PROTECTION OF CHILDREN (SCOTLAND) BILL

EXPLANATORY NOTES

(AND OTHER ACCOMPANYING DOCUMENTS)

CONTENTS

1. As required under Rule 9.3 of the Parliament’s Standing Orders, the following documents are published to accompany the Protection of Children (Scotland) Bill introduced in the Scottish Parliament on 6 September 2002:

- Explanatory Notes;
- a Financial Memorandum;
- an Executive Statement on legislative competence; and
- the Presiding Officer’s Statement on legislative competence.

A Policy Memorandum is printed separately as SP Bill 61–PM.
EXPLANATORY NOTES

INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Executive in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE BILL

4. The Bill provides for a list of persons unsuitable to work with children to be established and maintained by the Scottish Ministers and for those on the list to be banned from working with children. They will commit an offence if they work whilst listed.

5. Child care organisations are required to, and other organisations may, refer people working in child care positions for inclusion in the list if they harm a child or put a child at risk of harm and are dismissed or transferred from positions which give them access to children as a consequence. Those convicted of an offence against a child may also be placed on the list at the discretion of the courts.

6. Organisations will commit an offence if they offer work to an individual or do not move them from a child care position when they have been banned from working with children. The information that a person is on the list of adults unsuitable to work with children will be released as part of a disclosure check carried out by Disclosure Scotland (part of the Scottish Criminal Record Office) under Part V of the Police Act 1997.

Section 1 – Duty of Scottish Ministers to keep list

7. This section provides for a list to be set up and for individuals to be included in the list when the criteria and procedures set out later in the Bill are satisfied. It also allows for the Scottish Ministers to remove an individual from the list but only when satisfied that the individual should not have been included in the list.

Section 2 – Reference following disciplinary action etc.

8. This section places a duty on child care organisations to refer individuals to the list and allows other organisations to make referrals. Child care organisations and organisations are defined in section 16.

9. Subsection (1) specifies that referrals can be made only when certain circumstances have arisen. Subsections (2) and (3) list the circumstances which must have arisen before a referral can be made. Referrals can be made only when a person has harmed a child or put a child at risk.
of harm and has, as a consequence, been dismissed, transferred, resigned, retired, been made redundant or suspended. No referral can be made unless the organisation has (or would, but for a resignation, retirial or redundancy, have) taken steps to remove the individual from their present position. Subsection (4) allows for referrals based on events which occurred before the commencement of the Bill.

Section 3 – Reference by employment agency etc.

10. This section enables employment agencies and employment businesses to refer individuals to the list in the same way as in section 2. This will cover child care workers employed through or supplied by employment agencies and businesses (for example, nannies recruited through an agency).

Section 4 – Reference by certain other persons

11. This enables the Scottish Commission for the Regulation of Care and the Scottish Social Services Council to refer individuals to the list. The Scottish Commission for the Regulation of Care regulates a range of care services for children in Scotland including daycare for children and childminders. This will cover referrals for childminders and managers where there is no employing child care organisation to make a referral under section 2. The Scottish Social Services Council will maintain a register of social workers and other social service workers.

12. This section also confers power on the Scottish Ministers to make an order extending the type of persons who may refer individuals under this section. This allows for other regulatory bodies to be added when it is considered appropriate to do so.

Section 5 – Inclusion in list

13. This section describes the procedures to be followed by the Scottish Ministers in considering a reference.

14. Subsection (2) requires the Scottish Ministers, before making a determination, to be satisfied that—

    • the referral is not vexatious or frivolous; and
    • the information submitted by the organisation indicates that it reasonably considered the individual to have harmed a child or placed a child at risk of harm and that the individual is unsuitable to work with children.

15. Subsection (3) requires the Scottish Ministers to request the individual to make observations on the information submitted with the reference; and the organisation will be invited to make observations on the individual’s observations. It also allows, where the Scottish Ministers think it is appropriate, for further rounds of observations from both the referring organisation and the individual who has been referred for listing.
These documents relate to the Protection of Children (Scotland) Bill (SP Bill 61) as introduced in the Scottish Parliament on 6 September 2002

16. Subsection (4) requires the Scottish Ministers to make a determination as to whether or not to list an individual based on the reference and observations. Before making any determination, Scottish Ministers must be satisfied that the tests in subsection (5) have been met.

17. Subsection (5) contains the tests for listing an individual. The tests are that the Scottish Ministers consider that the organisation which made the reference reasonably considered the individual to have harmed a child or placed a child at risk of harm and that the individual is unsuitable to work with children.

18. Subsection (6) requires the Scottish Ministers to notify the individual of the decision of whether to include the individual in the list. In addition, where the individual is, at the time the determination is made, working in a child care position and the present employer is known, a notice of the determination must also be served on that employer.

19. Subsection (7) provides a safeguard concerning circumstances where individuals have been referred to the list while they have been suspended or provisionally transferred from their duties. In these cases, the referring organisation will have to have reached a decision to dismiss or transfer the individual before the Scottish Ministers can take steps to determine whether the individual should be included in the list.

Section 6 – Individuals named in the findings of certain inquiries

20. This section allows for the Scottish Ministers to include individuals named in relevant inquiries, defined in subsection (6), in the list. Procedures similar to those outlined above for section 5 are to be followed. The Scottish Ministers must be satisfied that the person who held the inquiry reasonably considered that the individual had harmed a child or put a child at risk of harm while working in a child care position; and that the individual is unsuitable to work with children. If both conditions are met the Scottish Ministers must add the individual’s name to the list.

Section 7 – Provisional inclusion in list

21. Subsection (1) requires the Scottish Ministers to provisionally list the individual once they have sufficient information to proceed to a determination under section 5 or 6.

22. Subsection (2) requires the list to show whether a listing is provisional.

23. Subsection (3) requires the individual to be notified of their provisional listing. The Scottish Ministers are also required to notify the individual’s employer, where known, of the provisional listing, if the individual is working in a child care position.

24. Subsection (4) provides that an individual who is included in the list provisionally must be removed from the list if the Scottish Ministers have not made a determination during a particular period.
25. Subsection (5) provides that the period will, in most cases, end 6 months after the date of the provisional listing, unless a sheriff agrees under subsection (6) to extend that period. An exception is made in relation to referrals subject to legal proceedings. In such a case the period is to end 6 months after the date of final determination of those proceedings, which is defined in subsection (8).

Section 8 – Determination under section 5 or 6: power to regulate procedure

26. This section allows the Scottish Ministers to make regulations setting out in further detail the procedures that are to be followed in relation to a determination on whether to list an individual. These regulations may set out more detail on the procedure to be followed by the Scottish Ministers and those invited to submit observations. The Scottish Ministers intend to make regulations setting out a procedure which should enable a decision to be reached within 3 months of provisional listing, although it will be possible to extend this for a further 3 months.

Section 9 – Individuals convicted of an offence against a child

27. This section provides for individuals who have been convicted of an offence against a child (or acquitted on grounds of insanity) to be referred by the sheriff or judge to the Scottish Ministers for inclusion in the list. The sheriff or judge is obliged (subject to being satisfied as required by subsections (2) and (3)) to make a reference if the offence is a relevant offence. The decision on whether to refer to the list is, in the case of any other offence against a child, to be at the discretion of the sheriff or judge. Subsections (2) and (3) will prevent the sheriff or judge from referring an individual to the Scottish Ministers unless the individual can satisfy the test in the relevant subsection.

28. Subsection (2) deals with individuals under 18. In these cases, to make a referral, the sheriff or judge must be satisfied that the accused is likely to commit a further offence against a child.

29. Subsection (3) deals with individuals over 18 and allows a sheriff or judge not to make a referral only if satisfied that the individual is unlikely to commit a further offence against a child.

30. Subsection (6) requires the Scottish Ministers to include referrals from the court in the list.

31. Subsection (7) requires the Scottish Ministers to inform the individual of the listing. If the Scottish Ministers are aware that the individual referred by the court is working in a child care position at the time of listing, they must also inform the employing organisation of the listing.

32. Subsection (8) defines a relevant offence and an offence against a child. Relevant offences are listed in schedule 1. An offence against a child includes both relevant offences and other offences relating to children.

33. Subsection (9) confers a regulation-making power on the Scottish Ministers to amend the definitions of “offence against a child” and “relevant offence”.
34. Subsections (10) and (11) provide for individuals who have been acquitted on the grounds of insanity to be considered for inclusion in the list on the same terms as if they had been convicted of the offence.

Section 10 – Offences relating to work in a child care position

35. This section creates two new offences both of which attract the same penalties (set out in subsection (7)). An individual disqualified from working with children (as defined in section 15) commits an offence if he or she applies for, offers to do, accepts or does any work in a child care position. It is a defence for an individual to prove that he or she did not know he or she was disqualified.

36. An organisation commits an offence if it offers child care work to a disqualified individual; fails to remove a disqualified individual; or moves the individual into a position involving such work. It is a defence for the organisation to prove that it could not reasonably have known that the individual was disqualified.

Section 11 – Searches of lists: amendment of Police Act 1997

37. This section provides for the fact that a person is included in the list of persons unsuitable to work with children to be released as part of a check made under Part V of the Police Act 1997 (c.50). It provides that criminal record certificates will reveal whether the individual is included in the list.

38. The amendments to Part V of the 1997 Act will allow Disclosure Scotland to include information from the list and from equivalent lists kept in England and Wales on checks for a specified range of positions. Some corresponding changes will be needed in England, Wales and Northern Ireland to allow information in the list kept under the Bill to be disclosed in those jurisdictions.

39. Subsection (1) provides that amendments made to that Part of the Act by certain other enactments apply in Scotland. Subsections (2) and (3) make further amendments so as to allow certificates to disclose whether an individual is included in the list.

40. Subsection (4) allows for future developments in sharing information with other countries and Crown Dependencies. It gives the Scottish Ministers powers to modify Part V of the 1997 Act by order to allow Disclosure Scotland to reveal whether the individual is included in similar lists, or is otherwise disqualified from working with children, in those jurisdictions.

Section 12 – Application for removal from list

41. This section allows an individual to apply to the sheriff for a review of their listing. It allows individuals to apply to be removed from the list. The sheriff must grant such an application if satisfied that the individual is not unsuitable to work with children.

42. The earliest opportunity for review will be 5 years after listing for those under 18 years at the time of listing and 10 years after for those over 18 at the time of the event which led to the
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listing. Where listing follows a conviction and referral by the court, the earliest opportunity for review will be on the date of completion of the sentence or 10 years after listing (5 years after listing for those under 18 at the time of the offence which led to the listing), whichever is later.

43. In all cases the sheriff has discretion to allow a review at an earlier date if satisfied that there has been a change in the individual’s circumstances.

Section 13 – Appeals: inclusion in list under section 5 or 6 etc.

44. This section allows for those included in the list under section 5 or 6 to appeal against such inclusion to a sheriff within 3 months of the listing. An individual who has unsuccessfully appealed may appeal the sheriff’s decision to the sheriff principal. The Scottish Ministers also have a right of appeal to the sheriff principal. A further appeal is in each case available, with the leave of the sheriff principal, to the Inner House of the Court of Session.

Section 14 – Appeals: inclusion in list following conviction of offence against a child

45. This section amends Parts VIII and X of the Criminal Procedure (Scotland) Act 1995 (c.46) to ensure that appeals against listing as a result of a criminal conviction are dealt with as part of the same process as appeals against that conviction. Individuals will only be listed when their time for appeal has expired or the appeal has been dismissed or abandoned.

Section 15 – Meaning of “disqualified from working with children”

46. This section sets out the categories of individuals who are, for the purposes of the Bill, “disqualified from working with children”. These include individuals included in the list and in the equivalent list kept, in England and Wales, under section 1 of the Protection of Children Act (c.14). It also includes individuals who are included in other similar lists kept in England and Wales and individuals subject to a disqualification order. Subsection (2) allows the Scottish Ministers to extend the definition to provide that individuals disqualified from working with children in other jurisdictions are similarly disqualified, for the purposes of the Bill, in Scotland.

Section 16 – Interpretation

47. This section defines terms used throughout the Bill and is self explanatory.

Section 17 – Notices

48. The Scottish Ministers are required to give notice of provisional and final listing and this section sets out the appropriate procedures to be followed in serving such notice.

Section 18 – Offences by bodies corporate etc.

49. This section allows for individuals who exercise control within an organisation, as well as the organisation itself, to be proceeded against and punished where the organisation commits an offence of offering child care work to disqualified individuals; failing to remove disqualified individuals; or moving them into positions involving such work.
FINANCIAL MEMORANDUM

INTRODUCTION

50. An assessment of the likely number of referrals to the list is central to estimating the costs. In Scotland there is no baseline for referrals, as statistics are not currently maintained for child carers dismissed from their jobs on account of harming a child or putting a child at risk of harm. In England and Wales, the Department of Health currently maintains a list of persons considered unsuitable to work with children which has been running since October 2000. The provisions for that list are contained in the Protection of Children Act 1999 (c.14) and it is similar to the proposed list for Scotland. Based on experience in England and Wales, referrals to the Scottish Ministers are likely to be in the region of 30 per year (child care staff and teachers combined).

51. Of the 30 referrals each year, about 18 (60%) are likely to be listed. Appeals against the listing are difficult to predict. It seems quite likely that two thirds of individuals listed, or 12 per year, will appeal their listing.

COSTS ON THE SCOTTISH ADMINISTRATION

52. The cost of maintaining the list will fall to the Scottish Executive. A small team will be required to process the referrals at all stages, including—

- receipt and acknowledgement of referral;
- initial check that criteria for referral are met;
- requesting supplementary information as required;
- preparing case for consideration of provisional listing;
- notifying individual of provisional listing;
- inviting observations on comments both parties make;
- preparing submission for determination;
- notifying individual of determination;
- preparing cases for appeals (possibly involving appointment of legal representative);
- preparing cases for review; and
- adding referrals from courts onto the list.

53. A member of the Senior Civil Service and either a Social Work Services Inspector or member of Her Majesty’s Inspectorate of Education will consider the determinations for final listing. The Office of the Solicitor to the Scottish Executive will advise on the handling of appeals and reviews and may represent the Department in court. This extra work would be absorbed within existing resources. There may also be occasions where legal Counsel is needed.
to represent the Scottish Ministers at appeal hearings. Individuals appealing their listing will be eligible to apply for legal aid but in view of the small numbers involved any costs falling on the legal aid budget will be readily accommodated.

54. In addition to staff costs, a budget will be required for publicity, including information leaflets and possibly a publicity campaign to launch the new proposals and make sure organisations know about their new duty to refer people for inclusion in the list.

55. The estimated total annual costs for the above is in the region of £140,000 to £160,000. Most of these costs will be direct running costs with a small amount of programme expenditure for Counsel and publicity.

56. The information that a person is on the list and therefore unsuitable to work with children is to be released as part of a disclosure check under Part V of the Police Act 1997. These checks are carried out by Disclosure Scotland, which is part of the Scottish Criminal Record Office (SCRO), in Scotland and the Criminal Record Bureau (CRB) in England and Wales. Northern Ireland is yet to implement Part V. SCRO is a Common Police Service funded by the Scottish Executive, with half of the costs being recovered from the Scottish police forces. SCRO issues certificates under Part V on behalf of the Scottish Ministers and so SCRO will not charge the Scottish Executive for releasing the information.

57. The list will need to be readily accessible by SCRO and CRB and will require appropriate IT support. There will also need to be links with the courts who will be referring those convicted of offences against a child and will be looking for the most straightforward and cost effective way of doing so. There are a number of developments currently underway which may help to facilitate this, including the upgrading of computer systems at Scottish Courts and the introduction of the Integrated Scottish Criminal Justice Information Systems (ISCJIS). Initial estimates for supporting IT systems are in the region of £50,000 and have been included in the Executive’s ICT Programme.

**COSTS ON THE COURTS**

58. Initial appeals and reviews on a change of circumstances are to be to the sheriff. Subsequent appeals are to sheriffs principal and in some cases the Court of Session. The person will have the right to appeal to their local court. The additional burden imposed by this new business will therefore be spread across the country and Scottish Courts Service advises that it should be readily absorbed without the appointment of additional staff. On an assumption of an average 2 days to consider an appeal and a cost of court proceedings in a region of £1,600 per day inclusive of staff costs, the total annual cost on the courts is likely to range between £30,000 and £50,000.

**COSTS ON LOCAL AUTHORITIES**

59. Local authorities directly employing child care personnel and teachers will be required to refer them to the list when they have harmed a child or put a child at risk of harm. They will also need to check the list before engaging new child care staff. These additional duties should be absorbed within existing resources.
COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

60. Organisations will be guilty of an offence if they engage a person to work with children who is banned from doing so. Access to this information is via a check carried out under Part V of the Police Act 1997. To obtain a check the organisation would countersign an application for a disclosure certificate. Under Part V, the individual pays for the check (currently costing £13.60), although organisations have discretion to reimburse them if they consider this to be appropriate. Volunteers are entitled to free checks. Organisations should already be requiring checks as part of good recruitment practices. There is therefore no obvious additional burden for organisations in connection with disclosure checks.

61. Regulated organisations are required to refer individuals working in a care position where they have harmed a child or put a child at risk of harm. The additional work associated with referral should be minimal. Organisations should already have been following the appropriate disciplinary procedures in reaching a decision to dismiss or move a person and so will have to do little more than pass on that information. They may then have to comment on the observations the individual submits in response to the referral and may have to appear at appeal hearings. On the assumption of 18 referrals and 12 appeals per year, it is expected that the average cost on a referring organisation will be in the region of £250 to £500. Given the range of organisations covered by the Bill, it will be unlikely for an organisation to have more than one case running at any one time and it would be unlikely to be a regular event.

62. Some training and guidance on the provisions of the Bill will be required. In most cases organisations will have a training programme in place for checking the suitability of staff who will work with children, including undertaking criminal record checks. The additional training required in connection with the list of persons unsuitable to work with children should be minimal.

EXECUTIVE STATEMENT ON LEGISLATIVE COMPETENCE

63. On 5 September 2002, the Minister for Education and Young People (Cathy Jamieson) made the following statement:

“In my view, the provisions of the Protection of Children (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE

64. On 6 September 2002, the Presiding Officer (Sir David Steel) made the following statement:
“In my view, the provisions of the Protection of Children (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”