These documents relate to the Protection of Children and Prevention of Sexual Offences (Scotland) Bill (SP Bill 30) as introduced in the Scottish Parliament on 29 October 2004

PROTECTION OF CHILDREN AND PREVENTION OF SEXUAL OFFENCES (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 and Prevention of Sexual Offences (Scotland) Bill introduced in the Scottish Parliament on 29 October 2004:

   • 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 30–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 seeks to support the aims set out in the Policy Memorandum through the introduction of a new criminal offence and associated orders. The Bill introduces an offence of sexual grooming of a person under 16 by an adult aged 18 or over. The Bill also introduces risk of sexual harm orders which are designed to protect children from those who display inappropriate behaviour towards them, and the further use of sexual offences prevention orders so that they can be applied to those convicted of sex offences by the court when they are sentenced.

THE BILL – COMMENTARY ON SECTIONS

Section 1 – Meeting a child following certain preliminary contact

5. Subsection (1) makes it an offence for a person aged 18 or over intentionally to meet, or travel with the intention of meeting, a child under the age of 16, in any part of the world, if the adult has met or communicated with that child on at least two earlier occasions, and intends to commit a “relevant offence” against that child either at the time of the meeting or after the meeting. An offence is not committed if the adult reasonably believes the child to be 16 or over. Relevant offences are set out in schedule 1 to the Bill. This schedule lists offences of a sexual nature that could be committed against children.

6. The offence is intended to cover situations where an adult establishes contact with a child through, for example, meetings, telephone conversations or communications on the internet, and gains the child’s trust and confidence so that the adult can arrange to meet the child for the purpose of committing a “relevant offence” against the child. The course of conduct prior to the meeting that triggers the offence may but need not have an explicitly sexual content.

7. The offence would be complete when, following the earlier contacts, the adult meets the child or travels to meet the child with the intent to commit a relevant offence against the child. The intended offence does not have to take place. One or more of the necessary elements of the offence, namely the preliminary meeting or communication(s), the subsequent intentional meeting or any part of the travelling to meet with the child must have a “relevant Scottish connection” (defined in subsection (2)(c)), unless the accused is a British citizen or UK resident, in which case all of these elements may take place entirely outwith Scotland.
8. The evidence of the adult’s intention to commit an offence may be drawn from the communications between the adult and the child prior to the meeting, or may be drawn from other circumstances, for example if the adult travels to the meeting with condoms and lubricants.

9. Subsection (2)(a) provides that references in subsection (1) to meetings or communications with the child include meetings or communications that take place in or across any part of the world.

10. Subsection (3) provides that the offence can be prosecuted summarily or on indictment. Anyone found guilty of the offence is liable to punishment of six months imprisonment and/or a fine not exceeding the statutory maximum (currently £5,000) under summary procedure or to an unlimited fine and/or 10 years imprisonment on indictment.

11. Subsection (4) applies subsections (6A) and (6B) of section 16B of the Criminal Law (Consolidation) (Scotland) Act 1995 to proceedings for an offence under section 1 of the Bill. The effect of this is that where acts leading to the apprehension of an accused person have taken place outside the UK, the person may be proceeded against in the sheriff court district in which the person was apprehended or is in custody or in such other sheriff court district as the Lord Advocate may determine.

12. Subsections (5) and (6) confer power on Scottish Ministers to modify the list of offences in the schedule by statutory instrument. The order will be subject to negative resolution procedure.

Sections 2 and 3 – Risk of sexual harm orders: applications, grounds and effects and Interpretation of section 2

13. Section 2 introduces a new civil preventative order, the risk of sexual harm order (RSHO), for which the police can apply to a sheriff court in respect of a person over the age of 18, if that person has, on at least two occasions, engaged in sexually explicit conduct or communication with a child or children, and as a result there is reasonable cause to believe that the order is necessary to protect a child or children from harm arising out of future acts by that person. The RSHO is not a substitute for a criminal offence, but applies in circumstances where the behaviour of the adult gives reason to believe that a child or children are at risk from an individual’s conduct or communication and intervention at this earlier stage is necessary to protect the child or children.

14. The application may be made by a chief constable to the sheriff in whose sheriffdom the person resides, is believed to be in or is intending to come to, or where the alleged acts are said to have taken place.

15. The person against whom an order is sought may or may not have a conviction for a sexual (or other) offence. The child or children to be protected must be under 16.

16. Subsection (1) explains the circumstances in which an RSHO may be sought. The acts in subsection (3) which constitute the trigger behaviour for an order all involve explicitly sexual
communication or conduct with or towards a child. (The terms “image” and “sexual activity” are defined in section 3). The types of behaviour at subsections (3)(a), (b) and (d) may already amount to a criminal offence. However the trigger behaviour need not amount to criminal conduct. Subsection (3)(c) would, for example, cover a person giving condoms or a sex toy to a child. Subsection (3)(d) would cover a person sending pornographic images to a child over the internet or describing the sexual acts they would like to carry out on the child. An order would not be made unless the court is satisfied (under subsection (4)(b)) that further such acts would cause a child or children physical or psychological harm (see definition of protecting children from harm in section 3(a)).

17. For the purpose of the Bill, “image” includes photographs, cartoon strips, email attachments and drawings. The use of the words “but regardless of any person's purpose” in sections 3(d), (e)(ii) and (f)(ii) means that an activity, or communication, or image, would only be “sexual” for the purposes of this Bill if a reasonable person, purely from the nature and circumstances of the activity, communication or image, would consider it to be sexual, without having to enquire into the motive behind it.

18. Under section 2(5), an order entitles the court to prohibit the person concerned from doing anything described in it. It cannot require the person concerned to comply with conditions requiring positive action.

19. The minimum duration of an order is 2 years.

Section 4 – RSHOs: variations, renewals and discharges

20. Section 4 provides for variations, renewals and discharges of RSHOs. Variations, renewals and discharges can be made on application to the sheriff court by the person to whom the order applies, the chief constable who applied for the original order or a chief constable of the area in which the person resides, is in or intends to move to. It would be open to a person to apply for a RSHO to be varied or discharged if the child concerned reached the age of 16.

Section 5 – Interim RSHOs

21. This section allows the police to apply for an interim RSHO where an application has been made for a full order in respect of an individual, and intimated to that individual, but has not yet been determined. The interim order would be for a fixed period and would cease to have effect at the end of that period or, if earlier, when a decision is made on the full order.

Section 6 – Appeals

22. This section provides that a sheriff’s decision in relation to an RSHO can be appealed. The appeal will be dealt with in the first instance by the sheriff principal. An existing RSHO would continue to have effect until any appeal had been decided by a court unless it is suspended by the court.
Section 7 – Offence: breach of RSHO or interim RSHO

23. Breach of an RSHO or interim RSHO without reasonable excuse is a criminal offence that is triable either summarily (with a maximum penalty of 6 months imprisonment or a fine not exceeding £5,000 or both) or on indictment, with a maximum penalty on indictment of five years imprisonment or a fine or both.

24. Section 7 also makes it an offence under Scots law for a person to breach an RSHO or interim RSHO that was imposed in England and Wales under sections 123 or 126 of the Sexual Offences Act 2003 (e.g. if that person was in Scotland and breaches the terms of the order that was made in England and Wales).

Section 8 – Effect of conviction etc under section 7 above or section 128 of Sexual Offences Act 2003

25. Section 8 makes provision for different types of offender to ensure that a breach of an RSHO entails compliance with the notification requirements in the 2003 Act, which require persons convicted of specified offences to notify their details to the police on a regular basis. It applies to persons who are convicted of an offence under section 7 of the Bill (breach of an RSHO or interim RSHO made in Scotland or England and Wales). It also applies to persons who have been convicted in England and Wales of a breach of an RSHO or interim RSHO that was made in England and Wales. This is to ensure that such persons are subject to the notification requirements of Part 2 of the 2003 Act as a matter of Scots law, which is necessary to deal with the possibility that such persons might move to Scotland.

26. Subsection (2) provides that where the offender was already subject to the notification requirements but would cease to be subject to those requirements at a time when the RSHO still has effect then that person should remain subject to the notification requirements until the expiry of the RSHO, including any renewals.

27. Given that a person subject to an RSHO need not have been convicted of any sexual offence before the order was made, the person would not necessarily be subject to the notification requirements in Part 2 of the 2003 Act. Subsection (3) therefore provides that if the person was not already subject to these notification requirements then that person becomes subject to those notification requirements from the time of the conviction until the RSHO ceases to have effect.

Section 9 – Prevention of sexual offences: further provision

28. Section 9 of the Bill amends the 2003 Act so as to enable the courts in Scotland to impose a sexual offences prevention order (SOPO) where the court deals with the offender in respect of an offence listed in paragraphs 36 to 60 of Schedule 3 to the 2003 Act. The offences listed in paragraphs 36 to 59 are all sexual offences. Paragraph 60 covers any offence committed in Scotland where the court determines that there is a significant sexual element in the offender’s behaviour in committing the offence. There is power for Scottish Ministers to amend the list of relevant offences by a statutory instrument under section 130 of the 2003 Act.
29. A SOPO is intended to protect the public from the risks posed by sex offenders by placing restrictions on their behaviour.

30. At present, the 2003 Act provides that in Scotland a SOPO can be made only on application to a sheriff court by a chief constable in respect of an offender who has previously been dealt with in connection with an offence listed in Schedules 3 or 5 to the 2003 Act (except paragraphs 64 to 111 of Schedule 5). The list of trigger offences covers persons with convictions under both Scots law and the law of England and Wales and Northern Ireland to cover the situation in which a person with an English conviction lives in Scotland and is exhibiting sexually risky behaviour that causes concern. The list of offences also includes any offence committed in Scotland where the court determines that there is a significant sexual element in the offender’s behaviour in committing the offence. The court must be satisfied that an order is necessary to protect the public or an individual from serious sexual harm from the offender.

31. This kind of SOPO, granted on the application of the police (a “police SOPO”) under the 2003 Act replaced the power conferred on the police to apply for sex offender orders that were introduced in the Crime and Disorder Act 1998 for Scotland, England and Wales and Northern Ireland.

32. Separately, the 2003 Act also enabled the courts in England and Wales to impose a SOPO on conviction – a “court SOPO”. This court SOPO replaced the sex offender restraining order for England and Wales that had been introduced in 2000. The court there may impose a SOPO when it deals with an accused following a conviction for an offence listed in Schedule 1 or a finding that he or she is not guilty of such an offence by reason of insanity or that he or she is under a disability but has done the act charged. Included within Schedule 1, as a trigger offence for consideration of a SOPO, is any offence where the court determines that there is a significant sexual element in the offender’s behaviour in committing the offence, as recommended in the report of the Expert Panel on Sex Offending “Reducing the Risk – Improving The Response To Sex Offending”. Under the 2003 Act, court SOPOs were not available in Scotland.

33. Section 9 of the Bill therefore amends the 2003 Act so as to enable the Scottish courts to impose a SOPO on conviction, or on finding that a person is not guilty of an offence by reason of insanity or that he or she is under a disability but has done the act charged. It does this by amending section 112 of the 2003 Act which sets out the way in which the existing SOPO provisions apply to Scotland. Section 112 is amended so as to remove the current disapplication to Scotland of the sentencing court’s power to impose a SOPO on conviction (section 9(3)). The new court SOPO can be imposed by the sheriff court when exercising criminal jurisdiction or by the High Court. Section 9(1) amends section 111 of the 2003 Act to make provision for appeals against the new Scottish court SOPOs. The amendment to section 111 provides that the appeal process for the court SOPO is to be equivalent to the appeal process for other community justice disposals, such as probation and community service orders.

34. It is not necessary to apply to the court to make a SOPO at the point of sentence although the prosecutor may ask the court to consider making an order in appropriate cases.

35. As with the existing police SOPOs and court SOPOs for England and Wales, in order to make a Scottish court SOPO, the court must form a view that the offender presents a risk of
serious sexual harm to the public and that an order is necessary to provide protection from this. The evidence presented in the trial is likely to be a key factor in the formation of this judgement, together with the offender’s previous convictions, of which the sheriff would have a copy. Courts may also ask social enquiry report writers to consider the suitability of a SOPO on a non-prejudicial basis.

36. In line with the provisions for existing SOPOs, a Scottish court SOPO can contain only those prohibitions on the behaviour of the offender that are necessary for the purpose of protecting the public or any particular members of the public from serious sexual harm from the offender (section 107(2) of the 2003 Act). It cannot require the offender to comply with conditions requiring positive action. Prohibitions could include, for example, preventing an offender from contacting victims, or from taking part in sporting activities that involve close contact with children, or from living in a household with girls under 16. Also, in line with the existing provisions for SOPOs in the 2003 Act, the Scottish court SOPO will also have the effect of making the offender subject to the notification requirements of Part 2 of the 2003 Act for the duration of the order. This will apply even if the offender is already subject to notification, if notification would end during the currency of the order (section 107 of the 2003 Act). The notification period runs from the date that the order is served on the offender (not from the date of conviction) – see section 107(5) of the 2003 Act. The minimum duration for an order is five years (section 107(1)(b) of the 2003 Act). There is no upper limit.

37. Breach of a court SOPO, without reasonable excuse, would be a criminal offence. An accused convicted of such an offence on summary conviction would be liable to a term of imprisonment of up to six months or to a fine or both; an offender convicted on indictment would be liable to a term of imprisonment of up to five years (section 113 of the 2003 Act).

38. Section 9 of the Bill amends the 2003 Act so as to bring the procedure for applying for SOPOs in Scotland more closely into line with the normal jurisdictional arrangements applicable to orders made under civil law. The effect of this change is that an order can only be applied for in a sheriffdom where the person who would be subject to the order resides, is believed to be or is intending to come to, or where the alleged acts are said to have taken place. Section 9 also amends the 2003 Act so that an application for an interim SOPO must be made in the same sheriffdom as the main application.

FINANCIAL MEMORANDUM

COSTS ON THE SCOTTISH ADMINISTRATION

39. Discussions with the police and the Crown Office and Procurator Fiscal Service (COPFS) suggest that the introduction of a new grooming offence is not likely to produce a significant net increase in the numbers of prosecutions. In most cases where suspicious activity is reported to the police there are already prosecutions in serious cases for related offences such as lewd and libidinous behaviour, or in less serious cases what appears to be ill-advised behaviour is deterred by the police enquiries. Nevertheless there is a potential gap in the law and for the purposes of estimating financial costs it is assumed that there will be some prosecutions that would not
Otherwise have taken place. It is not possible to produce a firm estimate of such prosecutions, but for these purposes we have illustrated the effects of 50 extra prosecutions for the grooming offence per annum. In practice the number may well be significantly lower than this number. The police advise that at present there are less than 100 enquiries throughout Scotland each year, and as is noted above, many of these are either already prosecuted on other charges or there is no evidence of criminal behaviour. It is also difficult to predict how many RSHOs and SOPOs might be imposed. Again discussions with police and COPFS suggest that 10 to 20 applications for each type of order would be a reasonable estimate.

Grooming offence

40. The introduction of this offence should not involve additional police costs as reports or indications of such behaviour are already investigated by the police.

41. The average cost of a summary court case is £1,260 including prosecution costs and the average indictment cost is £9,650. It is anticipated that 20% of these cases will proceed on indictment. Based on the estimate of 50 prosecutions per annum, this would therefore incur total court costs of £146,900.

42. There will also be additional legal aid costs. The average legal aid cost for a summary case would be £675; while the average for a solemn case would be £4,000. Based on the estimate of 50 prosecutions per annum, estimated total legal aid costs would therefore be £67,000. Appeals against convictions would also have an impact on legal aid.

43. If an offender is sentenced to a term of imprisonment there may also be costs to the Scottish Prison Service. Based on 2003-04 figures the average annual cost per prisoner place is £33,244. This figure is the Scottish Prison Service’s annual costs divided by the annual average number of prisoners. It is not the marginal cost of an extra prisoner.

Risk of sexual harm orders

44. For the purposes of this financial memorandum we anticipate that there will be about 10 to 20 applications per annum. The average cost to the Scottish Courts Service of a summary application is £1,260. In addition to these costs there may also be the need for additional social enquiry reports at a cost of £250 per report. There are also implications for legal aid and this is estimated at £2000 per case. Breaches and applications for variations would incur similar costs. There should not be any additional police costs as reports or indications of such behaviour are already investigated by the police. It is important to note that these orders may also generate savings as they would prevent offending and the costs associated with investigating, prosecuting offences, and providing support for victims.

Sexual offences prevention orders (SOPOs)

45. The extension in the use of sexual offence prevention orders (SOPOs) to allow them to be imposed at time of sentence should not lead to any significant cost implications as the cases will already have been investigated and heard. However it is possible that there may be some marginal lengthening of relevant court hearings to consider whether to make a SOPO. Set
against this, it is also noted that the imposition of a court SOPO should produce savings where a police SOPO would otherwise have been applied for, as there will not need to be a separate hearing with associated costs.

COSTS ON LOCAL AUTHORITIES

46. The introduction of the new grooming offence should not have any impact on the costs on local authorities other than in relation to costs associated with social enquiry reports. The introduction of RSHOs may have some impact on the work of social work departments as they may be called upon to participate in risk assessment. Similarly the use of SOPOs as a court disposal may also have some marginal effect in that courts may ask for social enquiry reports where they might not otherwise have done so, at a cost of £250 per report. In general though given the nature of the offences dealt with in this context it is likely that criminal justice social work departments will already be involved in these cases and that the new orders will represent additional tools to be employed rather than additions to their caseload.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

47. Individuals who are convicted of the new offence will be expected to pay any fine imposed on them by the court as a result of that conviction. There are no costs for other bodies or businesses.
SUMMARY OF COSTS

Grooming offence

<table>
<thead>
<tr>
<th>Description</th>
<th>Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of prosecutions</td>
<td>50</td>
</tr>
<tr>
<td>Average summary court case cost</td>
<td>£1,935 (including prosecution costs and legal aid)</td>
</tr>
<tr>
<td>Average indictment cost</td>
<td>£13,650 (including legal aid)</td>
</tr>
<tr>
<td>Police costs</td>
<td>No additional costs – already investigating these incidents</td>
</tr>
<tr>
<td>Social work costs (inc SERs)</td>
<td>Would already be involved in cases of this nature. If additional SERs required this would be an average cost of £250 per case</td>
</tr>
<tr>
<td>Average Prison costs per person pa</td>
<td>£33,244 but see explanation in text above</td>
</tr>
</tbody>
</table>

**TOTAL SUMMARY CASE (based on 40 prosecutions and excluding prison costs)**: £87,400

**TOTAL INDICTMENT (based on 10 prosecutions and excluding prison costs)**: £139,000

**TOTAL per annum excluding prison costs**: £226,400

RSHOs

<table>
<thead>
<tr>
<th>Description</th>
<th>Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of applications (inc variations etc)</td>
<td>10 to 20</td>
</tr>
<tr>
<td>Average summary application case cost</td>
<td>£3,260 including court costs and legal aid</td>
</tr>
<tr>
<td>Police investigation costs</td>
<td>No additional costs – already investigating these incidents</td>
</tr>
<tr>
<td>Social work costs (inc SERs)</td>
<td>No additional costs – already involved in managing these cases (if extra SERs are required this would be at the average cost of £250)</td>
</tr>
</tbody>
</table>

**TOTAL PER CASE**: £3,550

**Total for 10 orders**: £35,500

**Total for 20 orders**: £71,000

EXECUTIVE STATEMENT ON LEGISLATIVE COMPETENCE

48. On 27 October 2004, the Minister for Justice (Cathy Jamieson MSP) made the following statement:

“"In my view, the provisions of the Protection of Children and Prevention of Sexual Offences (Scotland) Bill would be within the legislative competence of the Scottish Parliament."
PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE

49. On 27 October 2004, the Presiding Officer (Rt Hon George Reid MSP) made the following statement:

“In my view, the provisions of the Protection of Children and Prevention of Sexual Offences (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”
These documents relate to the Protection of Children and Prevention of Sexual Offences (Scotland) Bill (SP Bill 30) as introduced in the Scottish Parliament on 29 October 2004

PROTECTION OF CHILDREN AND PREVENTION OF SEXUAL OFFENCES (SCOTLAND) BILL

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