to include records produced by an authority and records produced by contractors who deliver functions on behalf of the authority
- Establishing a role for the Keeper of the Records of Scotland in approving and monitoring the use of RMPs
- Amending sections of the Public Records (Scotland) Act 1937 relating to the records of Scottish courts
PUBLIC RECORDS (SCOTLAND) BILL BRIEFING

Bill

The Public Records (Scotland) Bill was introduced by the Scottish Government on 7 October 2010. The Education, Lifelong Learning and Culture Committee was designated as the lead Committee for Stage 1. The deadline for completion of Stage 1 of the Bill is 11 February 2011.

The Committee launched a call for evidence on Stage 1 of the Bill on 28 October 2010. The Committee will commence taking oral evidence on 8 December 2010.

Background

The Bill was the result of a recommendation contained in a review of public records legislation (National Archives of Scotland 2009) carried out by the Keeper of the Records of Scotland (the Keeper) at the National Archives of Scotland. That review had been carried out at the request of the Scottish Government, following a Scottish Parliament debate (7 February 2008) on the outcomes of Tom Shaw’s systemic review of historical abuse in residential schools and children’s homes in Scotland (Shaw 2007). Tom Shaw is the former Chief Inspector of Education and Training in Northern Ireland.

Prior to the introduction of the Bill the Keeper had carried out a consultation, on behalf of Scottish Ministers, on proposed new public records legislation (Scottish Government 2010a).

Shaw report

Following a debate in the Scottish Parliament on 1 December 2004, on a motion lodged by the Public Petitions Committee seeking an inquiry into past institutional child abuse, the then Minister for Education and Young People, Peter Peacock, announced his intention to appoint an independent reviewer.

Tom Shaw was appointed to carry out the review. Mr Shaw was asked to consider:

- The laws, rules, regulations and powers that governed how the residential schools and children’s homes were run, regulated and inspected
- What systems were in place to make sure these laws, rules, regulations and powers were followed
- How these systems worked in practice.

The report on this review, which Mr Shaw presented to the new Scottish Government, was published on 22 November 2007.

In his report, Mr Shaw stated that identifying how residential schools and children’s homes were monitored and inspected in practice had proved very difficult because records were scattered across organisations, archives and even countries (Shaw 2007 p5). He also found that potentially important information about the practice of inspection was lost because, as new guidance was issued, previous guidance papers were destroyed.
Mr Shaw found that the experience of trying to locate information reflected some of the difficulties former residents had described in their search for information on their experience in the institutions. These difficulties in accessing records were associated not only with the public authorities but also with the voluntary and religious organisations which provided these children’s services.

Mr Shaw stated that the lessons of the review pointed to an “urgent need to take action to preserve historical records, in order to ensure that residents could get access to records and also to information about where to find the records” (Shaw 2007 p7).

He recommended that the government should commission a review of public records legislation, which should lead to new legislation being drafted to meet records and information needs in Scotland. This proposed review should also make certain that legislation did not impede people’s lawful access to records and should address the need for permanent preservation of significant records held by private (non-statutory) agencies that provide publicly funded services to children.

In his report, Mr Shaw also recommended that all local authorities and publicly funded organisations with responsibility for past and present children’s services should undertake to use the Section 61 Code of Practice on Records Management issued under the terms of the Freedom of Information (Scotland) Act 2002 (Scottish Executive 2003).

Part One of that Code of Practice (the Code) provides guidance to all Scottish public authorities – which are defined in section 3(1) of the Freedom of Information (Scotland) Act 2002 (FOISA) – as to the practice which it would, in the opinion of the Scottish Ministers, be desirable for them to follow in connection with the keeping, management and destruction of their records. Part Two of the Code describes the particular arrangements which apply to those authorities which transfer records to the National Archives of Scotland (NAS), and Part Three describes the arrangements for those authorities which transfer records to public archives other than the NAS.

The provisions of the Code do not have the force of law. However, part of the role of the Scottish Information Commissioner is to promote observance of the Code. In fact, if an authority fails to have regard to the Code, they may be failing in their duty under FOISA and the Commissioner may issue a “practice recommendation”, specifying the provisions with which the Commissioner considers the authority’s practice does not conform and the steps the authority should take to so conform. Such a practice recommendation is only issued after the Commissioner has consulted with the Keeper.

In February 2008, Scottish Ministers accepted the Shaw recommendations and, in a ministerial statement to the Scottish Parliament, Adam Ingram, the Minister for Children and Early Years, asked the Keeper, in light of the shortcomings exposed by Shaw, to conduct a review of public records legislation (Scottish Parliament 2008).

**Review of Public Records Legislation**

In October 2009, as a result of the review he carried out on behalf of the Scottish Government, the Keeper submitted a report to Scottish Ministers on the recommendations in the Shaw report (National Archives of Scotland 2009).

The review had been guided by the Shaw recommendation to identify perceived failures of record keeping, but it was also conducted within the context of a general overview of public records legislation in Scotland. So the review went beyond the immediate concerns of the Shaw report, namely residential child care.
The NAS’s review had seven strands, which included:

- Setting up and consulting with a specialist advisory group
- Conducting a wider consultation
- Reviewing existing legislation in Scotland, the UK and overseas.

As well as consulting specialists in the fields of records management and archives, the Review also consulted former residents and abuse survivors. It also compared the outcomes of other inquiries involving the care of children in residential settings.

There were eight review findings, four dealing with record keeping in residential child care and four having wider relevance across the public sector (National Archives of Scotland 2009 p. 24-25). The findings included that:

- Survivors and former residents see records as essential in helping them understand what happened to them and why
- Records, and the information they contain, are important in assisting the healing process for care survivors
- Long term preservation of records created by care providers is not adequately covered by current statutes
- A definition of a ‘public record’ is required
- Freedom of information and data protection legislation does not address the issue of long-term preservation
- There is a lack of consistency in how the existing guidance on managing records is applied
- There is a general lack of application of standards and consistency, which undermines citizens’ rights to access public records and information.

In the review report four options were suggested to Scottish Ministers – with an outline of the benefits, disbenefits and costs of each – to address the concerns raised by the review, namely:

- Not to legislate
- To amend secondary legislation and sectoral guidelines
- To amend existing primary legislation
- To introduce new legislation.

The final option, to introduce new legislation, contained two proposals:

- Introduce comprehensive new legislation using as its model New Zealand’s Public Records Act 2005
- Introduce a limited or ‘lite’ Scottish Public Records Act restricted to defining such records and laying out principles for their creation, management and preservation, that would
provide a framework for further guidance and strengthen freedom of information. It would be designed to address the needs of a Scottish report demanding Scottish solutions.

In his conclusion, the Keeper told Ministers that, although a Scottish Public Records Act would not by itself improve record keeping, or avoid the problems uncovered by Shaw, it would provide an essential framework on which to develop better and more consistent sectoral guidance and training.

**Consultation on the proposed public records legislation**

In June 2010, Scottish Ministers agreed with the Keeper’s call for focussed public records legislation, as they believed that this would improve accountability and transparency, strengthen governance and support the national outcome of better public services. So, from 22 June to 4 August 2010, the Keeper, on behalf of the Scottish Government, held a consultation on proposed ‘lite’ public records legislation (Scottish Government 2010).

The main elements of the consultation were:

- The role and responsibilities of the Keeper, including proposals to formalise and extend the existing responsibilities
- A definition of ‘public records’ and their extent, including provision for a statutory definition of ‘public records’ and a proposal to include the records of private or voluntary bodies which provide a public service
- The record keeping requirements of public authorities, including an obligation for public bodies to adopt acceptable and consistent records management practices and produce records management plans
- Local authorities and the proper arrangements for the preservation and management of their records
- Enforcement of the public bodies’ obligations on records management
- Records of Scottish Courts, including clarification of the relevant elements of the Public Records (Scotland) Act 1937

The proposed legislation also aimed to align the new legislation with FOISA 2002 and the Data Protection Act 1998. It was hoped that this would encourage authorities to use existing best practice and the records management tools already available, such as the *Freedom of Information (Scotland) Act 2002: Code of practice on records management* (Scottish Executive 2003).

The consultation did not include a draft bill because of the tight timescale.

The consultation received 87 responses:

- 13 from private individuals
- 19 from local government
- 3 from local government social work services

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• 25 from public bodies (including Scottish Government Agencies, non-departmental public bodies, tribunals, commissions and non-ministerial departments)
• 8 from the NHS
• 1 from the police
• 5 from private or voluntary bodies which provide public services
• 6 from archives and records management professional bodies
• 4 from other organisations and individuals who had previously been involved in development of the consultation
• 3 from others (including survivors’ organisations).

Comments from the summary of responses produced by the National Archives of Scotland (due to be published on the NAS website at the end of November) are included in the next section of this briefing.

Public Records (Scotland) Bill

The Bill as introduced is in three parts:

Part 1 – Records Management Plans

Part 2 – Court Records

Part 3 – General

Part 1 – Records Management Plans

The provisions in this part of the Bill will place an obligation on Scottish public authorities, which are named in the Schedule to the Bill, to produce and implement a Records Management Plan (RMP). The RMP will be based on guidance about the form and contents of such plans, to be issued by the Keeper, and will have to be approved by the Keeper. The RMP will state how the authority will look after, keep and get rid of records, and when it will do this.

The Bill proposes that a group of two or more authorities may, with the Keeper’s approval, have a common RMP. Common plans would be appropriate where the functions of a group of authorities are sufficiently similar that they will create very similar classes of records. Examples might include certain local authorities, the courts, procurators fiscal or police forces. This is something which the Keeper will discuss with authorities when it comes to implementation of the legislation.

In the consultation paper on the proposed legislation, the NAS had pointed out the low priority given to record keeping in the public sector and how it hoped that the new legislation could help address this issue. Sixty nine respondents agreed that the Keeper should be responsible for producing a model RMP. The majority of respondents thought that this would need to be done in consultation with the public authorities, and with record keeping bodies, such as the Scottish Council on Archives, Archives and Records Association or the Records Management Society. Respondents also thought that the Scottish and UK Information Commissioners should be involved.
Concerns were raised by respondents that one model RMP might not be appropriate for every case and that there must be flexibility to encompass the requirements of different types of authorities. It was also felt that care should be taken to avoid confusion with the existing FOISA code of practice and to ensure that the two were compatible.

Fifty nine of the respondents agreed that public authorities should be required to produce RMPs, following the Keeper’s model, within a certain timescale and subject to approval by the Keeper. There were a number of comments about this proposal, including that:

- Production of RMPs would help to raise the profile of records management with senior management
- The requirement to follow the Keeper’s model should not restrict authorities and they must be able to adapt it to local requirements
- A partnership approach should be adopted to share information and advice between the Keeper and various public authorities
- There needs to be a realistic timescale set for submission and implementation of plans, and resource implications for authorities need to be taken into account.
- The Keeper’s staff need adequate knowledge and experience of the practicalities of records management issues in all sectors, including local authorities
- Authorities should be required to review their plans regularly to keep them relevant.

Section 1 of the Bill states that the Keeper will issue guidance on the form and content of the RMPs. The Keeper has not yet determined the exact timescales for the publication of the model plan and guidance, but the aim is to produce them in the months following Royal Assent, distribute them, and give sufficient time for authorities to use them to produce their own plans. An early draft outline of the elements that would be required in a model records management plan has already been discussed at meetings of a joint NAS/COSLA working group.

Section 2 of the Bill deals with the authorities listed in the Schedule (for further information on the Schedule see below) to which Part 1 of the Bill applies. This Section includes provisions on how the list of authorities, covered by the provision in Section 1 on the RMPs, can be added to, removed from or modified. The kinds of bodies which can be added include publically owned companies; these are companies which are wholly owned by Scottish Ministers or by another public authority.

The amendments to the Schedule would be made by Scottish Ministers using orders which would be subject to the affirmative procedure in the Scottish Parliament.

Section 3 of the Bill provides a definition of the term ‘public records’. In the responses to the consultation, respondents agreed that, in defining a public record, the informational content of the record is the important aspect, rather than its physical form. Therefore, the definition in this Section makes no mention of the form the records should take, only that such records are created by, or on behalf of, an authority in carrying out its functions.

Although the definition covers organisations which carry out functions on behalf of an authority it does not cover organisations which provide goods or services to an authority. The explanatory notes to the Bill give as an example of goods provision the supplying of stationery.
Sixty two respondents to the consultation agreed that when voluntary or private organisations deliver public services, using public money, their records relating to carrying out that work should be considered to be public records. There were a number of comments relating to the question set by the Keeper:

- The relevant records should be identified in terms of services and functions, rather than the use of public money. It would not be appropriate for example to class records relating to a grant-funded arts body as public

- Contracts between the public authority and the private or voluntary body should specify responsibilities and procedures for the management of records using standardised terminology, particularly with regard to what happens to records on the termination of services

- It may not always be easy for public authorities to negotiate these requirements within contracts, or there may be difficulty in ensuring the contracted body complies. There may be an additional burden on public authorities in ensuring compliance

- It may be difficult for some private or voluntary bodies to separate out their own records from those records which relate to services they provide on behalf of a public authority and apply separate record keeping practices

- Voluntary bodies may be reluctant to contribute to the delivery of public services if records management requirements are seen as over burdensome or disproportionate

- Consideration should be given to including subsidiary companies or bodies established with public funds by public authorities.

The Bill, as introduced, makes no mention of the use of public money in deciding which voluntary or private organisations should be covered by the provisions on public records.

Concerns have been raised by voluntary organisations that records management “requirements which are disproportionate or onerous would discourage or even preclude voluntary organisations from contribution to the design or delivery of ‘public services’” (Scottish Government 2010b).

Subsection 3(1)(c) provides that any records which come into the possession of authorities or their contractors when carrying out the authority’s functions, will fall within the definition of public records. The examples given in the explanatory notes include correspondence or statistics which relate to those functions. This subsection also encompasses the historical records of a predecessor authority, for example, the archive of a former local authority.

Section 4 of the Bill deals with the procedures which the authorities need to follow in order to gain approval of their proposed RMPs from the Keeper. This Section gives the Keeper powers on deciding the timescale for the submission of the proposed plans, the form in which they are submitted and the right to approve or reject them. It also ensures that the Keeper must state the reasons for any rejection of a proposed plan.

Section 5 requires that authorities keep their RMPs under review and gives the Keeper powers to request reviews within timescales set out by the Keeper. This Section also provides for the procedures to be followed after such a review has been carried out, including submission of a plan revised in light of the review.

Section 6 of the Bill deals with the reviews which the Keeper will be able to carry out in order to ensure that authorities are complying with their approved RMPs. These compliance reviews
may either result in the Keeper making recommendations as to how the authority can comply with its RMP, or require the authority to carry out a review of its plan.

The Keeper will also be given the power to carry out a compliance review on either an individual authority or a group of authorities by the provisions in this Section.

Under the provisions of Section 7 of the Bill, the Keeper will be allowed to issue a warning notice to an authority which has either failed, or is failing, to comply with its RMP, or with any other duty imposed on it by Part 1 of the Bill.

If the authority further fails to comply with such a warning notice, this Section of the Bill will give the Keeper a power to publicise such a failure. There are no further penalties for non-compliance with RMPs, reviews or warning notices provided for in the Bill. In fact, Section 10 of the Bill will specifically exclude any right of action in civil proceedings in respect of any authority which fails to comply with either its RMP or any other duty set out in Part 1 of the Bill. The ultimate sanction against those who consistently fail to meet their obligations will to be ‘named and shamed’ by the Keeper in the annual report to Scottish Ministers or elsewhere.

Fifty seven respondents were in agreement that the Keeper should be allowed to publish the names and details of the authorities found to be in breach of the provisions. This was seen as a useful tool in ensuring compliance. Eleven respondents suggested that fines should be imposed, while four went as far as proposing that cases of non-compliance should be referred to the Court of Session.

Section 8 of the Bill will establish that the Keeper must produce, publish, review, and, if necessary, revise a model Record Management Plan. The provisions in Section 9 will allow the Keeper to issue guidance on authorities’ duties under Part 1 of the Bill and require such authorities to have regard to this guidance.

Under the provisions in Section 11 of the Bill, the Keeper will be required to produce, and submit to Scottish Ministers, an annual report on the functions given to the Keeper in this Bill. Scottish Ministers will then lay such reports before the Scottish Parliament.

Section 12 provides a short list of definitions of some of the key terms used in Part 1 of the Bill. Section 13 repeals certain sections of existing Acts of the UK Parliament and the Scottish Parliament which refer to record keeping in Scottish authorities which are included in the Schedule to this Bill.

**Schedule**

Sixteen respondents to the consultation on the proposed bill suggested using the existing list of Scottish public authorities provided in Schedule 1 of the Freedom of Information (Scotland) Act 2002. The Bill does not replicate that list, which affects over 10,000 public authorities (Scottish Information Commissioner 2010). This is because the Bill is intended to be ‘light touch’ and the Scottish Ministers considered that it would be disproportionate to include all of the bodies in FOISA Schedule 1 in this Bill. Instead, Ministers have included in the Schedule to the Bill those authorities which they see as central to government in Scotland and which are the major record creators, such as local authorities. Ministers were also keen to include organisations in the Schedule whose work impacts upon the lives of vulnerable people.

Some of the bodies in the Schedule are described rather than fully listed, for example, Chief Constables of police forces and National Park authorities.
Part 2 – Court Records

The provisions in this part of the Bill make minor amendments to the sections in the Public Records (Scotland) Act 1937 which deal with the management of court records and the arrangements for transferring those records to the Keeper.

The court records affected by these provisions are the records of the High Court of Justiciary and the Court of Session, sheriff court records and JP court records.

The amendments to the 1937 Act include provisions to ensure that the various courts must consult with the Keeper on any changes they plan to make to the management of their records. For the High Court of Justiciary and the Court of Session, this means they will be obliged to consult with the Keeper before making an Act of Adjournal or Act of Sederunt in relation to the transmission and retransmission of court records.

Acts of Adjournal and Acts of Sederunt are statutory instruments enacted by the High Court of Justiciary and the Court of Session respectively. Acts of Adjournal are rules which govern procedures in Scotland’s criminal courts while Acts of Sederunt concern procedures in the civil courts.

Part 3 – General

This part of the Bill deals with commencement. The provisions in Section 15 will enable Scottish Ministers to commence Parts 1 and 2 of the Bill on a date or dates appointed by an order made by a Scottish statutory instrument.

Financial implications of the Bill

The financial memorandum for the Bill (contained in the Explanatory Notes) states that the bulk of the cost of implementing the Bill will be borne by the Keeper and will be absorbed from within planned resources. The estimated cost is given as approximately £60,000 per annum. This figure includes the costs of carrying out compliance reviews. The memorandum estimates the average cost of a compliance review as £4,000-£5,000. This estimate is based on the costs of practice assessments carried out by the Office of the Scottish Information Commissioner, which assesses public authorities against their access obligations under FOISA.

The memorandum goes on to state that it has not been possible for the Scottish Government to identify separately the exact cost to each of the authorities listed in the Schedule, or their contractors, of meeting their obligations. This is because the Government believes that the cost will depend on the quality and effectiveness of the current records management regimes in the various organisations.

One of the respondents to the consultation, Aberdeenshire Council (Scottish Government 2010c) believed that the Business and Regulatory Impact Assessment (BRIA) – used to inform the financial memorandum – had underestimated the cost of compliance, “zero to £40,000 staffing costs” (National Archive of Scotland 2010 p. 4). As well as recruitment of records management staff, the respondent believed that other costs – such as licensing, support maintenance services, and the procurement of systems – would have to be considered. The Scottish Government appears to have taken on board some of the comments received because in the financial memorandum, it provides four staffing options, including training, which exceed the staffing estimates in the BRIA. Depending on the option chosen, the staff costs for a public authority with no designated records management staff, could range from £40,000-£61,805 per year.
SOURCES


RELATED BRIEFINGS

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