INTRODUCTION

1. This document relates to the Prostitution (Public Places) (Scotland) Bill, introduced in the Scottish Parliament on 15 September 2006. 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 69–EN.

POLICY OBJECTIVES OF THE BILL

Policy Objectives

2. The Bill seeks to protect our communities from antisocial activity associated with prostitution in public places. The current law in Scotland is focused on those (predominately women) who sell sex on the street and not on those (predominately men) who purchase. There is a need to redress this balance in order to protect communities from the nuisance, alarm or offence arising from street prostitution-related activities in or near public places, whether caused by seller or purchaser.

3. The Bill will replace the existing soliciting offence, which applies only to sellers. It will deliver on, but go further than, the Executive’s Partnership commitment to criminalise nuisance from kerb-crawling. It will create new offences which enable the nuisance caused by those seeking to purchase prostitution services to be tackled, whether they be ‘kerb-crawling’ from vehicles, or operating on foot. Anyone causing nuisance, alarm or offence by selling sex, on behalf of themselves or others, would also be committing an offence. The offences are based on an objective assessment of whether nuisance, alarm or offence would be caused to reasonable persons if they witnessed the behaviour.

4. In 2003 the Executive established an Expert Group on Prostitution to consider the legal, policing, health and social justice issues surrounding prostitution in Scotland. The Group published a Report, focusing on street prostitution involving women, in December 2004. In developing this approach the Executive has drawn upon the work of the Expert Group on Prostitution and the principles which the Group identified, as well as the submissions received from a range of respondents to the consultation on the Group’s Report.

1 Being Outside: Constructing a Response to Street Prostitution – Scottish Executive 2004
http://www.scotland.gov.uk/library5/justice/crtsp-00.asp
Background

5. Section 46 of the Civic Government (Scotland) Act 1982, *soliciting and importuning by prostitutes*, provides that a prostitute commits an offence if, for the purposes of prostitution, he or she loiters in a public place, solicits in a public place or so as to be seen from a public place, or importunes a person who is in a public place. This offence criminalises the soliciting or loitering behaviour by sellers *per se*. In doing so the Executive believes it unhelpfully focuses on those selling sex on the streets whilst failing to deal appropriately with the conduct of those seeking to buy sex on the streets.

6. There is no equivalent offence applying to the clients of prostitutes who solicit or loiter for the purposes of obtaining the services of a prostitute in a public place. In some circumstances, the common law offence of breach of the peace can be used to prosecute those who cause offence or alarm by purchasing, or attempting to purchase, sex in a public place. However, there are drawbacks to relying on breach of the peace to prosecute the clients of people engaged in prostitution. There will be narrow cases where the evidence does not support a charge of breach of the peace, even where the community considers that nuisance is being caused.

7. For a charge of breach of the peace to be proved, it is necessary to satisfy the court that the accused’s behaviour was such that it was genuinely alarming and disturbing, in its context, to any reasonable person. In the current context, there would be instances where behaviour might reasonably be considered likely to cause nuisance, but may not be genuinely alarming or disturbing, and therefore would not fall within the scope of breach of the peace. While it is not possible to identify separately those prosecutions for breach of the peace which relate to the purchasing of sex in a public place, anecdotal evidence suggests that it is only rarely used for this purpose.

8. The Expert Group’s report identified a number of objectives which any reform of the law on street prostitution should deliver, including the following:

- It should address the imbalance between men and women arising from the present emphasis on the person soliciting, with little comparable legal impact on the potential purchaser;
- It should seek to reduce the stigma which attaches disproportionately to the person soliciting, as against the potential purchaser;
- It should not criminalise on a moral basis;
- It should provide effective protection to the general public from offensive behaviour and conduct; and
- It should avoid any tendency to increase risk to vulnerable people and communities through unplanned displacement.

9. The report set out three alternative proposals for reforming the law on soliciting and loitering for street prostitution so as to meet these objectives. All broadly proposed that the law should be reformed so as to:

- Repeal the section 46 offence;
- Create an offence covering the purchaser, as well as the seller, in prostitution transactions;
Clarify that the offence is a public order offence, intended to deal with the nuisance, alarm and offence which may be caused by street prostitution activity, rather than criminalising sexual transactions per se.

10. The Executive published its response to the Expert Group’s Report in November 2005. Ministers recognised the need to address street prostitution within the context of an overarching approach to tackling violence against women and also of building safer, stronger communities. Whilst the Executive’s long-term policy objective is to eliminate both demand for and supply of sexual services on our streets, Ministers recognise the need to protect communities now from antisocial activity associated with street prostitution.

11. Ministers have therefore committed to create new public order offences covering prostitution-related behaviour which causes nuisance, alarm or offence, whether by purchasers or sellers. This will ensure that enforcement focuses on nuisance to the community and will enable the police to deal with the harm caused by those (predominately men) who purchase, rather than only appearing to target only those (predominately women) who sell. The Bill will repeal the existing section 46 offence. The Bill will provide for an objective test to be applied. This will enable a court to determine whether the behaviour would be likely to cause offence to a reasonable person, on an objective basis, on the basis of evidence led by, for example, police officers witnessing the behaviour.

12. The offences contained in the Bill will apply in any “relevant place”. The objective of the Bill is to criminalise the nuisance, alarm and offence that may be caused by prostitution-related activity in any place where a member of the public might be likely to witness it. “Relevant place” is thus defined so as to include any public place, and any other place to which the public are permitted to have access, whether on payment or otherwise (as such, it would include, for example, theme parks or sports venues). The soliciting offence also applies to activity undertaken in any place that is visible from a relevant place. The reason for this is that a situation may arise whereby someone solicits from a place (e.g. from a driveway) which, while not itself a public place or a place to which the public may have access, is nonetheless visible to members of the public who are in the area, and equally likely to cause nuisance, alarm or offence to them. This is similar to the definition of “public place” used in the existing section 46 offence. For the avoidance of doubt, the Bill explicitly states that soliciting from a motor vehicle (‘kerb crawling’) is covered by the offence provisions.

13. The offences also apply to people travelling on or in public transport. This was specifically provided for as it might otherwise be argued that public transport was not a “place” and therefore did not fall within the definition of “relevant place”. However, the loitering offence only applies on those forms of public transport on which it was thought possible that a person could loiter, such as buses, trains and ferries (but not, for example, a taxi).

14. In addition, the loitering offence does not apply to persons who are in a motor vehicle which is not public transport, (e.g. a private motor car) as it was considered that it may not be possible to “loiter” within the confines of such vehicles. Even if it was thought possible to loiter within these vehicles, it was considered that more than simply sitting in a motor vehicle (other than public transport) should be required for the commission of an offence i.e. an act of soliciting.

2 http://www.scotland.gov.uk/Topics/Justice/criminal/17543/Response/StreetProst
would be necessary. The loitering offence does not apply to people in hire cars for the same reason that it does not apply to people in private motor vehicles.

15. Section 2 of the Bill provides police constables with a specific power of arrest in connection with the offences contained in the Bill. This was provided for within the Bill following consultation with the Association of Chief Police Officers in Scotland (ACPOS), who advised that a specific power of arrest where it is reasonably believed that a person is committing or has committed an offence would aid the police in enforcing the new provisions. There would therefore be no need to rely on common law powers which require constables to assess whether or not it is in the interests of justice to exercise their power of arrest.

ALTERNATIVE APPROACHES

16. The Expert Group considered a range of alternatives. The ‘status quo’ is considered unacceptable, as the absence of an offence applying to those purchasing sex on the street results in an imbalance in the way that the law treats purchasers and sellers of sex. As a result it compromises efforts to protect the public from offensive behaviour and conduct arising from street prostitution.

17. An alternative means of bringing about a degree of balance would have been to repeal the current soliciting offence and rely on breach of the peace to prosecute both those who sell sex and their clients. However, given the apparent difficulties in using breach of the peace to prosecute purchasers at present, this was considered by the Expert Group to be unlikely to provide effective protection to the public from nuisance or offensive conduct.

18. Consideration was also given to the broad approach proposed in Margo MacDonald MSP’s Prostitution Tolerance Zones (Scotland) Bill. This would involve giving local authorities a power to create ‘tolerance zones’ in which the law on soliciting would not apply. However, the Expert Group found little evidence that prostitution tolerance zones helped to protect women involved in prostitution, or that they protect communities from the nuisance associated with it. They considered that the creation of tolerance zones would send out the wrong message about the acceptability of street prostitution more generally, and might be seen to run counter to the Executive’s longer term objective of reducing and ultimately eradicating street prostitution. On a practical level, it was thought that local authorities would be likely to have great difficulty in identifying suitable locations for tolerance zones.

19. Consideration was given to the approach adopted in England and Wales. Section 1 of the Sexual Offences Act 1985 provides that it is an offence for a person to solicit from a motor vehicle persistently, or in such manner as to cause annoyance to the person being solicited or nuisance to the neighbourhood. Section 2 of the 1985 Act provides that it is an offence for a person to persistently solicit another person, or different persons, in a public place for the purpose of prostitution. Section 1 of the Street Offences Act 1959 creates an offence for either a male or female prostitute to loiter or solicit in a street or public place for the purposes of prostitution. The view was taken that these provisions drew an unhelpful distinction between purchasers and sellers in that a purchaser’s behaviour was only criminalised where it was persistent or caused annoyance or nuisance; however, a seller’s behaviour was criminalised of itself: there was no requirement for it to be persistent or cause annoyance or nuisance.
20. Consideration was also given to the approach adopted in Sweden, where the purchasing of sex is illegal (whether it takes place in a public place or not) while the sale of sex is legal. However, the Expert Group concluded that there was little clear evidence about the effectiveness of the Swedish legal provisions. They also had doubts that the Swedish experience would necessarily transfer to Scotland. The street prostitution population in Sweden was smaller than Scotland’s at the time the law was introduced, and the drug-using population was also smaller.

CONSULTATION

21. The Executive consulted widely on the findings of the Expert Group’s Report - including the Group’s proposals for reforming the law on street prostitution - before publishing their response to the Expert Group. Despite a relatively modest volume of submissions - 62 - the responses were considered to be representative of a wide range of perspectives from a variety of agencies and individuals. An analysis of the responses was published in November 2005.

22. The majority of respondents agreed that there was a need to reform the current legislation on street prostitution. Many respondents endorsed the Expert Group’s aim of addressing the imbalance in the legislation between the buyers and sellers of sex. Most respondents supported the creation of new offences along the lines proposed by the Group, although a number wanted the offences to cover ‘nuisance’ behaviour and several were concerned that a complaint from a member of the public might be required to establish the offences. The Executive has taken both these concerns into consideration in preparing the Bill. The definition of the offences now includes ‘nuisance’ as well as ‘alarm or offence’ and an offence is committed if the behaviour in question was such that it would be “likely to cause alarm, offence or nuisance to a reasonable person” regardless of whether any member of the public actually witnessed the offence.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

What is the policy for? Who is the policy for? What are the desired and anticipated outcomes?

23. The policy is to criminalise the nuisance, alarm and offence associated with street prostitution related activity, whether caused by the buyer or the seller. The desired and anticipated outcome is that, by criminalising the nuisance, alarm and offence caused by purchasers, as well as sellers involved in street prostitution, we will achieve a significant reduction in the nuisance, alarm and offence experienced by communities as a result of street prostitution activity.

Do we have full information and analyses about the impact of the policy upon all equalities groups? If not, why not?

24. The existing legislative provisions on street prostitution are theoretically gender neutral. However, in practice, the existing legislation can have a disproportionate effect on women because it explicitly criminalises those selling sex in public places, who are mainly women, but

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is silent on the activities of their clients, who are almost exclusively men. The new offence provisions address this imbalance, by providing that any person engaged in prostitution activity in a relevant place, whether as a seller or a purchaser, commits an offence if they do so in such a manner as to be likely to cause nuisance, alarm or offence to a reasonable person who might witness them.

25. The Expert Group on Prostitution’s report, on which the Executive’s policy is based, was the subject of a full and comprehensive consultation with stakeholders. A wide range of equalities groups, and in particular, women’s organisations and groups representing victims of rape and domestic abuse, was consulted. Other organisations consulted included the Commission for Racial Equality, the Scottish Council of Voluntary Organisations, the Disability Rights Commission and the Equal Opportunities Commission.

26. It is the Executive’s view that the Bill does not impact in any differential or discriminatory sense upon groups which are defined by personal attributes or characteristics such as age, race, disability, religion, sexual orientation, language, social origin or political belief.

Has the full range of options and their differential impacts on all equality groups been presented?

27. The Expert Group on Prostitution considered a range of different policy options for reforming the law on street prostitution. In doing so, they considered the likely impacts of each against the objectives which the Group considered any proposal for reform should meet. From an equality perspective, the two most relevant objectives were that any reform should:

- Address the imbalance between men and women arising from the present emphasis on the person soliciting, with little comparable legal impact on the potential purchaser;
- Seek to reduce the stigma which attaches disproportionately to the person soliciting, as against the potential purchaser.

What are the outcomes and consequences of the proposals? Have the indirect, as well as the direct, effects of the proposals been taken into account?

28. The outcomes and consequences are as set out in the answer to the first of these six questions on equal opportunities. The Expert Group on Prostitution considered the matter of street prostitution involving women in considerable depth, so as to ensure that both the direct and the indirect effects of the proposed policy were taken into account.

How have policy-makers demonstrated that they have mainstreamed equality?

29. As detailed elsewhere in this policy memorandum, the provisions have been the subject of extensive consultation, including with groups representing equality interests. The Executive has set out to address what is considered an imbalance in the existing legislation between sellers of sex and their clients.

30. The offence provisions are one part of the Executive’s broader strategy to tackle street prostitution as set out in the response to the report of the Expert Group. The Executive will
issue guidance to local authorities and their community planning partners to assist them in drawing up local plans which address street prostitution by:

- reducing demand for prostitution;
- preventing people becoming involved in prostitution;
- reducing the harm to which those who are involved are exposed; and
- helping women to leave prostitution.

Further details can be found in the Executive’s response.

**How will the policy be monitored and evaluated? How will improved awareness of equality implications be demonstrated?**

31. The Scottish Executive will monitor the effect of the provisions via Criminal Justice statistics, to ascertain the extent to which the legislation is effective in tackling nuisance, alarm and offence caused both by men and women. Guidance will be issued to practitioners involved in enforcing the new offences, which will draw their attention to equality issues.

**Human Rights**

32. The Executive is satisfied that the provisions of the Bill are compatible with the European Convention on Human Rights.

**Island Communities**

33. The provisions of the Bill have no differential impact on island communities.

**Local Government**

34. The provisions of the Bill have no direct impact on the responsibilities of local government.

**Sustainable Development**

35. The provisions of the Bill have no impact on sustainable development.
PROSTITUTION (PUBLIC PLACES) (SCOTLAND) BILL

POLICY MEMORANDUM

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