PROTECTION OF CHILDREN (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Protection of Children (Scotland) Bill introduced in the Scottish Parliament on 6 September 2002. It has been prepared by the Scottish Executive to satisfy Rule 9.3.3(c) of the Parliament's Standing Orders. The contents are entirely the responsibility of the Scottish Executive and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 61–EN.

POLICY OBJECTIVES OF THE BILL

Background

2. Lord Cullen’s report of the public inquiry into the shootings at Dunblane Primary School, and the Children’s Safeguards Review undertaken by Roger Kent, identified the need for adequate checks on the suitability of people working with children and young people. The Bill is intended to improve the safeguards in place to protect children temporarily or permanently in care of persons other than their parents, guardians or relatives. The Bill is designed to strengthen the protection of children by identifying and making known to prospective employers people considered unsuitable to work with children whether in paid or unpaid positions.

3. Wider access to criminal record checks has recently been introduced through Part V of the Police Act 1997 and this goes some way to improving the checks on people seeking positions which will provide them with access to children. Non-conviction information considered by a chief constable to be relevant to a position involving access to children can be included in the highest level certificates under Part V, but there is currently no source of information on misconduct not connected to criminal investigations or proceedings.

4. This Bill provides for a list of persons unsuitable to work with children to be established and maintained by the Scottish Ministers. Persons on the list will be banned from working with children and will commit an offence if they ignore the ban. Organisations will commit an offence if they employ an individual who is on the list.

5. These people will be identified in two ways. Firstly, they will be considered for inclusion on the list if they have been dismissed or transferred from positions giving access to children due to misconduct which has caused a child harm or put a child at risk of harm. Secondly, they may,
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and in some circumstances must, be put forward for inclusion on the list if they are convicted (or acquitted on grounds of insanity) of certain offences involving children.

6. It is important to note that this will not replace or lessen the need for a continuing culture of vigilance. Careful recruitment processes including taking up references and other good practice will still be essential.

Referrals

7. Childcare organisations employing individuals to work with children, whether paid or unpaid, will be required to report cases where a child has been harmed or put at risk of harm and as a consequence the employee involved has been dismissed or moved into a position which does not involve contact with children. Individuals who retire or resign, but would otherwise have been dismissed or moved, will also be referred to the Scottish Ministers. Other organisations will be able to make referrals but will not be required to do so, given the particular difficulties of enforceability in these cases. The primary responsibility for referral will rest with employers but the Bill also provides for others to make referrals, such as the Scottish Commission for the Regulation of Care, inquiries and employment agencies.

8. The court must refer to the Scottish Ministers all those aged 18 or over convicted of an offence specified in schedule 1 to the Bill unless they are considered by the court to be unlikely to commit a further offence against a child in the future. If the offender is aged under 18, referral will depend on the judge being satisfied in all the circumstances of the case that the individual convicted is likely to commit further offences against a child. The court will also have the discretion to refer those convicted of other offences against a child, but this discretion will also be dependent of the court being satisfied as to the likelihood of a further offence being committed.

Consideration of proposed names for the list

9. The Scottish Ministers will be under a duty to include referrals from the court in the list. Consideration of referrals from childcare and other relevant organisations will be founded on a paper-based approach. On receipt of a referral, the Scottish Ministers will give the person who is being considered for inclusion on the list the opportunity to submit any observations within a specified time limit. They will also invite observations from the referring organisation on any observations made by the individual.

10. On receipt of a referral, the Scottish Ministers will need to satisfy themselves that the reference is properly made and that it may be appropriate for the individual to be included on the list. They will then be under a duty to provisionally list the individual. The Bill allows for a maximum provisional listing of 6 months but the intention is to make a final determination within 3 months and only to increase that period for a further maximum 3 months on the decision of a member of the Senior Civil Service, acting on behalf of the Scottish Ministers. Provisional listing will only continue beyond this period if the Scottish Ministers make a successful application to the sheriff to do so or if the circumstances of the case have led to legal proceedings. A final decision will then be reached on whether an individual is unsuitable to work with children and should or should not be included on the list.

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Appeals and reviews

11. An individual included in the list following a referral from a child care organisation, employment agency, inquiry or other relevant body (as specified in section 4) will have the right of appeal to a sheriff within 3 months of being listed or later with leave of the sheriff. If the appeal is unsuccessful, further appeals may be made to the sheriff principal and, with the leave of the sheriff principal, to the Court of Session. The Scottish Ministers will also have the right to appeal decisions of the sheriff and sheriff principal. Where individuals are included in the list following conviction for an offence against a child, appeals will be dealt with as part of the standard appeals process for their conviction.

12. Individuals on the list will also be permitted to request periodic reviews by the sheriff to allow them to demonstrate that there has been a change in their circumstances such that they should no longer be on the list. Examples might include people who had been included on the list due to the effects of their dependency on drugs or alcohol but who had since successfully rehabilitated. The first opportunity for a review will be 5 years after listing for those aged under 18 years and, for those over 18, 10 years or the date of completion of sentence, whichever is later.

Access to the list

13. The information on the list will be released as part of a disclosure check carried out under Part V of the Police Act 1997. It will be released when the check is being carried out in connection with a post which involves access to children. Disclosure Scotland (part of the Scottish Criminal Record Office) carries out these checks in Scotland, and the Criminal Record Bureau carries out the checks in England and Wales. Westminster legislation will be brought forward in due course to complete the linking process. Consistency in releasing the information is essential to avoid the position where individuals can move around the UK to escape the ban on working with children. To allow for developments in international links, an order making power is included to extend access to the list. The Bill also enables the Scottish Ministers to pass information on a decision to list an individual to the current employer of an individual if that individual is in a child care position.

ALTERNATIVE APPROACHES

14. Options were to rely on the current vetting procedures and enhanced criminal record checks; or to set up a list of persons unsuitable to work with children which did not have statutory backing. The current procedures do not provide enough information to prospective employers about people who have been dismissed, resigned or moved from employment in circumstances where they had harmed a child or put a child at risk of harm. It was therefore not acceptable to maintain the status quo. Given the seriousness of the consequences for any person placed on a list of adults unsuitable to work with children, it seems far preferable to establish such a list on a statutory rather than an administrative basis. In England and Wales the Department of Health did maintain a non-statutory Consultancy Index of adults considered unsuitable to work with children. However, the Protection of Children Act 1999 (c.9) put this Index onto a statutory basis. The intended offences for breaching the ban on working with children could not be created without legislation.
POSITION ELSEWHERE IN THE UK

15. There are three different routes to disqualification from working with children in England and Wales. The Department of Health maintains a Protection of Children Act List of persons unsuitable to work with children. This List contains people who have worked in child care and who have been referred to the List by their employers. The Department for Education and Skills maintains a separate list (List 99) of those barred or restricted from teaching by the Secretary of State for Education. A person whose employment has been restricted by the Secretary of State may only work in a post which does not contravene the terms of the restriction. The Criminal Justice and Court Services Act 2000 introduced Disqualification Orders for those convicted of an offence against a child which prohibit working with children.

16. Northern Ireland currently maintains the Pre-Employment Consultancy Service Register which contains the names of those considered to pose a risk to children. A Protection of Children and Vulnerable Adults Bill was introduced in the Northern Ireland Assembly on 24 June 2002 and will put this Register onto a statutory footing. The provisions in the Northern Ireland Bill are very similar to the Protection of Children Act 1999 which covers England and Wales. A separate list of teachers barred or restricted from teaching is also maintained in Northern Ireland.

17. The Bill will bring Scotland into line with the rest of the UK by introducing a list of persons unsuitable to work with children and banning those on the list from working with children. However, it will amalgamate all those banned by the Bill from working with children onto one list.

CONSULTATION

18. In its Programme for Government, Making it Work Together, the Scottish Executive undertook to establish an Index of adults deemed unsuitable to work with children. Proposals for this index were included in Protecting Children – Securing Their Safety, a pre-legislative consultation paper on the establishment of an index of adults unsuitable to work with children. 2,400 copies of the document were distributed in July 2000 to a variety of organisations and individuals covering a wide range of interests. The document was also posted on the Scottish Executive website to allow wide access to it and publication was announced in answer to Scottish Parliamentary Question S1W–8590. Over 70 responses were received and there was universal support for the idea of establishing a list of persons unsuitable to work with children and general support for most of the detailed proposals.

19. Following analysis of the responses a policy position paper, Protecting Children – The Next Steps Towards Securing Their Safety, was issued in May 2001. This confirmed much of the original policy intentions. The key changes following consultation were as follows—

- to tighten the procedures for provisional listing as discussed in paragraph 10 above;
- to allow appeal to the sheriff rather than to a tribunal (while recognising that the arguments are finely balanced);
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- to allow some discretion for the sheriff (or High Court judge) to impose disqualification in cases other than when a custodial sentence is imposed; and
- to give the sheriff discretion to allow for a review at an earlier date than the set review cycle (10 years for adults, 5 years for youths).

20. Again there was a wide distribution with over 700 copies sent out and it was posted on the Executive’s website. Publication was announced in answer to Scottish Parliamentary Question S1O–3521. 26 responses were received. Copies of the responses to both documents are lodged in the Scottish Executive library and the Scottish Parliament Information Centre. On 5 September 2001 the First Minister announced the intention to introduce this Bill (Official Report, col 2199).

21. The Bill reflects these policy proposals, subject to some further (largely technical) amendments. The main technical change has been to streamline the system by which individuals convicted of certain offences against children are covered. It is now the intention that those disqualified by the court will be added to the list of persons unsuitable to work with children, rather than by the court issuing separate disqualification orders. This will help to streamline the procedures and avoid any potential duplication or confusion. The Executive had also originally proposed to consider further the case for a combined Index containing the names of persons unsuitable to work with vulnerable adults. Provision for protection of vulnerable adults will now be brought forward through separate legislation. Links between the two lists will be examined in detail at that stage.

22. In addition to external consultation, there was wide consultation within the Scottish Executive and associated agencies to ensure the proposals were in line with other policy objectives and to draw on expertise in areas such as regulating child care, equal opportunities, and court procedures. Whitehall Departments were also consulted and the proposals draw on the experiences of the Department of Health and Department for Education and Skills. Work with Whitehall Departments continues on the procedures for banning unsuitable individuals from working with children in Scotland to ensure that they fit with the arrangements in the rest of the UK and that there are no loop-holes which enable individuals to escape detection by moving around the UK.

EQUAL OPPORTUNITIES

23. The test for inclusion on the list will be consistent for all regardless of gender, race, disability, sexual orientation, age or religion. Members of the Senior Civil Service, Her Majesty’s Inspectorate of Education and Social Work Services Inspectorate, charged with making determinations on behalf of the Scottish Ministers, will all be trained in equal opportunities.

24. In view of the relatively small number of people who will be referred for inclusion in the list each year (estimated at 30), any problems with accessibility on account of language or disability will be dealt with on a case by case basis. Arrangements will be made to meet the needs of the individual. Appeals and applications for removal from the list are to be heard by the courts who make their buildings and procedures as accessible to all as possible.
EUROPEAN CONVENTION OF HUMAN RIGHTS (ECHR)

25. Balancing the protection of children with the rights of individuals is of prime importance. The Bill provides for a formal, fair and transparent process of gathering evidence and considering any representations from the individual concerned before he or she is placed on the list. The individual placed on the list will have rights of appeal. Malicious referrals by individuals are also ruled out as only prescribed organisations or the courts will be able to refer individuals.

OTHER ISSUES

26. No adverse impact on island communities is anticipated as a consequence of this Bill. Appeals against inclusion on the list will be heard by local sheriffs and so expensive journeys will be avoided.

27. Local authorities as employers of child care personnel and teachers will be required to make referrals to the list. In view of the small numbers each year across the whole of Scotland the impact on individual local authorities will be limited.

28. There should be no impact on sustainable development.
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