Passage of the  
Public Records (Scotland)  
Bill 2010  

SPPB 165
Passage of the
Public Records (Scotland) Bill 2010
SP Bill 56 (Session 3), subsequently 2011 asp 12

SPPB 165
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Foreword

Purpose of the series

The aim of this series is to bring together in a single place all the official Parliamentary documents relating to the passage of the Bill that becomes an Act of the Scottish Parliament (ASP). The list of documents included in any particular volume will depend on the nature of the Bill and the circumstances of its passage, but a typical volume will include:

- every print of the Bill (usually three – “As Introduced”, “As Amended at Stage 2” and “As Passed”);
- the accompanying documents published with the “As Introduced” print of the Bill (and any revised versions published at later Stages);
- every Marshalled List of amendments from Stages 2 and 3;
- every Groupings list from Stages 2 and 3;
- the lead Committee’s “Stage 1 report” (which itself includes reports of other committees involved in the Stage 1 process, relevant committee Minutes and extracts from the Official Report of Stage 1 proceedings);
- the Official Report of the Stage 1 and Stage 3 debates in the Parliament;
- the Official Report of Stage 2 committee consideration;
- the Minutes (or relevant extracts) of relevant Committee meetings and of the Parliament for Stages 1 and 3.

All documents included are re-printed in the original layout and format, but with minor typographical and layout errors corrected. An exception is the groupings of amendments for Stage 2 and Stage 3 (a list of amendments in debating order was included in the original documents to assist members during actual proceedings but is omitted here as the text of amendments is already contained in the relevant marshalled list).

Where documents in the volume include web-links to external sources or to documents not incorporated in this volume, these links have been checked and are correct at the time of publishing this volume. The Scottish Parliament is not responsible for the content of external Internet sites. The links in this volume will not be monitored after publication, and no guarantee can be given that all links will continue to be effective.

Documents in each volume are arranged in the order in which they relate to the passage of the Bill through its various stages, from introduction to passing. The Act itself is not included on the grounds that it is already generally available and is, in any case, not a Parliamentary publication.

Outline of the legislative process

Bills in the Scottish Parliament follow a three-stage process. The fundamentals of the process are laid down by section 36(1) of the Scotland Act 1998, and amplified by Chapter 9 of the Parliament’s Standing Orders. In outline, the process is as follows:
• Introduction, followed by publication of the Bill and its accompanying documents;
• Stage 1: the Bill is first referred to a relevant committee, which produces a report informed by evidence from interested parties, then the Parliament debates the Bill and decides whether to agree to its general principles;
• Stage 2: the Bill returns to a committee for detailed consideration of amendments;
• Stage 3: the Bill is considered by the Parliament, with consideration of further amendments followed by a debate and a decision on whether to pass the Bill.

After a Bill is passed, three law officers and the Secretary of State have a period of four weeks within which they may challenge the Bill under sections 33 and 35 of the Scotland Act respectively. The Bill may then be submitted for Royal Assent, at which point it becomes an Act.

Standing Orders allow for some variations from the above pattern in some cases. For example, Bills may be referred back to a committee during Stage 3 for further Stage 2 consideration. In addition, the procedures vary for certain categories of Bills, such as Committee Bills or Emergency Bills. For some volumes in the series, relevant proceedings prior to introduction (such as pre-legislative scrutiny of a draft Bill) may be included.

The reader who is unfamiliar with Bill procedures, or with the terminology of legislation more generally, is advised to consult in the first instance the Guidance on Public Bills published by the Parliament. That Guidance, and the Standing Orders, are available free of charge on the Parliament’s website (www.scottish.parliament.uk).

The series is produced by the Legislation Team within the Parliament’s Chamber Office. Comments on this volume or on the series as a whole may be sent to the Legislation Team at the Scottish Parliament, Edinburgh EH99 1SP.

**Notes on this volume**

The Bill to which this volume relates followed the standard 3 stage process described above.

Annexes B – E of the Education, Lifelong Learning and Culture Committee’s Stage 1 Report were originally published on the web only. This material, including the written and oral evidence taken by the Committee and the reports of other committees, is included in full in this volume.

At its meeting on 15 March 2011, the Subordinate Legislation Committee considered the delegated powers provisions in the Bill as amended at Stage 2. The Committee agreed without debate that no further action by it was required. No extracts from the minutes or the Official Report of that meeting are, therefore, included in this volume.
# PUBLIC RECORDS (SCOTLAND) BILL

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Schedule—Authorities to which Part 1 applies
Public Records (Scotland) Bill

[AS INTRODUCED]

An Act of the Scottish Parliament to make provision about the management of records by certain authorities; to amend the Public Records (Scotland) Act 1937 (c.43) in relation to court records; and for connected purposes.

PART 1

RECORDS MANAGEMENT PLANS

1 Records management plans

(1) Every authority to which this Part applies must—
   (a) prepare a plan (a “records management plan”) setting out proper arrangements for the management of the authority’s public records,
   (b) submit the plan to the Keeper for approval, and
   (c) ensure that its public records are managed in accordance with the plan as approved by the Keeper.

(2) An authority’s records management plan must—
   (a) identify—
      (i) the individual who is responsible for management of the authority’s public records, and
      (ii) (if different) the individual who is responsible for ensuring compliance with the plan, and
   (b) include, in particular, provision about—
      (i) the procedures to be followed in managing the authority’s public records,
      (ii) maintaining the security of information contained in the authority’s public records, and
      (iii) the archiving and destruction or other disposal of the authority’s public records.

(3) The Keeper must issue guidance to authorities about the form and content of records management plans.

(4) Authorities must have regard to the guidance issued by the Keeper in preparing their records management plans for the Keeper’s approval.
(5) An authority must, if the Keeper so requires, have separate records management plans for public records relating to separate functions of the authority.

(6) A group of two or more authorities—

(a) must, if the Keeper so requires, or

(b) may, with the Keeper’s approval,

have a common records management plan for both or, as the case may be, all of the authorities in the group.

2 Authorities to which Part 1 applies

(1) The authorities to which this Part applies are the bodies, office-holders and other persons listed, or of a description listed, in the schedule.

(2) The Scottish Ministers may by order made by statutory instrument amend the schedule by—

(a) adding—

(i) a body, office-holder or other person, or

(ii) a description of bodies, office-holders or other persons,

(b) removing an entry listed in it, or

(c) modifying an entry listed in it.

(3) An order under subsection (2)(a) may add a body, office-holder or other person, or a description of bodies, office-holders or other persons, only if the body, office-holder or person, or (as the case may be) each of the bodies, office-holders or persons within the description, is—

(a) a part of the Scottish Administration,

(b) a Scottish public authority with mixed functions or no reserved functions (within the meaning of the Scotland Act 1998 (c.46)), or

(c) a publicly owned company.

(4) In subsection (3)(c), “publicly owned company” means a company that is wholly owned by—

(a) the Scottish Ministers, or

(b) another authority.

(5) For that purpose, a company is wholly owned—

(a) by the Scottish Ministers if it has no members other than—

(i) the Scottish Ministers or other companies that are wholly owned by the Scottish Ministers, or

(ii) persons acting on behalf of the Scottish Ministers or of such other companies,

(b) by another authority if it has no members other than—

(i) the authority or other companies that are wholly owned by the authority, or

(ii) persons acting on behalf of the authority or of such other companies.

(6) In this section, “company” includes any body corporate.
(7) An order under subsection (2) may—
   (a) include consequential, supplementary, incidental, transitional, transitory or saving
       provision,
   (b) modify any enactment.

(8) An order under subsection (2) is not to be made unless a draft of the statutory instrument
    containing the order has been laid before and approved by resolution of the Scottish
    Parliament.

3 Meaning of “public records”

(1) In this Act, “public records”, in relation to an authority, means—
   (a) records created by or on behalf of the authority in carrying out its functions,
   (b) records created by or on behalf of a contractor in carrying out the authority’s
       functions,
   (c) records created by any other person that have come into the possession of the
       authority or a contractor in carrying out the authority’s functions.

(2) In subsection (1) “contractor”, in relation to an authority, means a person to whom
    functions of the authority are delegated (whether under a contract or otherwise) by the
    authority.

4 Approval of plans

(1) An authority must submit its proposed records management plan to the Keeper for
    approval by such date as the Keeper may determine.

(2) The proposed plan is to be submitted in such form and manner as the Keeper may
    determine.

(3) On receiving the proposed plan, the Keeper must—
    (a) approve it, or
    (b) if the Keeper considers that it does not set out proper arrangements for the
        management of the authority’s public records, reject it.

(4) What constitutes “proper arrangements” in any case is for the Keeper to determine.

(5) In deciding whether to approve or reject the proposed plan, the Keeper must have regard to—
    (a) the guidance issued by the Keeper under section 1(3), and
    (b) the model records management plan published under section 8.

(6) If the Keeper rejects the proposed plan—
    (a) the Keeper—
        (i) must state reasons for the rejection, and
        (ii) may propose modifications to the proposed plan, and
    (b) the authority must submit a revised plan to the Keeper for approval by such date as
        the Keeper may determine.

(7) Subsections (2) to (6) apply to a revised plan submitted under subsection (6)(b) as they
    apply to a proposed records management plan submitted under subsection (1).
(8) The Keeper may make different determinations under this section for different authorities or different descriptions of authorities.

5 **Review of plans**

(1) An authority must—

(a) keep its records management plan under review, and

(b) if the Keeper so requires (whether at the time of approval of the plan or otherwise), carry out a review of the plan by such date (the “review date”) as the Keeper may determine.

(2) After carrying out a review of its plan in accordance with subsection (1)(b), the authority must, by the review date, either—

(a) revise its plan and submit the revised plan to the Keeper for approval, or

(b) if the authority decides not to revise its plan, resubmit its current plan to the Keeper for approval.

(3) An authority may at any time revise its records management plan and submit the revised plan to the Keeper for approval.

(4) Subsections (2) to (8) of section 4 apply, as they apply to a proposed records management plan submitted for approval under that section, to—

(a) a revised records management plan submitted to the Keeper for approval under subsection (2)(a) or (3) of this section, and

(b) a records management plan resubmitted to the Keeper for approval under subsection (2)(b) of this section.

(5) The Keeper may make different determinations under this section for different authorities or different descriptions of authorities.

6 **Compliance reviews**

(1) The Keeper may carry out a review (a “compliance review”) of whether an authority is complying with its records management plan.

(2) An authority must provide the Keeper with such assistance as the Keeper may require for the purpose of carrying out a compliance review in relation to the authority.

(3) Following a compliance review, the Keeper may—

(a) make recommendations to the authority about how it complies with its records management plan, and

(b) require the authority to carry out a review of its plan by such date as the Keeper may determine.

(4) Section 5(2) applies to a review of a plan carried out under subsection (3)(b) of this section as it applies to a review of a plan carried out under section 5, but as if the reference to the review date were a reference to the date determined under subsection (3)(b) of this section.

(5) Subsection (3) does not affect the Keeper’s powers under section 7.

(6) The Keeper may carry out a compliance review in relation to—

(a) a particular authority, or
(b) a group of authorities.

7 Warning notices

(1) This section applies where the Keeper considers that an authority—

(a) has failed or is failing to comply with its records management plan, or

(b) otherwise has failed or is failing to comply with any duty imposed on the

authority by or under this Part.

(2) The Keeper may issue to the authority a notice (a “warning notice”)—

(a) specifying the details of the alleged failure, and

(b) requiring the authority to take specified action by a specified date.

(3) In subsection (2)(b), “specified” means specified in the warning notice.

(4) If the authority fails to comply with any of the requirements of the warning notice, the

Keeper may take such steps as the Keeper considers appropriate to publicise the failure.

8 Model records management plan

(1) The Keeper must prepare and publish a model records management plan.

(2) Authorities must, in preparing and revising their records management plans for the

Keeper’s approval, have regard to the model records management plan published under

this section.

(3) The Keeper must keep the model records management plan under review and may

revise it and publish the revised model plan.

(4) References in this Part to the model records management plan include references to a

revised model records management plan.

9 Guidance

(1) The Keeper may issue guidance to authorities about their duties under this Part.

(2) Authorities must have regard to any guidance issued by the Keeper under subsection (1).

10 No right of action for failures to comply

This Part does not confer any right of action in civil proceedings in respect of any failure

by an authority—

(a) to comply with its records management plan, or

(b) otherwise to comply with any duty imposed on the authority by or under this Part.

11 Annual report

(1) The Keeper must, after the end of each financial year—

(a) prepare a report on the carrying out of the Keeper’s functions under this Part

during the year, and

(b) submit the report to the Scottish Ministers.

(2) The report must—
Public Records (Scotland) Bill
Part 1—Records management plans

(a) be prepared in such form as the Scottish Ministers may direct,
(b) contain the information specified in subsection (3) and such other information as the Scottish Ministers may direct, and
(c) be submitted by such date as the Scottish Ministers may direct.

(3) The information referred to in subsection (2)(b) is—

(a) information about records management plans and revised records management plans approved by the Keeper during the year,
(b) information about any compliance reviews carried out by the Keeper during the year,
(c) details of any warning notices issued by the Keeper during the year,
(d) the names of any authorities that have failed to comply with any of the requirements of a warning notice together with details of the alleged failures.

(4) The Keeper may include in the report such other information as the Keeper considers appropriate.

(5) The Scottish Ministers must lay the report before the Scottish Parliament.

(6) The Keeper must, as soon as practicable after the report has been laid before the Parliament, publish the report in such manner as the Keeper considers appropriate.

12 Interpretation of Part 1

(1) In this Part—

“authority” means an authority to which this Part applies (see section 2),
“compliance review” means a review carried out under section 6,
“the Keeper” means the Keeper of the Records of Scotland,
“management”, in relation to public records, includes keeping, storage, securing, archiving, preservation, destruction or other disposal (and “manage” and other related expressions are to be construed accordingly),
“public records”, in relation to an authority, has the meaning given by section 3(1),
“record” means anything in which information is recorded in any form,
“records management plan”, in relation to an authority, means the plan referred to in section 1(1),
“warning notice” means a notice issued under section 7.

(2) Except where the context requires otherwise, references in this Part to an authority’s records management plan include references to the plan as revised from time to time.

13 Repeals

The following are repealed—

(a) section 53(1) to (3) of the Local Government etc. (Scotland) Act 1994 (c.39) (preservation and management of records of local authorities),
(b) section 30(1)(b) to (d) of the Environment Act 1995 (c.25) (preservation and management of records of SEPA),
Part 2—Court records

14 Court records

(1) The Public Records (Scotland) Act 1937 (c.43) is amended as follows.

(2) In section 1 (High Court and Court of Session records), after subsection (2) add—

“(3) Before making an Act of Adjournal or an Act of Sederunt under subsection (1), the High Court of Justiciary or, as the case may be, the Court of Session must consult the Keeper.”.

(3) In section 2 (sheriff court records)—

(a) for subsection (1) substitute—

“(1) A sheriff principal may, with the agreement of the Keeper, transmit any of the sheriff court records of the sheriff principal’s sheriffdom to the Keeper.”,

(b) in subsection (3), for “care and preservation”, in each place it appears, substitute “management”, and

(c) after subsection (4), add—

“(5) In subsection (3) of this section, “management”, in relation to sheriff court records, includes keeping, storage, securing, archiving, preservation, destruction or other disposal.”.

(4) In section 2A (JP court records)—

(a) for subsection (1) substitute—

“(1) A sheriff principal may, with the agreement of the Keeper, transmit any of the JP court records of the sheriff principal’s sheriffdom to the Keeper.”,

(b) subsection (2) is repealed,

(c) in subsection (4), for “care and preservation” in each place it appears, substitute “management”, and

(d) after subsection (4), add—

“(5) In subsection (4), “management”, in relation to JP court records, includes keeping, storage, securing, archiving, preservation, destruction or other disposal.”.
PART 3
GENERAL

15 Commencement
(1) Parts 1 and 2 come into force on such day as the Scottish Ministers may appoint by order made by statutory instrument.

(2) This Part comes into force at the beginning of the day following the day on which the Bill for this Act receives Royal Assent.

(3) An order under subsection (1) may include transitional, transitory or saving provision.

16 Short title
This Act may be cited as the Public Records (Scotland) Act 2010.
SCHEDULE
(introduced by section 2(1))

AUTHORITIES TO WHICH PART 1 APPLIES

Parliament

Scottish Parliament
Scottish Parliamentary Corporate Body

Scottish Administration

Scottish Ministers
Lord Advocate

Accountant in Bankruptcy
Chief Dental Officer of the Scottish Administration
Chief Medical Officer of the Scottish Administration

Drinking Water Quality Regulator for Scotland
Her Majesty’s Chief Inspector of Constabulary and Her Majesty’s Inspectors of Constabulary (appointed under section 33 of the Police (Scotland) Act 1967 (c.77))

Her Majesty’s Chief Inspector of Fire and Rescue Authorities, Her Majesty’s Inspectors of Fire and Rescue Authorities and Assistant Inspectors of Fire and Rescue Authorities (appointed under section 43 of the Fire (Scotland) Act 2005 (asp 5))

Her Majesty’s Chief Inspector of Prisons for Scotland

Her Majesty’s Inspector of Anatomy for Scotland

Her Majesty’s inspectors of schools (that is to say, the inspectors of schools appointed by Her Majesty on the recommendation of the Scottish Ministers under the Education (Scotland) Act 1980 (c.44))

Keeper of the Records of Scotland

Keeper of the Registers of Scotland

Office of the Scottish Charity Regulator

Procurators fiscal
Queen’s and Lord Treasurer’s Remembrancer
Queen’s Printer for Scotland

Registrar General of Births, Deaths and Marriages for Scotland

Scottish Court Service
Scottish Housing Regulator

Others

Accounts Commission for Scotland

Additional Support Needs Tribunals for Scotland

Architecture and Design Scotland
Audit Scotland
Auditor General for Scotland
Board of Trustees for the National Galleries of Scotland
Board of Trustees of the National Museums of Scotland
Board of Trustees of the Royal Botanic Garden, Edinburgh
Bòrd na Gàidhlig
Caledonian Maritime Assets Ltd (registered number SC001854)
Chief constables of police forces in Scotland
Children’s Hearings Scotland
Children’s Panel
Commission for Ethical Standards in Public Life in Scotland
Commissioner for Children and Young People in Scotland
Common Services Agency for the Scottish Health Service
Court of the Lord Lyon
Court of Session
Creative Scotland
Crofting Commission
David MacBrayne Ltd (registered number SC015304)
General Teaching Council for Scotland
Health Boards (constituted under section 2(1)(a) of the National Health Service (Scotland) Act 1978 (c.29))
Healthcare Improvement Scotland
Her Majesty’s Chief Inspector of Prosecution in Scotland
High Court of Justiciary
Highlands and Islands Airports Ltd (registered number SC097647)
Highlands and Islands Enterprise
Joint boards (established under section 62A(1) or 62B(1) of the Local Government (Scotland) Act 1973 (c.65))
Joint police boards (constituted by virtue of section 19(2)(b) of the Police (Scotland) Act 1967 (c.77))
Judicial Appointments Board for Scotland
Justice of the peace courts
Justices of the peace advisory committees
Lands Tribunal for Scotland
Learning and Teaching Scotland
Licensing Boards (continued in existence or established under section 5 of the Licensing (Scotland) Act 2005 (asp 16))
Local authorities
Local Government Boundary Commission for Scotland
Mental Health Tribunal for Scotland
Mental Welfare Commission for Scotland
Mobility and Access Committee for Scotland
National Convener of Children’s Hearings Scotland
National Park authorities (established by virtue of designation orders under section 6 of the National Parks (Scotland) Act 2000 (asp 10))
Parole Board for Scotland
Police Advisory Board for Scotland
Police Complaints Commissioner for Scotland
Principal Reporter
Private rented housing panel
Public Appointments Commissioner for Scotland (appointed under section 1(4) of the Scottish Parliamentary Commissions and Commissioners etc. Act 2010 (asp 11))
Public Standards Commissioner for Scotland (appointed under section 1(3) of the Scottish Parliamentary Commissions and Commissioners etc. Act 2010 (asp 11))
Public Transport Users’ Committee for Scotland
Quality Meat Scotland
Risk Management Authority
Royal Commission on the Ancient and Historical Monuments of Scotland
Safeguarders Panels (that is to say, panels established under section 30(1) of the Children’s Hearings (Scotland) Act 2010 (asp 00))
Scottish Advisory Committee on Distinction Awards
Scottish Agricultural Wages Board
Scottish Charity Appeals Panel
Scottish Children’s Reporter Administration
Scottish Commission for Human Rights
Scottish Commission for Public Audit
Scottish Crime and Drug Enforcement Agency
Scottish Criminal Cases Review Commission
Scottish Enterprise
Scottish Environment Protection Agency
Scottish Further and Higher Education Funding Council
Scottish Futures Trust Ltd (registered number SC348382)
Scottish Health Council
Scottish Information Commissioner
Scottish Land Court
Public Records (Scotland) Bill
Schedule—Authorities to which Part 1 applies

Scottish Law Commission
Scottish Legal Aid Board
Scottish Legal Complaints Commission
Scottish Local Authorities Remuneration Committee
Scottish Natural Heritage
Scottish Police Services Authority
Scottish Public Services Ombudsman
Scottish Qualifications Authority
Scottish Road Works Commissioner
Scottish Social Services Council
Scottish Sports Council
Scottish Water
Sheriff courts
Skills Development Scotland Co. Ltd (registered number SC202659)
Social Care and Social Work Improvement Scotland
Special Health Boards (constituted under section 2(1)(b) of the National Health Service (Scotland) Act 1978 (c.29))
Standards Commission for Scotland
Transport Partnerships
Trustees of the National Library of Scotland
Visiting committees (appointed under section 19(3) of the Prisons (Scotland) Act 1989 (c.45) or constituted by rules made under section 39 (as read with section 8(1)) of that Act)
VisitScotland
Water Industry Commission for Scotland
Public Records (Scotland) Bill
[AS INTRODUCED]

An Act of the Scottish Parliament to make provision about the management of records by certain authorities; to amend the Public Records (Scotland) Act 1937 (c.43) in relation to court records; and for connected purposes.

Introduced by: Fiona Hyslop
On: 7 October 2010
Supported by: Bruce Crawford
Bill type: Executive Bill
PUBLIC RECORDS (SCOTLAND) BILL

EXPLANATORY NOTES

(CONTENTS)

As required under Rule 9.3 of the Parliament’s Standing Orders, the following documents are published to accompany the Public Records (Scotland) Bill introduced in the Scottish Parliament on 7 October 2010:

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

A Policy Memorandum is printed separately as SP Bill 56–PM.
INTRODUCTION

1. These Explanatory Notes have been prepared by the Scottish Government 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.

2. 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.

SUMMARY OF THE BILL

3. The Bill is in three parts:

- Part 1 – Records Management Plans
- Part 2 – Court Records
- Part 3 – General

PART 1 – RECORDS MANAGEMENT PLANS

4. Part 1 of the Bill imposes duties on certain public authorities, which are listed in the schedule to the Bill, to produce, implement and review records management plans. A plan must set out the arrangements for the management of records created or held by the authority and records created or held by contractors who carry out any functions of the authority. Each plan must be approved by the Keeper of the Records of Scotland (the Keeper). The Keeper must issue guidance on the form and content of plans and must prepare a model plan. Authorities must have regard to the model plan and the guidance when preparing their own plans.

5. The Bill gives the Keeper the power to review whether authorities are complying with their plans. The Keeper may issue warning notices to authorities who are failing to meet their obligations under the Bill. If an authority fails to comply with a warning notice, the Keeper may publicise the failure. The Keeper must also produce an annual report in relation to the Keeper’s functions under the Bill, including details of any authority which has failed to comply with a warning notice and details of the failure.

Section 1 – Records management plans

6. Subsection (1) requires certain authorities to produce a records management plan in relation to their public records and to submit this to the Keeper for approval. Once the Keeper has approved a plan, the authority must ensure its records are managed in accordance with the plan. Section 2 and the schedule define the public authorities to whom the duty applies. Section 3 defines public records. Section 4 deals with the submission and approval process for plans. Section 12 contains definitions, including the meaning of “management” of public records.
7. Subsection (2) sets basic requirements about what a records management plan must contain. The Keeper must also issue guidance about the form and content of plans and authorities must have regard to that guidance (subsections (3) and (4)).

8. Subsection (5) allows the Keeper to require an authority to produce more than one plan. This could be used to require authorities, such as the Scottish Ministers, who exercise a large number of diverse functions to have different plans in relation to different functions.

9. Subsection (6) allows a group of authorities to have a single common plan where the Keeper requires or agrees that this should happen. This could be used to allow groups of authorities of the same description (e.g. procurators fiscal) or groups of different authorities which exercise related functions to have a common plan.

Section 2 – Authorities to which Part 1 applies

10. Subsection (1) defines the authorities that must comply with the duties in Part 1 of the Bill. The authorities are listed in the schedule. Some bodies are described rather than named individually, such as local authorities, Chief Constables of police forces and National Park authorities.

11. Subsection (2) allows the Scottish Ministers to add or remove authorities from the list in the schedule by order. Subsections (3) to (5) define the types of authorities which can be added to the list. The reference in subsection (3)(b) to an authority with mixed functions or no reserved functions is to be read in accordance with section 126 and paragraph 1 of Part III of Schedule 5 to the Scotland Act 1998. Orders under subsection (2) will be subject to affirmative procedure (see subsection (8)).

12. Subsection (7) allows orders amending the schedule to make consequential and other modifications to other legislation. If a new authority were to be added to the schedule, this power might be used to make consequential changes to any existing general records management duties which already applied to the authority.

Section 3 – Meaning of “public records”

13. This section defines “public records” for the purpose of Part 1 of the Bill. Public records are the records which must be covered by the records management plan for an authority (see section 1).

14. Subsection (1)(b) provides that records which are created by contractors in carrying out functions of an authority are public records of the authority. This means that the records management plan for the authority must set out the arrangements for managing its contractors’ records as well as records created by the authority. “Contractor” is defined in subsection (2). The definition covers persons who carry out functions on behalf of an authority. It does not cover persons who provide goods or services (such as supplying stationery) to an authority but do not deliver functions on its behalf.
15. Subsection (1)(c) provides that records which come into the possession of authorities or contractors in carrying out the authority’s functions are also public records. Examples might include correspondence, reports, evidence or statistics which relate to the functions. The authority must ensure that these records are managed in accordance with its records management plan. This subsection also covers historical records of a predecessor authority (e.g. a former local authority’s archive).

Section 4 – Approval of plans

16. This section sets out the procedures for obtaining the Keeper’s approval for plans. The procedures apply to an authority’s initial submission of a records management plan and to the submission of any revised plans.

17. Subsection (1) obliges public authorities to submit a proposed records management plan by a date set by the Keeper. Subsection (2) allows the Keeper to set requirements as to the form and manner in which a plan must be submitted. The Keeper may set different dates and different requirements for different authorities (subsection (8)).

18. The Keeper must approve a proposed plan or reject if it does not set out “proper arrangements” for managing the authority’s records (subsection (3)). “Proper arrangements” may vary according to the authority concerned and it is for the Keeper to decide if the test is met in each case (subsections (4) and (8)). When deciding whether to approve or reject a plan, subsection (5) also requires the Keeper to have regard to the model records management plan produced under section 8 and to the guidance issued under section 1(3). Subsection (6) makes provision about what is to happen where the Keeper rejects a proposed plan.

Section 5 – Review of plans

19. This section requires authorities to keep their plans under review and to review them when required to do so by the Keeper under subsection (1)(b). Subsection (5) allows the Keeper to set different review dates for different authorities. This could be used to allow the Keeper to consider revised plans on a phased basis.

20. The Keeper may also require an authority to review its plan following a compliance review under section 6.

21. Where the Keeper requires an authority to review its plan, subsection (2) requires the authority to submit any revised plan to the Keeper for approval in accordance with section 4. If an authority decides that it does not need to make any changes to its plan as a result of the review the plan must still be submitted for re-approval by the Keeper in accordance with section 4.

22. Subsection (3) enables authorities to revise their plans and submit revised plans to the Keeper at any time.
Section 6 – Compliance reviews

23. Subsection (1) allows the Keeper to undertake a review of whether an authority is complying with its records management plan. This could be used where the Keeper becomes aware of a possible failure by a particular authority to comply. Alternatively the Keeper may decide to undertake a general review of compliance by a group of authorities (see subsection (6)).

24. Subsection (2) requires authorities to assist the Keeper in carrying out compliance reviews if requested to do so. This might include, for example, providing information or documents.

25. After carrying out a compliance review, the Keeper may make recommendations to the authority and may require the authority to review its plan under section 5 (subsection (3)).

Section 7 – Warning notices

26. This section allows the Keeper to issue a warning notice to an authority which is failing in its obligations under Part 1 of the Bill. A warning notice could be issued in relation to a failure to prepare a records management plan, a failure to comply with a plan, a failure to assist in a review or any other failure under the Bill. Subsection (2) sets out the information which must be included in a warning notice.

27. Where an authority fails to comply with the warning notice, subsection (4) allows the Keeper to publicise the failure.

Section 8 – Model records management plan

28. This section obliges the Keeper to produce and publish a model records management plan and keep the model plan under review (subsections (1) and (3)). Authorities must have regard to the model plan when preparing and revising their own plans (see subsection (2)).

Section 9 - Guidance

29. This section allows the Keeper to provide further guidance to authorities on their obligations under Part 1 of the Bill and requires authorities to have regard to such guidance. Such guidance would be in addition to the guidance about the form and content of records management plans which the Keeper is obliged to issue under section 1(3).

Section 10 – No right of action for failures to comply

30. This section excludes any right of action in civil proceedings where an authority is in breach of Part 1 of the Bill. The Keeper can issue warning notices in respect of failures to comply with the Bill and can publicise any failure to comply with a warning notice under section 7.
Section 11 – Annual report

31. This section requires the Keeper to prepare an annual report and submit it to Scottish Ministers after the end of each financial year. “Financial year” is defined in schedule 1 to the Interpretation and Legislative Reform (Scotland) Act 2010 as a year ending with 31 March.

32. Subsections (2) to (4) specify the information which the report must contain. Subsection (2)(a) and (c) allows the Scottish Ministers to set the form and submission date of the report.

33. Once the Scottish Ministers have laid the report before the Parliament under subsection (5) the Keeper must publish it (subsection (6)).

Section 12 – Interpretation of Part 1

34. This section defines the key terms used in Part 1 of the Bill.

Section 13 - Repeals

35. This section repeals certain existing duties which require local authorities, SEPA, National Park authorities and Scottish Water to make arrangements for the preservation and management of their records. The repeals are consequential on the introduction of the duty to prepare and comply with an approved records management plan under section 1 of the Bill.

PART 2 – COURT RECORDS

36. Part 2 of the Bill consists of section 14 which amends sections 1, 2 and 2A of the Public Records (Scotland) Act 1937 (c.43) (“the 1937 Act”). These sections deal with the management of court records and the arrangements for transferring these records to the Keeper.

Section 14 – Court records

37. Subsection (2) inserts a new subsection (3) into section 1 of the 1937 Act. Section 1 of that Act deals with the records of the High Court of Justiciary and the Court of Session. The records of these courts can be transmitted to the Keeper in accordance with Act of Adjournal or Act of Sederunt. The amendment places a new obligation on the High Court of Justiciary and the Court of Session 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.

38. Subsection (3) amends section 2 of the 1937 Act, which deals with sheriff court records. Subsection (4) amends section 2A of the 1937 Act which deals with Justice of the Peace (JP) court records. Sections 2 and 2A operate in the same way and the effect of the amendments is the same in each case.

39. Subsections (3)(a) and (4)(a) and (b) remove the requirement for an order to be made before sheriff court or JP court records can be transmitted to the Keeper and remove the limit which prevents the transmission of sheriff court records under 25 years old and JP court records under 10 years old. These provisions are replaced with a power for the sheriff principal to transmit records where the Keeper agrees to the transmission.
40. Subsections (3)(b) and (c) and (4)(c) and (d) replace the existing duty on sheriffs principal to care for and preserve sheriff court and JP court records with a duty to manage those records. “Management” is defined in inserted sections 2(5) and 2A(5). The definition is consistent with that in section 12 of the Bill.

PART 3 – GENERAL

Section 15 – Commencement

41. This section makes provision for commencement. Subsection (1) enables the Scottish Ministers to commence Parts 1 and 2 on a date or dates appointed by order. Part 3 of the Bill (sections 15 and 16) comes into force on the day after Royal Assent.

Section 16 – Short title

42. This section provides for the short title of the Bill.

Schedule

43. The schedule lists the authorities which must comply with the records management duties under Part 1 of the Bill. The list of authorities can be amended by order under section 2.

FINANCIAL MEMORANDUM

INTRODUCTION

44. This memorandum sets out the financial implications of the Public Records (Scotland) Bill introduced in the Scottish Parliament on 7 October 2010. It has been prepared by the Scottish Government to satisfy Rule 9.3.2 of the Parliament’s Standing Orders. This Financial Memorandum has been prepared in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Parliament.

BACKGROUND

45. The Bill will place an obligation on named public authorities to prepare, submit and implement a Records Management Plan (RMP) approved by the Keeper of the Records of Scotland (the Keeper). The Keeper will publish a model plan as part of a suite of guidance and best practice advice to authorities. The Bill also gives the Keeper authority to scrutinise RMPs and their implementation by authorities. The Keeper will report to Ministers annually on his activities under the legislation and the report, which will be published on the National Archives of Scotland (NAS) website, will name public authorities that fail to meet their obligations and give details of the failures.

46. The Public Records (Scotland) Bill will make minor amendments to the Public Records (Scotland) Act 1937 in relation to records of the Scottish courts.
GENERAL COMMENTS ON FINANCIAL IMPLICATIONS

47. This Bill will make no new demands on the Scottish Consolidated Fund, so there is no net cost to the Scottish Government. The bulk of the cost of implementing the Bill will be borne by the Keeper and will be absorbed within planned resources. It is not possible to identify separately the exact cost to each of the named public authorities as this will depend on the quality and effectiveness of their current records management regimes. However, having adequate staff provision is critical to the success of any records management system and costs associated with this provision are detailed below. For similar reasons it has not been possible to predict costs to bodies in the private or voluntary sector where a named public authority requires them to manage records created under contract in accordance with the records management plan for that authority. Discussions with a representative sample of private and voluntary bodies, as part of the Business Regulatory Impact Assessment (BRIA) and the broader consultation process, established that for those organisations which already have records management provision, widely recognised in the sector as being critical to good business practice, there will be no significant cost (Appendix 1).

48. The ultimate sanction against those who consistently fail to meet their obligations is to be ‘named and shamed’ in the Keeper’s annual report to Scottish Ministers or elsewhere. There will be no additional cost to the Scottish Administration under this sanction mechanism.

COSTS ON THE SCOTTISH ADMINISTRATION

49. The Public Records (Scotland) Bill places new obligations on named public authorities in relation to their record keeping responsibilities. These authorities include the Scottish Ministers and other office-holders in the Scottish Administration but the Bill does not burden Scottish Ministers with responsibility for ensuring compliance by other authorities or with any direct regulatory role. The Bill confers implementation, regulation and advisory functions on the Keeper.

Costs of complying with records management planning duties

50. The cost of complying with the new records management duties for the Scottish Ministers and those named office-holders in the Scottish Administration that have already designated responsibility for their records management will be minimal. Costs will largely consist of administrative time to compile RMPs and submit them to the Keeper for his approval, to ensure that records management provisions are kept under review and to assist with any compliance reviews carried out by the Keeper. For those authorities with existing records management provision, it will be possible to prepare a credible RMP on the basis of existing documentation and policy statements. The cost to those authorities of complying under these circumstances will be restricted to administrative time and resources. It is likely that such costs will be met from within existing budgets.

51. Office-holders in the Scottish Administration that have no designated records management staff and/or procedures in place for proper management of their records would have to do more in order to produce a RMP for approval by the Keeper and to identify an individual who is responsible for management of the authority’s public records and (if different) the individual who is responsible for ensuring compliance with the plan. The costs associated with engaging
These documents relate to the Public Records (Scotland) Bill (SP Bill 56) as introduced in the Scottish Parliament on 7 October 2010

staff and making proper provision to cover such changes are detailed below at “Authorities with no current records manager or archivist provision” (paragraphs 69 and 70).

Self-regulation

52. The Keeper will issue separate guidance about the form and content of RMPs which will include proposals for self-regulation. Internal reporting as a method of self-regulation will permit Scottish Ministers and other office-holders in the Scottish Administration to maintain awareness of their records management responsibilities and ensure compliance with the provisions of the Bill. Records managers who were consulted confirm that they are already required to report regularly to senior managers on key performance indicators governing their obligations under the Freedom of Information (Scotland) Act 2002 (FOISA). There are no additional cost implications under this model.

Costs to the Keeper of carrying out implementation, regulation, advisory and compliance review functions

53. The Bill confers implementation, regulation and advisory functions on the Keeper, who is an office-holder in the Scottish Administration. The Keeper will carry out these functions by allocating staff, from within the present complement of the NAS, to manage the implementation and regulation of the new provisions. This will include developing and publicising the necessary guidance, developing a model RMP for use by public authorities and advising named authorities about their obligations. NAS staff will also assess RMPs submitted to the Keeper by authorities for approval and develop and manage the scrutiny function. The estimated cost to the Keeper is approximately £60,000 per annum.

54. This figure represents the equivalent of two B2 curatorial officers inclusive of salaries, overheads and other peripheral costs to be redeployed from the Keeper’s existing staff complement. Current pay scales for B2 officers are £25,165 - £30,267. This cost will be met from within the Keeper’s existing resources following the NAS strategic review which identified some areas of savings which it is intended to apply to meeting the costs of the additional responsibilities proposed by the Bill. Consequently there will be no additional new costs on NAS, but the scope for NAS to make administrative cost savings generally will be reduced by taking on the new tasks set out above.

55. The Bill gives the Keeper powers to scrutinise and approve RMPs and to carry out a review (a “compliance review”) of whether an authority is complying with its RMP. An authority must provide the Keeper with such assistance as the Keeper may require, and following a compliance review, the Keeper may make recommendations to the authority about how it complies and require the authority to carry out a review of its plans. Compliance reviews will not be used until after an authority has submitted its RMP and a suitable period of time has elapsed to permit the authority to implement its plan. The Keeper will take action to assess compliance only if the Keeper receives complaints about failures to manage records properly or if the Keeper decides to review compliance across a particular sector.

56. The cost to the Keeper of the scrutiny function will include routine administration, assessment of evidence submitted by an authority, conducting face-to-face interviews, reporting on findings and issuing practice recommendations. Where a site visit is necessary there will also be travel and subsistence costs. These costs will all be met from the Keeper’s existing budget.
Based on the costs of practice assessments by the Office of the Scottish Information Commissioner (the OSIC), which assesses public authorities against their access obligations under FOISA, this would be approximately £4,000-£5,000 per compliance review. These costs are included in the figure of £60,000 per annum given above.

COSTS ON LOCAL AUTHORITIES

Costs of preparing and implementing RMPs

57. Opinion was canvassed from a firm of experienced private sector information and records management consultants, which has worked closely with a number of Scottish public authorities. Their view is that almost all local authorities in Scotland operate some form of records management and/or archive service, but that the standard of provision varies greatly. This view was supported by evidence obtained from discussions held with a representative cross section of public sector archive and records managers. (Appendix 2). It is further confirmed by the Keeper’s own experience over many years of working with Scottish local authorities and other public bodies concerning their record keeping practices.

58. The cost of meeting the new proposals for those local authorities that have already designated responsibility for their records management will be minimal. Costs will largely consist of administrative time to compile and submit RMPs to the Keeper for authorisation, ensuring that a local authority’s records management provision is up-to-date and current, and facilitating the Keeper’s scrutiny function. For an authority with such provision, a credible RMP will be sought from existing documentation and policy statements. It is likely that all of these costs can be contained within existing budgets. However this may not be the case where a local authority does not already operate a compliant records management function, or fails to meet certain standards. In such cases, some catching up will be necessary implying some additional costs. We would expect those costs to be managed from within existing budgets, but they may displace other administrative activities that command a lower priority. It will be for the local authorities themselves to make the necessary adjustments to implement records management action and prioritise their administrative functions to ensure that resources are available.

59. The costs associated with engaging staff and making proper provision to cover such changes are detailed below at “Authorities with no current records manager or archivist provision” (paragraphs 69 and 70).

Self-regulation

60. The Keeper will issue separate guidance about the form and content of RMPs which will include proposals for self-regulation. Internal reporting as a method of self-regulation will permit Scottish local authorities to maintain awareness of their records management responsibilities and ensure compliance with the provisions of the Bill. Scottish local authority records managers who were consulted confirm that they are already required to report regularly to senior managers on key performance indicators governing their obligations under FOISA. There are no additional cost implications under this model.
These documents relate to the Public Records (Scotland) Bill (SP Bill 56) as introduced in the Scottish Parliament on 7 October 2010

Costs of assisting with compliance reviews

61. The exact cost to a public authority of compliance with the proposed compliance review regime is difficult to assess, as individual public authorities calculate staff and resource costs differently. The Scottish Government anticipates that it will be similar to that experienced by authorities currently complying with the OSIC’s assessment programme. The requirement of an authority will involve responding to the Keeper’s request for information and facilitating meetings. It will be carried out in most cases by the authority’s records manager or responsible officer. It will not therefore involve a redeployment of staff time and incur only routine administrative costs.

62. Two public bodies (Transport Initiatives Edinburgh and Perth & Kinross Council) who were recently assessed under the OSIC’s practice assessment procedures, were consulted to assess their experience of meeting their obligations under the OSIC’s assessment. Both organisations considered it to be a useful and necessary function. In their experience the task was neither onerous nor costly. It required both organisations to facilitate meetings and supply information when requested, amounting to administrative time and resources only.

63. A public authority managing its records in accordance with an approved RMP will be able to readily identify and produce information and records for the purposes of inspection. Incurred costs will be minimal, consisting entirely of administrative time and resources. The OSIC’s experience of conducting practice assessments confirms that the new obligation on both the Keeper and an authority will be manageable and the additional cost burden insignificant and absorbed within existing budgets.

COSTS ON OTHER BODIES

Costs of preparing and implementing RMPs

64. The Bill will impose duties on named public authorities in addition to the Scottish Ministers and office-holders in the Scottish Administration and Scottish Local Authorities. In the opinion of the firm of information and records management consultants who were consulted, most public authorities in Scotland currently support some level of records management provision. Again the standard of provision varies greatly. This view was again supported by evidence obtained from discussions held with a cross section of public sector archive and records managers (Appendix 2). The Keeper’s experience of working with Scottish local authorities and other public bodies about their record keeping over many years further confirms this.

65. As with local authorities, a similar assessment of the cost of meeting the new proposals for those public authorities that have already designated responsibility for their records management can be made. Costs will be minimal and largely consist of administrative time to compile and submit RMPs to the Keeper for authorisation, ensuring that an authority’s records management provision is up-to-date and current, and facilitating the Keeper’s scrutiny function. For an authority with such provision it will be possible to prepare a credible RMP on the basis of existing documentation and policy statements. Again, it is likely that all these costs can be contained within existing budgets. However this may not be the case if a public body does not already operate a compliant records management function or fails to meet certain standards. In such cases, some catching up will be necessary and this will involve some additional costs. We would expect those costs to be managed from within existing budgets but they may displace
other administrative activities that command a lower priority. It will be for the bodies themselves to make the necessary adjustments to implement records management action and prioritise their administrative functions to ensure that resources are available.

66. The costs associated with engaging staff and making proper provision to cover such changes are detailed below at “Authorities with no current records manager or archivist provision” (paragraphs 69 and 70).

67. As with local authorities the exact cost of compliance with the proposed compliance review regime is difficult to assess, as individual public bodies calculate staff and resource costs differently. The Scottish Government expects that it will be similar to that experienced by authorities currently complying with the OSIC’s assessment programme. The requirement of an authority will involve responding to the Keeper’s request for information and facilitating meetings. It will be carried out in most cases by the authority’s records manager or responsible officer. It will not therefore involve a redeployment of staff time and incur only routine administrative costs.

Self-regulation

68. The Keeper will issue separate guidance about the form and content of RMPs which will include proposals for self-regulation. Internal reporting as a method of self-regulation will permit Scottish public authorities to maintain awareness of their records management responsibilities and ensure compliance with the provisions of the Bill. Public sector records managers who were consulted confirm that they are already required to report regularly to senior managers on key performance indicators governing their obligations under FOISA. There are no additional cost implications under this model.

Authorities with no current records manager or archivist provision

69. A public authority that currently has no designated staff and/or procedures in place for proper management of its records would necessarily have to do more in order to fulfil its obligations under the Bill and create a RMP that could be approved by the Keeper.

70. To comply with the provision to designate responsible officer(s) to support good records management, an authority could pursue a number of options. The costs of these are set out below. The options would be to:

- employ a records management professional to undertake the preliminary work and manage the records in the longer term. In a mature organisation there should be no need to incur additional costs in providing the necessary office essentials for the records manager such as office and desk space, PC hardware and consumables and other peripheral and utility costs. These would be met from within existing budgets (Option 1).
- bring in temporary expertise and award the long term responsibility for managing the system to a current member of staff. This could be done by employing a professional records manager on a temporary basis or by hiring a firm of private records management consultants (Option 2).
- allocate responsibility for records management to an existing member of staff considered to have the necessary business knowledge, experience and acumen to learn about modern records management concepts and principles (Option 3).
• redeploy an existing member of staff with or without administrative support, to undertake the whole process. This would be the least expensive option, but an authority without in-house expertise to redeploy would be relying on the judgement and acumen of a non-professional who, with the appropriate training and guidance, would bring the authority into compliance. Additional costs incurred include training and development. Compliance may take considerably longer to achieve under this model (Option 4).

Option 1: **Permanent records manager**

Cost: approx. £30,000 p/a (future pay movements in line with pay policy. The current salary range for a qualified records management professional is approx. £25,000-£37,000 depending on experience.)

Plus one part time administration support member of staff (A3) @ £15,792-£17,632 (to be engaged only from the implementation stage on a pro-rata basis to include future pay movements in line with pay policy)

Training Courses & CPD: £2,000 based on 8 person days training per year and membership of a professional body.

Option 2: **Temporary records manager with longer term in-house ownership**

Costs: Professional Records Manager: £37,000 p/a (The current salary range for a qualified records management professional is approx. £25,000-£37,000 depending on experience.)

Part time B3: £32,249 (pro-rata for the duration of the professional records manager contract and then full time for the long term future; pay movements in line with pay policy). Pay range at B3 starts at £32,249 rising to a maximum of £40,173.

Part time A3: £15,792-17,632 (to be engaged only from the implementation stage on a pro-rata basis; to include pay movements in line with pay policy). Pay range at A3 is £15,792-17,632

Training Courses & CPD: £2,000 p/a (as above)

Option 3: **As Option 2, but with a Records Management Consultancy to devise and implement the system**

Costs: Records Management Consultant: £67,000 - £90,000 (based on 3 month contract to assess the need, develop policies, devise classification and scheduling documentation and oversee implementation. Average consultancy costs are between £750 - £1000 per day)

Part time B3: £32,249 (pro-rata for the duration of the professional records manager contract and then full time for the long term; future pay movements in line with pay policy)
These documents relate to the Public Records (Scotland) Bill (SP Bill 56) as introduced in the Scottish Parliament on 7 October 2010

Part time A3: £15,792 - £17,632 (to be engaged only from the implantation stage on a pro-rata basis; to include future pay movements in line with pay policy)

Training Courses & CPD: £2,000 p/a (as above)

Option 4: In-house Solution

Redeployed B3 Officer on existing salary: £32,249 - £40,173
P/t A3 Officer to assist on existing salary: £15,792 – £17,632
Costs: Training and CPD - £4,000 p/a (as above)

COSTS ON PRIVATE AND VOLUNTARY BODIES CARRYING OUT FUNCTIONS ON BEHALF OF PUBLIC AUTHORITIES

71. The Bill places an obligation on authorities contracting private or voluntary bodies to deliver functions on their behalf to ensure that records relating to that function are managed as public records. At the termination of any contract the commissioning authority would be responsible for the long term preservation of any records considered to be of enduring value, or for proper auditable disposal of what is not.

72. Private or voluntary bodies will be affected by the new proposals to the extent that the records they create under contract to a public authority in providing a service must be managed as if they are public records. This means that they will be required by the public authority to comply with the requirements of the public authority’s RMP with respect to those records.

73. If the private or voluntary body has a robust records management regime there will be no additional burden. If they do not, then they may need to put a system in place, but only in relation to the records created under contract to the public authority. This may be as simple as designating a secure space within an existing office area and designating a responsible person, perhaps the office manager, to have responsibility alongside existing duties for the management of the records kept there. Or, to have the relevant administrator permissions for a designated area of the authority’s file plan in the case of electronic records.

74. From discussions with private and voluntary bodies consulted as part of the BRIA and wider consultation, it is clear that the proper and efficient storage of information and records is recognised as a necessary business function in the private and voluntary sector. Those private and voluntary bodies consulted agreed that they had the office infrastructure and staff to adequately manage their records. They regularly transfer information back to the commissioning authority for business purposes and to help satisfy FOISA enquiries received by the commissioning authority. Under these circumstances any additional costs to the contractor under the new obligations would be calculated only in redeployed staff time. All those consulted were comfortable that provided the ‘record’ can be agreed in advance with the commissioning authority, they have the staff and systems in place to meet their obligations under the Bill if enacted without incurring any significant costs.
These documents relate to the Public Records (Scotland) Bill (SP Bill 56) as introduced in the Scottish Parliament on 7 October 2010

COSTS SUMMARY

75. The Public Records (Scotland) Bill will have no impact on the Scottish Consolidated Fund.

Scottish Administration (including the Keeper)

76. There will be no new costs or savings to the Scottish Government with the implementation of the compliance review function under the new proposals.

77. Implementation, regulation and advisory functions will be vested in the Keeper. The Keeper will allocate staff and resources from within existing budgets. It is estimated that this will cost in the region of £60,000 per annum, to be absorbed within existing budgets but reducing the scope for NAS to make administration costs savings elsewhere.

78. There will be a compliance review function cost to the Keeper of approximately £4,000 - £5,000 per inspection based on the OSIC’s model. This represents the equivalent cost of two B2 curatorial officers, inclusive of salaries, overheads and other peripheral costs. This will be met from existing budgets.

Local authorities and other public authorities

79. Authorities that have already designated responsibility for their records management will incur minimal additional cost.

80. A public authority with no designated records management staff and/or procedures will have to act to reach compliance. There are different options. Costs would range from £40,000 - £61,805 per year depending on the option or permutation of options chosen. Option 3 would involve an additional one-off payment of approximately £67,000 - £90,000 based on a three month consultancy exercise.

81. The costs associated with the development and implementation of the RMP for those authorities currently without provision would be absorbed within the salary and peripheral costs of employing a records manager or designating a responsible person from within the current staff complement.

82. The upper cost limit of £61,805 would apply only in the case of an authority which currently has no staff or procedures in place for records management, and which would therefore need to put in place proper arrangements for the first time. Based on evidence available, Ministers are of the view that the number of such authorities is very low, and that less than 10 authorities will fall into this category.

83. This view is based on evidence supplied in a 2007 report commissioned by the Scottish Information Commissioner, conducted by the University of St Andrews and Caledonian Business School, after the introduction of FOISA in 2005 (The Freedom of Information (Scotland) Act 2002: New Modes of Information Management in Scottish Public Bodies?). The report showed that 96% of public bodies reported that they had introduced some degree of organisational change to support FOI work and that 85% of respondents had either introduced new systems or adapted existing information management systems. Of those 69% either introduced or adapted existing document handling or records management systems.
84. A further 2008 assessment by the Improvement Service, of Scottish local authority knowledge and information management provision (The Knowledge and Information Management Landscape in Scottish Local Government Scoping Study) found that contact information from representatives across the sector was “consistent with the view that generally local authorities employ one records manager and one archivist within an authority.” It highlighted that between May 2000 and February 2008, 15 councils advertised archivist posts in key professional publications and 17 councils advertised records managers or records officer posts, indicating that around half of all local authorities advertised for archivists and/or records managers during that period. The Improvement Service report listed over 200 other job titles that often carry information management responsibilities. The Keeper understands only one smaller local authority has no designated professional records manager/archivist (although with allocated staff responsibilities and otherwise meeting its obligations under FOISA).

85. Evidence obtained from a cross-section of Scottish public sector records managers and independent consultants, supports the view that staff were allocated records management functions across most authorities, albeit on an ad-hoc basis, and that many of the named authorities in schedule 1 to the Bill are operating with some degree of records management provision. It is Ministers’ intention to phase in the implementation of RMPs over a number of years, giving authorities time to put new arrangements in place, thus keeping any resulting costs low.

86. A further factor reducing overall cost is that smaller authorities will be able, and would be encouraged, to share records management functions with others.

87. The proposals will not have a significant impact on staffing levels across the public sector.

88. The new obligations are achievable for most public authorities under current conditions, with no significant additional cost.

89. There will be a negligible cost to public authorities when assisting the Keeper with compliance reviews. Responsible staff and systems will be in place to assist with the process and costs will therefore arise only from routine administrative tasks.

90. The compliance review function will not apply to private and voluntary bodies.

**COST BENEFITS**

91. There is a great deal of research and information supporting the case for better records management from a business perspective as well as from a public right of access perspective. There are tangible and intangible benefits to be accrued to the organisation and to the wider community. It is not possible to estimate cost savings to be accrued in hard cash terms from the benefits of the new proposals, primarily because impact will be different across individual authorities, but also because the benefits will tend not to be immediate but made over the longer term.

**Tangible benefits** are those that can be quantified and are generally articulated in terms of measurable improvements or cost savings.
TANGIBLE BENEFITS

- increased efficiency in retrieval of records
- increased efficiency in receipt and fulfilment of customer orders
- reduced storage costs associated with keeping only required records
- reduced storage costs associated with offsite storage
- reduced consumable costs associated with fewer paper-based records
- increased productivity associated with automation of information/record related tasks and use of document templates
- reduced staff costs due to efficient performance of record related tasks

Intangible benefits are non-quantifiable improvements to an organisation.

INTANGIBLE BENEFITS

- effective compliance with the 8 data protection principles
- effective compliance with freedom of information and other information-related legislation
- improved decision-making and policy formation supported by reliable information
- increased accountability by providing reliable records of actions and decisions
- improved innovation and creativity through enhanced corporate knowledge management
- efficient collaborative working
- Implementation of proper records management practice will offset future record storage costs by appropriate and auditable disposal of non-current record material either to the authority’s archive service or by destruction. The value of these benefits in cash terms will vary from authority to authority.

SUPPORT FOR IMPLEMENTATION

92. The Keeper will implement the provisions of the Bill by allocating staff from within the current NAS staff complement as detailed above (paragraphs 53 to 56).

Appendix 1

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<tr>
<th>Private and Voluntary Bodies Consulted (Face-to-Face Meetings)</th>
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These documents relate to the Public Records (Scotland) Bill (SP Bill 56) as introduced in the Scottish Parliament on 7 October 2010

Appendix 2

<table>
<thead>
<tr>
<th>Bodies consulted on Local and Public Authority records management provision (Face-to-Face Meetings)</th>
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<tbody>
<tr>
<td>1. HJBS Ltd. Information and Records Management Consultancy</td>
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<tr>
<td>2. East Lothian Council (Records Manager)</td>
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<td>3. Borders Council (Records Manager)</td>
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<td>4. Edinburgh City Council (Records Manager)</td>
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<td>5. Scottish Funding Council (Records and Information Manager)</td>
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<td>6. Archivists of Scottish Local Authorities Working Group (Secretary)</td>
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<tr>
<td>7. Office of the Scottish Information Commissioner (Head of Policy and Information)</td>
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<th>Bodies consulted on Local and Public Authority records management provision (Seminar consultation)</th>
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<tr>
<td>1. Royal Commission on the Ancient and Historical Monument of Scotland</td>
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<td>2. Historic Scotland</td>
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<td>3. Fife Constabulary</td>
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<td>4. Culture and Sport Glasgow</td>
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<td>5. North Lanarkshire Council</td>
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<td>6. Aberdeen City and Aberdeenshire Archives</td>
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<td>7. Children and Families, Edinburgh City Council</td>
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<td>8. Scottish Borders Council</td>
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<td>9. Dumfries and Galloway Libraries, Information and Archives Centre</td>
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<td>10. North Ayrshire Council</td>
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<td>11. Dundee City Council</td>
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<tr>
<td>12. Edinburgh City Council</td>
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<tr>
<td>13. East Lothian Council</td>
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<tr>
<td>14. East Ayrshire Council</td>
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<td>15. Falkirk Council</td>
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<tr>
<td>16. Dumfries &amp; Galloway Council</td>
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SCOTTISH GOVERNMENT STATEMENT ON LEGISLATIVE COMPETENCE

On 7 October 2010, the Minister for Culture and External Affairs (Fiona Hyslop MSP) made the following statement:

“In my view, the provisions of the Public Records (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”
PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE

On 5 October 2010, the Presiding Officer (Rt Hon Alex Fergusson MSP) made the following statement:

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

1. This document relates to the Public Records (Scotland) Bill introduced in the Scottish Parliament on 7 October 2010. It has been prepared by the Scottish Government to satisfy Rule 9.3.3(c) of the Parliament’s Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 56–EN.

BILL OVERVIEW

2. Part 1 of the Bill will place an obligation on named Scottish public authorities to produce and implement a Records Management Plan (RMP) to be approved by the Keeper of the Records of Scotland ("the Keeper"). The Keeper will publish a model RMP as part of a suite of guidance and best practice advice to authorities. The Bill gives the Keeper authority to carry out reviews ("compliance reviews") of the implementation of RMPs by authorities. The Keeper will be authorised to issue warning notices and to make public the names of any authorities found to be in breach of provisions.

3. Part 2 of the Bill makes minor amendments to the provisions in the Public Records (Scotland) Act 1937 ("the 1937 Act") which deal with the management of court records.

POLICY OVERVIEW

4. The Government intends that the Bill will provide a framework to achieve measurable improvements in records management across the public sector, encompassing existing guidance and best practice while seeking to avoid placing significant new burdens on public authorities. It will complement existing legislation on information governance including data protection and freedom of information. It will seek to ensure that records are retained for appropriate periods of time and not disposed of while they are still required for business purposes. Improvements to record keeping will lead to a better quality of records being retained by public authorities which should document decisions taken and the reasons behind those decisions.

5. The Bill also addresses the issue of records which are created by private and voluntary organisations which carry out functions on behalf of public authorities. This is becoming increasingly common and includes functions such as the care of looked after children and other
vulnerable people. The Bill covers these records in a way which does not impose new and unreasonable burdens on these organisations.

6. The Bill will contribute to the Scottish Government’s Purpose\(^1\) by improving public services through better management of public records and the information those records contain. It will support the National Outcome on public services\(^2\) by encouraging public authorities to develop more efficient systems for the management of records and retrieval of information thereby improving transparency and accountability.

**POLICY OBJECTIVES OF THE BILL**

**Background**

*The Public Records (Scotland) Act 1937*

7. The main legislation governing Scottish public records is the 1937 Act. This provides for certain public records to be transferred to the care and custody of the Keeper. This process is referred to as “transmission” to the Keeper. The records covered include records of the Scottish courts, records of government departments, other records which belong to Her Majesty and relate exclusively or mainly to Scotland. It is also lawful for the records of local authorities and other statutory bodies in Scotland to be transmitted.

8. The Keeper is a non-ministerial office holder in the Scottish Administration and administers the National Archives of Scotland (“the NAS”) on behalf of Scottish Ministers. The NAS ensures the preservation of a historical record of the principal policies and actions of government in Scotland.

9. The 1937 Act also requires the Keeper to care and preserve records which have been transferred to the Keeper. It allows the Keeper to dispose of records where this is permitted by regulations under section 12 of the Act. However the 1937 Act is limited in scope because it only deals with the transmission of records to the Keeper and the role of the Keeper in relation to transmitted records. It requires sheriffs principal to manage sheriff court and JP court records but it does not impose any requirements on other public authorities to manage their records in a particular way before those records are transmitted to the Keeper. Accordingly, it has little relevance for the majority of today’s public authorities.

*Freedom of Information*

10. The Freedom of Information (Scotland) Act 2002 (“the 2002 Act”) gives rights of access to information held by named Scottish public authorities with certain exemptions. It drew attention to the importance of records, as it became clear that freedom of information is only as good as the records which contain that information.

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\(^1\) To focus Government and public services on creating a more successful country, with opportunities for all of Scotland to flourish, through increasing sustainable economic growth.

\(^2\) Our public services are high quality, continually improving, efficient and responsive to local people’s needs.
The Shaw Report and the review of public records legislation


12. The Shaw Report was published in November 2007. It examined the regulatory framework and made a number of key recommendations on records, many of which focused on shortcomings in the existing legislation. It found poor record keeping throughout the looked after children sector and identified the difficulties for former residents in tracing records for purposes of identity, family or medical reasons. The Shaw Report pointed to an urgent need to take action to preserve historical records and to ensure that residents can get access to records and information about their location. It recommended a review of public records legislation with a view to renewal.

13. In February 2008, Scottish Ministers asked the Keeper to conduct a review of public records legislation based on that recommendation. Ministers agreed that the review should extend beyond the immediate field of child care and it examined other legislation affecting record keeping. Evidence was gathered from the experiences of those involved in working with records as well as those who sought access to information from them. The review examined current records management practice, existing Scottish legislation and legislation overseas. It sought a broad spectrum of opinion from individuals and representative groups working directly in the fields of social work and child care, central government policy, local authority and private residential care, the police, and the management of public inquiries. The review also covered those involved in freedom of information and data protection and professional record keepers, together with survivors of abuse and former residents of care homes.

14. The Keeper reported to Scottish Ministers in October 2009. The report found that the record keeping failures uncovered by the Shaw Report did not end with the passing of the Children (Scotland) Act in 1995. While The Looked After Children (Scotland) Regulations 2009 have made some improvements by suggesting retention periods for children’s records, they do not set out detailed requirements for how such records should be managed, nor do they address the management of organisational records about the delivery of functions in relation to looked after children in general.

15. The Keeper also found that existing public records legislation is no longer sufficient for purpose and cannot be used as the foundation for any effective overarching national solution to address either specific sectoral requirements for child care, or wider public record needs. The Keeper concluded that there was a need for new public records legislation and, like the Shaw Report, felt that its scope should extend beyond the looked after children sector. Achieving consistency of record keeping required a modern framework to better support services and address issues such as the increased inter-connectedness between public authorities and private or voluntary organisations in the provision of public services for Scottish citizens.
Overview of the Bill provisions

16. The Bill is intended to provide a framework for measurable improvements in record keeping across the public sector, encompassing existing guidance and best practice while avoiding significant new burdens on public authorities. It will complement existing legislation on information governance including data protection and freedom of information.

17. The Bill also addresses the issue of records which are created by private or voluntary organisations which carry out functions on behalf of public authorities. The Bill covers these records in a way which does not impose new and unreasonable burdens on these organisations.

18. The Bill is in three Parts. The first Part contains the main provision relating to records management, the second Part deals with minor amendments to the 1937 Act in relation to court records, and the third Part includes provisions on commencement and short title. The public authorities to which the provisions of Part 1 apply are listed in the schedule.

Records Management Plans

19. Part 1 of the Bill places an obligation on public authorities to produce and implement a RMP setting out proper arrangements for the management of its public records. The plan must be approved by the Keeper. The plan should specify policies and procedures relating to the management, security, and disposal of records and identify the individual(s) responsible for the management of the authority’s records and compliance with the plan. The Keeper can require authorities to review their plans from time to time. Reviewed plans should be submitted to the Keeper for approval whether or not the authority has found the need to revise them.

20. A group of two or more authorities may produce and submit a common plan with the Keeper’s agreement where their functions and record keeping requirements are suitably similar.

21. The Bill gives a meaning for the term “public records”. These are records created by or on behalf of an authority or a contractor, or which come into the possession of an authority or contractor, in carrying out the authority’s functions. These records must be covered by a RMP. The definition of public records only applies for the purposes of Part 1 of the Bill and in the view of Ministers does not have any effect on ownership of or access to the records.

22. Part 1 places an obligation on the Keeper to produce a model RMP for authorities to follow and also to produce guidance on the form and content of plans. This Part also gives the Keeper power to carry out a compliance review of an authority’s records management practices and to issue warning notices where it is found to be failing in its obligations. Compliance reviews will not be used until after an authority has submitted its RMP and a suitable period of time has elapsed to permit the authority to implement its plan. The Keeper will take action to assess compliance only if the Keeper receives complaints about failures to manage records properly or if the Keeper decides to review compliance across a particular sector. The Keeper must submit an annual report to Scottish Ministers giving details of the Keeper’s activities under the Bill, including the names of any authorities that have failed to comply with a warning notice and details of the failures. Scottish Ministers must lay this report before the Scottish Parliament and the Keeper must then publish the report.
23. This Part also includes consequential repeals of existing provisions relating to the preservation and management of records of local authorities, SEPA, National Park authorities and Scottish Water (under the Local Government etc. (Scotland) Act 1994 (c.39) ("the 1994 Act"), the Environment Act 1995 (c.25), the National Parks (Scotland) Act 2000 (asp 10) and the Water Industry (Scotland) Act 2002 (asp 3)).

Court records

24. Part 2 of the Bill comprises minor amendments to the 1937 Act. These amendments simplify the procedures for transmitting Sheriff and Justice of the Peace Court records to the Keeper and give the Keeper a more active role in arranging transmission of records of the High Court of Justiciary and the Court of Session.

ALTERNATIVE APPROACHES

Use of Existing Guidance and Best Practice

25. Records management in the public sector has increased significantly in recent years, and has attained a much higher profile, particularly following the introduction of freedom of information under the 2002 Act. A great deal of guidance on the principles and practical application of records management already exists and a pool of best practice has built up. However there is no national records management standard in Scotland and no consistency in how the existing guidance is applied.

26. This approach relies on encouragement and exhortation alone to influence public authorities to make use of existing guidance and best practice in a consistent manner. Attempts to do this have been made in the past and while some positive improvements have been made they have been patchy and have tended to fall away over time. This is often because it is not possible to raise the profile of records management sufficiently with senior management. This means adequate resources are not allocated to records management and it does not stay high on the agenda for long. 13 of the 87 respondents to the public consultation thought it could be possible to make improvements without legislation, although only 4 of those considered legislation to be inappropriate.

27. Use of existing guidance and best practice is not without cost if it is to be done properly. In order to achieve the same level of improvements as the legislative option similar resources will be required. Without legislative backing it is easier for authorities to avoid incurring those costs and divert resources elsewhere.

Amending Freedom of Information Legislation

28. Assessing the success of this approach would also prove more costly to the Scottish Government. Without the structure of approved records management plans and timeframes for implementation it would be more difficult and time consuming to monitor success and would require constant monitoring and liaison.

29. This approach would entail making amendments to the 2002 Act by making the section 61 code of practice mandatory for public authorities to use. It is not the intention of the Scottish
Government or the Scottish Information Commissioner that the code of practice be made mandatory. The 2002 Act remains focused on access to information.

**Alternative methods of enforcement**

30. The Bill is intended to be light touch and any enforcement must be proportionate. Use of fines would not be appropriate in the current financial climate, and would divert funds away from service provision.

**CONSULTATION**

31. The public consultation on proposals for new public records legislation ran from 22 June until 4 August 2010. The consultation paper gave the background to the proposals and the proposed 6 main elements (the role and responsibilities of the Keeper, a definition of public records, record keeping requirements, the existing duty on local authorities to make “proper arrangements” for their records under the 1994 Act, enforcement, and records of the Scottish courts). 22 questions were asked in relation to these elements. A draft list of public authorities which would be covered was also included. The consultation paper is available on the Scottish Government website at [www.scotland.gov.uk/Publications/2010/06/22154359/0](http://www.scotland.gov.uk/Publications/2010/06/22154359/0).

32. The paper was circulated to those authorities to which the provisions were proposed to apply, as well as other stakeholder groups and interested organisations and individuals. An easy read version of the paper was also distributed and published. Two discussion forums were held, the first with survivors of abuse and representatives from support services, the second with archivists and records managers. Further details of these events can be found in the consultation report.

33. A total of 87 responses to the consultation were received from a mix of public and private bodies and organisations, and individuals. Consultation responses are available on the Scottish Government website at [www.scotland.gov.uk/Publications/2010/09/01153617/0](http://www.scotland.gov.uk/Publications/2010/09/01153617/0).

34. There was general support for the provisions as set out in the consultation paper. More than half of respondents specifically stated that they did not consider that lasting and measurable improvements could be made to existing poor record keeping practice without legislation. A number of respondents thought there could be alternative or mixed approaches using existing legislation, guidance and scrutiny bodies, but fewer than 5% considered that new legislation was not appropriate.

35. The Convention of Scottish Local Authorities (“COSLA”) and the Society of Local Authority Chief Executives presented the strongest opposition to the proposals for new legislation. They agree that improvements to record keeping need to be made and recognise that the importance and profile of record keeping in the public sector needs to be raised, but they believe this can be achieved by the Keeper assuming a more proactive role in supporting improvements through formulating a records management framework, sharing good practice, developing guidance and training and supporting peer review. They suggested that there are already sufficient obligations about records under the 2002 Act and for local authorities under the 1994 Act. They submit that the establishment of a new scrutiny function for the Keeper runs
This document relates to the Public Records (Scotland) Bill (SP Bill 56) as introduced in the
Scottish Parliament on 7 October 2010

contrary to the principles of the 2007 Scottish Government / COSLA Concordat. Their response
however runs contrary to opinions received to the consultation directly by local authorities. Of
the 18 local authorities who responded, 13 considered that lasting and measurable improvements
cannot be made without legislation.

36. The main concerns arising from the consultation related to guidance and resourcing.
Respondents felt generally that it would be important for the Keeper to ensure the provision of
sufficient guidance to allow authorities to meet their obligations, particularly in relation to the
records of private and voluntary organisations which provide functions on behalf of a public
authority. A total of 48 respondents (55%) thought that it was appropriate that further action
should be taken where authorities are found to be failing in their obligations, although it was
strongly felt that this should only apply after they have been given support to help them to
comply. There were a number of concerns raised in relation to resourcing, in terms of the costs to
public authorities in complying with the legislation and in terms of the resources required by the
Keeper in carrying out the Keeper’s duties under the legislation.

37. Overall, the Government’s proposals were seen as a positive step towards achieving
lasting improvements to the management of records by public authorities in Scotland.

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

**Equal Opportunities**

38. The provisions of the Bill do not discriminate on the basis of age, gender, disability,
sexual orientation, race, religion or belief. The consultation paper was sent to organisations and
groups with an equalities remit in all of these areas. The only comments received related to age.
Responses were received from Children in Scotland, Former Boys and Girls Association (of
Quarriers Homes), Edinburgh Child Protection Committee, Who Cares? Scotland and Barnardos
Scotland. It was generally felt that improvements to the management of records relating to
looked after children would have a positive impact by ensuring that records survive to be made
available in later life, thus giving former residents more information about their childhood and
background. It was felt that it would also protect and promote the rights of children and others
who are looked after away from home. Some concerns were expressed about who would take
responsibility for, and monitor records of, services provided on behalf of public authorities by
other organisations such as care of children and the elderly.

39. There is no particular evidence of concern arising from the proposed Bill. Improvements
to the management of records will lead to a general positive impact on all groups, perhaps more
among those who are more likely to have records about them generated by public authorities,
such as looked after children, older people receiving social care or people with disabilities
receiving support. The Scottish Government is satisfied that the Bill will have no other equalities
impacts.

**Human Rights**

40. It is considered that the provisions of the Bill are compatible with the European
Convention on Human Rights.
Island Communities

41. The Bill is intended to make improvements to the management of records by named public authorities across the whole of Scotland. It has no particular implications for island communities.

Local Government

42. The provisions of the Bill will apply to all local authorities and joint boards in Scotland. Each local authority will be obliged to produce and implement a records management plan which covers the records it creates and holds as well as the records created by private or voluntary bodies in relation to functions they carry out on behalf of the authority. This will ensure that each local authority manages its records in a consistent and standardised way, leading to increased transparency and accountability and improved efficiencies. Better management of records will also support obligations under data protection and freedom of information legislation.

Sustainable Development

43. The Bill will have no negative impact on sustainable development.

Strategic Environmental Assessment

44. A pre-screening report has been completed and was submitted in July 2010. No comments have been received in relation to this report. The proposals are therefore deemed to be exempt from strategic environmental assessment under section 7(1) of the Environmental Assessment (Scotland) Act 2005.

Business and Regulatory Impact Assessment

45. A partial Business and Regulatory Impact Assessment (BRIA) was published with the consultation paper. Some comments were received that the BRIA underestimated the resource implications of putting records management practice in order. Further consultation and engagement with records managers from a selection of Scottish local authorities and other public bodies, and including representatives from a cross section of private and voluntary sector organisations, revealed that in most cases the staff and systems required to comply with the new obligations are already in place. The costs and benefits of the proposed legislation have been analysed and included in the BRIA document. The BRIA confirms that the policy objective is achievable whilst minimising costs and burdens to stakeholders in the public sector. Likewise it confirms that there will be minimal impact on voluntary and private sector organisations.

46. The full BRIA has been approved by colleagues in the Scottish Government Better Regulation Team.
This document relates to the Public Records (Scotland) Bill (SP Bill 56) as introduced in the Scottish Parliament on 7 October 2010

PUBLIC RECORDS (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament’s Standing Orders, in relation to the Public Records (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

2. The contents of this memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

OUTLINE OF BILL PROVISIONS

3. The Bill is divided into 3 Parts (consisting of 16 sections) and one schedule.

4. Part 1 of the Bill imposes duties on the public authorities listed in the schedule, to produce, implement and review records management plans. The Scottish Ministers may amend the list of authorities by order under section 2. Plans must be approved by the Keeper of the Records of Scotland (“the Keeper”) and the Bill also gives the Keeper the power to review whether authorities are complying with their plans and to publicise failures to comply.

5. Part 2 of the Bill makes amendments to provisions about court records under the Public Records (Scotland) Act 1937 (“the 1937 Act”).

6. Part 3 contains general provision on commencement.

7. Further information about the Bill’s provisions are contained in the Explanatory Notes and Financial Memorandum, published separately as SP Bill 56–EN and the Policy Memorandum, published separately as SP Bill 56–PM.

APPROACH TO USE OF DELEGATED POWERS

8. The Bill contains a number of delegated powers which are explained in more detail below. The Scottish Government has carefully considered whether and in what manner
provisions should be set out in subordinate legislation rather than on the face of the Bill. In considering these issues, and in determining the appropriate level of scrutiny, the Scottish Government has had regard to:

- the likely frequency of amendment;
- the need to make proper use of Parliamentary time;
- ensuring sufficient flexibility to respond to changing circumstances; and
- the need to anticipate the unexpected which might otherwise frustrate the purpose of the provision in primary legislation.

9. In addition to the powers outlined below, the Bill also contains: a power for the Keeper to set dates for the submission and review of records management plans and requirements as to the form and manner of such submission (sections 4(1) and (2) and 5(1)(b)); a duty on the Keeper to issue guidance on the form and content of records management plans (section 1(3)); a duty on the Keeper to publish a model records management plan (section 8); a power for the Keeper to issue further guidance to authorities about their duties under the Bill (section 9); and a power for Scottish Ministers to issue directions to the Keeper as to the form and content of the Keeper’s annual report (section 11). It is considered that these are of an executive and administrative rather than legislative nature, and as such they are not detailed in this memorandum.

DELEGATED POWERS

10. The delegated powers provisions are listed below together with a short explanation of:

- what each power allows;
- who the power is conferred on;
- the form in which the power is to be exercised;
- why it is considered appropriate to delegate the power; and
- the Parliamentary procedure (if any) to which the exercise of the power is to be subject, and why this procedure (if any) is considered appropriate.

Section 2(2) – Power to amend the list of public authorities to which Part 1 applies

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<thead>
<tr>
<th>Power conferred on:</th>
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<td>Power exercisable by:</td>
<td>Order made by statutory instrument</td>
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<td>Parliamentary procedure:</td>
<td>Affirmative resolution</td>
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11. Section 2(2) enables Scottish Ministers to amend the list of public authorities to which Part 1 of the Bill applies. An order may be used to add public authorities to the list, or to modify or remove existing entries on the list. Subsection (3) defines and limits the types of bodies, office-holders and other persons who can be added to the list. Subsection (7) allows orders under subsection (2) to make consequential, supplementary, incidental, transitional, transitory or saving provision, and allows orders to modify enactments.
This document relates to the Public Records (Scotland) Bill (SP Bill 56) as introduced in the Scottish Parliament on 7 October 2010

Reason for taking power

12. This power enables Scottish Ministers to update the list of public authorities where necessary, as bodies or offices are abolished or newly created or their names are changed. The power is required to enable Scottish Ministers to keep the entries in the schedule up-to-date. It is preferable to have the capacity to do this without the need to await a suitable vehicle in primary legislation.

13. The power to make consequential and other amendments is considered necessary to ensure that, where a new public authority is added to the list, changes can be made to any existing records management duties which apply to that authority, so that these do not conflict with or duplicate the records management duties under the Bill. Section 13 of the Bill makes these kinds of amendments to records management duties of certain authorities which are listed in the schedule.

Choice of procedure

14. Section 2(8) provides that an order under section 2(2) is subject to affirmative procedure. This will enable Parliament to consider and decide whether it is appropriate to amend the schedule in order to impose records management obligations on a new body or to remove such obligations from an existing body.

Section 14(2) – Requirement to consult the Keeper before making provision about the transmission of Court of Session and High Court records

Power conferred on: High Court of Justiciary and Court of Session
Power exercisable by: Act of Adjournal or Act of Sederunt (according to which court exercises the power) made by statutory instrument
Parliamentary procedure: No Parliamentary procedure

Provision

15. Section 14(2) amends section 1 of the 1937 Act by inserting a new subsection (3). Section 1 of the 1937 Act allows the Court of Session and High Court to make Acts of Sederunt and Acts of Adjournal which provide for the transmission of their records to the Keeper. These Acts may set times and conditions for the transmission of records to the Keeper. They may also make provision for the Keeper to re-transmit records to the Courts where they are required for court proceedings.

16. Inserted subsection (3) will require the Courts to consult the Keeper before making an Act of Sederunt or an Act of Adjournal under section 1 of the 1937 Act.

Reason for amending the power

17. The addition of a consultation requirement is considered necessary to ensure that the Keeper’s views are taken into account by the Courts when deciding when, and how, records should be transmitted and when setting rules about re-transmission.
18. It remains appropriate for transmission and re-transmission to be regulated by Act of
Adjournal or Act of Sederunt, rather than by primary legislation or Orders made by Scottish
Ministers. The current approach ensures flexibility and recognises that the Courts remain best-
placed to make the final decision on these matters.

19. The new consultation requirement will ensure that the Keeper can contribute to decisions
about the timing of transfer of records to the Keeper for permanent preservation, which records
should be transmitted and how records should be re-transmitted and then returned to the Keeper
in accordance with section 1(2) of the 1937 Act.

Choice of procedure

20. The Bill does not alter the current procedures for Acts of Adjournal and Acts of Sederunt
made under section 1 of the 1937 Act. Transmission and re-transmission of court records is
largely an administrative matter and the addition of a consultation requirement to this power
does not necessitate a change in procedure.

Section 15(1) – Power to commence the Bill by order

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: No Parliamentary procedure

 Provision

21. This section provides that Parts 1 and 2 of the Bill will come into force on a day set by
the Scottish Ministers by order. Part 3 will come into force automatically on the day after Royal
Assent.

Reason for taking power

22. This will enable the Scottish Ministers to bring the Bill into force. It is considered
appropriate for the Bill to be commenced at such times as the Scottish Ministers consider
appropriate or expedient. It is standard procedure for such commencement provisions to be dealt
with by subordinate legislation.

Choice of procedure

23. Section 15 has the effect that commencement orders will not be subject to Parliamentary
procedure (meaning that they will not be laid after being made). This is usual for
commencement powers.
Education, Lifelong Learning and Culture Committee

1st Report, 2011 (Session 3)

Stage 1 Report on the Public Records (Scotland) Bill

Published by the Scottish Parliament on 3 February 2011
Education, Lifelong Learning and Culture Committee

Remit and membership

Remit:

To consider and report on (a) further and higher education, lifelong learning, schools, pre-school care, skills and other matters falling within the responsibility of the Cabinet Secretary for Education and Lifelong Learning; and (b) matters relating to culture and the arts falling within the responsibility of the Minister for Culture and External Affairs.

Membership:

Alasdair Allan
Claire Baker
Kenneth Gibson (Deputy Convener)
Kenneth Macintosh
Christina McKelvie
Elizabeth Smith
Margaret Smith
Karen Whitefield (Convener)

Committee Clerking Team:

Clerk to the Committee
Eugene Windsor

Assistant Clerk
Emma Johnston
EXECUTIVE SUMMARY

1. The Education, Lifelong Learning and Culture Committee recognises that the Public Records (Scotland) Bill is part of the legacy of the Historic Abuse Systemic Review (HASR) which uncovered significant failures in records management in residential schools and children’s homes. The Committee is supportive of the Scottish Government’s wish to legislate to ensure more effective records management in the future.

2. The Bill, however, makes records management provisions in respect of a wider range of public authorities than those highlighted in the HASR. The Bill would also impact on contractors carrying out public functions on behalf of public authorities. The Committee heard a number of representations which suggested that a statutory, as opposed to voluntary, scheme involving such a large number of public authorities was a disproportionate response. Concerns have also been raised with the Committee about the likelihood of some organisations taking a more cautious approach to file retention than necessary and “over-implementing” their responsibilities. Difficulties in estimating the costs of implementation have also been expressed.

3. The Committee agrees that a scheme underpinned by statute is more likely to secure the required changes than a voluntary scheme might be. The Committee shares some of witnesses’ concerns, however, relating to the obligations the Bill would place on public authorities and the possibility of “over-implementation”. The Committee recognises the attempts by the Minister for Culture and External Affairs to reassure public authorities and contractors that these concerns are unfounded. It is clear, however, that strong concerns remain.

4. The Committee welcomes the Minister’s commitment to continue to work with public authorities and contractors to address these concerns as the Bill progresses. The Committee will re-consider this issue at Stage 2.
5. The Committee recommends that the Parliament agree the general principles of the Public Records (Scotland) Bill.

INTRODUCTION

6. The Public Records (Scotland) Bill (SP Bill 56) was introduced in the Scottish Parliament on 7 October 2010 by Fiona Hyslop, Minister for Culture and External Affairs. The Bill was accompanied by a policy memorandum, explanatory notes, financial memorandum, and a delegated powers memorandum.

7. The Parliament agreed to refer the Bill to the Education, Lifelong Learning and Culture Committee for Stage 1 consideration and further agreed that this should be completed by 11 February 2011.

8. Prior to taking oral evidence on the Bill, the Committee issued a call for written evidence. Thirty three submissions were received.

9. Extracts of the minutes of committee meetings at which the Bill was considered can be found at Annexe A. The Finance Committee’s letter to this Committee in relation to the financial memorandum is provided at Annexe B and the Subordinate Legislation Committee’s report on the delegated powers memorandum is provided at Annexe C. Oral evidence, associated written evidence and other written evidence can be found in Annexes D and E.

PURPOSE OF THE BILL

10. Part 1 of the Bill would place an obligation on named Scottish public authorities to produce and implement a records management plan (RMP) to be approved by the Keeper of the Records of Scotland. The Keeper would publish a model RMP as part of a suite of guidance and best practice advice to authorities. The Bill would give the Keeper the power to carry out compliance reviews of the implementation of RMPs by authorities. The Keeper would be able to issue warning notices and to make public the names of any authorities found to be in breach of the provisions. Part 2 makes minor amendments to the Public Records (Scotland) Act 1937 in relation to court records. The named Scottish public authorities that would be affected by the legislation are listed in the schedule to the Bill.

11. Further information on the Bill is provided in a SPICe bill briefing.2

BACKGROUND TO THE INTRODUCTION OF THE BILL

12. The origins of the Bill rest in the Historic Abuse Systemic Review: Residential Schools and Children’s Homes in Scotland 1950-95 (HASR), a review initiated by

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the previous Scottish Executive and undertaken by Tom Shaw, former Northern Ireland Chief Inspector of Education. This followed a Public Petitions Committee debate on 1 December 2004 relating to a petition seeking an inquiry into past institutional abuse.4

13. The report of the review set out its remit—

“This is a systemic review: it’s about systems – the systems of laws, rules and regulations (the regulatory framework) that governed residential schools and children’s homes. It’s about how these schools and homes complied with the regulatory framework, and about the systems for monitoring and inspecting schools and homes.”5

14. The report, published in 2007, made three sets of recommendations, the third relating to the procedures for the retention of records. The report concluded that the “lessons of this review point to an urgent need to take action to preserve historical records to ensure that residents can get access to records and information about their location”. The review recommended that the Scottish Government—

“commission a review of public records legislation which should lead to new legislation being drafted to meet records and information needs in Scotland. … This review’s objectives should address the need for permanent preservation of significant records held by private, non-statutory agencies that provide publicly funded services to children.”6

15. This review of public records legislation was undertaken by the Keeper and reported to the Scottish Government in October 2009. The Keeper’s recommendation to Scottish Ministers was that legislation be introduced to improve record keeping—

“The Shaw report is clear evidence of the failure by many organisations to pay attention to records, and the current human cost of that failure. The Keeper believes there is a good opportunity to build on the lessons of the Shaw report and improve record keeping across the public sector through a limited piece of legislation. This would improve accountability, increase transparency and strengthen governance, thus supporting the national outcome on better public services. It would fulfil one of Shaw’s key recommendations and go some way to meet the demands of survivors. It would also strengthen freedom of information, which crucially depends on the quality of records.”7

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ISSUES CONSIDERED BY THE COMMITTEE

Current records management practice

16. Building on the issues raised prior to the introduction of the Bill – the HASR and review by the Keeper – the Committee explored with witnesses some of the current practices regarding records management in public authorities.

17. When asked about this during evidence, the Keeper stated that “the very strong impression that we gained was of very inconsistent practice: some places do it extremely well, other places do it less well and some do not do it at all”.  

18. During his evidence, the Scottish Information Commissioner (SIC) gave examples from his assessments undertaken under the Freedom of Information (Scotland) Act 2002 (FoISA). He likened searching for some records to “looking for a needle in a haystack” and argued that records management was still an area where many organisations could make significant improvements. The SIC gave examples of assessments in children’s care homes where records relating to laundry had been retained but records of former residents had not and of one local authority which operated over 200 separate RMPs. He later gave an example of one “major public authority” where valuable information was held in a member of staff’s email inbox, where colleagues were unable to access it or know what information was held when that staff member was on sick leave.

19. The Committee also discussed this issue with witnesses representing the interests of survivors of childhood abuse, who were seeking access to their personal records. They emphasised the importance of being able to access a comprehensive set of records from a childhood spent in care, referred to by one witness as a “photograph of someone’s life”, especially for those people who had gone into care at a very young age. They also acknowledged a need to “recognise that [records management] is not a bureaucratic chore”; Tom Shaw said that—

“I see records as valuable memory banks for the individuals, as valuable means of monitoring and evaluation for the institution or organisation, and as invaluable resources for the evaluation of policy and practice in local authorities, in government, in university research or wherever. They are also important in the understanding of the social history of a nation.”

20. Tom Shaw also elaborated on the findings of the HASR and spoke of the “good deal of confusion about what records existed, where they were, what they contained and, indeed, how they might be accessed”.

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21. The Committee is sympathetic to those former residents of residential schools and children’s homes who have experienced difficulties in accessing their personal records; the Committee recognises the importance these records must play in helping former residents to piece together their personal history and early years. The Committee believes that these experiences show that public authorities have a strong moral obligation to manage personal records effectively.

22. The Committee notes the views expressed by some witnesses that, whilst some public authorities operate very efficient record management plans (RMPs), there remains a high level of inconsistency across the sector.

Proportionality

23. The written submissions received were unanimous in their support for a review of public records legislation. Guidance from the Keeper and a model RMP were particularly welcomed. A large number of responses to the Committee’s call for evidence, however, expressed concern that the Bill was a disproportionate response to the issues raised by the HASR and Keeper’s review. These concerns are explored in the following paragraphs.

The need for legislation, rather than a voluntary scheme

24. A number of submissions argued that legislation would be a disproportionate solution to the problem and that a voluntary scheme would be preferable.

25. The Scottish Funding Council (SFC), for example, argued that the Bill was a “heavy-handed response” and highlighted that existing legislation, including the FoISA, had “raised awareness of, and improved significantly, record keeping”. The SFC advocated an approach where “the Keeper [was] given a leadership role in defining and promoting good standards of information governance amongst public bodies and in highlighting examples of best practice” and suggested a “voluntary ‘Chartermark’ type scheme”.

26. In its written submission, however, the Scottish Council on Archives (SCA) argued that “ensuring consistency in on-going records management requires a legal framework” which would “provide clear authority for action and a core reference point”.

27. Oral evidence to the Committee also gave mixed views as to whether legislation was required to achieve the aims of the Bill. Representatives of the SCA built on the comments in their written evidence, arguing that it was “very strongly of the opinion that we need a legislative framework to ensure that we improve record keeping in public authorities”. Another representative of the SCA

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13 Scottish Funding Council. Written submission to the Education, Lifelong Learning and Culture Committee, paragraph 3.
14 Scottish Funding Council. Written submission to the Education, Lifelong Learning and Culture Committee, paragraph 8.
15 Scottish Council on Archives. Written submission to the Education, Lifelong Learning and Culture Committee, paragraph 15.
likened a voluntary scheme to new year’s resolutions in that “we all start off with genuine enthusiasm and then gradually, as other things emerge, the enthusiasm wanes”.17

28. The SIC argued that there was, currently, the equivalent of a voluntary scheme under section 61 of the FoISA. That section provides that Scottish Ministers must issue a code of practice setting out what would, in the opinion of Ministers, be desirable for the authorities listed in the schedule to the FoISA to follow in connection with the keeping, management and destruction of their records. The code was prepared in consultation with the SIC and Keeper. During evidence, the SIC commented that “one might say that that [the code of practice on records management] would be sufficient, but the reality is that it is not”. He went on to add that “if authorities observed a code of practice, they would probably observe the good practice that the keeper would like to see in a records management plan, but that is not currently the case”.18

29. Tom Shaw also supported a statutory, rather than voluntary, scheme, referring again to the failures in record keeping highlighted by the HASR, which found that “arrangements were unsatisfactory in more than half the institutions [surveyed]”.19

30. Representatives from local authorities and the voluntary sector, however, maintained that a voluntary scheme would be preferable to legislation. COSLA’s representative argued that this issue could have been dealt with through the Best Value 2 and local area agreements. The Society of Local Authority Chief Executives and Senior Managers (SOLACE) argued that—

“a voluntary scheme could give you all the benefits of legislation without legislating. … My instinct is that legislation—or at least the wide-ranging, disproportionate legislation that is represented by the Bill—is not merited at present.”20

31. When challenged about whether local authorities would ignore a scheme which did not have a legislative basis, the representative from SOLACE went on to state that she did not think “that many authorities would respond to a voluntary scheme” in that way.21

32. Scottish Government officials elaborated on the Government’s position during their evidence. The Keeper argued that legislation was required to ensure that changes to records management procedures were maintained into the long term. Under a voluntary scheme, the Keeper acknowledged that, due to the publicity resulting from the HASR—

“I am convinced that we would get a good result, for a while. The big problem … is what happens after two years or so when the good practice does not continue. As memories fade on the difficulties that we had encountered, record keeping would slip back again in the minds of administrators, perhaps until the next big scandal.”

33. During her evidence, the Minister also drew on the current inconsistencies in public authorities’ records management practices and reinforced the Scottish Government’s position that the force of statute was required in order to overcome these. The Minister highlighted the obligation on local authorities under the Local Government etc. (Scotland) Act 1994. The Act requires councils, before entering into a contract with an organisation to deliver a public service on its behalf, to “have regard to the preservation and management of any records”. The Minister argued that this provision was similar to a voluntary scheme for records management for both local authorities and contractors but noted that it had been unsuccessful as, “had it been effective, we would not have had the recent problems [leading to the HASR and Kerelaw inquiry]”.

34. The Committee heard the arguments for and against the use of primary legislation to underpin public authorities’ duty to maintain an RMP. The Committee notes the Scottish Information Commissioner’s (SIC) experiences that suggest that many organisations have not adhered to the provisions of section 61 of the Freedom of Information (Scotland) Act 2002 (FoISA) (which relates to a code of practice for records management drafted by the Keeper). The Committee also notes the Minister’s comments in relation to the Local Government etc. (Scotland) Act 1994. The Committee agrees that both these provisions are akin to a voluntary scheme.

35. Despite local authorities’ stated commitment to adhere to a voluntary scheme, the Committee believes that there are clear inconsistencies between, and failures of some, public authorities, including some local authorities, to maintain a RMP. The Committee suggests that a voluntary scheme would not be sufficient to address these deficiencies and that legislation would, on balance, be more likely to improve record keeping.

A “one size fits all” approach?

36. Other evidence to the Committee argued that the range of authorities that the legislation would cover – set out in the schedule to the Bill – was also disproportionate. The SFC argued that a case has not been made for legislation to apply to such a broad range of organisations, stating that “with the exception of the looked-after children sector, we could find no compelling evidence … of a breakdown or failure in record-keeping across the public sector that warrants the introduction of a new regulatory framework”.

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24 Scottish Funding Council. Written submission to the Education, Lifelong Learning and Culture Committee, paragraph 3.
37. Some respondents suggested an alternative approach, which could differentiate between those organisations which maintain personal records and which may be said to be “high risk” from a records management perspective, with those organisations which maintain less sensitive, “low risk”, records. For example, National Museums Scotland (NMS) argued that “we find it difficult to see why NMS should be included on the list of named organisations and be expected to follow the same regulatory regime as organisations which are responsible for very sensitive personal records”. It also suggested that “there is an opportunity to categorise the bodies into high/low impact and risk, and for the requirements of the Bill to focus on those organisations where the highest risk exists”.  

38. Other submissions highlighted that costs would be likely to be higher for smaller organisations, especially those without dedicated records management officers. For example, the General Teaching Council (GTC) Scotland argued that—

“the Bill in its current form does not avoid placing significant new burdens on public authorities, particularly those that are smaller in scale and scope. GTC Scotland would question whether the outcomes that the Bill seeks to deliver are proportionate to the costs that will be associated with complying with it for such smaller organisations.”

39. Some witnesses, however, agreed that the range of organisations covered by the Bill was appropriate. The SCA argued that—

“Organisations must manage their records no matter how small they are. ... Smaller organisations should be encouraged to see that they should do records management anyway, so that their organisation works well and efficiently. They are public authorities, and the public deserve to know that the records that are kept on their behalf are kept appropriately and managed well.”

40. Some witnesses disagreed with the suggestion that the Bill should distinguish between “high and low risk organisations”. The SIC argued, first, that it would be simpler not to make such a distinction and, second, that risk does not relate only to personal records, rather—

“we are talking about a public records bill that may need to be called upon in relation to issues of accountability, governance and financial expenditure as much as for anything else. Therefore I do not think that we should say that the Bill is solely for one purpose and should focus on some organisations alone.”

25 National Museums Scotland. Written submission to the Education, Lifelong Learning and Culture Committee, paragraph 3.
26 General Teaching Council Scotland. Written submission to the Education, Lifelong Learning and Culture Committee, paragraph 3.
41. The SIC argued that it would be helpful if the list of organisations set out in the schedule were the same list of organisations covered by the FoISA. He argued that, as these organisations were already required to adhere to the section 61 code of practice for records management, it was “important that the same bodies should be subject to the provisions of this Bill”.

42. When asked about this issue at Committee, the Keeper stated that the Bill was intended to cover “all the organisations that are connected directly to Scottish Government, that receive substantial public funding and which are producing and providing services to the public”.

43. The Minister acknowledged the concerns raised with the Committee but argued that the Bill would provide for a flexible approach and that there would be different RMPs for different sectors. The Minister also highlighted the Keeper’s consultation with each organisation “to ensure that the model records management plan for a particular sector reflects the interests of that sector.” She stated that—

“Obviously, there will be different model records management plans for different sectors. There is not a one-size-fits-all model; plans will have to be proportionate to the interests and needs of different areas.”

44. In relation to the SIC’s suggestion that the list of organisations set out in the Bill’s schedule be amended to mirror the organisations set out in the schedule to the FoISA, the Minister argued that this would not be appropriate. The Keeper provided further information—

“The schedule to the FoISA is drawn extremely widely. Part of our light-touch and proportionate approach was to narrow the list down to those organisations that we think are most significant in terms of the records that they produce.”

45. The Committee notes the concerns raised by some organisations about the appropriateness of their being included within the remit of the Bill and their suggestion that the Bill should distinguish between “high risk” and “low risk” records.

46. The Committee agrees, however, with the Minister and those witnesses who argued that records management was about more than personal records; the Committee believes that organisations that receive public funding have a responsibility to practise efficient records management. The
Committee, therefore, agrees that the list of organisations set out in the schedule to the Bill is appropriate.

47. The Committee believes that the case for more effective and consistent records management relating to former residents of residential schools and children’s homes is overwhelming. The Committee understands, however, the concerns raised by some public authorities that do not manage such sensitive and personal records about the level of obligation the Bill would place on them. The Committee hopes that the Minister’s reassurances, particularly that RMPs will vary across different sectors, will help mitigate such concerns.

48. In relation to the SIC’s suggestion that the list of public authorities listed in the Bill should mirror those listed in freedom of information legislation, the Committee notes the Minister’s response that this would not be appropriate given the different focus of freedom of information legislation.

Obligations on contractors

49. The importance of contractors’ records was central to the HASR. Section 3(1)(b) of the Bill provides that the definition of a public record includes “records created by or on behalf of a contractor in carrying out the authority’s functions”. Such records would, therefore, need to be included in an authority’s RMP.

50. Paragraph 5 of the policy memorandum states that “the Bill covers these records [created by contractors when delivering a public function on behalf of an authority] in a way which does not impose new and unreasonable burdens on these organisations”. 34

51. Notwithstanding this assertion, however, the voluntary sector and local authorities have expressed strong concerns relating to this provision: the Scottish Council for Voluntary Organisations (SCVO), for example, argued that the Bill “has the potential to cast a very wide net across our sector that tangles us all up in a resource intensive bureaucracy disconnected from the original policy intent”. 35

52. One concern raised jointly by various children’s charities was that the Bill could change the definition of a record in a way that would “mean that every document, minute or email we produce discussing in any way the delivery of a service for a public authority would be deemed a public record and could therefore be subject to the provisions of this Bill”. 36

53. There was also an overall concern about the administrative burden of implementing the Bill, particularly whether it would result in organisations being

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35 Scottish Council for Voluntary Organisations. Written submission to the Education, Lifelong Learning and Culture Committee, paragraph 10.
36 Joint submission from Barnardo’s Scotland, Action for Children Scotland, Aberlour Childcare Trust and CHILDREN 1ST. Written submission to the Education, Lifelong Learning and Culture Committee, paragraph 9.
required to assess all information they produce against a large number of different RMPs from different local authorities.

54. The SCVO also raised a concern that RMPs would be applied in an “over-managed and risk-averse” way, which would be likely to increase the administrative burden and exacerbate the difficulties when voluntary organisations were contracted to a number of public authorities.  

55. These concerns were explored during oral evidence sessions. Barnardo’s Scotland repeated its concern that the Bill would lead to an overly bureaucratic system, suggesting it would be a “major burden” on those voluntary organisations who were contracted to a number of authorities with different RMPs. It argued that the only way to avoid this would be to introduce a single RMP for public authorities in Scotland.

56. Barnardo’s Scotland expanded on this point in a supplementary submission—

“The result would be significant shift in the current relationship where as a contractor we provide a standard policy which is approved by the commissioning agency, to a position where the commissioning agency would stipulate the policy framework. In such a situation, we would have no way of ensuring that our staff teams are working to clear and consistent standards across the organisation due to different contractual requirements. This would be very difficult to quality control and would also result in significant costs due to staff training and amendments to our IT systems that may be required as a result.”

57. Barnardo’s Scotland and the SCVO also discussed their concerns that local authorities and contractor organisations would over-interpret their obligation under the Bill. According to SCVO—

“We are concerned that, in some cases, there has been a practice of overzealousness in relation to previous legislation. Rightly or wrongly, local authorities want to protect themselves, so they may take a proactive approach that may be counterproductive.”

58. SOLACE expressed a similar view—

“One of the consequences of taking a legislative approach is that authorities are more likely to be a bit more cautious, although I am not sure that I would use the word ‘zealous’. If authorities are required to do something by
legislation, they will be very careful to ensure that they comply with that in every sense. That is more likely to push us towards overinterpreting the requirements and, where we contract, especially with the voluntary sector, placing burdens everywhere external to the organisation.”

59. Other witnesses, however, argued that voluntary organisations that deliver services on behalf of public authorities should share the responsibility to maintain their records in an efficient way. The SIC agreed that there were some issues that “certainly have to be ironed out”, but that “to say that that [the concern] is sufficient to lead us to say that the Bill should not come into effect for the bulk of public authorities in Scotland is probably a step too far.” The SIC also drew a parallel with the FoISA, highlighting that his office was moving towards model publication schemes for sectors and a single publication scheme for the whole of Scotland, and concluded that he was “trying to cut down burdensome or differential impacts on organisations as a result of the legislation”, and that he “expected the Keeper to take an active role in that as well”.

60. The Keeper dismissed the concern that every document, minute or email would be deemed a public record, stating that the Bill “does not mean keeping everything; in fact, it would possibly be the worst form of record keeping to keep everything or put everything into the public domain, because one would be able to find nothing at all”.

61. The Keeper also argued that the voluntary sector’s concerns were based on a “misinterpretation of the way in which the Bill is intended to work” and re-stated that the Bill would not place any additional responsibilities on voluntary bodies—

“The responsibility will be with the authority, not with such [voluntary] bodies. The bill will not give an authority any power whatever to force the voluntary body to do anything and will not change the status quo.”

62. Another member of the bill team went on to state that “all that we seek to do through the Bill is to ensure that records that are created, which are created in any case by every organisation, that they are managed through their life cycle, retained where they need to be retained for longer, but destroyed auditably and correctly after the shortest possible time so that they do not take up space and resources or cause confusion.”

63. The Minister, in her evidence on this issue, emphasised the Scottish Government’s intention that the Bill would be a “light touch” measure. Her
expectation was that RMPs across a sector, such as local authorities, would be expected to be similar and would not give rise to the situation envisaged by the voluntary sector. The Minister also highlighted the role that the regulatory bodies, such as Social Care and Social Work Improvement Scotland (SCSWIS), would have in providing guidance on what records would need to be kept, as opposed to the RMP which would provide for how records would be kept—

“We will encourage a more generic RMP for different sectors that will reflect the character of the services provided and must undoubtedly have input from the people who deliver the services. We do not envisage that a national voluntary organisation that provides services to, say, 12 different local authorities will have 12 different systems to work with—that would not be common sense for anybody”.

64. She reminded the Committee that it had been inconsistencies across some sectors, including local authorities, which had given rise to the HASR and that it would be against the review’s recommendations to introduce a situation that would allow those inconsistencies to be replicated. The Minister also emphasised that the Bill only related to the way that existing records were managed and made no provision for the creation or content of records.

65. The Committee heard a range of arguments about whether the Bill’s provisions should apply to those organisations contracted to deliver public functions on behalf of public authorities, and, if it is to do so, how they should be applied. On the one hand, local authorities and the voluntary sector have expressed strong concerns that the Bill would place a significant administrative burden on them. There has been a perception that the Bill would increase the number of records to be managed, lead to practical difficulties in managing multiple RMPs where an organisation provided a service to multiple public authorities and that local authorities and/or the voluntary sector would “over-implement” the Bill’s provisions to avoid breaching their responsibilities.

66. On the other hand, the Committee has heard evidence that the Bill would make changes only to the way in which existing records were managed. The Minister confirmed that RMPs within a sector would not be expected to differ considerably, thus lessening the chances that a contractor to multiple public authorities would be required to manage multiple RMPs.

67. The Committee shares the concern that the Bill might place an administrative burden on contractors and that local authorities, other public authorities and contractors, might “over-implement” their obligations under an RMP. Although the Scottish Government argued that the Bill would not place any obligations directly on contractors, voluntary bodies (and all contractors) would be required to adhere to the public authorities’ RMPs through their contractual obligations. It is also difficult to envisage what obligations would fall to contractors until the model RMP has been produced.

68. The Committee is mindful, however, that the problems that gave rise to the Bill related to poor records management primarily by local authorities and contractors. Members note the Minister’s commitment that the Bill would not give rise to the scenarios envisaged by local authorities and the voluntary sector. The Committee believes that guidance from the Keeper, together with engagement with the sector, would help in this connection. The Committee recommends that the Scottish Government give further thought to this issue in advance of Stage 2. The Committee, therefore, supports, in principle, section 3(1)(b) of the Bill but will give further detailed consideration to this issue at Stage 2.

Costs

69. The financial memorandum states that the estimated costs for those local authorities and public authorities that already had a “credible RMP” would be likely to be minimal. For those authorities that did not have a “credible RMP”, however, it acknowledged that the Bill might result in some additional costs. It states that Ministers expects these “to be managed from within existing budgets”, although the financial memorandum acknowledges that the required records management activities might displace other administrative activities that “command a lower priority”.  

70. In respect of contractors, the financial memorandum reiterates that records created in relation to the contracted function must comply with the contracting public authority’s RMP. Again, if a contractor did not have sufficient records management expertise in place, it might be obliged to address this. The financial memorandum states that—

“This may be as simple as designating a secure space within an existing office area and designating a responsible person, perhaps the office manager, to have responsibility alongside existing duties for the management of the records kept there. Or, to have the relevant administrator permissions for a designated area of the authority’s file plan in the case of electronic records.”

71. In estimating the cost of implementing the Bill, therefore, the financial memorandum states that it is not possible to identify the exact cost to each public authority, as this would depend on the quality and effectiveness of their current records management regimes.

72. A number of submissions highlighted concerns that drafting, submitting for approval by the Keeper and maintaining a RMP would require additional resources. Many relate these concerns to the current context of budget cuts.

73. In his written evidence, however, the SIC referred to the FoI/SA section 61 code of practice for records management and to his requirement that RMPs are published by public authorities. Thus, he argued, under FoI/SA, public authorities

50 Financial memorandum, paragraph 73.
“should already have such a policy in place.”\textsuperscript{51} This should mean that, for organisations listed in the schedule to the Bill, which are already public authorities under FoI\textsc{sa}, the costs would be minimal. The SCA argued that organisations should already have some information about the records that they hold and so drafting an RMP should not be “an onerous task”\textsuperscript{52}

74. Similar issues were considered during oral evidence sessions. In relation to the voluntary sector, Barnardo’s Scotland argued that as “there are many different organisations of different sizes and in different places ... we have absolutely no way of knowing what the overall cost would be”.\textsuperscript{53} The SIC agreed that it was “important not to discount the possibility of costs”, especially in relation to the implementation of the RMP.\textsuperscript{54}

75. When asked about these potential costs, the Keeper argued that “good records management is not free, but it is cheaper than bad records management or no records management”. He went on—

“If an organisation is currently fully complying with the freedom of information requirements, the costs of the bill will be virtually nil to it because it already has the infrastructure in place to do what is required. If it is not complying at the moment with FOI, it may have to take steps to do so.”\textsuperscript{55}

76. During her evidence, the Minister reaffirmed the Scottish Government’s position that costs should be minimal. The Minister also added—

“Sometimes, such things [good records management] are priceless. There is a moral aspect to talking to a constituent who cannot find information about what happened in the first part of their life. It is not just about the monetary cost.”\textsuperscript{56}

77. The Committee notes that, although many public authorities should already have a records management plan in place, there may be some costs associated with drafting and implementing an RMP under the Bill. The Committee notes that, although establishing an appropriate records management system under the Bill need not be expensive, there is insufficient evidence to identify accurately the overall costs.

78. The Committee notes that, over the longer term, effective management of records could result in some efficiency savings for organisations.

\textsuperscript{51} Scottish Information Commissioner. Written evidence to the Education, Lifelong Learning and Culture Committee, paragraph 11(e).
Common good assets

79. The Committee received a small number of submissions suggesting that the Bill offered an opportunity for Scottish Ministers to legislate to provide for the establishment of a common good asset register. Mary Mackenzie and Bill Fraser suggested that an instruction made by the previous Scottish Executive to local authorities to maintain a register had been “ignored” and that—

“It is now obvious that councils in their role as trustees of the Common Good have for the most part defied the will of Parliament and have no intention of complying. Further measures are required to rectify this national problem. The [Bill] presents such an opportunity.”

57

80. In addition to these written submissions, Robert Brown MSP lodged three parliamentary questions about common good assets, one specifically asking the Scottish Government whether the Bill would be “an appropriate vehicle for imposing a requirement on local authorities to compile and maintain a comprehensive record of common good assets”.

58

81. The Committee asked the Minister about this issue when she gave evidence. The Minister repeated her earlier comments that the Bill was intended to provide for how existing records were managed and would not place any obligations on public authorities to create new types of records. She expected, however, that an RMP approved under the Bill would provide for how existing records relating to common good assets would be managed.

82. In response to Robert Brown’s parliamentary questions, the Cabinet Secretary for Finance and Sustainable Growth said that the Bill “does not deal with specific types of records and therefore it is not appropriate to amend it to impose a specific requirement on local authorities to compile and maintain a comprehensive record of common good assets”.

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83. The Committee notes and shares the concerns raised in some submissions about the alleged failure of some local authorities to maintain a register of common good assets. Whilst the Committee understands these concerns, it believes that, as the Bill would make changes only to the way in which existing records were kept, it would not be an appropriate mechanism to place in statute a requirement that local authorities create such registers. The Committee would expect, however, that local authorities’ RMPs

57 Mary Mackenzie and Bill Fraser. Written submission to the Education, Lifelong Learning and Culture Committee.
58 Robert Brown MSP lodged S3W-38481 (To ask the Scottish Executive whether it has given direction to local authorities regarding the compilation and maintenance of a comprehensive record of common good assets); S3W-38482 (To ask the Scottish Executive whether it is considering imposing a legal duty on local authorities to compile and maintain a record of common good assets); and S3W-38483 (To ask the Scottish Executive whether it considers that an amendment to the Public Records (Scotland) Bill would be an appropriate vehicle for imposing a requirement on local authorities to compile and maintain a comprehensive record of common good assets) on 21 December 2010.
established under the Bill would include information on how existing records relating to common good assets were to be managed.

SCOTTISH GOVERNMENT CONSULTATION

84. In addition to considering the provisions of the Bill, the Committee also considered the Scottish Government’s consultation prior to its introduction. The consultation on the Bill’s proposals took place over six weeks between 22 June and 4 August 2010 and 87 responses were received.

85. There were a number of criticisms of the consultation on the Bill in the written evidence, from a range of stakeholders. Voluntary sector submissions, in particular, stated that much of the sector was not aware of the Bill and its proposals until relatively recently; because of this, they asked for the Bill to be withdrawn pending further consultation and discussions.

86. There were also criticisms that the consultation was limited to six weeks over the summer. The Coalition of Care and Support Providers in Scotland (CCPS) and SCVO argued that the six-week consultation was in breach of the compact between the Scottish Government and the voluntary sector.

87. During oral evidence, the point was made that many of the organisations which would be covered by section 3(1)(b) as contractors had been unaware of the Bill and its potential implications for them.

88. When asked about this, the Keeper said that the consultation period had been dictated by the parliamentary timetable. He went on to say—

“The formal consultation period was preceded by work that we did in reviewing the situation, so we were gathering evidence for quite a while before the consultation. There has been a very good opportunity for views to be aired.”

89. The Minister acknowledged that the consultation period “was not ideal” and stated that the Scottish Government would continue to work with COSLA and the voluntary sector to allay their concerns. She went on to add, however—

“The consultation period was curtailed, but the Bill didn’t come out of nowhere. ... Anyone who was working in the children’s sector would have known that at some point recommendations would be made about the need for legislation on better record keeping, which had been flagged up some years ago. The Bill did not come out of the blue.”

90. The Committee recognises that the timetable for the passage of the Bill has been restricted as a result of the forthcoming dissolution of the Parliament. The Committee regrets, however, that this has meant that the consultation process has not been as extensive as it could have been. The Committee believes that some of the concerns expressed by local authorities and the voluntary sector might have been eased by closer

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dialogue prior to the introduction of the Bill and welcomes the Minister’s commitment that the Scottish Government will work closely with these organisations throughout the rest of the legislative process.

POLICY MEMORANDUM

91. Rule 9.3.3(c) of Standing Orders requires a policy memorandum to accompany all bills when introduced. Amongst other requirements, the policy memorandum must set out the policy objectives of the Bill.

92. In its call for written evidence, the Committee sought views on the policy memorandum. The submissions that commented on this indicated satisfaction with the policy memorandum, noting that it had been helpful in clearly setting out the Bill’s objectives.

93. The Committee notes the comments received in written evidence that the policy memorandum had been helpful in setting out the objectives of the Bill.

SUBORDINATE LEGISLATION

94. Rule 9.4A of Standing Orders provides that, where an Executive Bill confers powers to make subordinate legislation, a delegated powers memorandum must be provided.

95. The Subordinate Legislation Committee considered the delegated powers memorandum and reported to this Committee on 19 January 2011. The Committee reported that it was content with the delegated powers set out in sections 2(2), 14(2) and 15(1) and that it determined that it did not need to draw the attention of the Parliament to any of those powers. The Subordinate Legislation Committee’s report is provided in Annexe B.

96. The Committee notes the conclusions of the Subordinate Legislation Committee and is content with the provisions in the Bill regarding delegated legislation.

FINANCIAL MEMORANDUM

97. Standing Orders Rule 9.3.2 requires a financial memorandum to be provided to accompany a Bill when it is introduced. The financial memorandum must “set out the best estimates of the administrative, compliance and other costs to which the provisions of the Bill would give rise, best estimates of the timescales over which such costs would be expected to arise, and an indication of the margins of uncertainty in such estimates”. The financial memorandum for the Bill is included in the explanatory notes.

98. The Finance Committee agreed to undertake level one scrutiny in relation to the Bill. This means that the Finance Committee sought written evidence on the financial memorandum but did not take oral evidence or publish a report.

99. The Finance Committee wrote to the Education, Lifelong Learning and Culture Committee on 8 December 2010 to confirm that no submissions had been
received in response to its call for evidence. The Finance Committee’s letter is
provided at Annexe C.

100. A range of issues relating to the potential costs of the Bill were raised with
the Committee, however, and these are discussed in the body of the report.

101. The Committee notes that the Finance Committee did not receive any
responses to its consultation on the financial memorandum.

CONCLUSIONS

102. The Committee notes the findings of the Historic Abuse Systemic
Review (HASR) and the experiences of former residents of residential
schools and care homes in accessing their personal records. The Committee
believes that these form a very persuasive argument that legislation is
required to ensure the more effective management of records generated in
relation to vulnerable people.

103. The Bill, however, makes provision in respect of a wider range of public
authorities than those that were implicated in the HASR. The Bill will also be
likely to have an impact, through contractual obligations, on voluntary
sector and commercial organisations that provide public services on behalf
of public authorities. The Committee has received representations from
some of those who listed in the Bill as a public authority that the Bill would
be a disproportionate response to the HASR and would place an
unreasonable burden on them. Concerns have also been expressed that
public authorities and contractors would “over-implement” the Bill,
increasing the potential burden. These concerns have also been
vociferously expressed by the voluntary sector in relation to the obligations
to be placed on contractors.

104. The Committee believes that all organisations that receive public
money have a responsibility to manage their records effectively. The
Committee also acknowledges the Minister’s belief that the Bill would not
create an undue burden on public authorities and, particularly, her
comments that the Bill would provide only for the management of existing
records; decisions on the creation of records would remain the
responsibility of the public authorities themselves and regulatory bodies,
where appropriate.

105. Notwithstanding these comments, however, the Committee recognises
that the voluntary sector’s concerns have not been allayed. The Committee
also remains to be wholly convinced that the administrative burden on some
public authorities and contractors would not be onerous and that it would be
possible to prevent some organisations “over-implementing” their
obligations. The Committee welcomes the Scottish Government’s
undertaking to work with public authorities and contractors to resolve these
issues.
106. Aside from the above concerns, however, the Committee recommends to the Parliament that the general principles of the Public Records (Scotland) Bill be agreed.
ANNEXE A: EXTRACTS FROM THE MINUTES OF THE EDUCATION, LIFELONG LEARNING AND CULTURE COMMITTEE

26th Meeting, 2010 (Session 3), Wednesday 27 October 2010

1. **Decision on taking business in private:** The Committee agreed to take item 2 in private.

2. **Public Records (Scotland) Bill (in private):** The Committee considered and agreed its approach to the scrutiny of the Bill at Stage 1.

33rd Meeting, 2010 (Session 3), Wednesday 8 December 2010

**Public Records (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

George MacKenzie, Keeper of the Records of Scotland, Bruno Longmore, Leader, Bill Team, and Hugh Hagan, Member, Bill Team, National Archives of Scotland; and Lindsey Henderson, Principal Legal Officer, Solicitors Constitutional and Civil Law and Division, Scottish Government.

1st Meeting, 2011 (Session 3), Wednesday 12 January 2011

**Public Records (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

Kevin Dunion, Scottish Information Commissioner; Dr Irene O'Brien, Chair, and Dr Gerry Slater, Policy Adviser, Scottish Council on Archives;

Jon Harris, Strategic Director, COSLA; Claire Monaghan, Head of Policy, Performance and Communication, South Ayrshire Council, Society of Local Authority Chief Executives; Mark Ballard, Head of Policy, and Karen Indoo, Management Information Officer, Barnardo's Scotland; and Nancy Fancott, Policy Officer, Scottish Council for Voluntary Organisations.

2nd Meeting, 2011 (Session 3), Wednesday 19 January 2011

**Public Records (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

Tom Shaw, Historic Abuse Systematic Review; and Lorna Patterson, Project Manager, In Care Survivors Service Scotland;

Fiona Hyslop MSP, Minister for Culture and External Affairs, Scottish Government; George MacKenzie, Keeper of the Records of Scotland, and Bruno Longmore, Leader, Bill Team, National Archives of Scotland; and Lindsey Henderson, Principal Legal Officer, Solicitors Constitutional and Civil Law and Division, Scottish Government.
3rd Meeting, 2011 (Session 3), Wednesday 26 January 2011

Public Records (Scotland) Bill (in private): The Committee consider a draft Stage 1 report. Various changes were agreed to, and the Committee agreed to consider a revised draft, in private, at its next meeting.

4th Meeting, 2011 (Session 3), Wednesday 2 February 2011

Public Records (Scotland) Bill (in private): The Committee considered a draft Stage 1 report. Subject to a number of minor changes, the report was agreed to.
ANNEXE B: SUBORDINATE LEGISLATION COMMITTEE

The Committee reports to the Parliament as follows—

1. At its meetings on 14 December 2010 and 18 January 2011, the Subordinate Legislation Committee considered the delegated powers provisions in the Public Records (Scotland) Bill at Stage 1. The Committee submits this report to the Education, Lifelong Learning and Culture Committee as the lead committee for the Bill under Rule 9.6.2 of Standing Orders.

OVERVIEW OF THE BILL

2. The Public Records (Scotland) Bill (“the Bill”) was introduced in the Parliament on 7 October 2010 by the Minister for Culture and External Affairs, Fiona Hyslop MSP.

3. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill.

4. Correspondence between the Committee and the Scottish Government, concerning the delegated power contained in section 2(2), is reproduced in the Appendix.

5. The Committee was content with regard to the delegated power contained in section 2(2), and also those in section 14(2) and 15(1), and determined that it did not need to draw the attention of the Parliament to any of those powers.
Section 2(2) - Power to amend the list of public authorities to which Part 1 applies

To the extent that that an order under section 2(2) may, in terms of subsection (7), include supplementary or incidental provision, and can modify an enactment, the Committee asks the Scottish Government for further explanation as to why these particular powers are required.

Response from the Scottish Government

I refer to the Subordinate Legislation Committee's letter of 14 December 2010 requesting further explanation about the delegated powers in the Public Records (Scotland) Bill. Please see the following further information.

The power to make consequential, supplementary, incidental, transitional, transitory or saving provision was included to ensure that if Ministers decide to add a new body to the list in the schedule, they will also be able to make related amendments to existing records management duties which the body already has. So the power could be used to repeal provisions which overlapped with the records management duties under the Bill (in the same way as section 13 repeals general records management duties which apply to Local Authorities, SEPA, Scottish Water and National Park authorities) or to amend provisions to ensure consistent terminology (in the same way as section 14 amends provisions about court records). This could involve amending primary as well as secondary legislation, which is why the power to modify enactments was included. The power was included to allow flexibility in future and was not drafted with a particular body in mind. Given that the purpose of an order under section 2(2) is only to modify the list of bodies to which records management duties apply, it is considered that there is little or no risk of the power to make consequential, supplementary, incidental, transitional, transitory or saving provision being used to make wider provision than is appropriate.

The power is already subject to affirmative procedure. It is considered that this will give the Scottish Parliament an appropriate opportunity to scrutinise any proposed amendments to primary legislation.
ANNEXE C: FINANCE COMMITTEE LETTER

As you are aware, the Finance Committee examines the financial implications of all legislation, through the scrutiny of Financial Memoranda. The Committee agreed to adopt level one scrutiny in relation to the Public Records (Scotland) Bill. Applying this level of scrutiny means that the Committee does not take oral evidence or produce a report, but it does seek written evidence from affected organisations.

The Committee did not receive any submissions on this FM. If you have any questions about the Committee’s scrutiny of the FM, please contact the clerks to the Committee via the contact details above.
ANNEXE D: ORAL AND ASSOCIATED WRITTEN EVIDENCE

33rd Meeting, 2010 (Session 3), Wednesday 8 December 2010

**Oral evidence**
George MacKenzie, Keeper of the Records of Scotland, Bruno Longmore, Leader, Bill Team, and Hugh Hagan, Member, Bill Team, National Archives of Scotland; and Lindsey Henderson, Principal Legal Officer, Solicitors Constitutional and Civil Law and Division, Scottish Government.

1st Meeting, 2011 (Session 3), Wednesday 12 January 2011

**Written evidence**
*Scottish Information Commissioner*
*Scottish Information Commissioner (2)*
*Scottish Council on Archives*
*COSLA*
*Barnardo's Scotland, Action for Children Scotland, Aberlour Childcare Trust and Children 1st*
*Scottish Council for Voluntary Organisations*

**Oral evidence**
Kevin Dunion, Scottish Information Commissioner; Dr Irene O'Brien, Chair, and Dr Gerry Slater, Policy Adviser, Scottish Council on Archives;

Jon Harris, Strategic Director, COSLA; Claire Monaghan, Head of Policy, Performance and Communication, South Ayrshire Council, Society of Local Authority Chief Executives; Mark Ballard, Head of Policy, and Karen Indoo, Management Information Officer, Barnardo’s Scotland; and Nancy Fancott, Policy Officer, Scottish Council for Voluntary Organisations.

**Supplementary written evidence**
*Barnardo's Scotland*
*Barnardo’s Scotland (2)*
*Scottish Council for Voluntary Organisations (2)*

2nd Meeting, 2011 (Session 3), Wednesday 19 January 2011

**Written evidence**
*Shaw, Tom*
*In Care Survivors Service Scotland*

**Oral evidence**
Tom Shaw, Historic Abuse Systematic Review; and Lorna Patterson, Project Manager, In Care Survivors Service Scotland;

Fiona Hyslop MSP, Minister for Culture and External Affairs, Scottish Government; George MacKenzie, Keeper of the Records of Scotland, and Bruno Longmore, Leader, Bill Team, National Archives of Scotland; and Lindsey Henderson,
Principal Legal Officer, Solicitors Constitutional and Civil Law and Division, Scottish Government.
Public Records (Scotland) Bill: Stage 1

10:01

The Temporary Convener (Elizabeth Smith): It gives me pleasure to welcome our witnesses this morning. George Mackenzie is keeper of the records of Scotland, Bruno Longmore is the bill team leader and Hugh Hagan is a member of the bill team. All of them are from the National Archives of Scotland. Lindsey Henderson is a principal legal officer from the Scottish Government.

I invite the keeper to make an opening statement.

George Mackenzie (National Archives of Scotland): Thank you, convener.

The Public Records (Scotland) Bill fulfils a key recommendation of the 2007 Shaw report, which found that poor record keeping creates difficulties for former residents of children’s homes who try to trace records about themselves and their time in care. Shaw recommended that the Government review the legislation on public records with a view to renewal. As keeper, I was asked by ministers to conduct that review, which concluded in 2009 that existing legislation on public records was no longer adequate for purpose.

The public consultation in the summer outlined proposals for new legislation, and more than half of respondents stated that lasting improvements to record keeping would require legislation. Less than 5 per cent thought that legislation would not be appropriate.

The bill is short, simple and light touch. It is about looking to the future and modernising how we look after records. As the bill’s title suggests, it is about management of records by authorities. It requires named public authorities to produce and implement a records management plan that is to be approved by the keeper. The keeper has to produce a model plan and guidance based on existing best practice, which strongly encourages self-assessment by public authorities.

When an authority engages a private or voluntary sector body to carry out functions on its behalf, the authority will be responsible for ensuring that the body manages the records relating to that function in line with the authority’s own records management plan. That tackles a key problem that Shaw found: when organisations have provided services on behalf of public authorities, the records have frequently disappeared once the service has terminated or the organisation is dissolved. It is important to note that the bill will not put any obligation on the
voluntary body, nor will it give the public authority any power to force the body to do anything.

The bill does not make provision about public access to records, which is already covered by the Freedom of Information (Scotland) Act 2002 and the United Kingdom Data Protection Act 1998. The bill ensures that appropriate records are kept to which access can be given under those acts.

To sum up, ministers’ proposals are not about creating more work for public authorities or burdens for the voluntary sector. The bill is not about prescribing what public records are to be created, but about improving the way in which they are managed. The bill will not lead to more records; in fact, better management means that records with no long-term value can be destroyed sooner. Shaw and, a little later, the Kerelaw inquiry showed just what can happen when we do not pay proper attention to records. That gives the bill strong moral and practical backing, but in the end it is about better management, good governance and improving efficiency in public services.

It is worth saying that, as human memory fades, it is the records, such as those being kept this morning by the official reporters, that are the evidence of actions and decisions. The Public Records (Scotland) Bill will help to manage records better and to safeguard them for the future.

The Temporary Convener: Thank you very much, Mr Mackenzie. That was very helpful. Obviously, the Shaw report made three specific categories of recommendation. Will you give a little more detail on how you will tackle each of them?

George Mackenzie: First, Shaw found inconsistencies in practice. One reason why we believe that legislation is necessary is to ensure a consistent set of standards across the whole public sector. That does not mean that we intend to prescribe every detail of how authorities manage their records, but that we believe that it is necessary to have across the public sector a consistent framework in which public authorities develop their own plans taking account of their sectoral requirements.

The second point that came out of Shaw is the issue of voluntary bodies, which is definitely a problem. For example when, in adulthood, survivors of care tried to find out what had happened to them, they found that the body that had looked after them no longer existed or that the care home had closed down. They did not know where to go to get their records. I believe that some survivors are still having difficulty in finding out what has happened to their records.

Thirdly, the petition to the Parliament that preceded the Shaw report indicated that inadequate record keeping was widespread. The records that came to Government and into the National Archives of Scotland were preserved. However, in many cases, care homes had not properly kept their records. Those are the main ways in which we will tackle the principal areas to which Shaw drew attention.

The Temporary Convener: How extensive are variations across the board? Are we talking about a large number of variations, or about a sizeable minority?

George Mackenzie: That is a difficult question. Based on the evidence that we have—the evidence from the first inquiry that took place after the petition to the Parliament, Shaw’s work and the review that we carried out—there is quite a lot of inconsistency across the whole public sector. The legislation on records, which dates back to 1937, is not particularly well known. It was drawn up in a completely different age when a lot of the issues that we see nowadays did not occur, or did not occur to the legislators at the time. Part of our review was to hold focus groups and structured interviews with records managers and public authorities. The very strong impression that we gained was of very inconsistent practice: some places do it extremely well, other places do it less well and some do not do it at all.

The Temporary Convener: Is there confusion among the affected groups about whether they should be part of this?

George Mackenzie: Some groups will look to more recent legislation such as the Data Protection Act 1998 and realise that they have a right under that. From press reports, we know that there is a lot of ignorance on exactly what data protection means, as there is on freedom of information legislation. Freedom of information and data protection can be called in to back up requests for access, but both are only as good as the records that carry the information that underlie them. If the records do not exist, there is no information, so the rights that one may have under subject access, data protection or freedom of information cannot operate.

Alasdair Allan: It strikes me from the evidence from the Scottish Information Commissioner that he seems to take the view that a voluntary approach would be more appropriate. Obviously, I understand why you do not feel the same way. Will you comment on his view?

George Mackenzie: I understand the commissioner’s point; he is relating the situation to his position and the operation of the Freedom of Information (Scotland) Act 2002. My honest view on a voluntary approach is that it would work quite
well if we were to start doing it right now. Given all the attention that Shaw has drawn to the issue and the fact that a committee of the Parliament is considering the bill, I am convinced that we would get a good result, for a while. The big problem—this is my reason for thinking not that the commission is mistaken but for taking a different view—is what happens after two years or so when the good practice does not continue. As memories fade on the difficulties that we had encountered, record keeping would slip back again in the minds of administrators, perhaps until the next big scandal. Something terrible would happen, for example, to looked-after adults in care.

I suspect that people do not pay attention to records. Of course, I would say that as keeper of the records, but records are fundamental to all our rights and obligations, and we rarely pay attention to them until something goes wrong. We then suddenly realise that we do not have a record any more or that the record is rather embarrassing. We take action only then.

I am sorry to go rather round about the issue. A voluntary approach would have an effect for a while, but I do not believe that that effect would be lasting. We believe that legislation is the only way to get consistency and durability in better record keeping. In addition, we have estimated that the cost of a voluntary approach would be more or less the same as the cost of a legislative approach.

Alasdair Allan: Do the bill team and others have a view on whether the voluntary approach has been considered?

Bruno Longmore (National Archives of Scotland): We have certainly looked at the voluntary approach. As Mr MacKenzie said, the cost of that approach was seen as being equivalent to the cost of legislating. Its main focus was on providing a framework across the public sector. Legislation will at least deliver a level playing field, but it will not deliver solutions for individual sectors: that will remain for individual sectors to address. For example, the Looked After Children (Scotland) regulations 2009 address particular issues relating to records, but the bill will present a level playing field on which individual sectors can assess areas of risk and perhaps identify problems in a sector that can be considered in more detail.

A voluntary approach would make things very piecemeal and would make it quite difficult to deal with standards. There is a lot of guidance on records management and there is a lot of information and some very good practice out there, but there is no overarching standard that can be used and addressed. The proposals in the bill require named public authorities to present or implement an agreed records management plan. By doing that, where problems may arise in sectors or across all the public authorities can be identified through the office of the keeper.

Hugh Hagan (National Archives of Scotland): I concur with everything that my colleagues have said. From a practical point of view, my job in the National Archives of Scotland for the past eight years has involved working closely with Government bodies on the provision of advice and guidance to them on their records management. I agree that, with the voluntary approach that we have at the moment, there is some good practice and some not so good practice, which is indicative of the playing field that we are on. People have good intentions and do things for a time, but other priorities tend to take over in the longer term and records management falls back. We are continually advising the same people on the same issues over a long period. That is how things work at the moment; I do not think that things would get any better if we went down a voluntary route.

Alasdair Allan: I do not think that many people would disagree with the contention that vulnerable people, such as people who have been in children’s homes, have the right to have their records and the system around them protected by law, but would you comment on the written evidence that we have received on the scope and number of organisations that should fall under the legislation? For instance, the National Museums of Scotland finds it difficult to understand why it would be bracketed with children’s homes. What number of organisations needs to fall within the scope of the legislation?

10:15

George MacKenzie: The schedule to the bill indicates the range of bodies that we believe should fall within the legislation. I agree that the decision whether an individual body falls or does not fall within it could be somewhat marginal, but overall we are aiming to catch all the organisations that are connected directly to Scottish Government, that receive substantial public funding and which are producing and providing services to the public.

Although Shaw is the driving force—or, perhaps, the moral imperative—behind the legislation, we do not see the bill as trying to solve only the Shaw problems. It has come out in the review of legislation and, in a sense, in the evidence on the bill, that the attitude to records is not consistent, as it should be across the public sector, and that there would be great benefits to the public sector in terms of efficiency, accountability and governance if record-keeping standards generally were raised. That is why we have deliberately gone wider than simply the organisations that look after vulnerable people. We believe that the
legislation should go further than that, which is why NMS finds itself within the scope of the bill.

Dave Thompson (Highlands and Islands) (SNP): Good morning. Section 3(1)(b) of the bill deals with

"records created by or on behalf of a contractor".

Mr MacKenzie has already said that he does not think that the bill would impose any duties on the third sector, because the responsibility would rest on the authority to manage its records. Notwithstanding that, I believe that the third sector has expressed concerns about the requirement. One comment that has been made is that it would

"mean that every document, minute or email we produce discussing in any way the delivery of a service for a public authority would be deemed a public record and could therefore be subject to the provisions of this bill".

That is quite concerning if it is correct. Can panel members give their views on the impact on the third sector?

George MacKenzie: That question goes to the heart of one of the voluntary sector's big concerns. We take those concerns very seriously. We have already engaged with the voluntary sector and are in the process of setting up a further meeting to draw out some of their concerns.

My main point is that their concern that the definition of “public record” means that every scrap of information that voluntary sector bodies produce will be subject to the legislation and will therefore have to be kept or be put into the public domain in some way, which I think underlies their fear, is not correct. The intention is not that they will have to keep every single piece of paper; it is simply that the authority will ensure that they manage the records relating to that function in accordance with the authority's own plan.

I emphasise that the bill is about good management of records. That does not mean keeping everything; in fact, it would possibly be the worst form of record keeping to keep everything or put everything into the public domain, because one would be able to find nothing at all. Good records management is about identifying what is important: what are the vital records and what records have long-term value? We identify those and draw up schedules that say that records will be kept for 10 years or permanently or, on the other hand, that a record need be kept for only six months and can then be destroyed. Ultimately, we take the voluntary sector's view very seriously, but we believe that it is based on a misinterpretation of the way in which the bill is intended to work and also on a misinterpretation of the relationship that voluntary sector bodies have with the local authority.

The point that I made at the outset was that the bill says nothing whatever about putting any obligation on voluntary bodies. The responsibility will be with the authority, not with such bodies. The bill will not give an authority any power whatever to force the voluntary body to do anything and will not change the status quo at all. The voluntary sector is concerned about that, but that is not the intention and it is not in the bill.

Hugh Hagan: In our discussions with colleagues from the third sector, voluntary and private organisations, confusion has arisen about data protection and freedom of information legislation. They feel that lots of organisations have not yet got to grips with that. The bill is an example of that confusion because there is misunderstanding of its proposals. It is not about freedom of information or data protection; it is about something quite different and there is a danger that issues are being conflated.

As we know, all information that is recorded in a public authority is subject to that other legislation and can be asked for by a member of the public through an access request. Similarly, all the information that pertains to an individual can be asked for through a subject access request under data protection legislation. That is fine as it stands, but what we propose in the bill will have no impact on that. All that we seek to do through the bill is to ensure that records that are created, which are created in any case by every organisation, that they are managed through their life cycle, retained where they need to be retained for longer, but destroyed auditably and correctly after the shortest possible time so that they do not take up space and resources or cause confusion.

Lindsey Henderson (Scottish Government Legal Directorate): I back up what George MacKenzie said and confirm that a public authority creates public records of its functions and those of a contractor that carries out functions on its behalf. Where a contractor produces lots of records about a function, they might well be public records, but the bill does not say what has to happen to those records. It does not say, “You have to keep them for X amount of time”; it simply says that the records have to be managed by the authority in accordance with its plan. The bill does not impose any duties on the contractor. As George MacKenzie said, the bill does not give the authority any new powers to make contractors do anything.

Dave Thompson: It was mentioned earlier that the voluntary sector's view was based on a misinterpretation of the bill. Are you confident that the authorities will not misunderstand it? Each of them will look at the bill in the light of their own circumstances and make their decisions in that way.
George MacKenzie: We can ensure that that is not the case through approval of the records management plans. We will encourage a lot of dialogue about the creation of the plans in the run up to the commencement of the legislation. The model records management plan that we will produce will also give clear guidance. Between the records management plan approval and the guidance that the keeper will produce, we will seek to ensure that if a public authority took what in my view is the completely crazy opinion that all records should be kept, we would be able to avoid that by not approving a records management plan that said that the contractor will have to keep everything.

Dave Thompson: Another concern was that confidential records would become available in the public domain, such as records that are “crucial to developing and maintaining trusting relationships”.

You are confident that that would not be the case.

George MacKenzie: Yes. The bill makes no change whatsoever to the situation about information of that kind—confidential or otherwise. We are not doing anything to alter the status quo in relation to confidentiality of therapists’ notes and so on.

Dave Thompson: You mentioned that you are going to have meetings with the relevant organisations. Are you confident that you will be able to assuage their fears and worries and, if necessary, propose amendments that would put their minds at rest?

George MacKenzie: There is a clear challenge to meet their concerns and that is why we are actively working on a forum and having discussions with them. The challenge for us, as the officials who are dealing with the bill, is to make the arguments to the voluntary sector and show it that it is misinterpreting how the bill will operate. It will also be helpful to share with the sector some of our thinking about what would go into a records management plan and the guidance.

The other thing that we need to try to do is to get officials to speak to the records managers—some of the voluntary sector has them—who will probably understand more about what good management of records is. That is not an expensive or difficult thing to do.

Dave Thompson: You do not believe or accept that there is any need for the bill to be withdrawn.

George MacKenzie: I am sure that you would not expect me to say that I do. We are here as officials; questions about the legislation and the proposals and so on are for the minister to answer when you speak to her next month.

As a professional record keeper, I fundamentally believe in the bill. I believe that it is necessary and that we have got the balance about right between the need to be a little prescriptive in having a records management plan and the need to be not too over the top.

We considered the model in New Zealand, which two years ago passed a records act that is very much more prescriptive and really lays down the law to public authorities. We did not believe that that was an appropriate way to go in Scotland, so we have pitched our approach at the level that we think is correct. As an archivist and keeper of the records, I believe that we have the balance right in the bill.

The Temporary Convener: I want to ask about the impact on local authorities. The submission that we received from the Convention of Scottish Local Authorities flagged up a few concerns, although I think that it was generally in favour of the principle of better record keeping. Its first concern was about the definition of “public record”. Is that a genuine concern? Do we need to do more to make sure that the definition is clarified?

George MacKenzie: If you believe that linked to the notion of “public record” is the idea that you have to keep the record, put it all in the public domain or do certain things, I can understand that concern. However, that is not the case. The definition is deliberately wide and we believe that that is necessary to catch all the potential pieces of information and records that are created. I emphasise that we are not trying to prescribe what is to happen to records that are deemed to be public. It does not mean that they are put in the public domain or that they have to be kept; it simply means that they have to be managed according to a structured plan.

COSLA perhaps got unnecessarily hung up on the definition, which has to be wide because it is difficult for us to predict now what records public authorities might create in the future. I guess that most such records will be digital in the future. Our definition is wide so that it is future proof and potentially will apply to information that is recorded in any form that the authority might produce. That is part of the approach, but it does not mean that the authority will have to do certain things with the records, such as making them public or looking after all of them.

The Temporary Convener: With the concordat between central Government and local government, there is greater scope for flexibility for councils setting their own local agendas. Do you see any conflict between that and asking for consistency on a national basis, or do you think that the balance can be maintained quite satisfactorily?
George MacKenzie: I think the balance needs to be maintained. The consistency that we are talking about relates to a fairly broad framework, within which there is plenty of scope for individual changes and conditions to be taken into account when an authority is drawing up its plan. We would expect, for example, that most of the Scottish local authorities would have similar records management plans and we would be keen to work with them to ensure that that was the case. However, that would be a decision for them, in conjunction with us. We are looking for overall broad consistency, rather than specifics.

The Temporary Convener: Can you clarify whether the historic private archives that are under local authority control would be covered by the bill?

George MacKenzie: The bill says nothing at all about the ownership of records; it would depend on the circumstances in which the authority had received or taken in the records. I know that many local authorities operate historical archives, and in some cases records have been gifted or left to the authority. In those cases, the records would be covered by the bill. However, records that were deposited with the local authority would not be covered. The same really applies in the National Archives of Scotland. Essentially, we are the public record keeper—the nation’s memory—but we also have some very rich private collections. Some of those have been bought by the nation and are now considered to be public as well, but some collections are simply deposited with us, and the ownership of those is still with private bodies.

10:30

Margaret Smith (Edinburgh West) (LD): I apologise for my late arrival this morning, convener.

We have picked up from a number of responses concern about the length of the consultation period and its timing, given that it fell between June and August, which is obviously a holiday period. What are your views on the consultation and those criticisms?

George MacKenzie: Certainly, the consultation period was short: it was really dictated by the parliamentary timetable. However, I believe that the consultation period was adequate and we have had a very large number of helpful consultation responses. The formal consultation period was preceded by work that we did in reviewing the situation, so we were gathering evidence for quite a while before the consultation. There has been a very good opportunity for views to be aired. I am sure that in an ideal world some people would have preferred more time to have been available, but I am not at all convinced that that would have meant any great change or improvement to the responses that we received.

Margaret Smith: It is fair to say that it is the third sector that has raised most concerns with us. One of the concerns is that a number of bodies within that sector were unaware of the bill or of what it would mean for them, which may partly explain some of their late submissions and the fact that some of them are calling for the bill to be withdrawn. They do not feel that they have been able to offer input and do not have an understanding of how the bill would affect them. What are your views on that?

George MacKenzie: The Scottish Council for Voluntary Organisations is one of the bodies that has called for the bill to be withdrawn. It made the point that the consultation period was short, and I cannot deny that it was. However, I think that SCVO is substantively concerned about the issues that we spoke about a few minutes ago. I reiterate that I believe that is based on a misinterpretation. We are still open to dialogue and are very keen to have further dialogue with the voluntary sector and to discuss with it the details of how the bill might operate. For example, we could look at case studies and talk through with the sector how we see the bill working in practice, which will help to allay some of the concerns about the process.

Margaret Smith: Would there be guidance that included such worked-through examples?

George MacKenzie: Yes, absolutely. I will be honest and say that we cannot do this ourselves; the keeper of the records will not be able to do this himself or herself. We have to do it collaboratively through dialogue and discussion. There is a lot of good practice out there, but it is not always known across the entire sector. One of the issues will be to ensure that best practice is drawn out from, for example, local authorities and spread around so that all are aware of it. There is very good practice in the voluntary sector, too. Clearly, a lot of good lessons have been learned from the Shaw report and from other difficulties that the sector has had. Our role will be to ensure that it is spread around and that knowledge is widened so that people really understand what is involved.

The Temporary Convener: I have a final question. It is predicted that the financial costs of the bill will be relatively small, but we are in a very tight economic circumstance and lots of other pieces of legislation are hitting local authorities just now, including the Education (Additional Support for Learning) (Scotland) Act 2009 and the Children’s Hearings (Scotland) Act 2010. Might local authorities genuinely feel that trying to get best practice “spread around”, as Mr MacKenzie put it, could actually increase costs?
George MacKenzie: Overall, it will not. Good records management is not free, but it is cheaper than bad records management or no records management. However, the cost will sometimes take a little bit longer to become evident. The issue is probably that in one or two cases there may be a short-term need for greater expenditure. I am absolutely convinced that that will lead to greater efficiency across the piece and that the sector as a whole will feel the benefits in time. If an organisation is currently fully complying with the freedom of information requirements, the costs of the bill will be virtually nil to it because it already has the infrastructure in place to do what is required. If it is not complying at the moment with FOI, it may have to take steps to do so. However, our very strong feeling is that over the whole of the sector and over a period there will probably be a reduction in overall costs and an improvement in efficiency.

The Temporary Convener: Thank you very much.

Lindsey Henderson: Perhaps I can clarify that the reference to complying with FOI is partly a reference to complying with the code of practice on records management under section 61 of the Freedom of Information (Scotland) Act 2002.

George MacKenzie: Thank you for that, Lindsey. I should have made it clear that when I referred to compliance I meant complying with that code. Organisations that are complying with it are already doing records management well.

The Temporary Convener: Right. Thank you very much indeed for providing evidence this morning.

10:37
Meeting continued in private until 11:24.
SUBMISSION FROM THE SCOTTISH INFORMATION COMMISSIONER

1. I welcome this opportunity to submit my views to the Committee on the proposed new public records legislation for Scotland.

2. As the Committee will be aware, I have the statutory duty to ensure compliance by Scottish public authorities with the provisions of the Freedom of Information (Scotland) Act 2002 (FOISA). As part of this, I am charged to promote the following of good practice by those authorities with the Code of Practice on Records Management:

3. The FOISA imposes a requirement (at section 61) upon Scottish Ministers to issue such a code of practice—

“...providing guidance to Scottish public authorities as to the practice which it would, in the opinion of the Scottish Ministers, be desirable for the authorities to follow in connection with the keeping, management and destruction of the authorities’ records.”

4. There is clear statutory recognition, therefore, that good records management is essential to the proper functioning of a freedom of information (FoI) regime. In short, authorities must have adequate policies and plans for creating, storing, and disposing of, records. If not, it is often difficult for the authority to be sure of what information it holds, and it becomes onerous to locate and retrieve it when responding to a freedom of information request (in many of my investigations I have established that authorities held more information within the scope of a request than their initial searches suggested).

5. I am supportive then of measures which will improve records management as this is likely to improve efficiency in the handling of FoI requests and makes it more likely that the public will be given all relevant information in response.

6. At present I may assess whether a Scottish public authority is following good practice, and in the event that I find that an authority’s practice falls short of the Code, I may issue a practice recommendation.

7. These functions bear a strong resemblance to the powers of the Keeper to carry out compliance reviews, make recommendations and issue warning notices for which the Bill provides.

8. I am mindful of the need to limit the regulatory burden on authorities and to avoid duplication of oversight. However I believe steps can be taken to ensure that in practice a sensible and proportionate approach is taken.

9. There is already in place a Memorandum of Understanding (MoU) between the Keeper and the Scottish Information Commissioner which provides for joint audits.
of records management arrangements of public authorities. This is in recognition of the statutory obligation on the Commissioner to issue a practice recommendation only after consultation with the Keeper of the Records of Scotland.

10. In my view the MoU could be readily adapted so that such joint audits could result in joint recommendations by the Commissioner and the Keeper. Alternatively where records management failures have been evident in responses to freedom of information requests the Keeper could be requested by the Commissioner to use his powers of compliance review.

11. In relation to the specific provisions in the Bill, I would offer the following comments:

(a) The schedule of bodies to which the new Bill will apply largely matches the schedule of Scottish public authorities in FOISA. This brings benefits, as authorities which are already subject to FOISA (and therefore by default should comply with the statutory guidance in the existing Code of Practice on Records Management), will also be subject to the Bill. The two schedules are not, however, the same. For example, the new Bill will not apply to authorities in receipt of funding by the Scottish Funding Council which are currently subject to FOISA, but the Bill will apply to courts which are not subject to FOISA.

(b) The Committee should be aware that the authorities to which part 1 applies excludes certain bodies to which it might be expected that the provisions of the Bill would apply e.g. local authority trusts. So, for example, as drafted the Bill will apply to Culture and Sport Glasgow which provides leisure, library, sporting etc services and facilities on behalf of Glasgow City Council, but will not apply to Edinburgh Leisure which provides sporting and recreational facilities and services on behalf of City of Edinburgh Council.

(c) I note the inclusion of a provision at section 2 of the Bill to allow Ministers to amend the schedule by statutory order. It will be important that where this power is used, in parallel, Ministers use similar powers under FOISA to amend the equivalent schedule in FOISA, to maintain the strong overlap between the two schedules.

(d) I welcome the definition of “public record” in section 3. In my experience of working with FOI law, definitions of such key terms have proven particularly important.

(e) The existing Code of Practice on Records Management states that authorities should have a records management policy. When approving publication schemes, I require public authorities subject to FOISA to publish these – so they should all already have such a policy in place. I agree that
public authorities should be required to produce records management plans. I agree that in principle records management plans should have the Keeper’s approval, or that he should be able to withhold his approval.

Kevin Dunion
Scottish Information Commissioner
25 November 2010
SUPPLEMENTARY SUBMISSION FROM THE SCOTTISH INFORMATION COMMISSIONER

1. I am writing in connection with the committee’s discussion with George Mackenzie, The Keeper of the Records of Scotland, on the Public Records (Scotland) Bill yesterday (8 December). With reference to my written evidence, a question was put to the Keeper which appeared to be based on a view that I was proposing a voluntary approach to improving records management. For the avoidance of doubt, I would like to make clear that my written evidence was submitted in support of a statutory framework as set out in the Bill.

2. My submission outlined how, if passed, the Bill’s proposed new arrangements for the Keeper of the Records and my own responsibilities under the Freedom of Information (Scotland) Act 2002 might work in practice. My view is that our roles are complementary and that the provisions of the Bill are a good fit with how we work together in practice.

3. I am sorry if this was not clear from my submission and I would be grateful if this clarification could be accepted

Kevin Dunion
Scottish Information Commissioner
9 December 2010
SUBMISSION FROM SCOTTISH COUNCIL ON ARCHIVES

Useful definitions

• **Continuous improvement**: The assessment of current performance in recordkeeping in a public authority in order to improve that performance and thereby support the business of the authority. It usually involves identifying areas for improvement and putting in place relevant action plans. It is not a one-off action but rather a repeated process so as to ensure that recordkeeping meets the changing needs of the authority.

• **Document**: A collection of information - in hard copy or electronic format – that is treated as a discrete entity. The importance (or otherwise) of the information content determines whether it becomes part of a record.

• **Electronic records**: Records created, maintained and accessed in an electronic format.

• **Hybrid system**: A records management system that embraces both paper-based records and electronic records, and which will usually seek to maintain links between the records.

• **Life cycle of records**: The period of time during which records are in the possession of a public authority. It consists of three stages: creation or receipt; use and maintenance; and final disposition (to an archive or for destruction).

• **Paper-based records**: Those records created and maintained using the traditional medium of paper. Individual documents are held in files with identifiers such as the name of the creating public authority, a file title reflecting the content or common theme of the accumulated documents and the dates of first and last papers.

• **Record**: A collection of information – in hard copy or electronic format – created or received by a public authority during the discharge of its functions and retained in order to document and support its activities, including the meeting of audit and compliance requirements.

• **Recordkeeping architecture**: The relation to one another of different recordkeeping systems within a public authority (eg, data shared across systems or records created and maintained in different formats).
• **Records management**: The systematic, economical and efficient control or management of the creation, filing, retrieval and final disposition of records in order to support the business activities of a public authority, including proper documentation of its policies and actions. Records management includes planning, organising, training and promotion.

• **Self-evaluation**: The monitoring, evaluation and revision of its own recordkeeping systems, procedures and practices by a public authority in order to ensure that they continue to support business needs, including legal and accountability requirements.

**Records management challenges**

1. The information age is a reality, and it is as omnipresent in Scotland as in any other modern country. The creation and exchange of hitherto unimaginable quantities of information - literally millions upon millions of individual pieces of information - has become the stuff of the everyday transaction within government (in the broadest sense), within the commercial world and even in the communications between ordinary individuals. Over the last two decades and more there has been an information revolution resulting in major economic and societal changes. We communicate differently from earlier generations and we do so at a speed previously literally unimaginable.

2. However, the information age is not wholly dominated by the electronic records phenomenon. While the overwhelming majority of information is indeed created and maintained within an electronic environment, there is another and much more long-standing aspect of recordkeeping that requires both to be recognised and to be fully allowed for, namely the traditional paper-based record.

3. The recordkeeping architecture of almost all public bodies is significantly challenging. They have to maintain traditional paper-based records management systems; create new systems to manage the mass of electronic records; and, more often than not, put in place hybrid systems that allow the linking of records created and maintained within the two recordkeeping media.

**Securing the investment**

4. Information – whether in electronic or traditional paper form – is in all instances the outcome of an input or investment. Every document has to be created, a process that can take the emerging text or data through several iterations. If time is money, then information clearly costs: from its creation, through its communication, to the maintenance of recordkeeping
systems that allow it to be accessed over time and disposed of when no longer of value to the business.

5. The investment in creating and maintaining records is recognition that these collections of words and of figures – whatever the differences in format – are vital assets. They are essential in a society that seeks to protect the legal and other rights of both government and citizens.

6. Without records the everyday operations of society would grind to an unpleasant halt. It is therefore vital that the records are created and maintained using procedures and practices – records management – that ensure they are accessible, accurate, auditable, authentic and secure. Given their importance, records management procedures and practices should be frequently monitored, evaluated and, as appropriate, amended so as to ensure that they meet ever-changing needs.

7. The information contained in records effectively managed can increase efficiency, reduce costs and underpin accountability. Records are the essential evidence of how a public authority discharges its functions, how it makes decisions and how it acts internally and externally.

8. If those assets are not handled efficiently, then there is a negative impact on business whether through time wasted finding the information and/or through the making of decisions on the basis of the inadequate information available. The consequences can be extremely serious.

9. Securing the investment in the creation and maintenance of records does not simply involve finding the ideal solution that will allow ease of access. During a time of rapidly changing technology and of challenge to the concept of how government can best deliver services for the citizen, there is an inescapable need to harness continuous improvement in relation to records management. Such an approach ensures that records management processes remain up to date and equipped to deliver the information needs of government and of the citizen against the backdrop of political, social and economic change.

Accessibility

10. Records management ensures that the records remain accessible over time. It is access not merely within the public authority responsible for the records but access for a much wider audience best summed up in the single word ‘society’. The citizen has the expectation that most information in the records will be available to him and that government (in the broadest sense) will fully recognise that expectation. Government has clearly done so by establishing defined access rights in freedom of information, data protection and environmental information legislation.
11. In particular circumstances, access to information for an individual is not about a business-related transaction or family or local history (both popular reasons for access) but about something uniquely and intensely personal to the point where it is endowed with emotional significance. Such circumstances have a unique importance that transcends administrative need or the exercise of a legal right but which, nonetheless, are usually dependent on both those elements.

Dealing with the issues

12. The key factors governing any approach to records and their management are clear:

- the volumes of records in electronic and paper-based formats and the continued growth in those volumes
- the all-pervasive nature of information creation in a modern society
- the investment committed to the creation of the information, and the need to recognise records and the information they contain as vital assets
- the importance of access, whether driven by business need, legal right or personal reasons.

13. These factors, taken individually and together, point to the economic, social and legal importance of records and the information they contain. To meet the pressures arising from these different factors records management systems have to be robust, offer guaranteed consistency and respond to changing business needs. To have it otherwise opens the way to inefficiency, waste of valuable resources and fragmentation of effort in meeting the challenges facing records management in an environment moulded by rapid technological change and increased public rights and expectations.

14. The need for the development of common standards in records management is recognised internationally and the application of common practices cannot be a matter for dispute in Scotland or any other modern country. However, there can be differences as to how best to create and maintain the common practices needed to ensure long-term efficient records management and access.

A new paradigm for records management in Scotland

15. In the opinion of the Scottish Council on Archives (SCA), ensuring consistency in on-going records management requires a legal framework that reflects the importance of records in government and the fact that they are as a publicly-funded asset. That legal framework – a Public Records
(Scotland) Act – would provide clear authority for action and a core reference point applicable across the range of public authorities that constitute government in Scotland.

16. However, a legal framework does not of itself guarantee consistency of improvement in recordkeeping and the handling of information assets. Achieving such a goal and maintaining it require that the framework should be populated by the on-the-ground records management needs of individual public authorities with very different functions and resources. And the same applies to voluntary or third sector bodies discharging functions on behalf of government.

17. The SCA is a body born of the desire to find strength and renewed purpose in a co-operative approach that recognises the strengths and needs of different participants. That approach is fully applicable – indeed, indispensable – in meeting the many challenges faced by modern records management, including straddling different media.

18. Within the National Archives of Scotland resides records management expertise of the highest quality. Within each public authority resides knowledge of its own functions and services and how those are reflected within existing records management systems. The bringing together in partnership of the two sources of expertise would open the way to a mutually beneficial partnership that could make best practice records management a reality in Scotland.

19. If records and the information they contain are vital, then it is sensible to have in place a mechanism that identifies those who repeatedly decline to recognise the importance of records. At the same time, it is necessary to see any sanction as extraordinary and to be used sparingly and solely for the purpose of achieving a necessary remedy for a serious deficiency in records management. Proportionality is essential.

A way forward

20. The SCA is of the view that the improvement of records management in Scottish public authorities is best secured by a balanced approach:

- On the one hand, there is clearly a need for the creation, maintenance and promotion of robust and flexible records management standards.
- On the other hand, the on-the-ground reality is that public authorities are best equipped to understand their business needs and the associated internal processes.
- Bringing together those two strengths will secure success.
21. This balanced approach is driving the SCA’s current work in developing a self-evaluation tool called Archives and Records Management Services (ARMS): a Quality Framework for Archives and Records Management Services in Scotland.

22. The ARMS framework is based on the widely-recognised European Foundation for Quality Management excellence model, which advocates an eight-step self-evaluation process applicable to the full range of archival and records management activities, including the specific records management function:

- Gain and retain management commitment
- Communicate what you are doing and what you are trying to archive
- Plan the self-evaluation process
- Brief and develop those directly involved in the process
- Conduct self-evaluation
- Consider outcomes and priorities
- Establish and implement action plans
- Monitor progress, review and maintain momentum.

23. The ARMS framework identifies core outcomes:

- Help people trust organisations (accountability)
- Select and make our individual and community stories accessible (access)
- Support efficient delivery of services
- Management and governance.

24. Assessment of the levels of effectiveness in delivering the outcomes - ranging from excellent to unsatisfactory – is tied to seven quality indicators (QIs):

- QI 1: Create and manage trustworthy records
- QI 2: Protect rights and interests
- QI 3: Make sure our records and archives survive as long as they are required
- QI 4: Help people find and use our records and archives
- QI 5: Work with our community
- QI 6: Leadership and management
- QI 7: Ethos and values.

25. Each QI is linked to the desired relevant outcomes, to associated themes, to a description of what the QI means in practical terms and to a list of questions that should be asked. The answers focus on evidence to support any assessment and on identified strengths and areas for improvement. The intention is to assess impact and to encourage improvements that extend impact.
26. In line with continuous improvement thinking ARMS is not merely a detailed snapshot of the present situation. It leads directly to two important outcomes: recognition of success, and the development of an action plan to meet the issues in areas requiring improvement.

27. ARMS is flexible in that any QI can be tackled on a standalone basis. It thereby addresses the issues of limited resources, of what is important at a given time to an organisation (which can change rapidly) and of maintaining a momentum for improvement.

28. The SCA is of the view that ARMS could provide significant practical support for the application of guidance issued by the Keeper of the Records under the envisaged Public Records (Scotland) Act.

Dr Irene O’Brien
Chair
26 November 2010
SUBMISSION FROM COSLA

Introduction

1. In our response to the consultation on proposals for a Bill on public record keeping, COSLA noted disappointment at the limited scope of the consultation. We also noted that the timing and length of consultation made a meaningful local government response difficult. To a certain extent, these concerns are also true for the progress of this Bill through Parliament. While it is a short piece of legislation we believe the content of the Bill could have significant implications for councils, third and public sector partners as well as constituents. However, we welcome the opportunity to discuss the subject of record keeping and to submit written evidence to the Education and Lifelong Learning and Culture Committee.

2. As we know from Kerelaw and the Shaw report, record keeping can be of the utmost importance to particular groups of individuals who have a right to access information and records about their lives, or the lives of their loved ones. It is impossible to rewrite history and correct the mistakes made during that time but since then, local authorities have worked hard with third sector organisations to improve record keeping in relation to looked after children.

3. COSLA therefore welcomes this opportunity to discuss how to further improve record keeping in Scotland. Local authorities are keen to identify those areas which may be subject to the same types of risks identified by Kerelaw and Shaw and to prioritise efforts to improve record keeping where the risk is greatest and particularly those areas of policy involving vulnerable people.

4. Local authorities particularly welcome the requirements for the Keeper of the Records to produce guidance and to support public authorities seeking to improve standards of record keeping and record management.

5. However, COSLA believes that any efforts to address record keeping in Scotland must be risk based, proportionate and have an eye to best value considerations. While we recognise that it is the intention of the Scottish Government for this Bill to be light touch and to drive a bottom up approach to improving record keeping, we are concerned that the Bill itself does not adequately reflect these intentions and would ask the committee to pay particular attention to the following points.

Main concerns

Definition of a public record

6. It is understandable that an argument could be made that all record keeping needs to improve – indeed, there is always a case for continuous improvement. However at a time of considerable financial constraint, it is crucial that this legislation targets and prioritises the improvement of record keeping in a risk based and proportionate way.
7. At present the definition of a public record is fairly all encompassing and may result in this legislation having a disproportionate cost to all public bodies and third sector partners. While implementing better record keeping across the piece is obviously desirable, and doing so may over time yield efficiencies, how public bodies prioritise improvements and meet the costs associated with these improvements must be risk based and focus primarily on those areas of business which may have a direct impact on the lives of those we serve. Dealing with all records as public records in a non-risk based way is not cost neutral — if there are savings to be made, they will not be realised immediately. These financial considerations are even more crucial at a point in time where councils are only assured of a yearly budget and are facing year on year cuts for the foreseeable future.

8. Finally, should the legislation be passed in its current form, it could cause additional bureaucracy for councils and third sector partners who enter into contractual relationships to provide any and all types of service — regardless of whether the record keeping measures concerned could pose a “risk”.

A collaborative approach in law
9. The intention of the legislation is to facilitate and drive improvements in record keeping and record management from the bottom up. Yet the Bill requires public authorities to seek approval for their record management plans (through a detailed and seemingly bureaucratic process) from the Keeper of Records. In relation to councils, this does not allow for the local political and financial prioritisation of record keeping which would tie in with local authority duties to provide best value.

10. If the definition of a public record is kept as it stands, it would also seem disproportionate for the Keeper of the Records to be tasked with a process of “highlighting failure” rather than supporting and driving best practice. Something more collaborative which allowed for “agreement” rather than “approval” of record management plans based on statutory guidance, and “risk based business improvement plans” rather than “compliance reviews” would strike a more proportionate response.

11. It should also be noted that if the local authority as a public authority were to be held responsible for the success or failure of record keeping by our third sector partners, it would be reasonable to expect that any burdens/requirements/standards placed on the authority by this legislation, would equally have to apply to those we hold contracts with.

The form of scrutiny needed post Crerar
12. The Bill currently provides the Keeper of Records with a scrutiny role which, while impossible to effectively realise within current resources, is a cause for concern in the longer term and is out of kilter with general policy on scrutiny and inspection post Crerar.
13. COSLA would like to be assured that consideration has been given to joining up with mainstream – risk based assessments which will be conducted in future for example, by SCSWIS and/or, with the Accounts Commission in their role coordinating corporate level scrutiny of local government.

14. This would seem a more proportionate and effective way of being reassured that record keeping and record management is being continuously improved to an agreed standard across Scotland. It is also a good example of how Scottish Government can limit any current or future burdens around the bureaucracy and financial costs to the public purse associated with inspection.

Conclusion

15. COSLA would like to reiterate local authorities’ commitment to improving record keeping so as to protect the rights of those vulnerable adults and children who receive services from local authorities. Local authorities are supportive of a more supportive role envisaged for the Keeper which would drive and facilitate best practice in record keeping and record management.

16. However it must be remembered that this Bill must both reflect the intentions of the day but also be considered in light of its implications for the future. The intentions expressed by the Scottish Government in the policy memorandum are broadly supported but we believe the legislation does not adequately reflect these intentions. COSLA is concerned that there is not an adequate amount of time to fully consider these matters but will support and contribute to the Bill process in any way possible.

29 November 2010
JOINT SUBMISSION FROM BARNARDO’S SCOTLAND, ACTION FOR CHILDREN SCOTLAND, ABERLOUR CHILDCARE TRUST AND CHILDREN 1ST

1. We welcome the opportunity to contribute to the Education, Lifelong Learning and Culture Committee’s consideration of the Public Records (Scotland) Bill. Barnardo’s Scotland, Action for Children Scotland, Aberlour Childcare Trust and CHILDREN 1ST are four of the largest children service charities in the country, with a combined spending on services for children and young people of over £75 million. Last year we worked with over 25,000 children and young people and child protection is central to the work of all our organisations. Much of our work is delivered as part of contracts with local authorities, health boards and other public bodies. It will therefore be affected by the provisions of the Public Records (Scotland) Bill.

2. Each of our organisations is committed to meticulously keeping full and accurate records of its involvement with children, young people and families. We recognise that rigorous record keeping and management is crucial to keeping children safe and support moves to improve standards in this area. We recognise that the records that we produce tell the story of the lives of the people with whom we work. We strive to ensure that records are kept sensitively and are produced with the utmost respect for the people who use our services. We are mindful of the challenges involved in balancing the need for confidentiality and privacy, and the need for appropriate access.

3. We recognise the failings in record keeping that were identified in the Shaw Report and the devastating impact of abuse that some children and young people received in residential care in the past. We have all taken steps to ensure that the lessons of reports such as the Shaw Report are taken on board in our policies and practices as organisations.

4. We are all therefore fully supportive of moves to improve record keeping and management in Scotland. However, we are concerned about the potential unintended consequences that the new legislation could have on the work of voluntary organisations like ourselves and our ability to deliver services effectively to some of Scotland’s most disadvantaged children.

5. Working through Barnardo’s Scotland, who made early contact with the bill team because of their work with survivors of sexual abuse, we sought to ensure that the proposed legislation was proportionate, workable and did not place inappropriate burdens on voluntary organisations. To this end Barnardo’s Scotland submitted evidence to the pre-legislative consultation process in August 2010. Several meetings took place with the bill team and we were confident progress had been made. However, scrutiny of the bill as published indicated that little action had been taken in our key areas of
concern. We are very concerned at the potential impact of the proposed legislation as currently drafted. Therefore we would ask the Committee to support the suggestion made by the Scottish Council for Voluntary Organisations (SCVO) that “because of a series of concerns around the potential negative impact on the voluntary sector [detailed below] and our lack of engagement in the development stages of this Bill, SCVO requests that the Committee recommend the withdrawal of the Bill pending a fuller consultation with the voluntary sector”.

Specific concerns

Definition of public records

6. The draft legislation defines public records as follows:

**3 Meaning of “public records”**

(1) In this Act, “public records”, in relation to an authority, means—
(a) records created by or on behalf of the authority in carrying out its functions,
(b) records created by or on behalf of a contractor in carrying out the authority's functions,
(c) records created by any other person that have come into the possession of the authority or a contractor in carrying out the authority's functions.

(2) In subsection (1) “contractor”, in relation to an authority, means a person to whom functions of the authority are delegated (whether under a contract or otherwise) by the authority.

7. And this is expanded upon later in the draft Bill:

**12 Interpretation of Part 1**

(1) In this Part—
“public records”, in relation to an authority, has the meaning given by section 3(1),
“record” means anything in which information is recorded in any form,

8. Therefore a public record is anything in which information is recorded in any form created by or on behalf of a body such as ourselves while carrying out a public authority's functions, whether under contract or in some other arrangement.

9. This very broad definition of public records, covering all and any forms of information, is deeply problematic. Having discussed the issue at length with members of the bill team, we can understand why this could be
appropriate when dealing with a single public authority, since it would simply ensure the legislation covered all information produced by that body. We also recognise the concerns expressed by CoSLA that this could place a major burden on local authorities. However, we would contend that it is not appropriate or logical when dealing with organisations like ourselves, which are independent but rely on a wide variety of public funding streams for the majority of our income. To define all information that we produce as a public record is entirely disproportionate. Effectively this would mean that every document, minute or email we produce discussing in any way the delivery of a service for a public authority would be deemed a public record and could therefore be subject to the provisions of this bill.

**Records Management Plans**

10. The Bill places a duty on public authorities to establish a records management plan (RMP), but gives public bodies the flexibility to establish their own RMP as long as it approved by the Keeper. Mention is made of a model RMP, but public authorities must merely “have regard to it”. Since almost all the work we do has some element of public funding the current working of the bill will lead to organisations like ours having to assess all information we produce against a large number of different record management plans.

11. We recognise that, just because something is a public record as defined in the legislation does not automatically mean it will be covered in a RMP, or confer any ownership, access or transfer rights outside those defined in the RMP. However, assessing all the information we produce against various RMPs, in addition to our existing information management systems, would create a significant burden. The Bill would also give local flexibility in the creation of RMPs, potentially resulting in every public authority having different requirements for information management. As an example, some of our services are funded by a dozen different public authorities, and therefore any information they produce would have to be assessed against up to a dozen different RMPs.

12. A further set of problems that arise from this very wide definition of public records is that RMPs will themselves be drawn too broadly by public bodies in an attempt to ensure that there can be no possible danger that a public authority could fail to ensure the recording and retention of potentially relevant data. This would transfer a massive burden of responsibility from public authorities to contracting bodies. Such over-managed and risk-averse application of the legislation is understandable from the point of view of a public authority, especially given the system of compliance reviews, warning notices and publicising of failures laid out in sections 6 and 7 of the Bill. However, this would again create an unnecessary burden for organisations like ourselves.
Lack of integration with other legislation and regulatory frameworks

13. The legislation could also act as a distraction from GIRFEC and other existing data management processes which focus on consolidating information about children into a single “child’s plan”. The approach in this legislation would be to create multiple sets of slightly different records held by different public authorities for the same child.

14. The legislation also does not take into account the progress that has been made by organisations such as ourselves since the publication of the Shaw Report with regard to information management and the codes of practice we work to. It is not clear how this legislation will relate to our existing systems of dealing with freedom of information and data protection legislation, and existing information management requirements from regulatory bodies for organisations working with children such as SCSWIS.

Conclusion

15. While we support the intention of the Bill to build on the work of the Shaw Report and ensure that appropriate records are maintained by organisations such as ours, the way the legislation would be likely to operate in practice would be burdensome, confusing and over-managed.

16. We believe that there is a need for a risk-based approach which recognises the importance of the proper generation and maintenance of records and is mindful of the failures of the past, but nevertheless takes a proportionate view of what information an authority and any contractors should be maintaining under their record management plans, particularly when there is no identifiable risk to vulnerable individuals.

17. We are keen to work with the Scottish Government and the bill team to help design legislation that is strong enough to protect children and families but that is also proportionate. However, as stated earlier, we support the position taken by SCVO that the current timetable for the Bill would not allow sufficient time for this work to be undertaken. Therefore we support SCVO’s call for the bill to be withdrawn to allow time for proper engagement and discussion. Child protection is central to the work of our organisations and it is therefore crucial that we get this legislation right,

Mark Ballard
Assistant Director Policy and Influencing
26 November 2010
SUBMISSION FROM THE SCOTTISH COUNCIL FOR VOLUNTARY ORGANISATIONS

About SCVO

1. The Scottish Council for Voluntary Organisations (SCVO) is the national body representing the voluntary sector. There are over 45,000 voluntary organisations in Scotland involving around 137,000 paid staff and approximately 1.3 million volunteers. The sector manages an income of £4.4 billion.

2. SCVO works in partnership with the voluntary sector in Scotland to advance our shared values and interests. We have over 1300 members who range from individuals and grassroots groups, to Scotland-wide organisations and intermediary bodies.

3. Further details about SCVO can be found at www.scvo.org.uk.

Introduction

4. SCVO welcomes the opportunity to provide evidence to the Education, Lifelong Learning and Culture Committee, which begins its examination of the Public Records (Scotland) Bill on 8 December 2010.

5. We wish to bring to the attention of the Committee the concerns of many of our members, who are in principle supportive of the aim to improve public record keeping. However, we are concerned about the way in which this Bill is drafted, and in particular, the potential for unintended consequences that could have a significant resource implication for the voluntary sector.

6. The Bill is relevant to the voluntary sector because it includes a statutory definition of “public records” that includes records "created by or on behalf of a contractor in carrying out the authority's functions" i.e. includes records kept by voluntary or private sector organisations working under contract to public authorities to provide public services. A record is defined in the Bill as “anything in which information is recorded in any form”.

7. According to the policy memorandum that accompanies the Bill “the Bill covers these records in a way which does not impose new and unreasonable burdens on voluntary and private sector organisations”. However, there is no specific evidence of how this has been determined.

8. The Bill sets out the duty on public authorities to establish a Records Management Plan (RMP), but does not give details of the model RMP nor does it specifically say that public authorities must follow it, rather they must “have regard to it”. So at this stage, it is quite difficult to know what the implications of the Bill might be for voluntary organisations.
Key Message

9. In brief, because of a series of concerns around the potential negative impact on the voluntary sector (detailed below) and our lack of engagement in the development stages of this Bill, SCVO requests that the Committee recommend the withdrawal of the Bill pending a fuller consultation with the voluntary sector.

What are the concerns for the voluntary sector?

- Despite the direct impact it will have on our sector, no one knows anything about it. This is in part due to a very limited consultation process. The Bill was consulted on for 6 weeks only, from 22 June to 4 August 2010. Only three voluntary sector organisations submitted responses (87 responses were received in total). This timeframe does not respect the best practice guidelines laid out in the Compact¹, nor has there been any explanation for why the consultation should have been curtailed from the usual 12 weeks. We also note the limitations of running a consultation in the middle of the summer.

- The terms of the Bill, especially the broad scope of the definition of “public record”, were not obvious from the terms of the consultation. Those voluntary sector organisations who did have early discussions with the Bill team, did not anticipate from the tone of those discussions, to see the Bill drafted in such broad terms.

- While we are told that the intent of the Bill is not to place additional burdens on the voluntary sector, the Bill does not make this clear and leaves the door wide open to all sorts of potential additional administrative burden and attendant costs.

- There is an apparent lack of proportionality and no mechanism to relate the new system to levels of risk – while the original issue of poor record keeping related to looked after children, the solution is now to cover any and all public functions, and any voluntary sector organisation that is performing the functions of a public authority.

- The law of unintended consequences: the Bill team have assured us that the new legislation will result in fewer records being kept, not more. However, this is not reflected on the face of the Bill; the Bill places no limits whatsoever on the definition of public record, or on public functions. We cannot ignore the fact that we live in a highly risk averse culture, with recent examples of legislation designed to simplify, enable and improve access, that result in the opposite, or that create a new scheme that is disproportionately resource

¹ A Compact between the Government and the voluntary sector was signed in October 1998, and refreshed in 2004. The Compact is an agreement on the principles of working in partnership, based on a mutual understanding of the distinctive values and roles of the Scottish Executive and Scottish Parliament and the voluntary sector. http://www.scotland.gov.uk/library2/doc16/cgpg-00.asp?textonly=FALSE
intensive and bureaucratic (e.g. Data protection or PVG - £50 million plus to create a barred list of less than 400 people)

- Voluntary organisations already provide records to public authorities, as specified in contracts; voluntary organisations would not want to see public authorities asking for more information, or expecting voluntary organisations to set up new systems, as a result of the Bill. If new obligations are placed on voluntary organisations, these must be properly costed and funded; however, in the current funding climate we have serious concerns about the ability of our sector to win that argument

- While consistency might be one of the potential benefits of this legislation, it is unclear that the Bill would result in more consistency, because public authorities do not have a duty to follow the model plan but only to 'have regard to it'; Voluntary organisations often operate under contract to several public authorities, and providing different information, or information in different formats, to different public bodies is/would be an administrative burden.

- There is a risk of further duplication where public authorities feel they are obliged by their RMP to ask for information that is also submitted to other bodies, such as the Office of the Scottish Charity Regulator (OSCR) or the Care Commission [NB, this is particularly important as the Public Service Reform Act regulations appear to give Social Care and Social Work Improvement Scotland (SCSWIS) inspectors the right to ask providers to keep/provide any information they see fit].

- What records would be included is not clear from the Bill, but will be set out in the guidance and in individual records management plans – how likely is it that the voluntary sector will be able to engage meaningfully with public authorities in the design of these plans; we say that public authorities must only include records in their records management plan which relate directly to the running of public services. Where the voluntary sector is concerned, this can become very complicated and difficult to manage; e.g. board minutes, research reports, etc.

- Voluntary organisations are concerned that information disclosed to them by the people they support is often provided on the basis that it is confidential; this is crucial to developing and maintaining trusting relationships, which voluntary organisations often have with those who would not otherwise engage with statutory services. Voluntary organisations have some real concerns about the impact on confidentiality/trust of records becoming public property.

- Voluntary organisations would also like to discuss the issue of ownership of records: once a contract is over, would records be the property of the voluntary organisation or the public authority? Voluntary organisations holding confidential records have developed systems for archiving and protecting these records, while at the same time allowing appropriate access to them, and would have concerns about handing records over to public authorities for archiving.
• Some organisations have also raised the issue of how this Bill fits with Freedom of Information (FOI). A separate consultation on extending Freedom of Information provisions that was published earlier this year did not propose to extend FOI to those providing services under contract to local authorities. We would seek clarity on whether or not the Public Records Bill introduces FOI to voluntary organisations “by the back door”.

Conclusion

10. In conclusion, the sector very much wants to work with the Bill team to find a solution that achieves the core aim of improving public record keeping in a proportionate and measured way. As it stands, the Bill has the potential to cast a very wide net across our sector that tangles us all up in a resource intensive bureaucracy disconnected from the original policy intent of the legislation. We do appreciate that this is not the intent of the Bill, but that is the way it is currently drafted. We need more certainty about how this Bill will address the high risk areas in a way that does not duplicate, lead to inconsistency across public authorities, or place additional burdens where there is no resource to meet them or risk to justify them.

11. We discussed two options. One option was to withdraw the Bill, in order to provide for more thorough consultation with our sector. A second option was to amend the Bill. We considered that the Bill would have required major amendment to narrow the scope of the definition of public record, and minimise the potential disruptions caused to the work of voluntary organisations. We would also have needed to be given assurances that the sector would be properly involved in the development of the model records management plan and guidance.

12. Of these two options, we decided that withdrawal of the Bill is the only appropriate action at this time. This is because, we are concerned that given the limited time left in this session of Parliament there may not be time to properly rework the Bill to make it fit for purpose. We therefore request that the Committee recommend the withdrawal of the Bill pending a fuller consultation with the voluntary sector.

Nancy Fancott
Policy Officer
25 November 2010
Scottish Parliament
Education, Lifelong Learning and Culture Committee
Wednesday 12 January 2011

[The Convener opened the meeting at 10:01]

Public Records (Scotland) Bill:
Stage 1

The Convener (Karen Whitefield): Good morning. I open the first meeting of the Education, Lifelong Learning and Culture Committee in 2011. I hope that everyone had a good festive break, enjoyed Christmas and new year, and is looking forward to the final weeks of Parliament before dissolution.

I remind all those present that mobile phones and BlackBerrys should be switched off for the duration of this morning’s committee deliberations.

We have apologies from Kenneth Gibson and Christina McKelvie, who are both unable to attend committee this morning. I am pleased to welcome Dave Thompson, who is attending as a substitute member. I understand that Liz Smith is running a little late, and Ken Macintosh will join us at approximately 10.30 as he has business at the Local Government and Communities Committee.

The first agenda item is evidence on the Public Records (Scotland) Bill. I am pleased to welcome Kevin Dunion, the Scottish information commissioner, and Dr Irene O’Brien, the chair, and Dr Gerry Slater, policy adviser, from the Scottish Council on Archives. I thank you for your attendance this morning and for your written submissions to the committee in advance of our evidence session.

I begin by asking for your views on whether the legislation is required. I ask the question because there has been considerable debate around whether a voluntary scheme would do exactly the same as legislation in ensuring that information is properly kept and accessible. Who starts with that is entirely up to you.

Dr Irene O’Brien (Scottish Council on Archives): The Scottish Council on Archives is very strongly of the opinion that we need a legislative framework to ensure that we improve record keeping in public authorities. We believe that we will be able to do that in a collaborative way, and we will work with the National Archives of Scotland to ensure that we assist public authorities and take them forward.

It is not a quick solution; we will undertake a programme that will lead to a large-scale improvement, which will take place over time. People should not expect that it will happen right away. We need the strength of legislation, but we realise that we must work together to ensure that we take into account individual circumstances in the general framework and that there is a long-term improvement.

We all know that we have to deliver better record keeping—we know how the need has arisen and we know that we have to address it. The legislative framework provides security that we ensure that we do that.

Kevin Dunion (Scottish Information Commissioner): What we currently have in Scotland as an adjunct to the freedom of information legislation is a code of practice on records management. One might say that that would be sufficient, but the reality is that it is not. The code of practice can lead only to practice recommendations that are issued by me in conjunction with the Keeper of the Records of Scotland. I have no ability to enforce that code of practice as it currently stands. If authorities observed a code of practice, they would probably observe the good practice that the keeper would like to see in a records management plan, but that is not the case currently.

Even prior to the FOI legislation coming into force, when I was asked by the then Scottish Executive to look at the search that it had made for the records that it held on looked-after children in care, it was like looking for a needle in a haystack. There was no records management plan that was sufficient to allow us even to target the search, and what we found was extremely disappointing to the survivors of abuse in care homes. We could find laundry lists, but no records of discipline or even the names of individual children who had been there. Therefore, in the context of the Shaw report, it is true that we need something better than we currently have. More broadly, it would make authorities far more efficient. When I was carrying out a practice assessment I came across one local authority alone that had more than 200 separate records management systems. That will simply not be possible if we have the statutory framework of a records management plan.

Sometimes really significant pieces of information cannot be recovered. In relation to a major private finance initiative contract for a hospital in Scotland, the authority could not produce the whole contract for me until several months into my investigation. That is simply not acceptable, and again it would not be possible under a proper statutory framework.
Dr Gerry Slater (Scottish Council on Archives): I am of the view that a voluntary scheme would be rather like new year’s resolutions: we all start off with genuine enthusiasm and then gradually, as other things emerge, the enthusiasm wanes. That is the reality of life.

We need a statutory framework as a fall-back position. It is particularly important because we are not just talking about traditional paper records; myriad electronic records systems—if I can call them systems—are emerging.

It is important that there is more standardisation across the public sector. I am aware of that from the situation in Northern Ireland, where we decided to face up to that particular problem. If we do not have that standardisation, practical difficulties will arise in terms of access and—above all—cost.

The Convener: Thank you, that has been helpful in explaining why you think that legislation is a more appropriate vehicle than a voluntary scheme.

The committee has received a number of submissions from organisations that argue that a voluntary scheme would be better. They argue that legislation may well be appropriate in some cases, but they suggest that the schedule that is attached to the bill, which lists the organisations that would be covered by the scheme and required to keep records, is too extensive and may place unnecessary burdens on organisations.

Two of the organisations that have made such suggestions to the committee are the National Museums Scotland and the General Teaching Council for Scotland. As small organisations, they think that the administrative requirements that will be placed on them will be too burdensome. Do you have a view on that? How would you seek to address their concerns?

Dr O’Brien: There was an argument that the schedule was not broad enough in terms of the archives and records sector, but we are broadly happy with it. Organisations must manage their records no matter how small they are. We must ensure that we have a scheme that meets the minimal needs of such organisations. It should not be a huge issue, but it is something that they must do for their own management and efficiency. Smaller organisations should be encouraged to see that they should do records management anyway, so that their organisation works well and efficiently. They are public authorities, and the public deserve to know that the records that are kept on their behalf are kept appropriately and managed well. Ultimately, any citizen may need access to such records at some time. It is important to emphasise that no matter how small an organisation is, it has a responsibility to manage its records. Doing so should not be regarded as an excessive burden.

Kevin Dunion: As I said in my submission, it would be helpful if the schedule attached to the bill was the same as that attached to the Freedom of Information (Scotland) Act 2002, which covers all public authorities in Scotland. They already have to observe the code of practice on records management, so it is important that the same bodies should be subject to the provisions of this bill, which is by and large what is happening.

Irene O’Brien made an important point that the keeper has emphasised repeatedly, which is that it is up to authorities to produce their records management plan, respecting the keeper’s guidance on a model plan. The burden should not be onerous, unless the body has no records management plan whatever, which would not be good enough for a public authority in any case. The remedy is in the hands of the authorities, which must identify what fits their needs and establish with the keeper that what they have in place is sufficient to meet the requirements of the eventual act.

Dr Slater: I certainly endorse what the commissioner has said. I strongly emphasise the partnership and co-operative approach, because this is not about trying to catch people out—that is not the intention—but about ensuring that basic systems are in place. I am sure that assistance will be offered by the National Archives of Scotland and that guidance will be available.

The Convener: The National Museums Scotland suggested that the bill covers two categories of organisation: those which it considers to be high risk because they maintain and have access to very detailed personal information about individuals; and lower-risk organisations, such as NMS, which do not have access to very much personal information and collect information that is of a very different nature. Should there be different categories of organisation in the bill’s schedule, or should all organisations be treated exactly the same?

Kevin Dunion: My view is that it is much simpler just to say, “Here is the statutory framework and the guidance.” Of course, subsequently, when the keeper carries out any inspections or assessments, I would expect him to focus on the higher-risk organisations, as I do. Nevertheless, a common high standard should be expected across all Scotland’s public authorities. As I understand it, we are not talking solely about records of children in care or, indeed, children or vulnerable groups; we are talking about a public records bill that may need to be called upon in relation to issues of accountability, governance and financial expenditure as much as for anything
else. Therefore I do not think that we should say that the bill is solely for one purpose and should focus on some organisations alone.

Dr O’Brien: I agree with that. The bill arose out of an issue relating to personnel files in the historic abuse inquiry, but the bill’s provisions are about managing records and about organisations’ accountability, both for how they spend public money and how they perform. It is important that we broaden our view of the bill in that regard. The personnel files were the issue, but there will be other issues in the future if we do not manage records appropriately throughout the public sector. It is important that we look forward and ensure that we have a system that manages records appropriately, whatever the public organisation, otherwise we could be hit by another problem in an area that we have not covered or that we decided was low risk.

It is important that we impose a framework that is helpful in giving people guidance on how to manage their records, regardless of how small or big their collection is. It will be helpful for the public to have the security of knowing that they can find the information that they require because every organisation is working within an acceptable framework of professional standards.

10:15

Dr Slater: All organisations, regardless of their function, create records and information and want to have access to them. On grounds of efficiency, it is in their interests to have a basic system in place that ensures that they can access their records as efficiently as possible. Efficiency in record keeping is no different from efficiency in any other function that an organisation carries out.

Claire Baker (Mid Scotland and Fife) (Lab): I want to turn to the obligation on contractors. Local voluntary sector organisations have raised concerns with us that the proposed system will place an unfair burden on them. Those concerns arise from their interpretation of the relationship that will exist between them and the local authorities that they contract their services to. Does the panel have any comments on how the system will work in practice? Do you understand the voluntary sector’s concerns?

Dr Slater: I certainly understand the concerns, which it is entirely appropriate for it to have expressed. However, under the bill, the responsibility will rest with the public authority, which will have a contractual relationship with the body that receives funding. If we have the collaborative approach that is central to implementing the bill’s proposals, there will not be a conflict of interests. It will not be a case of one body dictating to another. I see no sign of that in the bill. There will be guidance and collaboration.

Claire Baker: The use of the word “collaboration” is important. A contractor might feel that there is a difficulty in reaching agreement with the local authority on how its records should be managed. The voluntary sector is concerned that there is an expectation that organisations will have to change the way in which they manage their records. Given that they might work with a number of local authorities, that would be an unfair burden on their limited resources. If difficulty was experienced in reaching an understanding on what was expected of the contractor, to whom would it be appropriate to turn to find a resolution?

Dr O’Brien: If everyone works to a framework, there is less chance that different local authorities will expect different things of a voluntary body. I think that is less likely than it is now.

It is important that we work with local authorities and other public sector bodies, and that they work with their contractors, to ensure that there are no burdensome requirements. The responsibility will rest with the local authority or public body. Everyone in the sector needs to work together collaboratively to ensure that the guidance meets people’s needs, is written in such a way that no one is put off and reaches out to everyone because it is in plain English and does not use technical jargon. We must ensure that everything is done in a way that makes it easy rather than difficult for people to comply.

We should concentrate on taking positive, collaborative steps so that we make the process easy for people. That is our intention. The intention of the sector is that the bill’s proposals should not be difficult to implement. We want to make things as easy and as understandable as possible for everyone. Given that all the local authorities will be working to similar guidelines, people should not be asked for different things by different local authorities. The important thing for us is to work through the system to ensure that we all ask people to do similar things and that what they are being asked to do is extremely clear and not overly burdensome.

Kevin Dunion: Obviously, I have read the submissions that have been made on behalf of a number of organisations, and Mark Ballard, Nancy Fancott and others will speak after us on behalf of voluntary organisations in general and from their own perspective. I take their concerns seriously.

On what our records management plan would look like, we have no model yet, but the code of practice on records management gives a fair indication of what the keeper might require, given that it was drawn up by the keeper for the Freedom of Information (Scotland) Act 2002
coming into effect in 2005. I imagine that the plan will be built on that.

I do not think that we know enough yet about what any obligations on contracting voluntary organisations or any other party will look like downstream. I understand their concerns about creeping obligations or some public authorities requiring voluntary sector overcompliance—things certainly have to be ironed out—but to say that that is sufficient to lead us to say that the bill should not come into effect for the bulk of public authorities in Scotland is probably a step too far. I think that the concerns can be addressed.

A lot of the contracting may not be done by voluntary organisations; it may be done by the new breed of charities, such as local authority trusts. The same expectations that are placed on the City of Edinburgh Council should be placed on bodies such as Edinburgh Leisure. I would hate to throw the baby out with the bath water in addressing such concerns.

Claire Baker: There is a need to achieve the correct balance for local organisations and the voluntary sector. You have talked about trusts and other organisations that work as contractors. We need to ensure that there is not an unfair burden. At the same time, we expect them to play a greater role in delivering some public services as services are developed, and we need to ensure that they are tied into the system.

Kevin Dunion: The point is that if it is passed, the bill will place an onus on the keeper to be actively engaged in discussions on such matters, to provide guidance, to meet the voluntary sector and public authorities and to mediate between them on sensible requirements to place on contracting bodies. I will let the voluntary sector speak for itself, but I think that there is particular concern about programmes being funded by several public authorities that have separate records management plans. It is clear from the bill that there is nothing to stop there being a common plan that spans a number of bodies.

I will give a parallel. Every single public authority in Scotland must have a publication scheme approved by me, but we are increasingly moving towards model publication schemes for sectors and a single publication scheme for the whole of Scotland. We are trying to cut down burdensome or differential impacts on organisations as a result of the legislation, and I expect the keeper to take an active role in that as well.

Alasdair Allan (Western Isles) (SNP): From what the panel has said, it seems to support the principles behind the bill, but will you say more about how you envisage the bill working in practice? Will you put on the record other examples of what you think would be improved?

Kevin Dunion: If a person makes a request for information in Scotland, the first question that the authority must answer is whether it holds that information and whether it can locate and retrieve it. Some authorities have good records management systems and are able to get information efficiently and produce it to the applicant within 20 working days, but other authorities have very poor records management systems. They do not know what they hold or where it is. Their answer to a request will therefore be, “We don’t know.” The applicant will then say, “But surely you must hold it.” The case will then end up as an appeal to me, and my staff will have to work expensively with the authority to find out whether it holds the information. The authority could provide partial information, but not guarantee that that is all of it.

The key issue is that the creation, storage and disposal of records in Scotland will be improved. As Gerry Slater has pointed out, many records are now electronic, so there is no physical impediment to holding millions of records that people would never have to consult, but which must be trawled through to answer questions. In general, I think that the bill will improve records management and information recovery in Scotland to answer questions.

There are often internal inefficiencies, as I have pointed out. Authorities have silos even in carrying out their own business. Information is sometimes held solely on the computer of an individual member of staff, and nobody else knows what is there until that person goes off sick. That is not anecdotal; we came across that in a major Scottish public authority. All the information was held in somebody’s Outlook box. That was remedied, but only by my going in with my staff and carrying out an extensive assessment. Costs are attached to such cases. It would be much better to go upstream and try to fix things at the outset.

Dr O’Brien: I endorse everything that has been said. Good record keeping improves business efficiency in the day-to-day running of organisations and helps with stakeholder accountability, because it is important that citizens are able to access information when they need it. It also helps with compliance with legislation such as the freedom of information and data protection legislation. It is a protection for everyone, including the authorities. We sometimes see it as a negative, but it supports and helps authorities to do their jobs better and it ensures that citizens can exercise their rights of access. They know that the information is there—it may be stored as cheaply as possible, but it is there for them to access when they need it.
Often, people are not interested in records until they need them. At that point, they need to know that they are there. The important thing is that the citizen has the security of knowing that public authorities have records that are properly managed and preserved, and that they are disposed of when they are no longer required.

Alasdair Allan: Dr Slater, you mentioned that record keeping must be more than a new year’s resolution and must have some kind of legislative backing. Will you or anyone on the panel say more about the name-and-shame power in the legislation? Does it provide a sufficient incentive for people to adhere to the legislation?

Dr Slater: There is a basic cultural question. My personal view is that we do not get people to take records management seriously by taking them out and whipping them every now and then. It is correct to have in the legislation what I will call a default position for cases in which somebody simply does not do the job and is absolutely recalcitrant. To be honest, I cannot imagine a situation in which that would arise, but it might.

The Scottish Council on Archives is much more interested in the positive approach. The bill gives an opportunity to win people’s interest, permanently, in records management. It is there to help them, not to name and shame them. That power is, as I say, in reserve, but I would not see it as being up front in the legislation.

Alasdair Allan: Does anyone want to add to that?

Kevin Dunion: As well as determining that information should be disclosed in respect of specific information requests, I look at authorities’ compliance in general with the FOI act. I have the power to issue practice recommendations and to carry out enforcement actions, thereby naming and shaming, so there are some teeth attached to the powers. However, in my experience, even in what I would regard as weak authorities or bodies, I have had the support of the elected members of the authority or the members of the board and the senior staff in every instance so far. I have helped them to focus on the issue and have come up with a voluntary action plan that has been implemented within a reasonable period of time, so significant improvements have been made.

In one authority, more than 30 per cent of requests were not answered within the due time. That reduced to 0.3 per cent after the assessment was carried out and the recommendations were put into effect. With the compliance reviews, the keeper would expect to get voluntary compliance in the vast majority of cases. He has the capacity to issue warning notices and to name and shame, but that should be relatively rare.

Dr O’Brien: The tenor of the legislation tends to be about working to support authorities, and that is how we should see it. As Gerry Slater said, naming and shaming is a last resort. We are looking at working together with authorities and assisting them to make improvements. They cannot go from the bottom right to the top quickly, so we see it as a measured process in which we assist them to improve over time.

Elizabeth Smith (Mid Scotland and Fife) (Con): I apologise for being late, convener. I had some transport problems this morning.

Mr Dunion, will you give us a little more detail on how you see the proposed memorandum of understanding with the keeper?

Kevin Dunion: Between me and the keeper?

Elizabeth Smith: Yes.

10:30

Kevin Dunion: Currently, we have a memorandum of understanding with the keeper, so that if I determine that one of the failings of a public authority is its records management as opposed to any other failing and I want to carry out a practice assessment and make a practice recommendation, I have to do so in conjunction with the keeper, and consult the keeper. The MOU that we have currently is focused on that. I am suggesting that, without having to amend my legislation in respect of the code of practice of records management, we have an MOU between me and the keeper that would enable me to alert him to any failures in records management that I came across in the course of my work and invite him to carry out a compliance review. There would have to be some agreement about what would trigger that. That is consistent with what I currently do in relation to, for example, failings in a public authority that I think should be brought to the attention of the Scottish Public Services Ombudsman or, in respect of data protection compliance, the United Kingdom information commissioner. Given the extensive number of cases that I deal with, I could act as a watchdog for the keeper.

The MOU would also ensure that the keeper and I were given notice of practice assessments and compliance reviews that either of us intended to carry out in relation to an authority, which would mean that the tasks could be carried out jointly.

Elizabeth Smith: Do you envisage that arising and you having to do a lot of checking of such matters in a lot of circumstances?

Kevin Dunion: Frequently, problems arise in relation to front-line bodies that deal with information requests. One of their failings is that they often argue that certain information is not
held or cannot be found. I expect to have frequent engagement with the keeper to tell him of my experiences in that regard and to discuss whether that warrants an assessment or—more likely, under this legislation—a compliance review being carried out, which would be done by the keeper, supported by me. Currently, an assessment would be carried out by me, supported by the keeper.

Elizabeth Smith: So the main motive behind the suggested amendment is to achieve a better basis for communication, rather than to troubleshoot existing problems.

Kevin Dunion: The purpose of the communication would be, first of all, to draw certain things to the keeper’s attention and to discuss with the expert on records management whether a failing was sufficiently bad to warrant a team being sent in. Secondly, it would take advantage of the fact that the bill is stronger than the legislation that created my post and of the opportunity to turn upside down what currently happens and create a situation in which we look to the keeper to take the lead and support him by providing the evidence and, if necessary, the staff necessary to carry out the compliance review. Currently, we take the lead and the keeper supports us in carrying out an assessment, which is weaker than a compliance review.

Dave Thompson (Highlands and Islands) (SNP): The financial memorandum states that the estimated costs for those local authorities and public authorities that already have records management plans is likely to be minimal but that, for those authorities that do not have RMPs, there might be some additional costs. The memorandum also says that it is not possible to identify the exact cost to each public authority. A number of submissions highlight concerns that drafting, submitting for approval and maintaining an RMP would require additional resources. Will you comment on the costs?

Dr Slater: The starting point is that organisations should have sufficient information on their records to enable them to produce a records management plan. That is not an onerous task, unless an organisation is literally starting from scratch, and I cannot imagine that circumstance arising. Therefore, they have a head start.

As for other elements of the legislation, such as compliance reviews, again, unless something extraordinary is happening, I cannot see the burden being excessive. If an organisation has to review a records management plan, it will have staff who are dealing with records every day and so will know what is required, and they are the ones who will act on that requirement.

The issue is simply part of the day-to-day working of organisations. There is a terrible danger that we see records management as being somehow divorced from the operation of an organisation. It is not. It is central to the day-to-day functioning of any organisation.

Dr O’Brien: One thing that we would say is that if we work together, collaborate, share good practice and provide templates for reports and various guidance notes, that will help. In the Scottish Council on Archives we believe strongly in doing something once for everyone rather than asking everyone to keep doing the same thing. We assist by providing documentation that is a template so that public sector and other bodies do not have to keep doing the same work themselves.

That is a good method of working—helping out by providing guidance and templates for all the public sector and other authorities so that they do not have to keep doing everything themselves. It is a way of reducing the onerous nature of the work that is done.

Gerry Slater is right: record keeping is something that people are doing and should be doing. It should assist them and make things better. I hope that, if we get record keeping right over the longer term, freedom of information will become less of an issue because there will be fewer cases in which people do not comply. If we have a mechanism that drives improvements in public record keeping in Scotland, that will serve everyone well and, I hope, mean fewer issues for the freedom of information regime too.

Kevin Dunion: I agree with that, but it is important not to discount the possibility of costs arising from the legislation—not from complying with the requirement to come up with a records management plan but in implementing the plan to remedy any deficiencies that are discovered during the preparation of the plan. If we are simply asking for a plan and we do not expect anything to change underneath, it is bureaucratic. The expectation is that the plan will focus the attention of authorities on good records management and require senior management and governing bodies to implement the necessary measures to make good any failings, which may involve costs.

The point from the Shaw report and what the bill says is that the expectation must be that public authorities will put their house in order. We cannot simply keep putting our heads in the sand about the deficiencies and wait for some other crisis to come about.

Dr O’Brien: The other point is that records management is not just a cost; it can provide savings and efficiencies as well. We should not always look at it on the debit side. Records management is sometimes on the credit side...
because driving efficiency assists public authorities in reducing their costs.

**Dave Thompson:** Would it be fair to say that if a body has poor records management, that might be costing it money and that putting that right and getting records management in line with the plan might cost the body a little in the initial stages, but there will be long-term savings? Is that what you are saying?

**Dr O’Brien:** Yes.

**The Convener:** That concludes our questions to you this morning. Thank you for your attendance and for answering our questions.

The committee will suspend briefly to allow our witnesses to leave and our second panel to join us.

10:37

*Meeting suspended.*

10:39

*On resuming—*

**The Convener:** I am pleased to welcome the second panel of the morning. We have been joined by Jon Harris, who is the strategic director at the Convention of Scottish Local Authorities; and Claire Monaghan, head of policy, performance and communication at South Ayrshire Council, who is representing the Society of Local Authority Chief Executives. Jon Harris and Claire Monaghan represent the local authorities’ perspective on the bill. To represent the voluntary sector, we have been joined by Mark Ballard, head of policy, and Karen Indoo, management information officer, at Barnardo’s Scotland; and Nancy Fancott, policy officer at the Scottish Council for Voluntary Organisations.

Thank you all for your written submissions in advance of this morning’s meeting. You will probably find this slightly easier than members of the first panel did because you sat in on their evidence and will have an idea of what we will ask you. You had a chance to rehearse your answers as you listened.

I start by asking whether the legislation is required or whether a voluntary scheme would be more appropriate. The previous panel was straightforward in its support for the legislation. Do you share that view?

**Jon Harris (Convention of Scottish Local Authorities):** When we were in early discussions about the legislation with the keeper, we suggested that the consultation should include a voluntary proposal to benchmark against the statutory proposal. We were keen to see this being picked up through the best value 2 arrangements and the local area agreements, which do risk assessments for each of the local authorities, so that there would not be duplication. That option was not progressed. We would have preferred it to be included so that we could have measured whether the scheme could have been done on a voluntary basis.

**Claire Monaghan (Society of Local Authority Chief Executives and Senior Managers):** I apologise for not being here at the start of the meeting, which was due to traffic problems.

I completely agree with Jon Harris. I did not disagree with anything that I heard from the earlier panel on the benefits, efficiencies and reassurance to the public of proper public records management. What I did not hear was a compelling case for legislation at this time, particularly given the burdens on local authorities and the consequences that legislation could have for third sector organisations. A voluntary scheme could give you all of the benefits of legislation without legislating.

The word “collaboration” was used frequently, but collaboration can be generated much more willingly without a legislative rod, particularly with the potential for naming and shaming. I am not sure what benefits you would get from legislating as opposed to taking a softer route. When we consider the origins of the bill, and the Shaw report and the Kerelaw inquiry, no one would disagree that something needs to be done. It is clear that we need to take all reasonable steps to address the deficiencies that led to the problems and to avoid those deficiencies more generally in other areas that are not yet identified. However, we have a bill that is much more wide ranging than that, which is where the potential for disproportionality comes in. My instinct is that legislation—or at least the wide-ranging, disproportionate legislation that is represented by the bill—is not merited at present.

**The Convener:** The case that Mr Slater in particular made to the committee this morning was that he has no doubt that most of the people and organisations that would be affected by the legislation at the moment would be willing to engage voluntarily in keeping records. However, even with the best will in the world, human nature is such that, when other pressures and demands arise and require our attention, when the issue is no longer quite so high up our list of priorities and when the lessons learned from the Shaw report and the inquiry into historical abuse at Kerelaw are not so much at the forefront of policy makers’ minds, our good intentions will sometimes slip. If we have legislation, that cannot happen, because organisations will always be required to keep those records.
Claire Monaghan: That is where the benefit of the link with best value and the risk assessment in the audit and assurance plans that are produced for councils comes in. If the aim is to ask authorities and public sector bodies to make progress in that respect, I should point out that, instead of creating something new and more wide ranging, the bill will simply extend slightly a mechanism that is already in place. I do not think that many authorities would respond to a voluntary scheme in the way that you suggest. Of course there is a theoretical risk of variance in the extent to which authorities and public sector bodies would participate fully but, by building all this into the best value 2 process, one could close off the risk of someone simply saying, “Och, I’m too busy to do that. I’ll do it next week,” when next week never actually comes.

Mark Ballard (Barnardo’s Scotland): For Barnardo’s and the other large service-providing children’s charities in Scotland, the bottom line must be the welfare of children. We would support legislative or voluntary proposals of any kind if we were certain that they would improve the child’s welfare, but we are concerned that the bill will not work towards that aim and act as enabling legislation. Indeed, it might well undermine our work in this area by creating a culture of anxiety, overcompliance and confusion.

All of us, particularly those in the voluntary sector, recognise the care sector’s failings in this area, and we have taken great steps to transform how we keep and manage records along the lines recommended in various reviews, including the Shaw review, and are working closely with colleagues in local authorities, health and other public authorities to improve records management in a way that is centred on the principle of the child’s welfare and the getting it right for every child model. The idea of having a single child’s plan is one of the key ways of implementing better records management and having to adhere to a system of multiple record management plans that are all slightly different and all held by local authorities, health boards, central Government and police will distract our staff from the central focus on the child’s welfare. As a result, we feel that the bill is centred not on standards or quality but on a compliance regime that we think will prove unhelpful to a service such as ours in the way that it is implemented at the front line.

Nancy Fancott (Scottish Council for Voluntary Organisations): I have a couple of more general points about the voluntary sector’s engagement with the bill. In our submissions to the committee, we have expressed concern about the consultation process itself. The fact is that, having realised after the fact the bill’s potential impact on the sector, we have not been involved to the extent that we should have been in the debate over whether a legislative framework or a voluntary system will work. That said, the bill team has been incredibly generous with its time in working with us following the bill’s introduction, and I do not in any way criticise its recent engagement with us. However, we are still struggling to get the whole voluntary sector to think properly about the bill’s potential impact on us. Given that potential, the issue must be properly considered.

The other general point is that, if we go for a legislative framework, it will clearly apply significantly to the voluntary sector, but we are a different beast from the public sector. Our concern is that the bill, or any legislation, for that matter, must carefully consider the impact on our sector and the issues that arise with a piece of legislation that is designed to apply to the public sector but in practice affects our sector. There must be some recognition of the differences between the two sectors.

The Convener: Before we go on to the detail of how the bill will affect you, I will play devil’s advocate. Is it not the case that if any Government comes up with any legislation that will place a new burden on local authorities, they will always argue against it and say that, in fact, they could achieve the same goal by another means and that the legislation is not required, and the voluntary sector will always say, “Our priority is the policy area that we work in and delivery to service users that we will always say, “Our priority is the policy area that we work in and delivery to service users that we place on us will run counter to that.” Will the bill really frustrate you and cause difficulties in the delivery of the services that your organisations provide, or is it just that it will give you something extra to do that you would rather not do if you did not have to, but it will not be the end of the world if you do?

Jon Harris: We are saying that we already have a legislative framework that assesses risk and drives improvement, so, rather than setting up another framework, that one could be used.

If we are not going to use the existing framework, we need to be much clearer on what the role of the keeper is in connection with this and how it fits with that of the other regulatory bodies, such as Social Care and Social Work Improvement Scotland. We do not yet have that sort of connection. Even if we do not go down the best-value route, we still have to address the issue of how the legislation fits within the regulatory environment, because we are currently not clear on that. We do not want people to be regulated by two different bodies on the same issue.

Claire Monaghan: In one regard it is not a new burden, because we have a responsibility to have
good governance, to have good housekeeping and to manage our records appropriately. The Freedom of Information (Scotland) Act 2002 has crystallised that for authorities and we have all become much better at it.

What is in question is turning another few pages and legislating in this particular area, which, as Jon Harris says, links into other areas, when the linkages and the potential impacts have not yet been fully bottomed out. On one level, it is not a new burden as such, but it is a new legislative burden on authorities. That is the issue, particularly given that the consequences for the third sector seem disproportionate to the problem that is being addressed.

Mark Ballard: On the wider question about the voluntary sector and legislation, I draw a parallel with the Protection of Vulnerable Groups (Scotland) Act 2007, which will be burdensome for Barnardo's but is legislation that is designed around the welfare of children and vulnerable groups. We accept that burden and we have lobbied for it, because we can see that it will advance the protection of the groups that we work with. That is an example of the voluntary sector lobbying for something even though it recognised that it would place a burden on the sector; however, that was the right burden because it was a well-designed burden.

I will hand over to my colleague Karen Indoo to talk about the unnecessary burdens that would be placed on an organisation such as Barnardo's. We are one among 45,000 voluntary organisations, but what we say will illustrate some of the issues for a voluntary organisation.

Karen Indoo (Barnardo’s Scotland): I reiterate Claire Monaghan’s point that we already have a record keeping burden—we already have a responsibility to manage and keep records appropriately. As an organisation, we are mindful of the failings of the past and have worked hard to put those right. We are engaged in a programme of continuous improvement, for which I am responsible in Scotland. Our organisation is committed to continuing to improve the quality of our record keeping and records management.

The organisation is concerned about something that I see every day. I work with 71 services across Scotland on their information management. We see the unintended consequences of legislation every day. One of the most frequent examples is the Data Protection Act 1998, which was intended to be an enabling act that would allow professionals to understand more clearly where they could and could not share information, and how they could best protect personal information. However, there is still a significant amount of confusion about that and, as it is framed, the bill is not sufficiently clear about the standards to which we would be asking people to adhere.

Having 32 different local authorities with 32 different records management schemes could create further confusion that would lead to a much more risk-averse culture. In our organisation and others that I have worked with in the care sector over the years, professionals would become focused on ensuring that they are keeping those records appropriately. I can see the potential for front-line staff to be spending more and more time ensuring that they are meeting all the various requirements of the records management policies, and less and less time doing direct work. That would lead to poorer outcomes for the vulnerable people to which the care sector is providing services, rather than improving outcomes, which is the intention of the bill.

Although we are not necessarily saying that legislation is not required, we are saying that, as it is framed, the bill is wrongly focused.

Nancy Fancott: Risk aversion is one of our central concerns. The bill is not happening in a vacuum; it is going to be applied in a cultural, political and operational context. I do not think that anyone would deny that the voluntary sector has a culture of risk aversion that, unfortunately, distorts the original intention of a lot of legislation.

The other point is that the legislation and the records management plan may all seem to be quite clear, reasonable and proportionate at a senior level, but how things play out operationally as they filter down through a public authority’s structures means that the application of the legislation can often get quite distorted. The culture of risk aversion plays a significant role in that distortion. I guess that that is what we are concerned about.

It is not about scrapping the bill entirely but about crafting it so that it takes the practical realities into consideration and provides a framework that is a bit clearer and more defined, so that it limits the potential for that kind of distortion to occur as the practical application of the law plays out.

The Convener: This is probably a good point at which to allow Claire Baker to ask her questions about contractors and obligations.

Claire Baker: First, it might be helpful if the panel could let us know how the current contractual arrangements for records management plans operate between contractors and local authorities. I am looking for the third sector’s point of view as well as that of the local authorities. What are the typical arrangements for that at present? How will the bill change those arrangements?
Karen Indoo: Barnardo’s has a four-nations approach to records management—we have a comprehensive records management policy in place. When we tender for new services, we tend to make a submission to the local authority for its approval, and we negotiate on whether there is a need for any additional policy relating to each individual contract. Our records management policy has usually been more than sufficient—any change to it would be very unusual.

We are concerned that, if every authority that we contract with has a slightly different records management policy, we need to tie that up with our organisational policy and to manage it across all our services. It is unusual, but our Scotland-wide advice and support service works with about 12 different public authorities. We will potentially work with a large number of different records management plans, and we will have to balance those needs within quite a small team. That is just not workable, so we said to the keeper of the records at an early stage that there is a need to work towards a consistent records management policy across Scotland.

I echo the views that the Information Commissioner expressed earlier: if we are considering a records management plan for Scotland, we should look towards having a single plan. I recognise that it is difficult to achieve that with a high level of consistency yet in a way that still allows authorities to manage their records in a manner that is appropriate to their local context, but I suggest that we should be working towards that.

Claire Baker: Is the way in which Barnardo’s engages with local authorities typical? Would we expect there to be discussions about what kind of record keeping organisations have?

Jon Harris: We met the keeper and the minister yesterday, and we are willing to work together to address some of these issues. That means examining best practice, although not in isolation—we need to involve the third sector and the private sector in the process. That would send the right message: that we can work on record keeping in partnership—and the language that we use should be that of partnership.

That is not to say that we will not achieve a resolution if things do not go right. If the best-value test is failed, there are consequences. Let us come at it from a context where we all have something to offer, through our knowledge and through how we work in practice. Let us use that and examine the guidance, the best practice and the evidence on costs and so on. That would be of considerable value.

Claire Monaghan: One of the key issues is getting a proportionate response and ensuring that what comes out of the process is fit for purpose and appropriate. The current arrangements vary hugely among contractors, depending on the contract and on the situation. When contracting with an organisation, if that organisation’s approach to record keeping is relevant, it should be taken into account under due diligence as part of the contracting process.

Comments were made earlier about what the bill does with regard to responsibility resting with the public body, but to comply with that responsibility it is necessary to push the record keeping on to the contractors. That is right and proper in relation to the care of vulnerable children and other vulnerable people, but not in relation to everything else. That is where the disproportionality potentially arises. The founding principle here has to be the protection of young people and other vulnerable groups. Where that is the relevant factor, that approach with contractors regarding record keeping is absolutely appropriate but, because the bill is so broad ranging, it applies across the board in other contracts. That is where the unease arises.

Nancy Fancott: I echo that point regarding concerns over proportionality. The bill says that public records are anything and everything—any kind of information that an organisation holds in connection with its operation of a public function. We are talking about an incredibly broad scope.

The heart of our concern is that that will mean that all sorts of voluntary sector organisations that are not involved in working with vulnerable children or vulnerable groups in general will all of a sudden—theoretically, anyway—have this obligation. I do not see how that is a proportionate response to the original problems. Obviously, the SCVO and other intermediary national voluntary sector bodies do a tremendous amount of work with the voluntary sector as a whole on issues of governance and development, part of which concerns the proper management of records, which is a key element of a properly run organisation. However, having that imposed from the top down in a context in which public authorities might misunderstand the scope of the bill, because of its broad drafting, makes us very concerned.

Claire Baker: When we took evidence from the bill team and the keeper, we raised these issues with those witnesses. The policy memorandum states that the bill "does not impose new and unreasonable burdens" on contractor organisations, and the keeper spoke of the concerns being based on
"a misinterpretation of the relationship that voluntary sector bodies have with the local authority."—[Official Report, Education, Lifelong Learning and Culture Committee, 8 December 2010; c 4447.]

Although they do not sound particularly comforting, I think that those statements were meant to provide reassurance that the bill will not impose such burdens and that part of the issue may be local authorities’ interpretation of the bill. The evidence that we received from COSLA stated that local authorities think that it is reasonable to expect the burdens to be passed on.

There seems to be a strong difference of opinion on how contractors and third sector organisations will be affected. I appreciate that you are having discussions with the bill team on some of the issues, but how do you respond to the comments that the bill team and the keeper made to the committee?

Mark Ballard: For the purposes of clarification, the bill team recently put up on the National Archives of Scotland website a list of frequently asked questions from the voluntary sector. I will quote one of them as an example of a useful clarification. The fourth question is, “What is a record?” The response is:

“For the purposes of the bill, a ‘record’ is anything in which information is recorded in any form. ‘Public records’ are all records created in carrying out the functions of the public authorities listed in the Bill, whether directly by a public authority or through a contractual relationship with a voluntary organisation or business.

All these ‘public records’ would need to be covered by an authority’s records management plan. A small proportion of these ‘public records’ may need to be retained by the voluntary body or transferred to the commissioning authority for long term retention or preservation under the terms of the Records Management Plan.”

My feeling is that there is, at times, insufficient recognition by the bill team of the situation that voluntary organisations face. As Karen Indoo has described, we have a service that would have to work with a dozen different records management plans. Our staff would have to check all the information of any kind that they created as a result of carrying out that function against those records management plans. That would be a major burden. The situation is quite different from that in which a service is delivered by a local authority, in which staff would have to be mindful of only one records management plan—the local authority’s own. At a time when an increasing number of contracted services are being delivered by voluntary organisations or by private sector organisations, there is a failure to recognise the difficulties of translating to a voluntary organisation what was a logical scheme for a local authority, a health board or a police board.

The second example that I will give is a question that comes to me at Barnardo’s regarding a different piece of legislation. It is the question whether parents are allowed to take photographs at pantomimes, children’s nativity performances and things such as that. No matter how many times Kevin Dunion says that it is fine for parents to take photos of other people’s children at primary school Christmas nativity shows, there is still a concern about that among headteachers and there are still examples of that being banned in schools on the basis of a complete misunderstanding of the legislation.

If Kevin Dunion were still here, I am sure that he would tell you how many times he has had to make that point, but the legislation is still not interpreted in that way on the ground. Because of the breadth of what is covered, there is a danger of misinterpretation, which creates a potential burden for voluntary organisations.

Nancy Fancott: The bill team is placing a lot of emphasis on the importance of the model records management plan and the influence that it will have on the development of the individual records management plans that all public authorities will have to establish. It is a bit difficult for us to assess fully the potential impact, because we do not know what the model records management plan looks like, how public authorities will respond to the guidance that it provides and to what extent they will follow it.

There is a further layer. Once each public authority has established a plan, how will that translate in contractual terms to its relationships with every voluntary sector organisation and the relevance of those organisations keeping records for their type of work? It is tricky for us to figure out exactly how things will play out. We are concerned that, in some cases, there has been a practice of overzealousness in relation to previous legislation. Rightly or wrongly, local authorities want to protect themselves, so they may take a more cautious approach that may be counterproductive.

Karen Indoo: Within the business and regulatory impact assessment that the keeper has produced, it is stated clearly that at present there is no way of determining what the costs and implications for the voluntary sector will be, because there is such a wide range of organisations in the sector and currently we do not know the status of each of those organisations. That is at odds with the evidence that the keeper has presented to the committee.

Claire Monaghan: One of the consequences of taking a legislative approach is that authorities are more likely to be a bit more cautious, although I am not sure that I would use the word “zealous”. If authorities are required to do something by legislation, they will be very careful to ensure that
they comply with that in every sense. That is more likely to push us towards overinterpreting the requirements and, where we contract, especially with the voluntary sector, placing burdens everywhere external to the organisation. It goes back to the dilemma of whether to take a legislative approach or to have a voluntary scheme. A voluntary scheme would allow more development of the approach on an iterative basis. That would enable us to see where the tension points are and allow them to be explored. If it did not work, you could legislate, but a legislative approach is more likely to lead authorities to be extra cautious.

Alasdair Allan: How do you think that the bill would work in practice? Given what you have just said, I will put the question in another way. Why do you not think that it would work in practice? If it were to work, what would it have to say that would nonetheless deal with some of the failings by local authorities that the previous panel identified?

Jon Harris: One issue that we have raised with the minister and the keeper is that we do not know the risk assessment or the costs of developing records management plans. We have been given a commitment that there will be guidance. Rather than have individual sectors speak to the keeper, I am keen for us to begin to look at the issue collectively. We need to get a feel for it, because every time we come to it people ask what the costs are, how we will assess risk and how we can ensure that the bill does not compromise our position in relation to other regulatory bodies. All those issues remain. COSLA is willing to address them and to be part of that process, but that has not happened yet. Perhaps we need to do that before stage 2. We have been asked about such issues—about what the proposal will mean in practice, how it will be measured and how it will fit with all the other frameworks that we must deliver.

Karen Indoo: I will suggest three key points that would make the bill work much more effectively. The first and most important is that we need to tighten significantly the definition of a public record. As it stands, it is so broad that it is all-encompassing—it could mean anything that we ever produce. That needs to be balanced with future proofing legislation and thinking about how the situation might change, but the definition of a public record needs to be tightened significantly.

Another point that goes a long way towards making the bill more effective relates to the fact that, although developing practice-based standards legislation is fantastic, it does not on its own improve practice. The bill does not set out clear standards, but we need clear standards in the bill to which practitioners are asked to adhere and a means of inspecting compliance with standards, preferably via existing inspection agencies and with the keeper’s contribution.

We need to be mindful that significant legislative developments have improved record keeping since the Shaw report was issued. The Freedom of Information (Scotland) Act 2002 and the records management policies that are part of that act have significantly improved record keeping in the public sector and, by extension, the private and voluntary sectors. We need to think more about how the Scottish information commissioner and the keeper could work within existing legislation and a potential extension of that to improve record keeping and how they could use legislation, processes and policies that are in place, instead of additional legislation that is created.

Mark Ballard: Everything that Karen Indoo has described links in with what Jon Harris said. As an organisation, we strive continually to increase the quality of the records that we hold and to maintain a balance between openness and the appropriate checks for confidentiality. We work to do that in conjunction with partners in local authorities, national Government and health boards.

The conversation needs to centre on how we improve quality. All sides are willing to engage in that debate. However, as Karen Indoo said, the bill starts from a slightly different place, which might not help in ensuring that the debate is always about the quality of records and, by extension, the welfare of children and vulnerable groups. We are keen to be part of that conversation with Government partners, because that is part of our mission and their mission.

Nancy Fancott: Implicit in what Mark Ballard says is the fact that the bill and the framework will not of themselves improve quality; resources that are put into that will improve quality. Our concern is that another regulatory framework is being created that will have an impact on the voluntary sector and that it is not at all clear that provision will be made for resources to allow the voluntary sector to step up to the plate when that is necessary. In the current financial climate, and given the stresses on local government in particular, we will not win the fight when we ask for additional resources for small and medium-sized voluntary sector organisations to pay proper attention to such a framework. That will be a difficult argument to make.

I am concerned that, even though that may not of itself push public authorities towards dealing more with large voluntary sector organisations that may have more resources, it will create one more pressure on them to do that. By contrast, we think that it is important to encourage a range of voluntary sector organisations to become engaged in providing public services. We need to think
carefully about whether such a pressure would be one of the unintended consequences of imposing such regulation without considering the resource implications for everyone, not only directly affected public authorities.

Alasdair Allan: The previous panel of witnesses seemed to feel that the power in the bill for the keeper of the records to name and shame organisations would be a useful backstop. Is that the current witnesses’ view?

Claire Monaghan: It depends. If you are going to legislate, there needs to be some sanction for not complying with the legislation. It is not a particularly strong sanction to name and shame an organisation, because most authorities will not be driven by the prospect of being named and shamed.

Alasdair Allan: Are they shameless?

Claire Monaghan: They should be driven by the prospect of improving their records management because of the potential business benefits and the consequences to service users.

In one regard, the provision is not particularly problematic. The issue is what happens up above. Is legislation the right approach and is the broad-ranging approach in the bill right? If you are going to go down that route, the power to name and shame is not a huge issue.

Jon Harris: We can consider the matter in terms of best value. At one point, best value was about the punishment for not doing something, but now it is about a common commitment to deliver improvement. In records management, the focus should be on doing that before we name and shame.

What if a particular council that the keeper had named and shamed challenged that sanction in the courts? We do not know what the standards will be under the bill and we have not evidenced the cost of implementing it. We have not examined how risk assessment will work and how the bill sits with all the other regulatory functions that we have. We would need to cover a range of issues before we could say what we could do with a council or other body if naming and shaming did not work. We have a clear idea of what that means in practice. We can name and shame, but that does not take us far.

Karen Indoo: I agree that naming and shaming is not a particularly strong sanction, but there was a lot of discussion this morning, and there has been a lot of discussion with the keeper, about the bill being supportive. It is about working in partnership and continuous improvement in quality. We need to focus on those aspects rather than naming and shaming.

How do we work in partnership to learn, individually and from one another, in order to improve practice, which will improve outcomes for the people who use our services? If we go down the legislative route, sanctions will be needed, but a power to name and shame is quite toothless. It also feels a bit contrary to the bill’s stated intentions on partnership working and improving quality.

Mark Ballard: Further to that, as we have highlighted, one of our concerns about the bill is that a culture anxiety, overinterpretation and gold plating may arise.

We are concerned that the fact that the keeper may come after a public authority with a big stick if it does not keep to its records management plan may lead to a culture of local authority officers overextending the bill to ensure that their backs are covered, because nobody would want to be responsible for the local authority being named and shamed. Although a records management plan may be appropriate at local authority level, the power to name and shame may drive the interpretation of that plan in a contractual relationship to go beyond what is needed and create unnecessary burdens because of the fear of failing to comply.

Alasdair Allan: The thing that I cannot quite reconcile is that Mr Ballard talks about the name and shame power as a big stick, yet others say that it would not be a meaningful threat. Which is it?

Mark Ballard: As Karen Indoo, Jon Harris and Claire Monaghan said, the reality is that, at local authority level, it is not necessarily a particularly strong sanction. I am talking about the perception of that power at officer level and contractual level, which might aid in the misinterpretation of the legislation. I agree that the relationships between local authorities and the keeper are different. So both statements are true, because we are talking about the perception and interpretation by different groups of individuals in different places in organisations.

The Convener: Before we move on to the final question, I ask Barnardo’s whether any local authorities by which it is currently contracted have indicated that they require to have a dialogue with Barnardo’s about changing the current record keeping system as a result of the proposed legislation.

Karen Indoo: Not to our knowledge. As yet, none of our service managers or operational assistant directors has been approached to have such dialogue with local authorities.

Claire Monaghan: A consequence of the truncated consultation period is that awareness of the bill among local authorities is generally low.
Karen Indoo: That is possibly true in the voluntary sector, too.

Dave Thompson: We have touched on costs. The previous panel took the view that poor records management can be expensive and that, although a bit of change will require additional costs, there will be long-term savings. The keeper argued that

“Good records management is not free, but it is cheaper than bad records management or no records management.”—[Official Report, Education, Lifelong Learning and Culture Committee, 8 December 2010; c 4453]

Of course, the contrary view is that there will be extra costs, and we have heard about some of them. COSLA has argued that the bill might have a “disproportionate cost to all public bodies and third sector partners”, because of the wide definition of the term “public records”. Karen Indoo elaborated a wee bit on that. Who is right on that?

Karen Indoo: It is not as simple as right or wrong. As someone who is responsible for information and performance management in our organisation and as an information professional, I agree with the keeper that good records management is cost and business effective. It supports sound business decisions, improves quality and leads to continuous improving and learning. So I completely agree, as does Barnardo’s, that we need to continue to improve our record keeping, records management and management of information more generally to enable us to deliver the best possible services.

My personal view is that the bill as framed will not necessarily support that, because it is not specific enough. For an organisation starting from a low base, costs will be involved in getting where it needs to be. Across the voluntary sector, there are many different organisations of different sizes and in different places, so the issue is that we have absolutely no way of knowing what the overall cost would be. For Barnardo’s, I do not know how big the cost would be. We have a good records management policy that currently fits with all the policy and legislation in the four UK nations, but we have no way of knowing how it will fit with the records management plans that are to be developed by the public authorities with which we work, or what the cost of that will be. That is our big issue at the moment.

11:30

Claire Monaghan: It is absolutely correct to say that, in practice, poor records cost you more money than good records, given the quite high level of business and service inefficiencies that can flow from that. However, the uncertainty about what is required to deliver the bill opens up further uncertainty about costs. Moreover, if all this is done on a legislative basis, compliance will have to happen at a very pressurised time for local government, and the provisions cannot necessarily be introduced incrementally. As a result, you would remove the option for authorities to implement the legislation in a planned and measured way that fits in with their own financial cycles. As I said, I do not think that any authority will disagree that good records management is efficient and cost effective but there is also uncertainty about what the legislation will mean for contractors and the adjustments that will need to be made to existing systems to ensure full compliance.

Dave Thompson: Could that uncertainty be resolved simply by changing the definition? Would it be possible to refine the definition and make it more specific?

Claire Monaghan: This is a really complex web of issues and I am not sure that we can resolve matters simply by fixing one element. For this to work, all the elements will need to be examined and connected together sensibly. I am sorry that I cannot give you a more helpful answer.

Mark Ballard: SCVO has suggested that the bill be withdrawn to allow our sector to be consulted further. Barnardo’s is on this particular panel because, as a result of our work with survivors of historical systemic abuse, we became aware of the bill quite early on and have been involved in the process. As the largest children’s service-providing charity in Scotland, we are in quite a different situation to that of other organisations, and we have benefited from the opportunity of discussing some of our concerns with the bill team. However, that situation has not been replicated across the voluntary sector. I do not know what engagement there has been with the private sector, which, as contractors, will also be subject to the bill’s requirements, and I am very aware of the tight timescale for getting legislation through before the Parliament’s dissolution.

The area is complex and there are many different organisations that have different perspectives on it. We are very keen to work with our public authority partners, including COSLA and the health boards, as well as the Scottish Government and the bill team on this issue, but I am concerned about the complexity of the issues, how the bill will affect organisations and that very tight timescale for resolving matters. I can speak for Barnardo’s because, given our work with children and the bill’s roots in the Shaw report, there are particular issues of interest to us; however, the issues for other organisations, particularly business organisations, might be entirely different.
The Convener: That concludes the committee’s questions. I thank the witnesses for their attendance and evidence.

11:33

Meeting suspended.
SUPPLEMENTARY SUBMISSION FROM BARNARDO’S SCOTLAND

Tendering

1. The extent to which records management plans are considered during the tendering process currently varies from tender to tender but Barnardo’s are usually asked to demonstrate that we have robust policies, procedures and systems in place for the management of records created under the contract. We have in place a corporate records management policy which takes into account the regulations that apply across the four UK nations and ensures that staff can be sure that records are managed in line with policy.

2. As part of the tender process Barnardo’s will submit its record management policy along with all the other required documents for consideration. We also routinely describe our IT Case Management System and its associated electronic outcomes framework. We have always had very positive feedback on this aspect of our tenders and know that this is an area of that we consistently score highly on in the tendering process.

Multiple funding streams

3. We have a number of services that operate in multiple local authority areas or who have funding from more than one statutory agency. At the moment we work to our corporate records management plan and provide that to those agencies as part of the due diligence process when we are contracted. This has always proven more than adequate to date. Where our concerns arise is that under the Bill as it is currently drafted, that relationship would change with the contracting authority taking the lead. The result would be significant shift in the current relationship where as a contractor we provide a standard policy which is approved by the commissioning agency, to a position where the commissioning agency would stipulate the policy framework. In such a situation, we would have no way of ensuring that our staff teams are working to clear and consistent standards across the organisation due to different contractual requirements. This would be very difficult to quality control and would also result in significant costs due to staff training and amendments to our IT systems that may be required as a result. Rather than creating the consistency in practice that the Bill seeks to bring about it would have quite the opposite effect. We do agree that it is absolutely right and appropriate that commissioning agencies bear the responsibility for ensuring that the records management plans of contractors are sufficient however, the regime proposed by the bill would result in wide variances in what contractors are asked to work to.

Core standards

4. The Bill as currently drafted would not require public authorities to work to the same set of core standards, it would instead allow each individual authority to
produce different plans with different standards. The aim of the Bill is to achieve greater consistency in records management but we do not believe that this will be borne out unless public bodies are required to work to a common records management plan across Scotland. This position was supported by the Information Commissioner in his evidence to the Committee. A clear example of the result of not giving a common model was in the development of single shared assessments by local authorities several years ago. The Scottish Government developed clear guidelines on what a single shared assessment was and what should be included within it but did not provide a common model to allow flexibility for authorities. The result was that every authority interpreted the guidance differently and produced quite different assessment documents and processes. A subsequent audit by the Transformational Government Unit found that not only was practice varied between authorities but that in some authorities multiple versions of the single shared assessment existed within care groups.

Impact

5. We feel that without a common model across the nation that history would be likely to repeat itself. The result of this for organisations like ours would be that our staff would potentially be working to a number of different policies as part of the same service delivery. Not only would this be very difficult to manage but could also lead to inconsistencies in how the service is delivered to service users if, for example, authority A required information to be recorded and delivered to them in a different way to authority B. At its most extreme, we could have services where staff would be working to multiple records management plans some of which might contradict the others. This would not only be very resource intensive to manage it would also make our internal inspection of quality in services extremely cumbersome. Ultimately the requirements of managing multiple records management plans within the same service would have the effect of taking staff time away from direct delivery, it would lead to confusion around recording standards and would have a negative impact on the quality of the service delivered to service users.
SECOND SUPPLEMENTARY SUBMISSION FROM BARNARDO’S SCOTLAND

1. Barnardo’s Scotland welcomes the position taken by SCVO, as the national body representing the voluntary sector.

2. Our position has not changed since the oral evidence we gave to the committee two weeks ago. We recognise the previous failures within the care sector in this area, and the need to continuously improve record keeping. We therefore support the stated intention of the Bill to help in this process. However, in its current form we do not believe that the Bill will deliver this improvement, and could undermine our ability to deliver services to some of the most vulnerable children in Scotland.

Mark Ballard
Assistant Director Policy and Influencing
26 January 2011
SUPPLEMENTARY SUBMISSION FROM THE SCOTTISH COUNCIL FOR VOLUNTARY ORGANISATIONS (SCVO)

1. We are writing with some further comments for your consideration after the evidence from Lorna Patterson and Tom Shaw, and from the Minister.

2. Tom Shaw and Lorna Patterson made a powerful case for improving the culture of record keeping with the public, private and voluntary sector as it relates to the personal records of vulnerable adults and children. We recognise Scotland’s historic failings in this area, including by the voluntary sector, and are completely committed to taking appropriate and proportionate action to tackle it. However, as Lorna Patterson, highlighted “I agreed it would be challenging, time consuming and costly for organisations to record absolutely everything...There needs to be some debate about, or guidance, on what is classed as important and having an impact”.

3. Having heard the Minister’s evidence, we are still not convinced that there is recognition on the part of the Government and the Bill team of the potential impact of the Bill for voluntary organisations, and therefore the need for the kind of proportionality and risk-assessment Lorna Patterson described. We welcome the Ministers commitment to bringing forward amendments to clarify the role of the keeper, and to work with CoSLA and the children’s voluntary sector on issues of content, policy and scrutiny, but these amendments still do not go far enough.

4. We were not reassured by the Minister’s argument that “Voluntary sector concerns about dealing with different records management systems in different authorities will largely be met through common records management plans”. As was highlighted in the voluntary sector evidence, even very small differences between records management plans in different local authorities will create a major burden for organisations that work with a large number of public bodies. George MacKenzie, the Keeper of the National Archive argued in his supporting evidence last week. argued that he “expect[ed] there to be a definite convergence of record-keeping practice, so the likelihood of there being quite different forms of record keeping among children’s homes would probably dwindle over time.” Sadly, an expectation that differences will be reduced over time will not provide much reassurance to an organisation struggling to cope with an additional bureaucratic load.

5. The Minister went on to say that “If a voluntary sector organisation felt pressure from the plan, I would advise it to inform the keeper. He could then, in his role, work with local authorities and say, “Look, we need a more generic plan. You are asking for receipts when there is no need. You have to work out whether that is a public function.” We consider it unlikely that this would be the way the relationship between a public authority, a
voluntary or private organisation in receipt of a contract and the Keeper would work in practice, not least because of the sheer volume of voluntary sector organisations working with public authorities.

6. We would therefore reiterate our position as stated in our original written evidence. The voluntary sector very much wants to work with the Minister and Bill team to find a solution that achieves the core aim of improving public record keeping in a proportionate and measured way. But as it stands, the Bill has the potential to cast a very wide net across our sector that tangles us all up in a resource intensive bureaucracy disconnected from the original policy intent of the legislation. We do appreciate that this is not the intent of the Bill, but that is the way it is currently drafted. We need more certainty about how this Bill will address the high risk areas in a way that does not duplicate, lead to inconsistency across public authorities, or place additional burdens where there is no resource to meet them or risk to justify them.

7. We feel that the Bill will still require major amendment to narrow the scope of the definition of public record, and minimise the potential disruptions caused to the work of voluntary organisations.

8. Therefore we strongly feel that withdrawal of the Bill is still the most appropriate action at this time. This is because, we are concerned that given the limited time left in this session of Parliament there may not be time to properly rework the Bill to make it fit for purpose.

9. However we recognise that it is the Parliament that must vote on the general principles of the legislation at stage 1, and if the Bill is agreed at stage 1 we would be happy to work with Committee members to try, within the very limited time available, to amend the Bill in such as way as to meet the needs of the sector.

Nancy Fancott
Policy Officer, SCVO
25 January 2011
SUBMISSION FROM TOM SHAW

The Historical Abuse Systemic Review (HASR) and public records

Background - the findings which prompted the recommendations relating to records and records management

1. The HASR was a review of systems ie of the laws and associated monitoring and inspection systems designed to ensure the welfare, needs and rights of children in residential care in Scotland from 1950 to 1995.

2. To carry out the Review, it was necessary to—
   - research the legal framework governing residential child care;
   - find what records existed relating to residential child care provision;
   - examine records to learn how the law was being implemented;
   - talk to people who delivered residential child care services;
   - talk to people who as children were cared for in residential institutions and, on the basis of the information collected;
   - assess the adequacy of the legal framework and practice in monitoring and Inspection.

3. The Review found that many authorities and institutions did not know what records existed, where the records were located and what the records contained. The Review also found that knowledge about systems of monitoring and inspection was being lost when people left or retired from organisations.

4. Our research found that vast amounts of records existed. The records were scattered across organisations, archives, and even countries. Some records were in the process of being examined, some sat in boxes with little or no hint of what they contained, and some were in off-site secure storage. We also found that others had been lost or destroyed.

5. Potentially important information about practice, eg relating to monitoring and inspection, was also being lost because when practice changed, new guidance was issued and, in order to avoid the risk of confusion, previous guidance papers were destroyed. Such losses would have been avoided had appropriate retention schedules been in place.

6. Further obstacles to the work of the Review included the lack of central government databases about residential child-care, for example records giving details of which organisations provided which services, at which locations and over what period of time.

7. It was little wonder that former residents were having such difficulty in getting access to records about themselves or about the institution(s) in which they were cared for; or were finding their records to be disjointed or were being told their records were missing.
8. The findings of the Review pointed to an urgent need to take action to preserve historical records so that former residents could have better prospects of getting access to their records and information about the residential schools and children’s homes they lived in as children.

The recommendations relating to records

9. In seeking to address the observed weaknesses in records management systems and practice, and the many problems faced by former residents in trying to access records, I recommended that—

- the Government should commission a review of public records legislation to ensure that the legislation in place is appropriate to meet the records and information needs of Scotland, and not least, the needs of former residents, service deliverers and researchers;
- the Government should invite the National Archives of Scotland (NAS) to establish a records working group to address issues specific to children’s historical residential services;
- voluntary organisations, religious organisations and local authorities, working in partnership, should commission guidance to ensure that their children’s residential services records are adequately catalogued to make them readily accessible; there were examples of such being done but they were few.
- records management practices should be evaluated regularly, particularly records associated with monitoring children’s welfare and safety.

10. My Review had found that there is a comprehensive set of laws, rules and regulations covering the generation of records for children’s residential establishments for the period 1950 to 1995. I also found that the law had not been effective in ensuring that these (records) were kept and made accessible.

11. Well-kept, properly managed and accessible records are essential if looked-after and accommodated children, indeed all children, are to receive care and services that are appropriate to their needs, welfare and rights. Responsible record keeping and records management are also vital to adults who, as children, were looked after in residential schools and children’s homes; and they are also important to a broad range of researchers and policy makers providing, as they can, insights into the outcomes of professional practice, policy, and legislation, as well as societal changes.

12. Good records, well-managed, are the foundation of good governance and are essential to the achievement of appropriate care for all looked-after and accommodated children. Good records on their own are not enough.
13. I welcome the Public Records (Scotland) Bill. It responds comprehensively to the findings and recommendations of my Review on records management and to the wider needs for appropriate legislation governing public records and record keeping in Scotland.

14. The Bill complements the legislation already in place in Scotland which specifies the records that are to be kept. It does not risk duplicating or compromising the work of public bodies that have responsibilities in regard to the content and maintenance of records.

15. The Bill, in effect, will “complete the circle” by requiring that all records - historical, current and future - are managed properly. This will be in the interests of assuring quality, appropriateness of provision, and accountability in public services. Poor management of records is costly in terms of the consequential impact on people, services and finance. Additionally, by defining what constitutes a public record, the Bill will lead to the strengthening of the content and usefulness of records both for service providers and stakeholders including former residents.

16. Importantly, the Bill not only requires the relevant authorities to produce, implement and review records management plans, but also provides for the establishment of appropriate standards for management planning and the provision of guidance on that process. These provisions will ensure that standards of practice become consistent across authorities and across Scotland, thereby removing the unsatisfactory variation that has characterised practice to date. In future, for example, former residents should be able to experience, not just expect, the same standard of provision and practice in the management of the records to which they are seeking access, irrespective of the authority/ies or location/s in which they were cared for as a child.

17. I also welcome the proposed procedures for obtaining the Keeper’s approval of plans and any revised plans and for the requirements for plans to be kept under review by those who devise them. It is crucial to the effectiveness of the plans and to realising the benefits of them to the services delivered by the authorities, to have internal review procedures in place. The role of the Keeper in undertaking external reviews of authorities’ records management plans is important both to ensuring compliance and in the interests of informing and improving practice on a continuing basis. I fully support this element of the Bill.

18. It is essential that the care of children in any form of residential setting is monitored and evaluated by those who determine the policy, legislate for and deliver residential care services. A critical part of this is effective record keeping and records management and the active use of records for raising standards. Well-developed and managed records are also important to effective communication with those receiving the service and to the wider public who, ultimately, are paying for it. Records are key
to the children in care both at the time their records are being assembled and in the future when, as adults, they seek information about themselves and where they spent some of their childhood. Any weakness in the management of the records at any stage can only be to their detriment.

19. The Bill aims to ensure that responsibility, effectiveness and accountability are achieved in records management, not only in the interests of children in residential care but also across the work of all services. I am confident that when such arrangements are in place, the shortcomings in records management identified by my Review will be overcome. I am also confident that it will be possible to pre-empt the recurrence of the problems of the past in relation to finding, gaining access to and benefiting from records. The principles on which the Bill is based are sound and appropriate.

20. I am very mindful of the frustration and pain felt by former residents who cannot access their records because of weaknesses in or lack of records management planning. Action to improve the circumstances they face is to be welcomed and that action is needed urgently. It is my hope that the Bill will be able to proceed in the appropriate way as quickly as possible and that former residents and, in particular, survivors will be able to benefit from its provisions soon: any delay will only compound their difficulties.

Tom Shaw
5 January 2011
In Care Survivors Service Scotland (ICSSS) welcomes the opportunity to provide our views on the Public Records (Scotland) Bill. ICSSS welcomes and supports the Bill proposals to safeguard historical records. We are therefore keen to continue to work with the Government in establishing a workable, relevant and fit for purpose Bill.

Every effort is made with integrity to represent the views of service users of who have accessed the advocacy service, specifically in relation to access to records.

Up to October 2010 18% of service users had successfully obtained some of their records. This has increased to 21% have used the service to retrieve copies of their records from statutory organisations and private organisations.

We support the obligation on Public Authorities to produce and implement a Records Management Plan. We agree this should include Voluntary Agencies and Health records.

Preservation of historical records is critical for survivors of abuse in care settings and goes some way to providing information to fill the gaps in their childhood. Poor records management has psychological consequences for survivors of in care abuse (and other survivors) because historical records are essential in providing information about what happened to a person when they were in care. We appreciate that as children and young adults it is often not thought they can access records. Later in life, questions arise about their identity, family history and how they came to be in care. Case studies are provided.

Tom Shaw’s report found that authorities and institutions did not know what records existed and where they were kept. This is consistent of ICSSS experiences in supporting survivors of in care abuse to retrieve their records. Further, some contact with institutions showed that staff did not know if someone was entitled to receive their records, where they existed.

The good care and maintenance of records, we believe, is part of care provided by institutions or statutory bodies.

The issue for survivors of abuse in care, in our experience, is that records have been typically incomplete or have been destroyed. We understand that the Keeper will have the responsibility to keep and get rid of records and to decide when the latter should take place.
9. Recommendations include keeping records for an appropriate period of time and this needs defined.

10. We would want to bear in mind that service users/survivors of abuse in care have not had an organisation they could access easily to provide therapeutic support whilst accessing records. This means that many have waited decades to request their records and this may be a factor for the Record Keeper to consider.

11. The current recommendations are that the Record Keeper would issue guidance to authorities on the requirements of record keeping. This information and the requirements should be well publicised and advertised through the Voluntary Sector also as survivors have told ICSSS that they did not know they had the right to request their records. Further, there is confusion over who owns the records as individuals often feel that records about them, are for them and therefore belong to them.

12. Service Users have been advised in the past that they can come in to view their records. This does not meet the requirements of survivors of abuse in care because it is too much information to retain in the presence of one person. Issues also arise such as flashbacks as a result of reading records and this is very distressing.

13. The Records Management Plan must include recommendations on how to handle records which are archived, showing clearly a paper trail of where records were and where they were transferred to. This is particularly important, when listening to and working with service users, because some organisations amalgamate, are sold and become other businesses and it becomes bureaucratic to trace records.

14. We are interested to learn what records will be retained. Survivors of in care abuse have often found that pictures, school records kept by the private/public or voluntary care organisation provide key evidence of their existence and affects their sense of belonging.

15. Whilst it is anticipated that the bulk of the financial costs will be with the Keeper, we acknowledge that costs will be incurred with public/private/voluntary organisations. As described in the consultation process, organisations charge different fees for providing copies of records. Service Users of ICSSS have had to pay between £0 and £50 for records and fees do not always have a bearing on the size of the records.

16. The Disposal of Records Regulations (Scotland) 1992 confirms permission should be sought from the Scottish Records Advisory Council. Survivors of in care abuse may not then have the opportunity to accept their records before they are destroyed.
SUBMISSION FROM CK

A case about accessing my records

I accessed the In Care Survivors Service Scotland for counselling at the start of the project. I was really scared. I only had to wait a week to be given my first appointment with (development worker).

The 1st meeting was really about meeting her, finding out what I needed, although I knew it would be counselling. The worker explained other parts of the service – up until that point I didn’t know what advocacy was. She put it in plain terms with some examples and my ears pricked up when she said accessing my records.

I was abused by my adoptive parents, both of them, not just my dad. We all were. I didn’t know why I was adopted although I speak to my biological mother. She wouldn’t tell me why I went into care because she is still feeling guilty. My adoptive parents had a photograph book that Social Work had made up for me before I went into foster care and I only recently got to see that. I think the photographs are really really important, and they should be kept because they are about me. I was just a wee girl.

The worker told me what I would have to do and what she would do for me. I signed a consent form and she wrote to the Scottish Adoption Agency. The worker there called to say the records were ready. This took 3 weeks just. I was scared about what was in it, but I was hoping there would be proof of my abuse.

Whilst we waited for my records my worker spent alot of time with me preparing me. She had experience and knew that the records may be incomplete and it was hard to hear her say that there probably wouldn’t be anything about the abuse. She also prepared me by telling me that the language used by workers back in the day would not be what we would use today, and she was right. When I did read my records I was called “delusional, and badly behaved with low intelligence”. I was able to take a deep breath when I read them though because I now expected it.

We also talked about how I would get the records, if I would keep them, if my worker would keep them, if I would read them myself or if I would read them with my worker.

First off, we both met the Scottish Adoption Agency to receive the first set of records. There was only about 20 pages, but both ICSSS and the Adoption Agency were really patient with me. It helped that they both said the same things about how difficult it could be to read the information about me, and how hard it might be to realise there would be gaps. This is a powerless bit, gaps in my life when I don’t know what happened or why.
My worker took the records at my request and told me she would lock them in a cabinet until I was ready. After 3 months I read through them with her. It was upsetting, my biological parents let me down and there was no full screening of my adoptive parents. Too much was missing so I asked my worker to get records from Social Work. We did the consent form again and waited a month.

The records arrived to my counsellor and I wanted her to keep them for me. Then I asked her to read them with me. I liked the fact that the envelope was still sealed, she obviously hadn’t read them until I said it was OK.

Social Work wanted £10 for the records, the Adoption Agency didn’t charge me. Then I wanted my medical records as I was ill a lot. My GP charged me £50.

I now have my records to keep. The copies are easy to read, except the GP ones, can anyone read a GP’s writing! There are gaps that leave me with questions, such as how did I do at school, or how did they class me as low intelligence, and why was I delinquent? I have no pictures of each of the years as I grew up before going to be adopted. I don’t really know what I looked like so I can’t tell if my own child looked like me as a child.

I thought I would just read my records myself, but I am glad that I had my worker to prepare me for the content, the words, the language, and to read things about myself that don’t fit with my memories. I feel distrusting that some of my social work records are missing, and it makes me wonder what was in that.

I needed my counsellor to be the same person that got and went through my records so she understood. I needed her afterwards too, especially then, because of what it brought up for me. I thought the Scottish Adoption Agency did the best they could, but there are better records needing to be kept.
SUBMISSION FROM BA

When I accessed my records, or not

I got in touch with In Care Survivors Service Scotland to access my records. I have been trying for over 10 years to get my records myself but I don’t seem to get listened to by agencies and I have been hit with a lot of red tape.

I have been offered to take a look at my Social Work records but I seemed to be stopped in getting copies. It was the same with my GP. My hospital records have not been kept and I got different stories about they don’t need to keep them any longer than 5 years, or they should have kept them until 5 years after I die, or they don’t keep anything current if a condition was not treated in hospital. It was like I was asking for the crown jewels.

I felt embarrassed that it took headed paper to get my records. I was in 18 care homes in Scotland, and my worker tried really hard to get my records. I got records from nearly all of the homes but all of them were incomplete. Some were illegible, especially the nuns’ writing and the GP writing. I know I was on medication when I was 5, like an anti depressant, but it’s not documented.

Some of the care homes, assessment centres or listed schools no longer exist so my worker spent hours trying to find out from the Councils who would hold records up there. I know that there is an old cottage with piles of records in them and the cottage is locked up, I looked through the window, but no one will acknowledge it or take a look. Some of the staff in the stat agency told my worker there was no one old enough left working to remember that particular home. It’s on Google earth though!

My worker agreed with me how to get the records, and she made up a table for me of the different homes, the progress being made, and who returned records and who didn’t. It helped me because I can’t remember everything. There was information about other members of my family in my records so I found out things about them.

That made me think the missing information about me might be in their records, my brothers and sisters, but my worker was told that she couldn’t get information about their records.

Two things for me I want to say – the first is that it shouldn’t take an organisations letter head for me to get my records, how powerful is that! The 2nd thing though is that it’s just as well the organisation was there because I have a huge box full of records and I don’t know what would have happened to my head if the emotional support didn’t go alongside getting my records.
It cost me £150 to get my records. My GP charged £50 and the first set that was sent to my worker contained only 6 pages, that’s not exactly value for money, but after a 3rd attempt we got the rest, well I think we did.
Scottish Parliament

Education, Lifelong Learning and Culture Committee

Wednesday 19 January 2011

[The Convener opened the meeting at 10:00]

Public Records (Scotland) Bill: Stage 1

The Convener (Karen Whitefield): Good morning, and welcome to the second meeting in 2011 of the Education, Lifelong Learning and Culture Committee. We have received apologies from Christina McKelvie, who is unable to join us, and we are joined by Dave Thompson, who is Ms McKelvie’s substitute on the committee. I remind all those present that mobile phones and BlackBerrys should be switched off for the duration of the meeting.

Under agenda item 1, we continue to take evidence on the Public Records (Scotland) Bill. Our first panel of witnesses represents the interests of survivors of childhood abuse. Members will recall that recommendations arising from the investigation into historical abuse gave rise to the bill. I am pleased to welcome Tom Shaw, who conducted the historical abuse systemic review, and Lorna Patterson, who is the project manager for the in care survivors service Scotland. I thank you for your attendance today.

Both witnesses have been involved in this field for some time. Perhaps it would be helpful if you were to give the committee some information on why you believe that the bill is necessary and, in particular, on the difficulties that the survivors of childhood sexual abuse have experienced in accessing their records.

Lorna Patterson (In Care Survivors Service Scotland): The in care survivors service Scotland has worked with about 20 per cent of the client group who have accessed their records; we are talking about more than 80 people so far. Of those 80 people, survivors are not looking to access their records from only one place. As you can imagine, some records might be held in social work and there might also be medical records, school records and so on.

We believe that the bill is necessary because, in our experience of supporting survivors, records have, in the main, not been available to them. Typically, there will be either no records at all or very limited records, and there might just be a

chronology. When survivors access and receive their records, it causes a lot of distress to them if some records are missing or there are no records at all. Survivors may have gone into care when they were very young. They have no idea who their parents are and why they went into care. Generally, they cannot remember, often because of the trauma, what happened to them, how they did at school and what events they participated in. That all forms part of a very important identity for survivors of abuse, so we believe that legislation to improve the way in which records are managed is important to fill in gaps, fill in missing pieces of the jigsaw and give the survivor a sense of who they were as a child.

As Tom Shaw has said previously, people often do not access their records until they are in their 30s or 40s. They may have had leave care at 16 and become homeless, and they may have survived in various different ways. It is not until they become older that they start to wonder about their time in care. They may have memories and they may talk to their peers, who talk about schools that they have been to, whereas survivors do not know what schools they have been to or who people were. The historical side of things, and documenting the story of someone’s life and what happened to them, is therefore fundamental.

Tom Shaw (Scottish Government Directorate for Health and Social Care Integration): I echo what Lorna Patterson has said. Five years ago, I was asked to conduct a review of the legislation and provisions that were designed to protect children in care from 1950 to 1995. To do that, I felt that I had to look at records and, while it was possible to research the legislation and establish what it was and what its provisions were, we needed evidence of how things had worked in practice. Therefore, we contacted all the local authorities and all the voluntary organisations and institutions in Scotland that had provided residential care over the period concerned. We did that as far as we could, given that there was no central database of all the providers; that was another problem that we faced at that stage.

As we made our inquiries, it became clear that there was a good deal of confusion about what records existed, where they were, what they contained and, indeed, how they might be accessed. Although I am concerned not to be insensitive in saying this, in some measure our experience in trying to find the records reflected—I think—something of the experience of the former residents and survivors.

There were other issues around those records that we found, because they indicated evidence of poor record keeping. That is not part of the ambit of the bill, but I am confident that the bill’s requirement for the proper management of records
and for the planning of that management will contribute to the raising of standards in the keeping of records.

One of the biggest problems—Lorna Patterson echoed this—for a former resident or survivor who is looking for their records is being told, “This is all we’ve got.” Very often, when they look at it, they do not know whether, in fact, that is all that exists. Secondly, if that is all there is, is it all that there ever was? Have things been removed, destroyed or lost? That creates a huge problem for individual survivors, who feel very discouraged and disheartened whenever they see incomplete pictures of places that, after all, even given their experiences there, were their homes. Many people who have not been in residential care find it difficult to identify with that problem. We all had a family home, with all that that meant to us. However, for individuals who lived in an institution for 10, 14 or 15 years and sometimes longer, that was where their home was. They look in the records for evidence of the sort of thing that a family would have, such as photographs, letters and correspondence, as well as for the official contents.

Our review identified a range of weaknesses, gaps and inconsistencies in records, which it seems to me the Public Records (Scotland) Bill has the potential to bring to an end. Former residents also face the difficulty that, depending on where they lived in Scotland or where they were cared for, different approaches were taken to managing and planning records and, indeed, to what is held in the files. Some people were in care in a range of places; they were not in one place for the whole time. As a result, they get different responses to their requests in different authorities and settings. The bill has the potential to introduce, appropriately, consistency of standards and practice across Scotland, which would be in the interests of future former residents of care, of whatever form that care might be, as well as of those who were in care in the past.

The Convener: What was the most important finding of your research? How will the bill address your findings to ensure that the mistakes that we made for that period in time are not repeated and that people who grow up in care do not find themselves in the same difficulties in the future?

Tom Shaw: One of the key findings was that it is absolutely essential to listen to people, take them seriously and respect them, and to give them the opportunity to say what they want to say and ask what they want to ask about their past experience.

Another fundamental outcome of our review is the need for those who make records to recognise that it is not a bureaucratic chore but, in fact, a proper way of recording the life experience and circumstances of an individual and that it becomes, in due course, an invaluable means of monitoring and evaluating the effectiveness of the provision that is being made. How else can an internal assessment of that effectiveness be performed if you do not have records giving examples of the outcomes of the policies and practices that you had in place?

Too often, I am afraid, we found little evidence of records being regarded in that way: very often, records were aggregated into large volumes of documents and were regarded as little more than a storage problem. Decisions would be made about where to put them or how to get them off the premises. Facilities managers might decide that records had to go into secure storage somewhere. That is fine, from my lay point of view—provided that it is known what the contents are, that the records have been properly catalogued and classified, and that people have a means of getting access to them when required.

We have to engage with survivors in order to understand what is important from their perspective. We must then take heed of that and allow it to inform policy and practice. I see records as valuable memory banks for the individuals, as valuable means of monitoring and evaluation for the institution or organisation, and as invaluable resources for the evaluation of policy and practice in local authorities, in Government, in university research or wherever. They are also important in the understanding of the social history of a nation.

Lorna Patterson: As Tom suggested, a few key points have come out of our experience of helping people to access records from various organisations. When a person is in their 40s, 50s or beyond, their records have obviously been either archived or destroyed. It can be very difficult to find out where records have been archived. Someone might phone an organisation—voluntary or statutory, the result is the same—and find that no one seems to know what might have happened to the records, or where they might have been archived. It is very important to have documentation on where records have gone to.

Survivors often tell us that their record was about them and for them, so they should have had a choice over what was kept or given to them. Things such as photographs or records of family visits may have been destroyed by a worker in the organisation but survivors are saying that it was their information and, if you like, a photograph of their life. They would have liked to have the option of keeping their records before someone decided to destroy them.

Another important point that we have found is that it does not seem as if the child’s or the young person’s views have been recorded; it is often the professionals’ views that have been recorded—
their views of the child's behaviour. With survivors of in-care abuse, it might be documented that the child has been delusional, but there will be no information on what the child has said, why the child has felt angry, or why the child has had distressing behaviour. A huge amount of information is missing. As Tom said, others can turn to their families and ask, “What was I like when I was five? What was my first day at school like?” None of those things is documented; there is a massive gap.

I re-emphasise that the paper trail is hugely important. Many of the survivors we work with have not been in just one care home; some have been in at least 18 homes, or in a secure unit from the age of four. A question would arise instantly in that person's mind: “Why did I go to a secure unit when I was four years old?” There are no answers.

10:15

The Convener: Mr Shaw said that you wanted the bill to ensure that the keeping of records is no longer viewed as a bureaucratic chore. That is a rather interesting perspective. The committee has already heard evidence from some of the key stakeholders from the voluntary sector and local government, and I am not convinced that they yet understand that record keeping is not just a bureaucratic chore. How do we ensure that the new legislation does not just change how people go about doing their job—it is not as if those in the organisations concerned do not want to assist people in doing so—but instigates a culture change, so that it is not just a matter of ticking boxes and keeping records? The importance of information to individuals also needs to be recognised.

Lorna Patterson: It is a matter of getting home the point about the impact that records can have. When someone is writing or typing something about an individual, that might indeed be part of their job and their company policy, but a way should be found for them to connect with survivors and to understand the impacts. Various organisations such as the in care survivors service and the Scottish Government could play a part in spreading the message about the impact on people of full records not being kept for them.

Tom Shaw: I can fully relate to that concern. The cultural issue is the big problem—it is difficult for legislation to establish a culture in practice, because that is the responsibility of the professionals and the providers who operate within the terms of the legislation. That is part of what they are accountable for.

The bill seems to have a real strength, in that it is truly enabling. It is written in such a way as to allow a developmental process, which involves the providers, the local authorities and anyone else who is in the business of making records to be part of the development. The annual records management plan and its internal review, and its subsequent external evaluation by the keeper, form an iterative process. Over time, that allows the prospect of continuing practice improvement. It allows people better to understand the nature and purpose of the records. The best way of persuading someone that a record is worth making is to demonstrate to them that it is used, and used for a purpose that benefits the person who receives the service, as well as the person who provides the service.

The issue is not just one of survivors and former residents; it is also about the people who deliver the services. It is vital to have a bonding of identification with the purpose of keeping records. Local authorities and others have a big responsibility to continue to work at that. It involves developing an understanding of records among staff and highlighting the use of records by staff for the purposes of reporting in due course to the Parliament, not least, about how well investment in the sector concerned has been delivering.

Elizabeth Smith (Mid Scotland and Fife) (Con): The committee's focus is on deciding whether we need new legislation. You have both made a powerful case this morning as to why you think we should proceed. Other groups have put it to us that new legislation is not required and that, if we ensured that the existing legislation worked properly, there would not be a need for any more. Can you give us an example of a loophole or a way in which the existing legislation does not work, whether that involves freedom of information or some other problem with the existing law?

Tom Shaw: I can talk about problems that we have faced whenever we have tried to get information about records. Our initial inquiries did not even involve asking for records, in fact—they were requests for information about what records existed. We sent a questionnaire to every local authority and voluntary organisation. In the majority of responses, replies to various parts of the questionnaire were, "We don't know," "We haven't got that information," or "We don't know what's in those records."

The researcher who worked with me visited several archives, stores and other locations where records were held. I do not want to be melodramatic, and one instance does not necessarily prove the case, but on several occasions, my researcher was taken to—it sounds Dickensian—dusty storerooms where cardboard boxes that appeared not to have been opened for a long time sat. Whenever people were asked...
what was in the boxes, the answer was in effect, "We don't know—would you like to have a look?" I do not want to be melodramatic but, strictly speaking, somebody who is undertaking a research project should not be given free access to have a look. Issues relate to what the boxes contain. If the records are personal, they are private and confidential to the named individuals about whom they are written.

In that way, existing practice has failed. We could say that, in the best possible circumstances, all the work would be done, but it has not been done. My major concern is that the longer it takes to do it, the more records will be lost and the more people who never access what is held on them will pass through the system.

Elizabeth Smith: In your opinion, was the situation unsatisfactory in more than half the institutions that you surveyed?

Tom Shaw: Yes—arrangements were unsatisfactory in more than half the institutions.

Elizabeth Smith: I will take up the convener's point that, although we can have all the legislation in the world, if best practice is not followed, issues can remain. What needs to happen for a better culture of communication to be developed?

Tom Shaw: That goes back to what the record that is being kept is for. What is it designed to do? Is it designed to have just a single purpose—to have something on the record? Alternatively, is it part of the collection of information that will allow an overview to be taken over time of aspects of provision and outcome, which can inform decisions about changing practice or provision?

The question is difficult, because a record must be for an individual—such as a former resident—a fairly comprehensive description of what they experienced. I will illustrate that with an example. Some people vividly remember being punished. In its time, such punishment was not necessarily outside the law, but the law required the punishment to be recorded. We were frequently unable to find the punishment books, which would be expected to be part of any backlog or archive that people wanted to keep. That is a very big issue for a former resident, who will ask why the book is not there and what is being covered up, although the reason might be poor practice, carelessness, ineptness or casualness—who knows? Many reasons might apply, but we do not know the reason, because the books are not there.

Elizabeth Smith: I say with respect that that is what happened in the past. I am driving at the fact that, in some people's opinion—perhaps not yours—more recent legislation has improved the situation. You still argue that we need the bill because arrangements are unsatisfactory now.

Tom Shaw: I argue that the bill will close the circle. It will acknowledge and respect the other Government legislation on what goes into records and on access and ownership of records, but it will recognise that records have not been collectively managed in an agreed plan to agreed standards that ensure that the same approach to keeping records is taken in every provider's domain.

Alasdair Allan (Western Isles) (SNP): From hearing your evidence, I suspect that committee members will be of one view—that some pretty terrible failures of record keeping have occurred in the past. How do you respond to evidence that we have received on proportionality? Barnardo's and others have put it to us that some measures in the bill might represent an undue burden on smaller organisations. What is your view on those concerns?

Tom Shaw: As I understand the terms of the bill and the way in which it will operate, if it is implemented, there will be an opportunity for engagement with the providers in the development of the scope and nature of the model records management plan that would be made available. That will allow organisations big or small to engage with the keeper and the National Archives of Scotland in debate, discussion and decisions about how the plan can be shaped in a way that takes note of whether those are real and genuine concerns.

The bottom line is that the organisations should be keeping the records and managing them anyway. In that sense, it is not an imposition; it is, rather, a reduction in the optionality whereby people are allowed to decide whether to do it. The bill will make it an obligation to which people can be held accountable. As I understand the terms of the bill, the nature, detail and content of the records can be agreed, developed, managed and moderated over time.

Lorna Patterson: There is an obligation on organisations to keep records that are useful to them, bearing in mind the fact that a person on whom records are kept may come along and read those records. I have worked in both small and large organisations and my personal view is that the process is not laborious. It is part of the care that is offered to a person when they are provided with a service.

In terms of culture, the obligation to meet policies is one thing but the attitude of staff is another. I believe that taking accurate, useful notes and recordings about a person is part of the care package. I sometimes worry that people are taking records just to keep themselves straight, which is understandable, when there is someone else at the end of the process—a child, young person or vulnerable adult. It is not about keeping
records just to tick a box; it is about keeping records for a purpose.

Alasdair Allan: The evidence that we have received has shown more consensus on the need to change the law as it relates to your sector, dealing with vulnerable children or adults, than on the need for a record-keeping regime that would apply to other sectors. I do not expect you to comment in detail on other sectors, but how do you respond to the criticism that one size does not fit all—that other areas of public life should not be subjected to the new legislation on records?

Tom Shaw: I very much appreciate your acknowledgement. I am not an expert in every field of public service delivery. However, I understand the bill to be written in generic terms that allow interpretation and the development of the records management planning process in a way that takes account of the nature and character of the service that is involved.

I will give you the nearest that I can to an example that we came across of things that were not simply in the field of child care. Whenever we were tracing, the experiences were reported to us by some former residents, and one of the things that they spoke about was running away. They were often picked up by someone else in the community—a policeman or a neighbour who understood where they had come from and how to get them back there. Whatever the situation was, we thought that we might be able to trace records of where the children who had run away had been found. However, we faced the problem that there appeared to be difficulties in managing the records regarding the children. For example, we asked for records on aspects of the children’s health, which were held separately, and there were difficulties in accessing that information.

I do not want to exaggerate our insight into that, but we felt that there was evidence of the need for better retention schedules, records management planning and understanding of the nature and purpose of the records across sectors, not just within the sector on which we had a specific focus.

10:30

Claire Baker (Mid Scotland and Fife) (Lab): I want to pursue the issue of record keeping in the third sector and in other organisations whose services are contracted to local authorities. We have talked about the concerns that have been expressed by the sector. It is not so much that people do not recognise the importance of record keeping—a lot of work has been done in recent years and there has been a huge improvement in the records that are kept, but the main concern is that they might have to change how they currently keep records. They feel that, although they have very good record-keeping systems that have been approved by the local authority with which they have a relationship, if that local authority introduces a different RMP they might be required to change their record keeping. They feel that there might also be difficulties if they work with several local authorities—a number of organisations now have multiple contracts. It has been suggested that there should be a single or common RMP, rather than the flexibility that the bill allows. Do you have a view on the concerns that have been raised on that issue?

Lorna Patterson: The in-care survivors service Scotland is part of the voluntary sector and we cover the whole of Scotland. I would fully support the view that if future funding were to come from individual local authorities and each asked us to keep records differently, that would be completely unmanageable for the third sector, especially for national organisations. It is clear to me that one size does not fit all. However, there could be a simple template for what should be kept and how it should be kept—which is another issue, because how records are kept varies among organisations. It would be a logistical nightmare if each local authority had its own guidelines on what it expects from voluntary organisations.

Claire Baker: Do you want to comment, Mr Shaw?

Tom Shaw: I echo Lorna Patterson’s comments. I understand that the bill would ultimately lead to a records management planning template with associated guidance and a set of agreed standards, which would inform the provision for records management in many different organisations and the agencies that might be contracted to work with them. It can only be good to have a common set of principles and standards—I do not see a problem in that.

As I said earlier, in the past I have been concerned about how different individuals going to different places get different things. It would be valuable for them to receive broadly similar responses to their requests wherever they went. The planning principle and the standards that I hope can be developed will overcome some of that. I would like to see much greater consistency.

Lorna Patterson: It is really important to have common principles. For example, when I have approached other voluntary sector organisations, there has been great confusion about how long they are supposed to keep records for. Some think that it is for one year, some think that it is for five years and some think that it is for seven years. Clear common principles would help.

There is also the issue of how much it costs for someone to get copies of their records, which varies from nothing to £100. The amount of
records that are kept has no bearing on the cost. In addition, there should be common principles about how a person gets to see their records. Some statutory organisations invite the person in to look through their records, but that would be far too traumatic for survivors of abuse. It would be too much information for them to take in, so they are entitled to have legible copies of those records. The situation varies.

Those are the kind of things that we could streamline and make clear. That would help all organisations, including those in the third sector, to be clear about what they needed to do and for how long.

Claire Baker: That is helpful.

The other issue that the third sector has raised is the definition of “public record”. In a joint submission, children’s charities argued that it would “mean that every document, minute or email we produce discussing in any way the delivery of a service for a public authority would be deemed a public record and could therefore be subject to the provisions of this bill.”

It goes back to the issue that Alasdair Allan raised of whether the bill should distinguish between high risk and low risk. The charities argue that, because the current definition of “public record” is very broad, they will have to maintain every item that is relevant to any service that they deliver, regardless of whether that service involves working with vulnerable groups. Do you see the current definition as creating difficulties for organisations? Could there be improvements in that area?

Lorna Patterson: This is where things become complex. I agree that it would be difficult, challenging, time consuming and costly for organisations to record absolutely everything. The question is, what do you keep and what do you not keep? Some organisations record telephone calls on their system, to indicate that a client has contacted them. That may or may not be relevant information. There needs to be some debate about, or guidelines on, what is classed as important and as having an impact. I imagine that health records, consultations, financial records, chronologies of where people went, for how long and why, and information about behaviours would be included.

Tom Shaw: My perspective is that by defining “public record” broadly, you allow for development of an agreed subset of understandings, guidance, practice and indicators that make the system both manageable and sensible. The definition must be wide.

Again, the issue relates to some of the more historical work in which I was engaged. We were interested to find that some records were highly significant in understanding more about life for someone who was in care in the 1950s. Those included records of people’s diet. Whenever people thought about their records, they thought about people records, but all aspects of provision—including decisions about sleeping accommodation, the standard of caretaking and management of facilities to ensure that they were secure—are covered. It is necessary to have an all-embracing definition to ensure that a range of relevant information can be drawn on. The key is to discuss what is relevant and how that can best be developed or, as I said earlier, moderated over time. The current definition allows that to happen.

Ken Macintosh (Eastwood) (Lab): You say that we should have one form, so that different voluntary organisations are not subject to different demands in their contact with different local authorities. However, National Museums Scotland says that the bill will apply to it, too, even though it does not hold personal or sensitive information. I cannot quite work out how the system will work. It is impossible not to be moved by the evidence that you have given, which relates to organisations that deal with highly vulnerable groups, but it is difficult to see how applying the bill to organisations such as National Museums Scotland will help anyone.

Tom Shaw: I do not wish to pretend to have any expertise with regard to the work of National Museums Scotland, but as I said in my submission, good record keeping and records management are the essence of good governance. I think that any organisation in the public sphere that is in receipt of public funds has to pay attention to its governance procedures and the means by which it manages its records, so that appropriate interests can ask questions and audit its practices and operations and so on—the normal thing that happens all the time. In that sense, I cannot envisage the kinds of records that might be accumulated as a result of the bill being significantly different from what is kept at present as data that are used to evaluate the provision, quality and appropriateness of services.

Ken Macintosh: I am sure that National Museums Scotland has good record-keeping practices—that must be the case, given the nature of the job that it does. However, the suggestion is that we are going to place a legislative duty on it and issue standardised guidance that it must abide by, which might be framed by your evidence, which is all about protecting people’s records and sensitive personal information. That clearly applies to people’s health records and social work records, but it is hard to see how it applies to information of the sort that is held by National Museums Scotland. I cannot quite see why we should impose national standard guidance by legislation on an organisation that holds information that is different to the information that
is held by, for example, health and social work bodies, and whose remit and purpose are totally different. Can you comment on that?

Tom Shaw: I can say only that I presume that it will, within the realm of the negotiations about the records management plan—the template that will be eventually developed and introduced—and the guidance that is issued with it, be possible to differentiate between the particular circumstances of various bodies. Again, I do not know about the work of National Museums Scotland, but I appreciate that it will be involved in a different sort of service delivery to that which I have been talking about. However, I presume that it provides services that it wants members of the public to use, and will therefore have to have provision for child protection and have an appropriate overview of the operations, activity, training and qualifications of its staff—things that I am sure are provided for within other Scottish legislation. I presume that it would be such things that its plan would draw on.

I do not want to fall into the trap of trying to anticipate that which is yet to be developed. I expect, from the terms of the bill, that development of the guidance would be a co-operative activity, and that there would be a lot of interaction between various kinds of service, which would allow appropriate moderations or adjustments to the format. I realise that I am indulging in speculation when I say that. However, I appreciate that the breadth of the bill is due to the terms in which it is written.

The Convener: Thank you for answering our questions.

I suspend the committee while our witnesses leave and the minister joins us.

10:43

Meeting suspended.

10:50

On resuming—

The Convener: We return to the first item on the agenda, with our second panel of witnesses on the Public Records (Scotland) Bill. I am pleased to welcome the Minister for Culture and External Affairs, Fiona Hyslop, who is joined by George MacKenzie, keeper of the records of Scotland; Bruno Longmore, the bill team leader from the National Archives of Scotland; and Lindsey Henderson, a legal officer for the Scottish Government. Minister, I understand that you have a short opening statement.

Fiona Hyslop (Minister for Culture and External Affairs): Yes, I have. I thank you for the opportunity to get some things on the record that I think will be helpful for the committee in its deliberations on the bill.

The Public Records (Scotland) Bill is about improving the management of records by public authorities, but it also has—as I think you have heard this morning—an important moral dimension. Tom Shaw’s compelling report and his evidence to the committee show starkly how vulnerable children were not looked after properly while in care and that records about them were not looked after, either.

Some have argued that the problems that the Shaw report uncovered were put right with the Children (Scotland) Act 1995, but the Kerelaw inquiry showed otherwise. It found many instances of poor record keeping; for example, some records of senior management meetings between Kerelaw and council departments could not be traced, other files were difficult to find and there were problems accessing older electronic records. A proper records management plan would help in avoiding many of those problems. The Looked After Children (Scotland) Regulations 2009 state that authorities must ensure the safe-keeping of case files and say for how long they will be retained, but they do not address wider issues of records management.

I am sure that many members of the committee will, like me, have heard harrowing first-hand accounts from constituents who have been in care and whose earlier lives are a worrying blank because the records about that time are disjointed, deficient or have disappeared. The reasons are various, but to put it simply, no one took responsibility for managing the records properly. The moral argument for the bill is powerful, but ultimately the bill is about good governance and improving efficiency across public services. Records are crucial to organisations, particularly in this information age: reliable information depends on good records. At a time when public bodies are looking at ways of increasing efficiency, they need to manage their records and information better than they do now. Some already do it very well, but everyone agrees that there is room for improvement.

I know that the committee has heard evidence that our proposals might be disproportionate. I disagree: we have taken a light-touch approach, compared to other countries, and our proposals went through a systematic scrutiny check, as was recommended by the Crerar report. The bill does not prescribe what records are to be created or how long they are to be kept; those are matters for individual authorities and existing regulatory bodies.

The bill does not give the keeper any powers to dictate the content of records. Authorities will draft
plans setting out how they intend to manage the records that they create, and the keeper's responsibilities are about approving those plans and helping to ensure that they are implemented. I understand, however, that the language of the bill has given some people the impression that the keeper will assume a prescriptive and directive role. I have therefore asked my officials to look at the bill's wording with a view to lodging appropriate amendments at stage 2.

Some evidence that has been submitted to the committee has pointed to increased costs. Certainly, good record keeping is not without cost, but in the longer term the costs are much lower than they are for poor record keeping or, indeed, for no record keeping. Where authorities already manage records well, there will be minimal costs.

The definition of "public records" in the bill is intentionally broad to make it future proof, so that it will catch paper records, electronic records and records that will be created in other future formats, depending on technological change. It covers records of private and voluntary sector organisations, which will be "public records" where they relate to functions that are performed on behalf of a public authority. The only consequence of defining a record as "public" is that it must be covered by a records management plan. Indeed, the definition only has reference to this bill.

Importantly, the definition "public" does not make the records public property, publicly accessible or publicly owned. The bill does not create new rights of access to information or compromise confidentiality. Access rights are already dealt with in Scottish and United Kingdom legislation and the bill will not alter those rights or responsibilities in any way.

Records that are created by the voluntary sector on behalf of public authorities must be covered because the Shaw report found in such cases that records frequently disappeared when the service ended or the voluntary organisation dissolved. However, the responsibility in the bill is with the public authority: it will not put any direct responsibility on the private sector or voluntary sector.

The bill requires the keeper to issue a model records management plan and guidance. He will continue to work closely with authorities and the voluntary sector in drawing those up. Voluntary sector concerns about dealing with different records management systems in different authorities will largely be met through common records management plans and the generic work that is already being done by local authority records managers.

Some argue that the proposed scrutiny function and sanctions are contrary to Crerar, but the main focus of the bill is not about scrutiny but about making consistent and durable improvements. To do that, a degree of scrutiny is essential, but that has been kept to a minimum in relation to the records management plan. I reassure the committee that the keeper has neither the intention nor the resources to carry out blanket inspections, but will react to specific problems and assist public authorities in improving their record keeping.

Others argue that we can improve public record keeping by voluntary means. I appreciate the good intentions and genuine desire to get records right this time, but I firmly believe that the only way to ensure consistent and lasting improvement is by an act of this Parliament.

In legal terms, the bill is extremely tightly drawn and does not cover content or access. A number of matters have been raised by the Convention of Scottish Local Authorities and the voluntary sector dealing with children's issues. As the process of the bill continues, it is my intention to work closely with both on their separate but sometimes related issues to ensure that when the bill is enacted, issues of content, policy and scrutiny of service delivery remain firmly in the hands of the specialist authorities and agencies.

On the narrower scope of the bill on public records management, I will ensure that the keeper works in strong partnership with bodies such as COSLA, and with local government officers, other public authorities and representatives of the voluntary sector to develop and implement guidance and ensure tangible benefits from the legislation. A partnership approach and ethos of joint working underpins that intent.

To sum up, the bill cannot put right what went wrong in the past, but it can help us to avoid the same problems in the future. We owe it to former care residents and survivors of abuse—indeed to all future generations in this country—to make the necessary improvements to the way that public authorities deal with records, to safeguard their rights and their identities as individuals and to secure our collective memory.

Elizabeth Smith: Thank you, minister. You gave us a comprehensive report, and your remarks were very helpful, if I may say so. Obviously it is the committee's decision as to whether legislation is required. You have made a very powerful case, as Tom Shaw did before you, for why it is needed. You are right to say that other groups and associations have said that they do not think that legislation is required because they think that some of the existing legislation deals better with the problems that they face. It has been put to us that a lot of the very emotional concerns in relation to child abuse were about problems of the past, rather than of the present, and that some
of the recommendations could be taken up in more of a voluntary way, because the existing legislation is satisfactory. Can you confirm that you think that the bill will take on board everybody’s concerns about record keeping?

11:00

Fiona Hyslop: Yes. I can assure you that we will make every effort to do that. On whether I can guarantee that, the proof will be in the delivery. The genesis of the bill is in the Shaw report, the recommendation of which was to look at all public records. Clearly, the records that are probably the most emotive and concerning are those that relate to children. There are other areas of concern, however. The areas that the bill covers are comprehensive—they include any public function that receives taxpayer money.

Obviously, there will be different model records management plans for different sectors. There is not a one-size-fits-all model; plans will have to be proportionate to the interests and needs of different areas. If I am asked questions on information from public authorities—which happens frequently, as it does to my colleagues—I say that it is important to have in place decent records management systems so that people can obtain the information that they seek. We are talking about information that, at times, can be from the previous 10 or so years. Plans have to be proportionate.

The current legislation is the Public Records (Scotland) Act 1937, which is obviously quite dated. In a modern age—an information age—when a lot of information is electronic, we need to become better at how we deal with records. The act says that, before a local authority enters

“into any arrangements ... to which ...section 56 of the 1973 Act (arrangements for discharge of functions by local authorities) applies with regard to the preservation and management of any records”

it

“shall consult the Keeper.”

The result of that is the voluntary code that we have just now. Had it been effective, we would not have had the recent problems. Adam Ingram led on the Kerelaw inquiry, but I dealt with the matter as the then minister with responsibility for children. At the time, I was very conscious that, if improvements had been made to records management, and had the voluntary arrangements been in place, the inquiry would not have found what it found. That example is important on the voluntary side of things.

The level of record keeping is different for different areas; it depends on content and subject matter. For example, the health service was covered in

the original bill, but the police were not. Police authorities asked to be included.

As the committee knows, many public organisations do very good record keeping and the people who maintain those records can evidence it. The bill may make little difference to how they carry out their duties, but we want to ensure that all those areas are covered. The duty on local authorities to consult the keeper is in the Local Government etc (Scotland) Act 1994—I think I said earlier that I was quoting the 1937 act. The 1937 act covers public records in general, but the issue around the current voluntary code comes under the 1994 act. Had that been successful, we would not have had the result of the Shaw report or, indeed, the Kerelaw inquiry.

Elizabeth Smith: I understand the points that you make, minister. In the modern age, freedom of information requests and the better-quality information that is general to modern society have led bodies to improve as a matter of course. That is where they are coming from. They feel that the process is, in itself, enough and that they do not need extra legislation because their culture is now one in which they know that they have to keep better records. The question remains: can the process be enhanced by forcing everybody down this route?

Fiona Hyslop: It is interesting to note that the majority of people who will be affected think that the bill is common sense and that it is straightforward. I suppose that the issue is how to ensure that the model records management plan for a particular sector reflects the interests of that sector. That is why it is important that the keeper take advice from the sector on the degree of importance that the records contain. No more records will be kept as a result of the bill, but the records that are already there will be better kept.

You are correct in saying that experience of FOI and data protection has led to improvements. However, the improvements are in relation to the contents. People know what has to be kept because of the types of request that come in. It is not the “what?” of the records that are being kept, but the “where and how?” Obviously, the experience that the keeper has can also be shared more widely. I think that it is generally recognised that a statutory provision that is light in its touch and that provides for relationships with specialist areas to dictate the content is enough. The issue remains: could we trundle along without the bill because the direction and pressures of FOI and data protection are enough? By and large, the view is that much of the bill is common sense—indeed, I think that 14 of the local authorities that responded said that they were very supportive. I hope that the bill will relieve some of the pressures.
One of the biggest challenges is to decide what to keep and what not to keep. In a situation in which everything is kept, it can be harder to find the stuff that is really needed. An effective records management plan would allow people not to keep some records. Once an overall strategy and the criteria are in place, people will be able to recognise which records they do not need to keep and get rid of them. That is important.

With regard to electronic record keeping, it is important—as members will know—to modernise what we do so that systems can talk to each other. The bill is a modernising efficiency—the moral dimension has led to it, as I said, but that will be the impact.

Alasdair Allan: As we heard in previous evidence, there have clearly been failures of record keeping in the past, but some of the witnesses have questioned whether the bill will place undue burdens on smaller organisations. Can you comment on that?

Fiona Hyslop: I listened to the earlier evidence session, and I make the point that just because an organisation is small, that does not mean that record keeping is not important. Very small organisations do very important work in looking after children, for example, and they should not be negated in terms of what they keep.

From its other responsibilities in relation to child protection the committee will be aware that, in the development of social care and social work improvement Scotland and the work on getting it right for every child, there is a far more joined-up and child-centred approach to service delivery and, therefore, to record keeping. That is helpful, but we are conscious of the suggestion that, if a small organisation deals with different local authorities, the bill might be a burden. We need to change the culture. We keep records because they are important, especially to individuals. We need to find ways to make it easier for small organisations to be confident that they know what to keep. A model records management plan will help small organisations because it will give them confidence in working in the sector.

A lot of this, understandably, is concentrated on children, but I am keen to ensure—as I discussed with the Convention of Scottish Local Authorities recently—that groups such as COSLA, SCSWIS and all the people in the voluntary sector who work with children’s issues help to advise on what should be in the records management plan. That is precisely to help the small organisations, so that they can put forward their views as to what goes in the plan. The organisations, rather than the keeper, will determine that, although they can always take advice from the keeper, whom we would expect to be involved in the process. For a small organisation, what to keep should be determined by the profession.

The how is also important. Are the records kept in a cupboard? Have you got the dates? Is there an overall plan that tells you where the records are and when or whether they can be destroyed? What happens if the records are moved? The keeper will be involved in that overall management stuff, as opposed to the burdens of small organisations going about their service delivery for children.

Alasdair Allan: Tom Shaw mentioned in his evidence that there might be the opportunity for guidance to clarify which organisations would have to follow which type of plan for their records, depending on whether it was felt that they were dealing with vulnerable people. Is that a relevant issue?

Fiona Hyslop: Yes, it is. We should perhaps mutually clarify the issue, convener, with regard to where we are going at stage 2. We are quite clear that the bill is very tightly drawn—it is about the management of records, not about their content. However, guidance on the question that Alasdair Allan has just asked—about what should and should not be in the plan—is precisely what the professionals should be able to give us. Relevant professionals can advise us on the content of guidance for child protection matters, for health and for policing matters. We will work closely with the keeper on that, but it is for the professionals to determine the content.

The issue is whether the guidance is statutory or not—I am looking to my legal support on my right. I suspect that there is an issue in that statutory guidance in relation to the bill must be about the terms of the bill. Guidance on what records can be kept, and how and when they are kept for children, can be issued at any time. In that instance we would work with Adam Ingram, for example, because guidance is constantly being issued in relation to those issues. The professionals will inform that work; I would not expect the keeper to take a lead on it. My point about scope is another issue on which the convener might want to reflect.

Alasdair Allan: The Scottish Information Commissioner has suggested that the list of bodies in the schedule to the bill should mirror the list of bodies that are covered by freedom of information legislation. Is that a reasonable comparison to make?

Fiona Hyslop: I will reflect on that point and get back to the committee on it. There have been recent moves to extend the scope of the freedom of information legislation, but the bill is about the management of records. I suspect that there is a narrower definition in the freedom of information legislation, which I understand to be more
restrictive. Perhaps the keeper might want to comment on that point. The bill is about public authorities carrying out public functions, which I suspect goes wider than the freedom of information legislation.

George MacKenzie (National Archives of Scotland): The schedule to the bill is not the same as the schedule to the Freedom of Information (Scotland) Act 2002. That is deliberate. The schedule to the FOISA is drawn extremely widely. Part of our light-touch and proportionate approach was to narrow the list down to those organisations that we think are most significant in terms of the records that they produce.

Fiona Hyslop: So that we are not talking at cross-purposes, I point out that the bill relates to public functions, whereas the FOISA can go wider in many ways because it covers different organisations, including organisations that are not defined in the bill as public authorities. However, in some areas, the scope of the FOISA is narrower than the scope of the bill. The two pieces of legislation are intended to serve different purposes, which reflects the answer to Liz Smith’s question that they do not necessarily operate in parallel. We cannot rely just on freedom of information legislation, as it may not cover the areas that we want to cover in the bill. You will see that there is scope in the bill to amend the schedule by order so that if, in the future, the committee thinks that other organisations should be included, the Government or the committee can identify that and the schedule can be amended.

Kenneth Gibson (Cunninghame North) (SNP): The Scottish Information Commissioner has recommended that the memorandum of understanding between the commissioner and the keeper should be adapted so that joint audits result in joint recommendations and that, when there are records management failures, the commissioner can ask the keeper to undertake a compliance review. What is your opinion of that proposal?

Fiona Hyslop: The Scottish Information Commissioner, who has oversight of the information system, will know from appeals in which areas there is a problem in accessing information. There can be different reasons why he cannot access information, one of which could relate to poor records management planning. A record might be there but it just cannot be found. He will be able to flag up to the keeper areas or authorities where he thinks that there is a problem with repeat FOI rejections. There might be lots of different reasons why FOI requests are rejected, but if there is a systemic issue with the way in which information is being recorded, kept and managed, he will be able to deal with that under the memorandum of understanding. Similarly, the Accounts Commission, which looks for specific information, could also identify where it cannot get information, either because the information has not been recorded or because it just cannot be found, which would highlight the fact that closer work needed to be done with a specific local authority.

It is about the improvement agenda. This is not just about scrutiny; it is about trying to make improvements. I do not expect the keeper to be able to go round doing blanket inspections all the time—that will not happen. However, we will know, using these provisions, where there are failings. You can probably identify from your own case load organisations with which there are issues. The reason may not be poor records management, but at least the system that the bill proposes would allow records management to be addressed. If there are any problems in the future in relation to data protection or freedom of information, records management will not be the problem, as we will have improved records management.

Kenneth Gibson: Okay. Should the commissioner act as a watchdog, alerting the National Archives of Scotland to any problems with an organisation’s approach to record keeping?

11:15

Fiona Hyslop: That is what I tried to address in my previous answer. Yes, the issues will be flagged up.

Everybody is involved in a process of continuous improvement and self-assessment is important. The compliance review that is cited in the bill is not about the keeper ensuring compliance with something else; it is about ensuring that a local authority is complying with its own records management plan—ensuring that it is not just saying that it is doing something, but that it is actually doing it. There are parallels with the self-assessment that takes place in public authorities and councils, which, increasingly, leads to improvement.

There is also the statutory role of the keeper, who has expertise in the field and whom the best people will ask, because they know to ask. The issue is that some people either do not have records management plans at all, which is very worrying, or they have them but pay only lip service to them. We must try to change that. It should improve under the bill. I am not saying that the bill will save money immediately but, if organisations do not have to keep lots of archives of information, that will be an improvement for local authorities.
The Convener: Minister, you touched on the issue of the existing freedom of information legislation. The committee has heard concerns from the voluntary sector that it could be argued that the bill will extend the freedom of information regime to voluntary organisations that are not covered by it. At the moment, a public authority can contract a voluntary organisation to undertake a piece of work without that voluntary organisation being subject to freedom of information legislation. The voluntary sector is concerned that the bill will introduce the provisions of that legislation by the back door. Do you agree with those concerns?

Fiona Hyslop: No, I do not. We have spent a great deal of time, especially recently, in discussing that issue with the voluntary sector in order to reassure it. I hope that I made it clear in my opening statement that the bill is not about access issues, which are the focus of the freedom of information legislation, or confidentiality. Indeed, the Looked After Children (Scotland) Regulations 2009 make it clear that there is a responsibility for the safekeeping and confidentiality of records. That still stands—the bill does not affect it. We might have put something in the bill to say that the keeper would not have responsibility for access or confidentiality, as those issues are not covered by the bill, but we think that the bill is so tightly drawn that it would not be possible to include those issues in its scope. We will continue to make efforts to ensure that that is clear, so that the interpretation of the bill is clear.

The bill deals only with the management of public records; access and confidentiality issues are still governed by the relevant legislation dealing with freedom of information, data protection, looked-after children and—in health—patient confidentiality. I suspect that, if there was an issue with confidentiality regarding the bill, similar concerns would have been raised by the health service. The fact that the health service has not raised such concerns shows that its understanding of the bill is the same as ours—that it is about records management only, not access and confidentiality.

Margaret Smith (Edinburgh West) (LD): Another concern that the voluntary sector has raised with the committee is how the records management plans will fit among their existing obligations to various regulatory bodies. Do you have any thoughts on that aspect? Do you see any potential conflict with requests for information that voluntary sector organisations already receive from regulatory bodies?

Fiona Hyslop: They should be complementary and mutually supportive. Many of the regulatory responsibilities are about the content of what is kept. The bill should help with how the records are kept, so that the regulatory aspects can be evident. It was interesting to hear, in Tom Shaw’s evidence to the committee, that part of it is about being able to evidence that an organisation’s service has delivered to individuals what it was intended to deliver. The bill is about the evidence side of things, not the content. The guidance will be helpful, whether it is part of the bill or general guidance in relation to other specialist organisations.

It will be the professional organisations such as SCSWIS, including the HMIE children’s services that SCSWIS will take over, working with the voluntary sector, the children’s organisations and COSLA that will determine the what. This should be complementary to that, rather than displacing it. The only thing that will be new is the records management plan, which will be drafted to take account of any sector specific records management requirements. The keeper will provide advice about what should be in a model records management plan for children’s homes, for instance, and the contents of that plan—what should be kept and how—will be informed by a working partnership with sector specific specialists. That means health specialists for the health service or SCSWIS in relation to child protection—that is how it should be. Such partnerships should be complementary and should involve the management of the how, as opposed to determining the content of what is kept.

Perhaps I am labouring the point, but in the development of the bill that distinction is probably the most difficult aspect to discuss, in what is quite a technical area.

Ken Macintosh: Suppose that one children’s home keeps receipts for expenditure over 10 years as a matter of course, but another home does not. Say that the model plan suggests that receipts should be kept. I cannot work out how things would work. What happens to a care home that does not keep receipts? What happens once the model plan is produced?

Fiona Hyslop: I stand to be corrected by my colleagues if I get this wrong, but my perspective, and the bill’s perspective, is that what a voluntary organisation that runs a care home keeps, for example, will not be directed by the bill; that will be directed with regard to the organisation’s relationship with the authority for which it is carrying out its public function—and that is the key driver. That voluntary organisation’s public function is the care of children, not the administration of the care home in terms of pounds, shillings and pence.

We have provided answers on this, which we gave to the committee last week. The admin costs or functions of a voluntary organisation in carrying out its business—rental, receipts and so on—are for the organisation itself, and they would not need
to be covered by the records management plan. What would need to be covered is the function that the organisation is carrying out for the public authority—that is, the care of children. We would not expect receipts for the expenditure of a voluntary organisation that is involved in the care of children to require to be itemised as one of the things that the records management plan should cover.

George MacKenzie: Responsibility lies firmly with the public authority, rather than the voluntary sector body. Anything that the voluntary sector body does by way of looking after its records would be in relation to the plan from the authority. It is the relationship between those two organisations that would regulate that.

I suppose that it would be possible for local authorities to have different requirements for care homes in relation to their records management plans—it would be up to each authority to determine that. Part of the guidance that the keeper will produce, and part of the work of local authority record managers, involves moving towards developing generic approaches to managing records. I expect there to be a definite convergence of record-keeping practice, so the likelihood of there being quite different forms of record keeping among children’s homes would probably dwindle over time. Essentially, the voluntary sector body would make its decision with regard to its relationship with the public authority.

Ken Macintosh: I wish to clarify one further issue. Let us say that one care home keeps a record of every time that a child in the care home visits hospital or a doctor. Another care home, in the same local authority, does not do that, on the basis that records are kept by the doctor or the hospital—the child has a medical record, and the home does not need to duplicate it. I am just making this up—I have no idea whether this would happen in practice. In one case, a home keeps a health record; in another case, the home does not, as it is kept somewhere else. The organisation that runs one of those two services also operates in another local authority area. How would the new RMP impose on all three of those cases? Would you expect one home to stop keeping such records, or one to start keeping them? Would you expect the situation to be the same in the other local authority?

Fiona Hyslop: I will bring in George MacKenzie in a second. As far as children are concerned, that is precisely the area that needs to be determined. In the past, there was a danger that somebody might assume that someone else was keeping such records. Details about hospital visits, for example, should most definitely be kept. The committee will know from previous child protection inquiries that that is exactly what has been missing in the past.

There are two ways of approaching the issue. The content of a record that is kept about a child is not determined by the bill. The bill is about how a record is kept. Whether a record of hospital visits—to use that hypothetical example—should be kept will be determined by specialist organisations, such as SCSWIS. Undoubtedly, the view will be that that record should be kept, and the bill will kick in on the question of how it should be kept.

There is a challenge around the single records for children under GIRFEC. The management of that process should be far more effective with regard to professional working in the children’s sector in general. However, the decision about what is kept by people concerns advice that should come in guidance from the child protection and health areas. It is the decision about how it is kept that will come from us.

The creation of the records is not covered by the bill. It is important to state that the bill is not about the creation of records. Some people in the voluntary sector are concerned that the bill is about creating new records. However, section 12(1) says:

‘‘management’, in relation to public records, includes keeping, storage, securing, archiving, preservation, destruction or other disposal’’.

It says nothing about the creation of the content of the records. It is the specialist organisations that will say what sort of things are to be kept. The more standardised the situation, the clearer that guidance about what should be kept will be, which is helpful.

It might be useful to consider the issue as having two aspects. The first aspect is about managing records once they are in place. Under the bill, the keeper determines that model and will take advice from various specialist bodies on that, as there are different management plans for different sectors. There is an issue about whether we can lodge an amendment at stage 2 to make that clear.

The second aspect is about what is kept. That is not determined by the bill, but it is clear that there are better ways of ensuring that people know what to keep. I absolutely agree that there have been improvements along the way in that regard. At that point, the keeper will advise on the issues that are involved; he will not facilitate or co-ordinate that work.

You are right to identify the fact that there is a need for guidance on that second aspect. As I said earlier, such guidance will reflect what the existing regulatory authorities require to be kept, and I am
fairly confident that hospital visits will be part of that.

I know that that was quite a long explanation, but I hope that it was helpful.

Ken Macintosh: I do not have an example to hand, but I am sure that you have come across examples of care homes that keep certain records and other care homes that keep other records. Although the bill does not require them to change, you expect them to change—either one will keep more records or the other will keep less, until they become standardised. That situation is not created by the bill, but it is what you expect will happen. Is that correct?

Fiona Hyslop: I expect the change in what is kept to be driven by the specialist regulatory authorities that already exist. If anything, the bill will allow unnecessary things not to be kept.

Ken Macintosh: And it will encourage others to keep things—

Fiona Hyslop: Yes, but I think that, over the piece, there will be more convergence.

Ken Macintosh: The bill does not require the creation of more records but, in some cases, it will end up creating more records, because that will be good practice. In other cases, there will be fewer records, because that will be good practice in those circumstances.

Fiona Hyslop: The issue is about making record keeping more efficient.

Claire Baker: We have touched on the contractor relationships that third sector providers and private providers have with public authorities and local authorities. Earlier, the minister spoke positively about the fact that the form of RMPs would be left up to local authorities, and said that that would give flexibility to the arrangement. However, the voluntary sector has expressed concerns about that. As you will be aware, voluntary organisations work with a number of authorities, so they might have to try to meet demands from different authorities whose RMPs vary considerably. Voluntary organisations might have to change their existing systems not only once but several times. Will such concerns be addressed mainly through guidance, or do we need to consider doing that in the bill?

11:30

Fiona Hyslop: It will be done more through guidance than in the bill. I can understand the concerns about the issue, but the commonsense approach—which I know is already being taken—is that the voluntary sector and COSLA will discuss what will be best practice contractually, which is not determined by the bill. If RMPs were so disparate that they would put unbearable pressures on the voluntary sector, that would not be efficient public service delivery, anyway. The keeper could maybe flag that up.

We will encourage a more generic RMP for different sectors that will reflect the character of the services provided and must undoubtedly have input from the people who deliver the services. We do not envisage that a national voluntary organisation that provides services to, say, 12 different local authorities will have 12 different systems to work with—that would not be common sense for anybody. COSLA recognises the importance of working with the voluntary sector to standardise best practice. That is good policy making in practice, and does not necessarily need legislation to effect it. However, Claire Baker has correctly identified an issue of concern.

As I have said, in implementing the bill's provisions, it is important that the Government facilitates discussions between the voluntary sector and COSLA to ensure that a commonsense approach is taken. The bill will not affect contractual relationships between local authorities and care homes, for example. Some of the issues that have been raised already exist in terms of the interpretation of statutory functions that have nothing to do with the bill, whether in relation to the provision of services or whatever. The concerns that the voluntary sector has raised are mostly relevant to relationships between it and COSLA, rather than to the bill.

Claire Baker: Another point that the third sector raised last week was that smaller voluntary organisations might interpret the bill in an unnecessarily risk-averse way and overimplement RMPs, which would result in increased bureaucracy for organisations. Also on risk aversion and its implications, they referred to the example of parents' confusion over local authorities' positions on whether they can photograph their children in nativity plays and so on. They said that because there were many questions about the relevant legislation, it was interpreted differently by different authorities. The third sector therefore has concerns about the ability of smaller organisations to engage fully with the bill's provisions and about whether they are proportionate for such organisations.

Fiona Hyslop: Again, we anticipate that the bill's implementation will be about the management of existing records rather than the introduction of something new. Records management is about how you manage the content of what has already been recorded. Issues such as the volume of records and the importance of different records will be involved. For example, an organisation might decide that records of hospital visits are a high priority and ensure that
they are accessible and so on, but decide that other records have a lower level of importance. Again, the regulatory authorities rather than the records keeper will indicate what records need to be kept.

I agree that there are issues about the relationship between the voluntary sector and local authorities in terms of keeping records, but there are probably similar issues around all the services that the voluntary sector provides to local government. There should be a commonsense, practical records management plan that sets out what needs to be kept and what led to that decision. For example, an organisation could say that it had consulted SCWIS and that it agreed that a certain type of record should be kept until whatever year and be accessible by particular means. There is a particular issue with electronic records, though. We should not underestimate the challenges in trying to retrieve electronic records, particularly five or 10 years down the line. Obviously, technology will change a great deal, which is why the bill’s definition in that regard is quite broad.

I suppose the general issue is the perception by an organisation that a risk-averse council’s records management plan is increasing the organisation’s burden of bureaucracy. If a voluntary sector organisation felt pressure from the plan, I would advise it to inform the keeper. He could then, in his role, work with local authorities and say, “Look, we need a more generic plan. You are asking for receipts when there is no need. You have to work out whether that is a public function.”

Just as the Scottish Information Commissioner and Audit Scotland can flag up concerns about record keeping by local authorities, those who carry out public functions can flag up issues and say, “This is getting a bit bureaucratic. How do we ensure, in terms of the guidance issued by the keeper, that there is more proportionality?” There are checks and balances to allow that to happen.

**Claire Baker:** Would your reply about the role of the keeper address the voluntary sector’s concerns about the broad definition of the term “public record”? Some organisations have suggested that a public record can be anything from an e-mail to a letter, and they have asked for the definition to be narrowed, as the current definition is too broad. Does that come down to how the relationship between the contractor and the local authority is defined, with the keeper always there as someone to whom the organisation can turn for advice on streamlining the process and making it as effective as possible?

**Fiona Hyslop:** Yes. The term “public record” is defined only for the purposes of the bill. I asked for a report on where else the term “public record” appears. There is a piece of legislation in England, but the only reference to “public record” in Scotland relates to what the UK is not allowed to do because it is an issue for Scotland. The term “public record” does not appear in other legislation in Scotland, and it can be used in any shape or form. The definition is just for the purposes of the bill. The bill is not about the creation, content or confidentiality of or access to records; it is only about how people keep and manage them.

**Ken Macintosh:** I have a couple of questions on costs and consultation. A number of organisations—particularly COSLA—are concerned about the potential costs of the legislation. What efforts have you made, or what discussions have you had, with COSLA to bottom out those concerns?

**Fiona Hyslop:** If a public authority—it is not just local councils; other bodies are in there—already has records managers who are carrying out the functions, there will be no additional cost because they will not need to employ anybody else. If they do have to employ somebody because they do not have anyone doing the job, that will lead to the question of how they have been managing their records to date if they do not have someone whose job it is to do that. However, that will be a minimal cost of one salary, and it is unlikely to be required for most local authorities, because they already have someone who performs that function. You may have already had evidence from the organisation that works with the public records managers of local authorities, which I think has been quite supportive of what the bill requires.

Nationally, we anticipate that there will be two additional positions at the National Archives of Scotland, but we are keeping those within existing costs, so that there is no added burden from the bill. Where things are being done well, additional posts should not be necessary to carry out the functions in the bill.

Smaller local authorities may require to set up pooling arrangements to share expertise with other local authorities. That is already happening in various areas, and records management is perhaps an ideal area in which it can work. We do not anticipate that the changes will produce excessive costs, but there is a cost in not making the changes. If people keep records that they do not need to keep, that can in the longer term cost money in space and storage. I also come back to the moral argument that the cost of not keeping records can impact not only on professional scrutiny, but on people’s lives, which is the type of cost that the committee heard about in the evidence earlier today.

Having gone through a parliamentary session in which we began to receive the concerns of the survivors of abuse in care homes, we have a
responsibility and a duty as a Parliament to help to resolve that issue. Sometimes, such things are priceless. There is a moral aspect to talking to a constituent who cannot find information about what happened in the first part of their life. It is not just about the monetary cost, as I am sure the committee appreciates.

Ken Macintosh: Indeed, and we heard very powerful evidence earlier for that aspect being the key motive behind the bill. I am sure that we all have a great deal of sympathy with and support for that.

The difficulty is that the bill is a practical measure. If we start from the basis that the bill is needed because records are not being kept properly, and we want the bill to improve record keeping, that implies a level of expenditure and activity that we do not currently have. The key issue is whether we can even begin to attempt to cost the proposals.

A number of respondents to the committee’s call for evidence were critical about the lack of consultation. The bill was consulted on for only six weeks during the summer. There is also more general concern in the voluntary sector. Children’s organisations were taken by surprise when they heard about the bill and think that some organisations will not know much about it. There is a lack of awareness. Could more be done to bottom out the costs that might be involved, to reassure people, and to consult the voluntary and other organisations that will be affected?

Fiona Hyslop: The answer to your last question is yes. In my opening remarks, I talked about working with the voluntary sector and COSLA, in particular. There are issues that will be dealt with not by amending the bill but in operational guidance in some shape or form.

The consultation period was not ideal. You will be aware that, in the context of the parliamentary cycle, announcements about bills are often made around May and June of the final year of a parliamentary session, and a bill then has to be consulted on and introduced. I know that the committee has been under pressure from the amount of legislation that is in its work programme—it can be difficult.

Barnardo’s was sent the bill directly when it was introduced, as I think were five other children’s organisations. The consultation period was curtailed, but the bill did not come out of nowhere. The Shaw report, the recommendations of which were accepted by the previous Administration, included the recommendation that the keeper of the records of Scotland be asked to assess record keeping across public authorities and make recommendations in that regard. The keeper was carrying out his assessment before the consultation on the bill took place. Anyone who was working in the children’s sector would have known that at some point recommendations would be made about the need for legislation on better record keeping, which had been flagged up some years ago. The bill did not come out of the blue.

I have tried to emphasise the point about differentiating between content, which is not covered by the bill, and operation—how things are managed—which is covered. The continuing uncertainty in the voluntary sector makes it incumbent on us to continue to engage, answer questions and reassure the sector. We will continue that dialogue, because we must get things right.

From work on the Protection of Vulnerable Groups (Scotland) Bill in the previous session of the Parliament and more recently on the Children’s Hearings (Scotland) Bill, I know that it is important that when resource is available for public services, in relation to children, for example, it should go to services that meet children’s needs and not to the bureaucracy that surrounds them. However, the bureaucracy, regulation and all the rest of it is necessary to deliver the service. If we make public records management more efficient, I hope that that will release time, effort and resources for what really matters: service delivery.

The Convener: My final question might well fall outwith the scope of the bill. The committee has been lobbied about the need to require local authorities to keep a register of common goods. Has the issue been raised with the Government? Is there scope to amend the bill to provide for the introduction of such a register?

11:45

Fiona Hyslop: I have also been lobbied about this issue. It is, rightly, an emotive issue for constituents, as people are concerned about common assets.

As I said earlier, the bill is not about the content of what should be kept. That should be determined by the public authorities and by regulation and so on. However, there is a common expectation that records of common good assets should be kept. We might be able to discuss that with the committee and your clerks, with regard to the scope of the bill. However, even if the proposals were desirable, I do not know whether the situation could be amended through the bill, because the bill is about how records are managed.

However, you raise an outstanding issue, in relation to reassuring the public that such important records need to be kept. We could think creatively about who should determine and give advice on what should be kept—whether it should
be done by departments, regulatory bodies, ministers, local government or someone else—and we could recommend that, in the interests of public service, common good assets registers should be kept. We can certainly influence how they should be kept.

We will probably have to resolve the issue ourselves, in case you need to determine the admissibility of something that comes forward, convener.

George MacKenzie: The point has been handled well. The issue is a detail for public authorities. As keeper, I would expect the authorities to go through the process of identifying what records are most important to them and putting them into their records management plan. However, I am concerned only with that process, not with the details that are put into the records.

Fiona Hyslop: Of course, the committee could, in its stage 1 report, touch on issues that might not be reflected in amendments to the bill and express a view about how they might be managed. I know that the issue means a lot to many people, so it might be useful for you to express a view in a parliamentary report, even if it is not possible to lodge a relevant amendment.

The Convener: You are right to say that there is a feeling that the issue has been neglected for some time, particularly because, since the reorganisation of local government, we have lost some local assets and people do not know who is accountable or responsible for certain local assets. It appears that many organisations want the issue to be addressed. The bill might not be the avenue whereby that can happen, but the issue will not go away until we address it.

Fiona Hyslop: If the bill had been in force at the time of the reorganisation of local government and authorities had had effective records management plans that itemised their important assets, the problem that we now face might not have arisen. The solution to the problem at this stage, however, might require something else to be done.

Where records of common good assets have been created by public authorities, they will be public records and will need to be managed under the bill. In cases where those records do not exist, further work would need to be done to identify the common good assets. I think that you could use your stage 1 report to flag up recommendations about how that might be done.

The Convener: That concludes our questions. The committee will suspend briefly to allow the minister and her officials to leave.

11:50

On resuming—

Decision on Taking Business in Private

The Convener: Under the second item on our agenda, I ask the committee to agree to consider its draft report on the Public Records (Scotland) Bill in private at future meetings. Do we agree to do so?

Members indicated agreement.

The Convener: That concludes this meeting of the Education, Lifelong Learning and Culture Committee.

Meeting closed at 11:50.
ANNEXE E: OTHER WRITTEN EVIDENCE

Association of Chief Police Officers in Scotland
British Medical Association
Coalition of Care and Support Providers in Scotland
Community Council of the Royal Burgh of Peebles and District
Creative Scotland
Cross Party Group on Children and Young People
Crown Office and Procurator Fiscal Service
Dumfries and Galloway Council
Fraser, Bill
General Teaching Council for Scotland
Highland Council
Mackenzie, Mary
NHS Borders
National Museums Scotland
Police Complaints Commissioner for Scotland
Scottish Commission for Public Audit
Scottish Courts Service
Scottish Enterprise
Scottish Environmental Protection Agency
Scottish Funding Council
Scottish Legal Aid Board
Scottish Local Authorities Remuneration Committee
Scottish Natural Heritage
Standards Commission for Scotland
Strathclyde Partnership for Transport
1. The Association Of Chief Police Officers In Scotland (ACPOS) Records Management Group provided detailed comment on the consultation paper previously released by the Keeper of the Records of Scotland on behalf of Scottish Ministers. In their response to the consultation, the Group provided answers to 22 direct questions outlining the principles of the proposed legislation.

2. In their response, dated 3 August 2010, members of the Group expressed their favourable opinion towards the principal features which are set out in the Bill, including the development of model records management plans by the Keeper, the requirement for public authorities to produce records management plans following the model, the instigation of a compliance regime under the oversight of the Keeper, the use of proportionate sanctions, and the extension of the bill to cover private organisations delivering services on behalf of a public authority.

3. Members of the ACPOS Records Managers Group are of the opinion that the principal concerns raised in their previous response are taken account of in the Bill. These include the range of public authorities subject to the legislation and the role of peer review. Consequently, the Group are in broad agreement with the principles of the Bill.

George Graham
Deputy Chief Constable, Dumfries and Galloway Constabulary and Secretary, ACPOS Information Management Business Area
15 November 2010
SUBMISSION FROM THE BRITISH MEDICAL ASSOCIATION

1. The British Medical Association (BMA) would like to draw your attention to its concerns regarding the Public Records (Scotland) Bill. Although the Association is aware that the Education Committee’s call for written evidence has now closed, as oral evidence is still being taken, it hopes that the Committee will still be able to consider our comments.

2. Our understanding is that GPs will be covered by the definition in section 3 of the Bill as they carry out functions of the NHS board with regard to patient records.

3. Whilst policies and procedures for the management of patient records in the NHS, including GP records, are well established, we are concerned that boards may be able to impose plans on record management on GPs and require them to manage those records in a particular way. Our concern is that such changes may be imposed without consultation with GP practices at a local level. We believe that consultation is essential to ensure that any changes are not onerous on practices, are achievable and do not impinge on the GP contract.

4. The BMA would therefore urge the Committee to consider incorporating a requirement to consult with contractors (in this case, GP practices) prior to implementing changes to the management of public records.

Martin Woodrow
Scottish Secretary
20 December 2010
1. The Coalition of Care and Support Providers in Scotland (CCPS) is the national association of voluntary organisations providing care and support services across Scotland. The combined membership of CCPS supports approximately 230,000 people and their families, and employs around 44,000 staff. In 2008-09, CCPS members managed a total annual income of over £1.1 billion, of which an average of 74% per organisation related to publicly funded service provision. As members operate primarily under contract to local authorities, aspect of the Public Records (Scotland) Bill relating to contractors are of particular interest to CCPS.

2. CCPS was involved in the Shaw review, and is supportive of the need for people to have access to records. We provide the following comments to assist the Committee in its thinking around the possible unintended consequences of the Bill, in particular its impact on an already overstretched voluntary sector and on the relationship between voluntary organisations and the people they support.

Scottish Government consultation

3. Like many other voluntary organisations, CCPS did not respond to the Scottish Government consultation on the Bill, as we were not aware of it. While the consultation was available on the Scottish Government website, it was not widely distributed to voluntary organisations, from whom we often receive intelligence about consultations, and was not open for the standard 12 week period. A consultation period of six weeks, particularly over the summer months, is not sufficient to ensure that all stakeholders have time to respond, and is, as we understand it, in breach of commitments given in the Scottish Compact.

Policy Memorandum and Explanatory Notes

4. In getting up to speed with the Bill, we have found the policy memorandum and explanatory notes helpful in explaining what the Bill is supposed to achieve. We have some concerns, however, that the Bill itself is not drafted tightly enough to ensure that its intentions are implemented as intended.

5. In particular, we are concerned about the ways in which public bodies might interpret their obligations in relation to voluntary (and private) sector organisations which provide public services. The policy memorandum states that “the Bill covers these records in a way which does not impose new and unreasonable burdens on these [voluntary and private sector] organisations”. While we appreciate that the Bill team have consulted with a sample of voluntary and private sector organisations, and found that, in
most cases, the staff and systems required to comply with the new obligations are already in place, we would raise the following concerns.

6. We understand that the Keeper has made clear that he intends that records management plans should clarify and simplify record keeping, but for some voluntary organisations it seems likely that, while expectations will be clarified, this will result in an increase in bureaucracy.

7. Some voluntary organisations already provide records to public authorities, as specified in contracts. In this case, voluntary organisations would not want to see public authorities asking for more information, or expecting voluntary organisations to set up new systems, as a result of the Bill. Some voluntary organisations, however, have indicated in response to a CCPS briefing on the Bill that the records they keep are entirely separate to the local authority, and that they do not know what the local authorities’ expectations on them are with regard to record keeping, suggesting that these organisations will almost certainly face new or different obligations under the Bill. If new obligations are placed on voluntary organisations, these must be properly costed and funded.

8. Voluntary organisations are also concerned about consistency. Many CCPS members provide services in several local authority areas, and providing different information, or information in different formats, to different public bodies is/would be an administrative burden on them (particularly where people whose support is funded by different local authorities receive the same service). We understand that the Keeper hopes that records management plans will bring consistency between local authorities, and we share this hope. We are concerned, however, that authorities must only ‘have regard’ to the Keeper’s guidance on this matter, and that this give significant potential for different authorities to ask for different information or information in different format. We would be keen for the most to be made of this opportunity to introduce consistency, and would like to see the voluntary sector, along with the private sector and public bodies, working with the Keeper to establish a ‘gold standard’ records management plan. The kinds of issues that we would like to see addressed in discussion/guidance around records management plans are:

- Public authorities should not duplicate requests for information made by other bodies, such as the Office of the Scottish Charity Regulator (OSCR) or the Care Commission. In the field of social care, this is particularly important as Regulations being consulted on around the Public Service Reform Act appear to give Social Care and Social Work Improvement Scotland (SCSWIS) inspectors the right to ask providers to provide any information they see fit.
Public bodies must only include records in their records management plan which relate directly to the running of public services. There must be clarity about what can/can't be included in terms of records kept by voluntary organisations, for example board meeting minutes.

Voluntary organisations are concerned that information disclosed to them by the people they support is often provided on the basis that it is confidential; this crucial to developing and maintaining trusting relationships, which voluntary organisations often have with those who would not otherwise engage with statutory services. Voluntary organisations have some real concerns about the impact on confidentiality/trust of records becoming public property.

Voluntary organisations would also like to discuss the issue of ownership of records: voluntary organisations holding confidential records have developed systems for archiving and protecting these records, while at the same time allowing appropriate access to them, and would have concerns about records becoming the property of the public body at the end of a contract period.

General principles – freedom of information

9. The final issue that we would raise is around freedom of information (FOI). The consultation on extending FOI earlier this year did not propose extending FOI to organisations providing services under contract to local authorities. We are concerned that the Public Records (Scotland) Bill could be a way to introduce FOI in these circumstances ‘by the back door’, and would seek clarification as to whether or not records covered by the records management plan will be automatically subject to FOI.

Kirsten Gooday
Policy and Development Manager
23 November 2010
SUBMISSION FROM THE COMMUNITY COUNCIL OF THE ROYAL BURGH OF PEEBLES AND DISTRICT

1. With regard to the Public Records (Scotland) Bill, the Community Council of the Royal Burgh of Peebles and District would like to request that the definition of public records is clarified to specifically encompass all records relating to common good funds.

David Pye
Chairman
1 December 2010
1. Creative Scotland welcomes the opportunity to contribute to Stage 1 of the Public Records (Scotland) bill.

2. Creative Scotland is the new national leader for Scotland’s arts, screen and creative industries. We were formally established on 1 July 2010 under the leadership of our Chairman, Sir Sandy Crombie and Chief Executive, Andrew Dixon. We replace the functions of the Scottish Arts Council and Scottish Screen and continue to be the Lottery distributor for the arts and film in Scotland.

3. Our ambition is that Scotland becomes recognised as a leading creative nation – one that attracts, develops and retains talent, where the arts and the creative industries are supported and celebrated and their economic contribution fully captured - a nation where the arts play a natural part in the lives, education and well being of our population.

4. Creative Scotland welcomes the Public Records (Scotland) bill and its general principles. In addition the guidance provided at this stage within the Policy Memorandum and the Financial Memorandum is valued and appropriate.

5. Creative Scotland is currently undertaking an information management project which is addressing the issues of the new organisation taking over the functions and information of its two predecessors (Scottish Arts Council and Scottish Screen) and the general principles of the bill are being taken into consideration through this project.

Lynsey McLeod
Internal & Stakeholder Communications Officer
25 November 2010
SUBMISSION FROM THE CROSS PARTY GROUP ON CHILDREN AND YOUNG PEOPLE

1. The Cross-Party Group on Children and Young People met on 18 November 2010 to discuss the Public Records (Scotland) Bill.

2. Members of the group raised a number of concerns regarding the implications of the Bill, which they felt should be brought to the Committee’s attention.

3. Our members welcomed the Bill’s intention, which is to regulate the generation and keeping of public records. There is no doubt that records management has been, and is, patchy and inconsistent, with the result that individuals have been unable to locate and gain access to their own records. This is unacceptable and the Group recognises the Bill’s importance in countering the failings of the past.

4. However, our members’ view is that the manner in which this Bill requires records to be managed is bureaucratic and disproportionate, in that it treats all records as equal. There are real concerns that this approach is prescriptive and over-managed. There is a need for a risk-based approach which is cognisant of the importance of the proper generation and maintenance of records, but nevertheless takes a proportionate view of what information an authority should be maintaining under its record management plan, particularly when there is no identifiable risk to vulnerable individuals.

5. Our members’ specific concerns are as follows:

   • The definition of public records in the Bill:

   12 Interpretation of Part 1
   (1) In this Part—
   […] “record” means anything in which information is recorded in any form

   This is an extremely broad definition and has the potential to create a culture of confusion and over-compliance. There is a real danger that this definition will lead to an exponential rise in the records that voluntary organisations and public authorities generate and keep.

   • The legislation applies to organisations that are contracted to undertake work on behalf of public authorities. Many third sector organisations fall under this category. The requirement on voluntary organisations to assess all information produced during the delivery of a service for a public authority (‘public records’ as defined in the Bill) against what could be a large number of different record management plans, has the potential to place an unprecedented bureaucratic burden on organisations at a time when the sector is already under pressure to deliver an increasing amount of services while at the same time coping with reduced resources.
Many organisations were unaware of the Bill and had therefore not considered its implications for the sector. The consultation period took place during the summer and lasted for six weeks, the timing and duration of which meant that many organisations missed the opportunity to respond.

The Bill represents a disproportionate response to the problem. The narrow focus of the original review from which the legislation developed has been extended nationally, with the result that what may be proportionate and entirely appropriate for organisations which work with vulnerable individuals has now been extended to all public bodies and organisations contracted by them.

6. The group also discussed the policy memorandum that accompanied the Bill. The memorandum suggests that the burden on the voluntary and public sector will not be undue, but this view was strongly challenged by the members of the group and was raised as a specific issue by SCVO who have been contacted by their members with regards to this issue.

7. Further information relating to the Cross Party Group’s meeting can be found on its web pages - [http://www.scottish.parliament.uk/msp/crossPartyGroups/groups/cpg-child.htm](http://www.scottish.parliament.uk/msp/crossPartyGroups/groups/cpg-child.htm)

Sara Collier
Secretary
26 November 2010
SUBMISSION FROM THE CROWN OFFICE AND PROCURATOR FISCAL SERVICE

1. The Crown Office and Procurator Fiscal Service agree with the principles underpinning the Bill. The Policy Memorandum was very helpful, providing a concise explanation of the intention of the Bill. A robust records management framework is essential for the effective management of all public authorities and to ensure compliance with other legislation on information governance including data protection and freedom of information.

2. It is particularly helpful that the Bill adopts the records management principles set out in the Code of Practice in the Freedom of Information (Scotland) Act 2002 (FOISA). COPFS has recently produced a comprehensive records management manual providing details on our records management policies and the Service is keen to engage with the Keeper on any aspect of our policies.

Catherine Dyer
Crown Agent and Chief Executive
30 November 2010
SUBMISSION FROM DUMFRIES AND GALLOWAY COUNCIL

Part 1 – records management plans

Section 1 – Records management plans

1. The introduction of records management plans (RMPs) is seen as a satisfactory way to improve consistency in recordkeeping across Scotland. It is appreciated that the previous policy of “encouragement and exhortation” to achieve best practice has not been more than patchily effective. The Council therefore supports this approach, providing the following criteria are met:-

- Sufficient time is allowed to produce and implement a RMP
- The “guidance” from the Keeper does not place unreasonable burdens on the Council’s financial and other resources
- If two or more authorities are required by the Keeper to share a RMP, cognisance is taken of variations in the capabilities of the authorities to produce and implement the plan, taking into account the challenges facing them and/or the resources available to them.

Section 2 – Authorities to which Part 1 applies

2. Agreed

Section 3 – Meaning of “public records”

3. Agreed. The Council agrees with the functional approach to records created by contractors (rather than the ‘publicly funded’ criterion previously proposed). The Council does still have concerns relating to:-

- The practical implementation of an RMP on the records of contractors outwith the direct control of the public authority.
- “Spot purchasing”. When making provision for childcare (for example), only part is contracted, the remainder being purchased on an ad hoc basis. Will the resulting records also be subject to the provisions of the Act?
- Joint commissioning and joint working. When records are split between two or more public bodies how will the responsibility for them be assigned under the legislation?

Section 4 – Approval of plans

4. Given that the Keeper will determine the date of submission of the RMP, its form and manner and the definition of ‘proper arrangements’, the Council believes that there should be a reasonable level of flexibility regarding these determinations to allow for the particular circumstances of each authority.

Section 5 – Review of plans

5. As above (Section 4).

Section 6 – Compliance reviews

6. The council agrees with the requirement for compliance reviews as a necessary element of the RMP process.
Section 7 – Warning notices
7. Agreed

Section 8 – Model records management plan
8. Agreed, with the reservation that the model RMP should not be too prescriptive. In this context, the Bill states that “ Authorities must... have regard to the model records management plan” (8(2)) (my italics). To what extent will this mean close (and possibly restrictive) adherence to it?

Section 9 – Guidance
9. Agreed, with reference to comment in section 1 above.

Section 10 – No right of action for failures to comply
10. The test may come when authorities, having had their non-compliance published, still fail to implement RMPs. Will there then be a need for additional legislation to grant powers parallel to those of the Scottish Information Commissioner or the Information Commissioner (DPA)?

Section 11 – Annual report
11. Agreed.

Financial Memorandum
12. A particularly useful document for public authorities that do not have an RMP currently in place, in particular paras. 69-70, 79-90 and the cost benefits given in para. 91.

Policy Memorandum
13. Provides the necessary background to, and justification for the legislation, and as such a worthwhile reference tool.

Graham Roberts
Local Studies Coordinator, Ewart Library
25 November 2010
SUBMISSION FROM BILL FRASER

1. To quell public disquiet about the proper accounting for Common Good assets, heritable and moveable, the Scottish Executive in 2007 issued an instruction to all local authority Directors of Finance to maintain comprehensive and up-to-date registers. It is now obvious that councils in their role as trustees of the Common Good have for the most part defied the will of Parliament and have no intention of complying. Further measures are required to rectify this national problem. The forthcoming Public Records (Scotland) Bill (SP56) presents such an opportunity.

2. In 2007 the Scottish Executive instructed all local authorities “to hold a record of all common good assets and ... make this information available to the public if asked”. It was a condition of the additional capital grant provided to councils in 2007-08 “that a report on asset ... management be provided” and that “they must hold accurate records” (including) “those assets held for the Common Good” This exercise was to be completed by March 2009.

3. A number of local authorities, including Glasgow City Council, failed to comply. Despite criticism from the Information Commissioner, Glasgow maintains its position that any common good implications will be examined at “exchange of missives”. This policy contributed to the abandonment of the proposed lease to Go Ape in Pollok Park. As a result, in March 2010 the Scottish Public Services Ombudsman found some degree of maladministration since the Common Good status of the Park could have been affirmed two years previously and prevented a waste of public money in pursuing a lease which did not meet common good objectives.

4. In June 2010, Audit Scotland’s gave evidence to the Public Petitions Committee (PE1050) that “Councils have generally taken reasonable steps to comply with the (2007) guidance”. Based on this assurance the Committee wrote “that the Scottish Government, in light of this assessment, is satisfied that common good sites are as protected as they can be and sees no need for new legislation in respect of common good assets”. In reply to further enquiries about proposed future monitoring, Audit Scotland wrote to campaigners that their future programme “will not include any proposals for a study of common good assets.” The Clerk to the Public Petitions Committee has confirmed there is no mechanism to reopen consideration of a petition if new evidence suggests Audit Scotland’s assurances are optimistic.

5. In conclusion, local authorities have chosen to ignore the instructions of the Scottish Parliament and the watchdog refuses to bark. The forthcoming Public Records (Scotland) Bill requires the introduction of an approved Records Management Plan but makes no specific mention of Common Good Asset Registers. Specifying an up-to-date Common Good Asset Register as part of the Model Plan and securing the right of public access may send the message to
recalcitrant local authorities that proper accounting for Common Good is an obligation to the community they must no longer ignore.

6. Without a comprehensive public record of Common Good Assets and Trusts administered by councils, communities cannot act to preserve their ancient rights and the government’s stated policy of community involvement will be frustrated.

Bill Fraser
26 December 2010
SUBMISSION FROM THE GENERAL TEACHING COUNCIL FOR SCOTLAND

1. The General Teaching Council for Scotland (GTC Scotland) welcomes the opportunity to provide written evidence to the Education, Lifelong Learning and Culture Committee on the general principles of the above noted Bill.

2. GTC Scotland is the independent regulatory body for Scotland’s teachers and was established by the Teaching Council (Scotland) Act 1965. We maintain and enhance teaching standards as well as promote and regulate the teaching profession in Scotland.

3. GTC Scotland is committed to continually improving its records management processes and appreciates the importance of the Bill’s policy objective in seeking to provide a framework for measurable improvements in record keeping across the public sector. GTC Scotland is concerned, however, that the Bill in its current form does not avoid placing significant new burdens on public authorities, particularly those that are smaller in scale and scope. GTC Scotland would question whether the outcomes that the Bill seeks to deliver are proportionate to the costs that will be associated with complying with it for such smaller organisations (including GTC Scotland).

4. In addition, as has been noted by others in response to the Scottish Government’s consultation on the Bill, Section 61 of the Freedom of Information (Scotland) Act 2002 (FOISA) already sets out a provision for Scottish Ministers to issue a Code of Practice for Scottish public authorities to follow in connection with the keeping, management and destruction of records. In setting best practice standards, GTC Scotland’s view is that this Code of Practice is the proportionate and appropriate model to use in order to achieve good records management on the part of smaller organisations (particularly those that are not public authorities per se, but simply carry out certain public functions).

5. If, in spite of the FOISA Code of Practice framework already in place, it is felt necessary to proceed to enact further legislation in the public records arena, GTC Scotland would suggest that the Bill’s content should be amended. GTC Scotland would recommend that the points set out below should be considered in this regard.

- The Schedule attached to the Bill should be reviewed and revised to narrow the scope of the organisations made subject to Part 1 of the Bill. This exercise should aim to focus the compliance burden more proportionately (and appropriately) upon those organisations: (i) that have more extensive resources at their disposal; or (ii) are generally considered more significant given the nature and scale of public records that they create.

- As an alternative to above, GTC Scotland would suggest that the definition of “public record” set out in Section 3 of the Bill should be reviewed and revised.
The intention of this exercise would be to ensure that Records Management Plans, and the compliance burden, focus on records that actually are properly public in nature, rather than effectively encompassing any information that is created or received by the range of authorities listed in the Schedule.

6. We have provided responses to the two questions set out specifically in the call for evidence below.

How helpful do you find the policy memorandum and financial memorandum accompanying the Bill?

7. These documents are both helpful in clearly articulating and emphasising the objectives and implications of the Bill.

8. We would highlight again, however, that the impact analysis set out in the financial memorandum is of particular concern to GTC Scotland. As an organisation that comprises (at the date of writing) just 43 full-time (and 51 full-time equivalent) employees, if enacted, the resource implications of the Bill would be felt acutely. As noted above, within the context of an organisation that is of the size and scope of the GTC Scotland, we would suggest that the costs and impact of compliance are disproportionate to the tangible benefits that the Bill would bring.

Do you have any comments on the consultation the Scottish Government carried out prior to the introduction of the Bill?

9. Our only comment in this regard would be to note that we believe it would have been beneficial to have consulted upon the principle of introducing legislation at all in this area.

Jennifer Macdonald
26 November 2010
1. The Highland Council fully supports the general principles of the Public Records (Scotland) Bill. It is recognised that the Public Records (Scotland) Act 1937 is out of date, and that an updated framework for the improved management of public sector records, building on existing guidance and best practice, will greatly improve public service provision.

2. The Council welcomes the proposal incorporated in the Bill to place an obligation on Scottish public authorities to produce and implement a Records Management Plan, and would support the powers proposed whereby the Keeper of the Records of Scotland may monitor and review the plans.

3. The proposal incorporated in the Bill whereby the Keeper may prepare a model Records Management Plan setting out and outlining the minimum key elements and standards for efficient records management would provide a welcome benchmark against which local authorities could measure their performance. Whilst incorporating existing standards and guidance, such a plan would need to be sufficiently flexible to allow local authorities to take account of their own unique geographical and cultural characteristics and to develop their plans accordingly.

4. The Highland Council has recently taken a number of important steps towards formalising its own provision for Records Management. The recently constructed Highland Archive Centre was designed to incorporate a dedicated Records Centre for the storage of the Council’s records, and this is managed by a team of Records Management staff headed by a Records Manager. On 10 June 2009 the Council formally approved its Records Management Strategy and Policy, and Disposal Authority were also approved and are being rolled out within Council services.

5. In the context of its role as the custodian of historic, archival records, the Council notes the proposal in the Bill to repeal Section 53 (clauses 1-3) of the Local Government (Scotland) Act 1994, which relates to ‘proper arrangements for the management of records’. In this respect, the Council would wish to point out that, while the Bill addresses proper arrangements for the records of the current local authorities, and also those of their predecessors, it appears not to address the need for proper arrangements for records described in Section 53 (clause 1c) as being ‘otherwise placed in their custody.’ This clause embraces the very substantial holdings of archives of private individuals and other organisations which have been placed in the care of many Scottish local authority archive services during the period since 1975.

6. In general, the Council is mindful that the Bill represents an important step forward for record keeping practice within Scotland’s public bodies, and respectfully
submits this written evidence trusting that its comments will be of assistance to the Education, Life-Long Learning and Culture Committee.

Hugh Fraser
Director of Education, Culture and Sport
23 November 2010
SUBMISSION FROM MARY MACKENZIE

1. Bill SP 56 [the Public Records (Scotland) Bill] is welcome in principle; however, it should be enhanced with a specific/clear reference to “safeguarding all common good assets (heritable, moveable, finance) and Trusts, particularly those Trusts which have been in existence for a considerable time.

2. There is no indication that the envisaged records are to be open to public access; were the public to have the right to access, is this to be at a similar charge to the Register of Scotland and other public records, to ensure equality of payment/fees, and is it envisaged that copies are permitted for stated fees?

3. It is highly commendable that the paragraph 45 of the Policy Memorandum (business and regulatory impact assessment) shows “in most cases the staff and systems required to comply with the new obligations are already in place … this policy objective is achievable”.

4. As evidence of the necessity of specifically including reference to all common goods assets etc—

5. Audit Scotland in a special audit of Scottish Borders Council (SBC) in November 2004 made a series of clear recommendations with a timetable for action, yet these remain unfulfilled, in part, in its recent SBC audit 2009-10 and a further timetable has been provided (approximately 5 years).

6. In response to three petitions (PE875, PE896 and PE961), the Local Government and Transport Committee views on safeguarding all common good assets throughout Scotland were expressed in a letter from the then Scottish Executive Victoria Quay to all Directors of Finance dated 12 March 2007 (quoting Audit Scotland) with clear guidelines about keeping all common good assets separate from all other Council assets [further detail provided – available in hard copy only from the clerks].

7. Petition PE1050 discussed with witnesses, including Audit Scotland. The Committee examined this further petition, about common good – better protection for common good sites, and to ensure such assets are retained for their original purpose for future generations; after three years closed PE1050 under Rule 15.7. The Public Petitions Committee, however, obtained specific disturbing facts about asset registers from Craig Russell, Deputy Director, Efficiency and Transformational Government [further detail provided – available in hard copy only from the clerks].

8. In addition, one Committee member, Robin Harper MSP, “put on record my considerable concern that many local authorities still do not have a common good asset register … There will be continuing concerns about the status of common good sites in Scotland for a considerable time.”
9. A further comment from John Wilson MSP "some worrying signs … the petitioner’s original concern was that common good assets were being sold off without any public consultation or reference to the fact that local authorities are transferring out of the common good assets that were given to communities by benefactors".

Mary Mackenzie
24 November 2010
SUBMISSION FROM NHS BORDERS

1. Thank you for the invitation to comment on the contents of the Public Records (Scotland) Bill. The principles of the Bill are sound, and the introduction of a Records Management model plan as part of a suite of guidance and best practice advice to authorities and any private organisation supplying services on behalf of public authorities, is to be welcomed. We in NHS Borders were pleased to recently receive Version 2.0 of the Records Management: NHS Code of Practice (Scotland) under CEL 31 (2010) - which offers the NHS useful reference and guidance on this topic.

2. In an age of proliferation of desktop computers it has become very, if not too easy to create all classes of documents, and unless appropriate structures are in place it can be difficult to ensure both version control, and retention of these for appropriate periods under the existing legislation and guidance.

3. The main point of concern is the definition of "records" in section 12 as “meaning anything in which information is recorded in any form,” as this could make the task of records management in the context of the act both daunting and potentially expensive.

4. Notwithstanding this being a period when public finance is limited, it is nevertheless important that key records are maintained where appropriate, in a manner that aids easy reference when required. Assuming that the Bill’s provisions are broadly accepted, there may be an opportunity for efficiency and efficacy for records management within Scotland to be organised in a similar manner across the public sector.

5. We have no additional comments on the consultation the Scottish Government carried out prior to the introduction of the Bill. NHS Borders did submit a response to the consultation document which is available to see on the Scottish Government website.

Dr Ross Cameron
Medical Director/Chair of Information Governance Committee
26 November 2010
SUBMISSION FROM THE NATIONAL MUSEUMS SCOTLAND

General feedback

1. We broadly support the need for effective management of records within the public sector and measures that would enable that, as well as increased efficiency and accountability to all our stakeholders now and in the future. Our key concern is that the Bill would place an additional and unnecessary burden on National Museums Scotland at a time of budget reductions and resource constraints. Our key points are as follows:

Proportionality
2. The requirements in the Bill for the named organisations to develop, have approval of, implement, monitor, and continually review records management plans will have significant resource implications. The bodies listed are very different in size and in the scope of their functions, giving rise to very different records gathering requirements and indeed levels of impact in terms of records management practice.

3. We would suggest that there is an opportunity to categorise the bodies into high/low impact and risk, and for the requirements of the Bill to focus on those organisations where the highest risk exists. We find it difficult to see why National Museums Scotland should be included on the list of named organisations and be expected to follow the same regulatory regime as organisations which are responsible for very sensitive personal records relating to people.

Costs
4. Whilst it is stated that the Keeper will incur no additional costs due to the diversion of internal savings from elsewhere, we are concerned that there will be additional costs to organisations in implementing this new regime. At a time of national financial stringency we are concerned about the inevitable additional burden which will be placed upon National Museums Scotland to manage the reviews, audits and other activities which will be a part of the ongoing process.

Bureaucracy
5. The Bill presents significant new requirements on both the Keeper and the bodies required to comply. There are increased levels of monitoring, reviewing and compliance checking. We are concerned that this will result in the further stretching of our increasingly limited resources, meaning a redirection of resource from other priorities.
Specific feedback

6. The development of the model Records Management Plan is a welcome initiative and the ability for authorities to share a plan where appropriate is helpful.

7. We believe that it is important to have further clarity with regard to defining the scope of contractor records that would be relevant to the Bill, and any provisions that the authority might make on the contractor to enable and encourage compliance with the Bill.

8. In section 3 (1) of the Bill, the definition of a ‘record’ could be improved - for example, by explaining that a record is information that is recorded in a physical form. It becomes a record based on a judgement about its content.

9. We are also concerned about the action to “name and shame” non-compliant organisations, and do not see how this will enable greater compliance or support those organisations to improve their practice. This can only lead to media sensationalism rather than the considered and effective improvement of weaknesses.

10. We would welcome further best practice guidance on the ongoing preservation of records and recommendations of best value approaches to digital preservation in particular. Any further opportunities to invest in sector-wide generic tools and best practice is also useful providing the potential for a shared services approach and better access to public sector information.
1. As Police Complaints Commissioner for Scotland (PCCS), my organisation will be affected by the Public Records (Scotland) Bill. My organisation understands the importance of having in place a robust records management policy that ensures that public records are held, managed and destroyed in a secure and systematic way. The PCCS has in place a Records Management policy which covers procedures for the management, security, archiving and destruction of information.

2. I support the principles of the Bill, which complement existing legislation and place a duty on public authorities to produce records management plans in line with the model records management plan produced by the Keeper. In my view, the production of a model plan will lead to standardisation in the way in which public authorities manage their records which in turn will ensure an accurate audit trail of all actions taken by public authorities.

3. The PCCS also recognises the importance of joint working in this current economic climate and I welcome the proposal for joint record management plans to be developed by groups of authorities holding similar records. While the practicalities of such an arrangement will require careful investigation and testing prior to implementation it should be given consideration.

4. Moreover, the Keeper’s role of scrutinising public authorities’ records management plans and making recommendations for improvement will ensure a high standard of record keeping across the public sector and will act as an effective method to achieve compliance and a powerful learning tool.

5. In reference to the specific questions asked:

   How helpful do you find the policy memorandum and financial memorandum accompanying the Bill?

6. Yes. The policy memorandum and financial memorandum clearly set out the background to the bill and arguments for the introduction of new legislation.

   Do you have any comments on the consultation the Scottish Government carried out prior to the introduction of the Bill?

7. No further comments.

Professor John McNeill
Commissioner
26 November 2010
SUBMISSION FROM THE SCOTTISH COMMISSION FOR PUBLIC AUDIT

1. In response to the call for evidence on the Public Records (Scotland) Bill, I provide a submission from the Scottish Commission for Public Audit (SCPA).

2. The SCPA is composed of five Members of the Scottish Parliament. The Public Finance and Accountability (Scotland) Act 2000 stipulates that the SBCB will provide the SCPA with the support resources it requires and therefore the SCPA does not have any corporate resources, staff, income or separately identified operating expenditure of its own.

3. It is the Commission’s view that as the Scottish Parliamentary Corporate Body (SPCB) and Scottish Parliament are included in the schedule of authorities affected by the Bill, the SCPA is covered by the proposed legislation and should not be listed as a separate organisation.

4. The Commission therefore recommends that the Bill is amended to remove it from the schedule of authorities affected.

Angela Constance MSP
Convener
1 December 2010
1. The Scottish Court Service (SCS) is grateful for the opportunity to comment on the principles of the Public Records (Scotland) Bill, in particular as Part 2 relates to the handling of court records. This submission reflects the responsibilities of the SCS in managing and maintaining its own administrative records and, as part of its functions, for holding and preserving court records on behalf of the Court of Session, High Court of Justiciary, Sheriff Courts and Justice of the Peace Courts, which it administers.

2. In general, the SCS appreciates there may be need to provide structure and guidance for the public bodies listed in the Schedule to the Bill in relation to the records handled and maintained by them. The service provided by an authority will undoubtedly be enhanced by its ability to access and provide information from records which have been accurately and securely maintained. This principle is already enshrined in freedom of information and data protection guidance and practice.

3. The requirement upon the Keeper to provide draft plans and guidance will undoubtedly be of considerable assistance to all public bodies, particularly during the early stages of commencement.

4. We also note the proposal that, with the approval of the Keeper, there is scope for a common records management plan to be considered, notwithstanding that the SCS and the various courts are defined individually within the Schedule to the Bill.

5. The provisions usefully clarify what falls within “management” of records. By necessity, this is to include a degree of archiving. In the broadest sense there is likely to be an element of “archiving” at a local level associated with the long term storage of records in court buildings, and this in itself can present a resource implication for court staff and managers.

6. The SCS, on behalf of the courts, also has the responsibility for the transmission of documents to the Keeper. In the case of the Sheriff Courts, relevant court records are transmitted following application by the Keeper. The Keeper specifies the type of court records that should be transmitted by the Sheriff Courts. Once transmitted, final decisions on which individual records merit retention as being of historical significance or interest are taken by the Keeper’s staff. We would not consider it to be appropriate, within the principles of the Bill, to seek the transfer of this final decision taking responsibility for all court records to local Sheriff Court staff, ahead of transmission to the Keeper.

7. Wider issues about the management and preservation of court records have been considered by a working group established by the Lord President, on which both the Keeper and SCS are represented.
8. The Financial Memorandum envisages “It will be for bodies themselves to make the necessary adjustments to implement records management action and prioritise their administrative functions to ensure that resources are available”. As the Committee will recognise, within the current financial environment for public bodies, including the SCS, there will be challenges associated with taking on any additional responsibilities, and in funding a specialised post or posts required for the purposes of this Bill, at a time when front line services are being constricted. We would ask that this is taken into account in the arrangements and timescales for commencement.

9. The Committee has also sought responses to the following questions—

**How helpful do you find the policy memorandum and financial memorandum accompanying the Bill?**

10. The policy memorandum is useful insofar as it sets the background and highlights the drivers behind the proposed legislative change. It is also useful to see how this sits alongside other provisions already in force and what other alternative approaches have been considered along the way. Some support is also included in the form of a useful summary of the consultation findings.

**Do you have any comments on the consultation the Scottish Government carried out prior to the introduction of the Bill?**

11. We have no comments on the consultation process.

Neil Rennick
Executive Director Policy and Strategy
30 November 2010
SUBMISSION FROM SCOTTISH ENTERPRISE

1. Information is business critical to Scottish Enterprise (SE). The way in which we manage, access, and store information has a major impact on business success and day to day operational running. As information volumes increase, we are mindful of the need to effectively manage our information and, especially, to comply with freedom of information regulations. We therefore strive for consistency and efficiency in the way we manage our information throughout its lifecycle based on recognised records management practices. The Bill will bring support and further consistency to this area.

Lena Wilson
Chief Executive
26 November 2010
1. The Scottish Environmental Protection Agency (SEPA) supports the principles of defining a records management plan (RMP) and identifying the individuals responsible for the quality of SEPA’s records. We would point out that we have legislative requirements to maintain public registers for some of the legislation we administer, and we would expect the framework to ensure that this requirement does not come into conflict with the requirements of the Public Records (Scotland) Bill. We would also suggest that any self-assessment duties, under the Bill, in respect of the RMP be aligned to other analogous requirements for public authority compliance, such as the Cabinet Office security framework. Where such compliance requirements include similar issues of record compliance, these should be taken into account to avoid duplicate reporting for public authorities.

2. SEPA considers that until the contextual guidance is issued, it will be very difficult to assess the impact of the Bill. The fact that the Bill’s supporting documentation seem to indicate that costs to authorities to administer and implement the Bill will be minimal suggest that both the Keeper and the Scottish Government do not want to create anything which is unduly burdensome for public authorities. It may be, however, that the guidance to be issued by the Keeper may at least suggest otherwise. The guidance can only relate to the “form and content” of plans. To consider the impact of the Public Records (Scotland) Bill in isolation, however, may give a misleading impression as to a public authorities’ duties. For instance, an authority has a general equalities duty (under the Equalities Act 2010) and it has a duty in relation to production of publication schemes (under the Freedom of Information (Scotland) Act 2002). It may be, therefore, that the guidance will make reference to these other duties.

How helpful do you find the Policy Memorandum and Financial Memorandum accompanying the Bill?

3. SEPA has reviewed the Policy Memorandum and considers that it provides useful background to the drafting of the Bill. It also provides additional context, as far as it exists at present, on the wider framework underpinning the Bill’s provisions.

4. The Financial Memorandum also provided more useful and targeted information on the indicative financial costs and impact on public authorities of the proposed regime, for those authorities that are not already implementing formal records management procedures and processes.
Do you have any comments on the consultation the Scottish Government carried out prior to the introduction of the Bill?

5. The Scottish Government consultation carried out prior to the introduction of the Bill posed specific and targeted questions. The Bill necessarily contains the regulatory framework output from the consultation.

John Ford
Director of Finance and Corporate Services
26 November 2010
SUBMISSION FROM THE SCOTTISH FUNDING COUNCIL

Introduction

1. The Scottish Further and Higher Education Funding Council ('the Scottish Funding Council') is the national, strategic body with responsibility for investing in further and higher education in Scotland. In 2010-11, we will invest about £1.7 billion in teaching and learning, research and other activities in Scotland's colleges and universities in support of the policy priorities of Scottish Ministers. There are 41 colleges and 20 higher education institutions funded by the Scottish Funding Council (SFC).

2. We are committed to high standards of information governance and have:

   • a dedicated information management officer with responsibility for information governance - including the management of records - and a network of local information officers within the organisation;

   • an integrated intranet and electronic document and records management (EDRM) system;

   • a corporate file plan (classification scheme) and retention schedules; and

   • information management policies, including policies for the lifecycle management of records in the organisation.

We recently commissioned an external review of our information governance which concluded that SFC has "a successful and mature approach to information management."

Our views on the Public Records (Scotland) Bill

3. We agree with many of the aims behind the Public Records (Scotland) Bill, including the opportunity to develop standards of record-keeping and improve consistency across the public sector, and strengthen the rights of individuals seeking access to records and information. However, whilst we recognise the failings in record keeping which were highlighted in the Shaw report - and which were clearly part of a wider systemic failure in the looked-after children sector - we remain unconvinced that there is a need for legislation which introduces a new regulatory framework for record-keeping across much of the public sector in Scotland; indeed, we think this is a heavy-handed response. In our view:

   • existing legislation - including the Freedom of Information (Scotland) Act 2002 and its associated code of practice on records management, has raised awareness of, and improved significantly, record-keeping;
• the code of practice already requires public bodies to produce a records management strategy and gives the Scottish Information Commissioner power to issue ‘practice recommendations’ to public bodies whose standards fall short of those set out in the code (although we recognise that the existing focus is primarily on access to information rather than the preservation of records);

• with the exception of the looked-after children sector, we could find no compelling evidence in either the Keeper’s 2009 report to Scottish Ministers, or the Scottish Government’s consultation about the proposed Bill, of a breakdown or failure in record-keeping across the public sector that warrants the introduction of a new regulatory framework; and

• we believe that the proposals for a new scrutiny regime are inconsistent with the Scottish Government’s own principles for improving external scrutiny.

4. We note that, in his October 2009 Report, the Keeper considered the option of not legislating and concluded that “A great deal of guidance and advice on records management best practice already exists. The main problem is not the lack of guidance, rather the lack of consistency in how it is applied. This has resulted in no common national standard.” However, we think this conclusion is flawed and that the reason for a lack of consistency is because of the absence of a national standard and not the other way around.

5. The key issue now is: how do we best develop national standards and promote a culture of continuous improvement in record-keeping across the public sector?

Our preferred approach

6. We believe that good record keeping is, and should be, an essential function of good corporate governance in organisations and, therefore, responsibility for the quality of records management and the effectiveness of records management plans should rest with the organisations themselves. In our view, scrutiny should be undertaken:

• by governing boards as part of their regular reviews of governance (including financial governance); and

• internally and externally audited through existing mechanisms, such as Audit Scotland, perhaps taking advice from the Keeper.
7. We are concerned that the introduction of a top-down regulatory framework which involves ‘approval of plans’, ‘requirements for reviews of plans’, ‘compliance reviews’, ‘warning notices’ and ‘publicising of failure’ will be burdensome and, in its effect, remove from public bodies a responsibility which properly should rest with them.

8. Our preferred approach is for the Keeper to be given a leadership role in defining and promoting good standards of information governance amongst public bodies and in highlighting examples of best practice. As we suggested in our response to the Scottish Government’s consultation, this could be achieved through a voluntary ‘Chartermark’ type scheme which recognises publicly those bodies that demonstrate high standards.

Concluding remarks

9. In summary then, our view is that:

- existing legislation has raised awareness of, and improved, record-keeping;
- there are opportunities to develop standards of record-keeping further and improve consistency through continuous improvement;
- there is no compelling evidence of a breakdown or failure of record-keeping across the public sector that warrants the introduction of a new regulatory framework;
- the Keeper should be given a leadership role to define and promote good standards of information governance and highlight examples of best practice;
- good record-keeping is, and should be, a function of good corporate governance and responsibility for how this function is exercised should rest with public bodies; and
- the introduction of a new top-down regulatory framework is unnecessary.

Michelle A McNeill
Information Management Officer
24 November 2010
SUBMISSION FROM THE SCOTTISH LEGAL AID BOARD

1. The Scottish Legal Aid Board (“the Board”) was set up in 1987 as an independent non-departmental public body responsible to the Scottish Government. Our main functions are to manage the Legal Aid Fund and to advise Scottish Ministers on the current operation and development of legal aid provision.

2. The Board would wish to raise the following points—

Scope of the Bill

3. It is not clear from the legislation whether records submitted to us by the legal profession in relation to legally aided cases are within the scope of the records management plan. There are currently no contractual arrangements between the Board and the legal profession. The Board may have access to the records of solicitors and advocates although these are ultimately the property of the client and are covered by separate rules (see below on confidentiality).

Confidentiality

4. We are mindful of our responsibilities regarding confidentiality, particularly those governed by section 34 of the Legal Aid (Scotland) Act (‘the Act’) that prohibits, amongst other things, the release of information without the consent of the provider. As well as restrictions under section 34 of the Act, the records created and held by solicitors and advocates may be governed by other statutory and professional provisions around confidentiality and privilege.

5. If the intention is simply to make these records the subject of a records management plan with the aim of improving record keeping across the public sector (which is how the Board reads the Bill) then the Board would not have a difficulty (subject to the below comments on costs). However, if the intention is to make these records public, then the Board believes that any statutory provision should be arrived at only after careful consideration of issues of this type; and regarding legal aid, such a proposal would certainly require consultation with the Law Society of Scotland and the Faculty of Advocates.

Costs

6. We are now operating in a difficult economic environment which is affecting both the private and public sector. The Scottish Government has cut the funding for both the administration of legal aid and the Board’s running costs by around 8% in 2010-11 which will be extremely challenging.

7. The Board welcomes the aim of the Bill not to reduce any new significant costs for public bodies. An obligation for the Board to create and maintain a records
management plan should not introduce significant costs for the Board if, as the Financial Memorandum states, it—

“largely consists of administrative time to compile and submit plans to the Keeper for authorisation, ensuring that an authority’s records management provision is up-to-date and current, and facilitating the Keeper’s scrutiny function. For an authority with such provision it will be possible to prepare a credible plan on the basis of existing documentation and policy statements.”

8. However, as there has been no consultation on what a model record management plan would look like, the Board cannot comment on how realistic this is. We look forward to be able to comment on the model plan in due course.

9. The Board would also not wish the Bill to introduce additional costs or obligations for private sector solicitors or advocates. The Financial Memorandum states—

“private or voluntary bodies will be affected by the new proposals to the extent that the records they create under contract to a public authority in providing a service must be managed as if they are public records. This means that they will be required by the public authority to comply with the requirements of the public authority's RMP with respect to those records.

If the private or voluntary body has a robust records management regime there will be no additional burden. If they do not, then they may need to put a system in place, but only in relation to the records created under contract to the public authority. This may be as simple as designating a secure space within an existing office area and designating a responsible person, perhaps the office manager, to have responsibility alongside existing duties for the management of the records kept there. Or, to have the relevant administrator permissions for a designated area of the authority’s file plan in the case of electronic records.”

10. The Board would not expect it to be required to ask private practice solicitors or advocates to carry out any additional duties as a result of this Bill.

**Proportionality**

11. The Board, like others, would wish to raise the issue of proportionality. Although the Board welcomes any desire to improve the record keeping of public bodies, doing this through legislation needs to be justified.

12. There were clear failings in record keeping which were highlighted in the Shaw report. However, these were part of a wider systemic failure in the looked-after children sector. The Board is unconvinced that there is sufficient evidence of a systemic failing in records management across the public sector as a whole which necessarily warrants a new regulatory regime.
13. The Board welcomes that the proposals for civil sanctions for non-compliance with a records management seem to have been dropped.

2 December 2010
1. We note that the provisions in the Bill, if approved, would require us to prepare records management plans setting out proper arrangements for the management of our records, which would have to be approved by the Keeper. The Bill schedule lists those authorities to which the provisions would apply and include the Scottish Local Authorities Remuneration Committee.

2. The Scottish Local Authorities Remuneration Committee is a committee established under Section 13 of the Local Governance (Scotland) Act 2004 comprising a convener and up to 6 members all of whom are public appointments. The Committee has no staff or premises. It is serviced by a Scottish Government official who is also responsible for keeping the committee’s records. As such, our records comply with Scottish Government procedures and should comply with any records management plans agreed between the Keeper and the Scottish Government.

Liz Hamilton
Secretary
23 November 2010
1. We provided a positive response to the Consultation on the proposals for a new Public Records Bill. We are supportive of the aims and objective of better record keeping and we remain supportive of an update to the legislation governing Scottish public records.

2. We have noted our specific comments below.

**Records Management Plans**

3. We welcome the Keeper’s role in issuing guidance on the form and content of plans and the preparation of a model plan. We believe that the flexibility provided for review of plans is beneficial. Plans may require update for a number of reasons, for example a change to statutory duties or organisational mergers.

**Compliance Reviews**

4. The proposed process for compliance reviews does not seem unduly onerous.

**Policy Memorandum and Financial Memorandum**

5. The Policy Memorandum provides a useful summary of the policy objectives of the Bill and explanation of why an update to the Public Records (Scotland) Act 1937 is now required. The Financial Memorandum is helpful in setting out anticipated costs of compliance with the proposed Bill. We note that it will be for the bodies themselves to ensure compliance and make the necessary adjustments to implement records management action plans and prioritise their administrative functions to ensure that resources are available. At present, we anticipate that these costs will be tolerable to SNH, however any further budget reductions are likely to make this additional requirement challenging.

**Consultation on the Proposed Legislation**

6. We were content with the consultation carried out by Scottish Government on the proposed Bill.

John Thomson
Director of Strategy and Communication
26 November 2010
SUBMISSION FROM THE STANDARDS COMMISSION FOR SCOTLAND

1. The Commission’s view was that the general principals of the Bill appear to be sufficiently broad to enable measurable improvements in records management across the public sector. Whilst there was an obligation placed on public bodies to conduct audits of records to ease the processes of implementing the requirements of Freedom of Information (Scotland) Act 2002 the Bill provides a more formalised approach to record keeping.

2. The Policy Memorandum which accompanied the Bill provided useful background information about the rationale for the perceived requirement to introduce the proposed legislation, the results of the preliminary public consultations and the views of some of the organisations who were involved with this process.

3. The Commission’s view is that the main costs involved in the initial setting up and thereafter running costs associated with an effective records management regime appear to have been detailed within the Financial Memorandum. However, the Commission does not have sufficient detail about the link between the proposed functions and activities and the level of activities to comment in detail about the individual cost areas as these will vary significantly throughout the public sector organisations detailed within the Schedule to the Bill.

4. From the Commission’s perspective the primary cost will be administrative time to compile the Record Management Plan (RMP) for submission to the Keeper of Records, to ensure that the provisions detailed within the RMP are reviewed and to provide assistance with any compliance reviews which are deemed necessary by the Keeper. The Commission will be required to meet these costs from its current and future budgets.

5. However, Scottish Parliament should be mindful that the cost of compliance with the requirements of this Bill need to be very finely balanced with the requirement to continue to force down current and future expenditure costs.

6. The Commission has no comment to make about the consultation carried out by Scottish Government prior to the introduction of the Bill.

26 November 2010
1. Strathclyde Partnership for Transport (SPT) recognises the benefits of a good records management system and supports the use of existing guidance and best practice. However, as a relatively small organisation with no in-house archivist or records management staff, we consider that the proposed new statutory obligation to produce and implement a Records Management Plan would require significant in-house resources and expenditure on employing consultants with relevant experience, compounding the financial difficulties faced by SPT (and all public bodies) at this time.

2. Given that SPT’s records management practices are already subject to the statutory code of practice made under section 61 of the Freedom of Information (Scotland) Act 2002 and our records management systems are subject to inspection by the Scottish Information Commissioner (under freedom of information legislation and the (UK) Information Commissioner (under data protection legislation), we further consider that the costs of compliance with the additional obligations contained in the Bill are disproportionate to any benefits which might result.

3. We strongly recommend that any new legislative requirements and compliance regime should be consistent with, and not duplicate, existing obligations on public bodies.

Valerie Davidson
Assistant Chief Executive (Business Support)
25 November 2010
Public Records (Scotland) Bill: The Minister for Culture and External Affairs (Fiona Hyslop) moved S3M-7900—That the Parliament agrees to the general principles of the Public Records (Scotland) Bill.

After debate, the motion was agreed to (DT).
The Presiding Officer (Alex Fergusson): The next item of business is a debate on motion S3M-7900, in the name of Fiona Hyslop, on the Public Records (Scotland) Bill.

Stage 1

The Minister for Culture and External Affairs (Fiona Hyslop): I am pleased to open the debate on the general principles of the Public Records (Scotland) Bill. I thank those who gave evidence and thank the convener and members of the Education, Lifelong Learning and Culture Committee for their detailed scrutiny of the bill at stage 1. I welcome their support for the general principles of the bill, and I will seek to address some of the key issues that they highlighted.

The bill has its origins in Tom Shaw’s report on the historical abuse of looked-after children, which was published in 2007 and accepted by all parties in Parliament. Tom Shaw underlined the lessons of his report in evidence on the bill that he gave to the committee. His powerful and compelling evidence showed the human cost of record-keeping failures. He repeated his recommendation on the need for new legislation to cover all public records. That is why we have introduced this comprehensive bill, which covers all functions that are listed in it.

The bill is not only about past problems. As a minister who previously had responsibility for children, I am familiar with the outcome of the Kerelaw inquiry in 2009. It found instances of lost records, files that were difficult to locate and problems in accessing older electronic records. I am conscious that, if there had been improvements to records management such as those that we now propose, the findings would have been different.

Some people have argued that we do not need to legislate, because a voluntary approach will achieve the same result. However, the existing system is essentially voluntary, and had it worked properly we would not have had the Shaw and Kerelaw findings with regard to records management. Therefore, I am pleased that the committee agreed to back the general principles of the bill and took the view that there was a strong moral obligation on public authorities to manage personal records effectively.

The committee expressed concerns about the representations that it received that the bill was disproportionate and would create a heavy burden on public authorities, and particularly on the voluntary sector. I emphasise that, from the outset, our approach has been light touch and we have produced a tightly drawn bill. It is about only the management of public records, not their content or how long they are to be kept, which are matters for individual authorities and existing regulatory bodies. For example, the getting it right for every child programme means that decisions about what is kept come from the professional specialists in child protection and health, therefore Social Care and Social Work Improvement Scotland, the national health service and the Convention of Scottish Local Authorities should lead on the content of records.

The bill is about how to manage records once they exist. Decisions about what records are to be created are for the authorities that create them. The keeper of the records of Scotland will determine the model records management plan to assist public bodies in preparing their own plans to improve their records management and will take advice from different sectors.

I recently discussed with COSLA my keenness for it and others to advise on what should be in the model plan for local government, for example. The keeper and his staff will work in a complementary partnership with sector specialists. My officials are considering an amendment at stage 2 to make that clear, and we are reviewing the language in the bill to emphasise our aim of encouraging self-improvement as opposed to dictating solutions.

I note the concerns that the committee raised about the obligations that will be placed on public bodies, and the genuine concerns that we heard from people in the voluntary sector, as contractors for public authorities. I am committed to working with public authorities and contractors to address those concerns.

I also note the committee’s concerns that the bill might place an administrative burden on contractors and that public authorities might overimplement their obligations under a records management plan, which could incur record-keeping costs for small organisations. However, let us not forget that small bodies often do important work and generate important records. We need to find ways to make that easier for them and to give them confidence about what they need to do. The model records management plan and the keeper’s guidance will help to do that.

Concerns were expressed about being forced to keep everything by risk-averse public authorities. The bill does not place any direct responsibility on voluntary or private sector contractors and it does not give public authorities any power to force contractors to do anything. Public authorities must ensure that records of contractors are managed in accordance with their records management plans. Approval of those rests with the keeper, who can
refuse to approve them. The answer is partnership between the authorities, voluntary sector providers and the keeper. That dialogue is already under way.

The detail in plans is for each authority to determine, but I expect there to be a great deal of convergence. It simply would not be efficient for every authority to develop its own plan, and the keeper will emphasise that in the guidance. The bill allows for common plans, which may be appropriate where authorities’ work is similar. Work is already under way to draw up generic retention schedules, for example. The Government’s role is to facilitate dialogue between COSLA and the voluntary sector to ensure that a commonsense approach that is based on best practice is taken.

Issues relating to confidentiality and access have been raised. Let me be clear: the bill is not about freedom of information by the back door. It is entirely silent on access, which is dealt with in other legislation, and it does not interfere with confidentiality in any way.

If authorities already have good records systems in place—as many do—costs will be minimal. That has already been recognised by records professionals working in local authorities, who support our proposals. However, there is scope for sharing and pooling resources. Records management is an ideal area for imaginative co-operation and joint working between authorities. There is a cost in not making improvements. Keeping too many records for too long is a needless waste of resources.

We will continue to engage on the bill with sectors and organisations. The dialogue to date has been positive, and it is continuing.

Records are not just boring data; they are memories of people and what has happened to them—they are the only memories for some people—and they need to be managed properly.

I move,

That the Parliament agrees to the general principles of the Public Records (Scotland) Bill.

The Presiding Officer: I call Karen Whitefield to speak on behalf of the Education, Lifelong Learning and Culture Committee.

14:48

Karen Whitefield (Airdrie and Shotts) (Lab): I thank everybody who gave written and oral evidence to the Education, Lifelong Learning and Culture Committee, and the committee clerks, whose help and support was, as ever, invaluable.

To help us to understand what the bill is intended to achieve, I will give a working definition of what is meant by public records in the context of the bill and a brief description of the circumstances out of which the bill arose.

For the purpose of the bill, public records are any information that is generated by a public authority in carrying out its functions or by any organisation or individual that is contracted to do so on behalf of a public authority. However, it is important to note that, as well as applying to record keeping relating to children and vulnerable adults who are engaged with health and local authorities, the bill pertains to records management across the voluntary sector and to any other organisations that benefit from public funding.

The bill originated from the historical abuse systemic review, which uncovered significant failings in records management in residential schools and children’s homes in Scotland. Indeed, Tom Shaw gave some of the most compelling evidence to the committee during our stage 1 deliberations. The primary intent of the bill is to introduce measures to combat those failings and to improve record keeping across the public sector in Scotland, and the committee supports those aims.

I will now outline the key provisions of the bill. First, all public authorities must draft and adhere to a records management plan, which must be approved by the keeper, who will produce guidance to support that process. To ensure consistency and minimise unnecessary work, similar types of public authority may adhere to a common RMP. In addition, the bill will empower the keeper to undertake compliance reviews to ensure that the legislation is adhered to and will enable them to issue warning notices to authorities that fail to comply. In the event that such notices go unheeded, the keeper will be able to publicise the failings of those authorities that are non-compliant.

Some of the organisations that gave evidence to the committee were vigorously opposed to records management plans backed by legislation. The Scottish Further and Higher Education Funding Council questioned the need for new legislation and called the bill “a heavy-handed response”. It said:

“with the exception of ... looked-after children ... we could find no compelling evidence ... of a breakdown or failure in record-keeping across the public sector that warrants the introduction of a new regulatory framework”.

National Museums Scotland contended that the bill should not apply to such a wide range of organisations. It said:

“We find it difficult to see why National Museums Scotland should be included on the list of named organisations and be expected to follow the same
regulatory regime as organisations which are responsible for very sensitive personal records’.

The Scottish Council for Voluntary Organisations pointed out that the bill “has the potential to cast a very wide net across our sector that tangles us all up in a resource intensive bureaucracy”.

However, the minister did her very best to respond to those concerns when she appeared before the committee. She pointed out that records management plans would not be rigid but would be tailored to meet the needs of each sector; that the bill would be light touch as opposed to heavy handed; and that steps would be taken to minimise the administrative burden that is placed on public authorities and external contractors. In addition, she assured the committee that when external contractors did the same job for several public authorities, only one records management plan would be required. I know that some voluntary sector organisations still have concerns about that, although I appreciate that there has been helpful dialogue this week between those organisations and the minister’s officials. I urge her to continue that dialogue.

The committee believes that the bill must be accompanied by guidance to ensure good practice across the public sector, and that it will have to be nuanced to suit the needs of different organisations. It is hoped that rather than adding to the volume of records that are currently kept, the bill will ensure that records are managed appropriately, but the committee agrees that there is a danger that some public authorities or external contractors may apply RMPs with excessive zeal to avoid the risk of falling foul of the legislation. I hope that the minister will guard against that.

The committee recognises that the concerns of the voluntary sector have not been fully addressed. Many voluntary organisations are already overstretched, and it is vital that the bill does not add unnecessary weight to their administrative burdens. The Scottish Government must work to address those concerns at stage 2, and I am confident that the minister will do that, because during stage 1 she has made genuine efforts to engage with the committee to ensure that steps are taken to avoid overly rigorous interpretation and implementation of the bill.

As far as the financial implications are concerned, although at this stage there is insufficient evidence on the cost of the bill, the Scottish Council on Archives believes that the task of drafting a records management plan will not be onerous, and it is generally agreed that implementation of the bill is unlikely to incur great expense.

The committee believes that the historical abuse systemic review revealed shortcomings in record keeping and records management in the care sector, and that urgent action is needed to address them. Furthermore, it strongly believes that all organisations that receive public money have an obligation to keep their records responsibly. I am sure that every member agrees that that is especially the case when those organisations deal with documents that are sensitive and/or of great emotional or practical value. It is imperative that such records are properly maintained and accessible to the people to whom they relate.

Although the committee acknowledges that not all the concerns that were raised during stage 1 have been fully addressed, we are satisfied that the bill is necessary. As the committee heard from the National Archives of Scotland:

“Good records management is not free, but it is cheaper than bad records management or no records management.”—[Official Report, Education, Lifelong Learning and Culture Committee, 8 December 2010; c 4453.]

On that basis, the committee recommends that the Parliament agree to the general principles of the bill.

14:55

Ken Macintosh (Eastwood) (Lab): I do not know whether members are familiar with the film “Diner”. It is a great film, and one of the best scenes involves a young man called Shrevie, who is newly married to his childhood sweetheart. The couple are having their first experience of marital discord: an argument has broken out over Shrevie’s record collection, which is alphabetised and broken down by genre—rhythm and blues, jazz, rock and roll, and so on. I am talking about vinyl records, which is what some of us were brought up with—

Ted Brocklebank (Mid Scotland and Fife) (Con): What is vinyl?

Ken Macintosh: I said, “some of us”.

Shrevie loses his temper because his wife has put his Charlie Parker album back under “R and B” rather than “Jazz”. She retorts, “I only wanted to play the thing.” The trouble with the scene is that I think that we are supposed to identify with the wife, but I identify with Shrevie, because I like to keep my records alphabetised and categorised by genre. I think that that appeals to the pencil-sharpening retentive side of me.

That is rather a long-winded way of saying that many members, including me, welcome and are attracted to the bill and the whole notion of meticulous and well-ordered record keeping. I would not describe myself as an historian, but I certainly know the value of good historical records.
The bill is relatively simple and straightforward. It seeks to improve the management of records in certain public authorities by requiring them to produce a records management plan. It will empower the keeper of the records of Scotland to draw up a model RMP and to monitor compliance with the new duty. On the face of it, the bill does not appear to be overly onerous. The keeper’s only power of enforcement relates to failure to maintain records to the expected standard, and the penalty is the naming and shaming of the defaulting authority.

Members will correct me if I am wrong about this, but I think that every member of the committee and all the witnesses who gave evidence thought that it was a good idea to try to improve standards of record keeping. Nobody disagreed with the intent or policy objectives of the bill. However, despite the apparent consensus, the question that the committee faced was whether we need the bill at all. The Parliament must now face the same issue.

As members know, the voluntary sector and local authorities, represented by the Convention of Scottish Local Authorities, in particular, were perhaps the most animated in their concern about and opposition to the bill. Members have talked about some of the concerns, and I will consider what the Parliament and the minister can do to address them at stage 2. The concerns focused on three areas: the unnecessary bureaucracy that the bill might bring; the proportionality of the duties that the bill will impose to the risk that is posed by poor records management; and the lack of certainty about costs, and the priority that we should give to that at a time of painful budget cuts.

We all agreed with the bill’s intent and policy objectives, but if the objectives can be achieved without legislating and without introducing a gold-plated record-keeping system, surely we should go down the voluntary route. In some ways, I was surprised that the committee unanimously agreed that there is a need to legislate on records management. One of the strongest arguments that was put during the committee’s recent discussions on the Autism (Scotland) Bill was that there is no need to legislate at all times, particularly when alternative routes such as guidance or partnership working—the concordat approach—can be pursued and will achieve the same policy objectives.

In any event, members of all parties agreed and indicated our support for the bill. The most persuasive evidence that led us to that conclusion came from Tom Shaw, who carried out the review of historical abuse in residential child care, and from Lorna Patterson, on behalf of the in care survivors service Scotland. Indeed, Mr Shaw’s report and conclusions about the consequences of failing to keep appropriate records in residential schools and homes were the key drivers for the legislation. To this day, survivors of abuse continue to suffer because of the difficulty that they have in finding out about their own lives and childhoods through memories and records that most of us take for granted and certainly would not discard carelessly. The fact that many of the children’s homes were run by voluntary organisations was also a factor in the committee’s thinking.

Therefore, although we have real concerns about the way in which the bill might be implemented and its lack of proportionality when it comes to records that contain little sensitive or personal information, we support the bill, not only because we do not wish to see a repeat of the trauma that has been experienced by those who have survived abuse in children’s homes but because most members of the committee thought that it was important for accountability and the good management of our public services. The decision is finely balanced, but I believe that we should go down the legislative route while asking the Government to address the genuine and clear concerns of the many organisations involved.

15:00

Ted Brocklebank (Mid Scotland and Fife) (Con): I have always been attracted to the view that journalism is the first draft of history. The historian’s craft is, of course, the superior one, given the journalistic distortions and spin that the historian must navigate in coming to a balanced version of events. However, both crafts undoubtedly echo the Inuit view that to know where one is going, one must first know where one comes from. Judging from the surge of interest in our forebears, with any number of television shows helping us to “Meet the Ancestors” and family tree advice available on all manner of websites, more and more of us are fascinated about where we came from.

It is, though, not just to feed the fascination with our roots that it is important that accurate records are kept and managed. As the minister indicated, the genesis of the Public Records (Scotland) Bill lies in the report into institutional child abuse in residential schools and children’s homes in Scotland. Clearly, there was a feeling that vulnerable people had been let down by the inadequacy of the records that were held, and the keeper of the records of Scotland conducted a review of public records legislation. As a result of that review, the keeper recommended limited legislation to improve record keeping across the public sector, which would

“improve accountability, increase transparency and strengthen governance”.

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“improve accountability, increase transparency and strengthen governance”.
Behind those words lay much hurt and frustration on the part of those who had attempted to find out basic information about their own backgrounds.

Even before freedom of information legislation, it was obvious that record keeping in Scotland was not all that it might be. I remember, in a previous incarnation, finding it remarkable that there was no publicly available register detailing who actually owned the land of Scotland. Thousands of acres were being bought by and sold to trusts and purchasers hiding behind shell companies, yet there was no mechanism whereby the public could find out who owned what. The records were incomplete, to say the least.

In 1977 a retired forester called John McEwen published a painstakingly researched book called “Who Owns Scotland?”. It was a partial lifting of the veil, but many of the records still remained hidden. Andy Wightman updated McEwen’s work in 1996, but again admitted to huge gaps in the records. To this day, there is no complete transparency about who owns much of Scotland. For those who wonder about the apparent lack of urgency in introducing legislation to publicise those records, I recommend Andy Wightman’s latest explanatory tome, which is entitled “The Poor Had No Lawyers: Who Owns Scotland (And How They Got It)“.

As the keeper of the records rightly states: “freedom of information ... crucially depends on the quality of records.”

Although the bill is largely technical, and concentrates on issues such as records management and transferring court records to the keeper, it is no less welcome for that. The Public Records (Scotland) Bill is not about which records should be held and which discarded—there is a much bigger debate to be had about that undoubtedly controversial subject. However, I accept that there is a genuine fear, particularly in the voluntary sector, that an overzealous approach to record keeping might overwhelm the limited administrative resources that those organisations can call on. We do not need to take a sledgehammer to crack what might be a fairly fragile nut where those smaller institutions are concerned.

I have read COSLA’s briefing on today’s debate, which claims that, for some bodies, it will cost up to an additional £60,000 a year to implement the legislation. I agree with COSLA that the key to improvement will be the sharing of good practice among all stakeholders, especially smaller voluntary organisations. In these straitened times, however, it is gratifying that this technical bill will result in no additional burdens on the public purse, which is as it should be.

I believe that the bill, like the Historic Environment (Amendment) (Scotland) Bill, which we passed in Parliament a few weeks ago, may well be the precursor to a more important piece of legislation that grapples with the fundamental questions as to which records should be kept and, perhaps more important, which should be made publicly available. Nevertheless, the Scottish Conservatives support the general principles of the bill.

15:05

Hugh O'Donnell (Central Scotland) (LD): For the avoidance of doubt, I confirm to members that I am not Margaret Smith and therefore was not on the committee. I apologise for Margaret Smith not being here today. She is unwell.

Having looked at the detail of the report—somewhat quickly, I have to say—I believe that foremost in our minds when considering it should be what prompted it, which, as members have said, was the review that was undertaken by Tom Shaw. His 2007 report made three sets of recommendations. I understand that, today, we are considering the third of those, on the procedures for the retention of records. As we deal with the bill—which, as Ted Brocklebank has just said, is concerned with a largely technical matter—we must always keep at the forefront of our minds the fact that that the issue has a real human dimension for many people.

I have looked through the committee’s report on the bill, and it is clear that the committee heard from a wide range of groups, most of which supported the bill. However, there was a clear divide over whether what is proposed is heavy handed and whether, as Ken Macintosh suggested, something more voluntary might be more suitable.

The Liberal Democrats are inclined to side with the Scottish Council on Archives, which argued that “ensuring consistency in on-going records management requires a legal framework”.

Gerry Slater of the SCA highlighted to the committee that a voluntary scheme could be problematic. He likened a voluntary scheme to new year’s resolutions and said:

“we all start off with genuine enthusiasm and then gradually, as other things emerge, the enthusiasm wanes.”—[Official Report, Education, Lifelong Learning and Culture Committee, 12 January 2011; c 4505.]

We share that opinion, as, I understand, does Tom Shaw, who also favours legislation over a voluntary scheme.

We must return to the genesis of the bill, which was a response to systematic abuse in residential
schools and children’s homes. We believe that it is a reasonable response. We believe also that, in the most plain terms, it is good governance.

There have been objections to the bill, including many from the voluntary sector, as some organisations are understandably concerned about the unintended consequences that the legislation will have for their work.

Concerns were put to the committee about the cost of the proposals for organisations—other members have spoken about the uncertainty in that regard. However, as the committee’s report says, local and public authorities that already have a credible system in place will see a minimal impact in terms of costs, and maybe those that do not have a system should have had one, and might be incentivised to produce one.

Ultimately, Liberal Democrats believe that Parliament will agree that there is a need to ensure that there is effective records management in relation to vulnerable people. The historical abuse systemic review report made for uncomfortable reading, and today we go some small way towards rectifying systemic problems. As parliamentarians, we have to consider whether the bill is a proportionate response to those findings. We believe that it is. Although some administrative burdens might be placed upon some organisations, I am reassured by what the minister has said about the Scottish Government’s willingness to work with public authorities and contractors to resolve issues such as overimplementation and to ensure that implementation remains the responsibility of public authorities.

Public organisations in Scotland have a clear moral obligation to ensure that records are kept to the highest possible standard. Consequently, we will support the bill at stage 1.

15:09

Alasdair Allan (Western Isles) (SNP): Despite its unprepossessing name and content that will never make a newspaper editor hold the front page, the Public Records (Scotland) Bill is, for good reasons that other members have alluded to, deeply important to the lives of many people in Scotland.

As we know, the Shaw report into historical failures—and much worse—in some of Scotland’s children’s homes was very clear on that point. Failure to maintain adequate records meant that a generation of our most vulnerable children were failed, and failed for the rest of their lives, by the hopeless record keeping of many institutions in the past. As the Education, Lifelong Learning and Culture Committee heard in distressing evidence, that meant that many people who were formerly in the care of such institutions were, in later life, completely unable to piece together the stories of their lives, their family origins or the reasons why they ended up in care, far less to be in an adequate position to investigate any failures or abuse that may have occurred in many cases. From that evidence, the committee concluded that we have a

“strong moral obligation to manage personal records effectively.”

Although those very unhappy stories provided the springboard for the bill, the legislation takes the opportunity to impose standards of record keeping across a wide range of authorities. The Education, Lifelong Learning and Culture Committee took evidence on the bill and we were convinced, despite the misgivings of some witnesses, that it provides a proportionate solution.

Part 1 of the bill will require the production and implementation of a records management plan, to be approved by the keeper of the records of Scotland, by named Scottish public authorities. As other members have said, the keeper will design a model records management plan, with best practice advice and supplementary guidance, to deliver to authorities. The bill will further guarantee the keeper the ability to carry out compliance reviews of the plan’s implementation by authorities. The keeper may also issue warning notices and take related measures to ensure that the management plan’s provisions are being observed. During evidence, the keeper concluded that, from the review, an understanding had been gained that there were widespread inconsistent record-keeping practices throughout Scotland.

The Scottish Information Commissioner stated during his evidence that, under current record-keeping regimes, finding many records is like

“looking for a needle in a haystack.”—[Official Report, Education, Lifelong Learning and Culture Committee, 12 January 2011; c 4504.]

He made it clear that many organisations, not least some of Scotland’s local authorities, could make very significant improvements in their record-keeping practices.

Other witnesses were of the view that the schedule of the bill is perhaps disproportionate and covers too broad a range of organisations, and they offered the view that there should be a differentiation between high risk and low risk records management. The General Teaching Council for Scotland, for instance, argued that the bill will place significant burdens on public authorities and questioned whether the bill will deliver appropriate compliance that would be proportionate to the costs.

However, others persuaded the committee of the position that organisations should keep
accurate records no matter how small in scale and scope, and that organisations that keep reasonable records have little to fear from the legislation. Having said all that, I welcome the minister’s indication that at stage 2 she is willing to return to some of those concerns and to engage with them.

The bill requires the public authorities that are listed in the schedule of the bill to “produce, implement and review records management plans.”

Once the public authority has developed a records management plan, it must be approved by the keeper of the records of Scotland. The bill aims to ensure that records are organised and easily accessible for public review.

The plan describes the arrangement of records not only by the authority but by contractors who carry out any function of the authority. That point is central to the scheme that is set out in the bill and it is why contractors’ records are to be included in an authority’s records management plan. Although the committee wants to be reassured that that will not impose new and unreasonable burdens, it was again broadly persuaded of the need for that aspect of the bill.

The bill’s financial memorandum states that bodies that have credible records management plans will likely face only minimal costs as a result of the legislation, which also seems to committee members to be broadly credible.

The Public Records (Scotland) Bill has been deemed important because it holds public authorities accountable for the storage of information, which is often information on individuals. I hope that a reform of the public records system will ensure that significant public records are no longer filed away in unmarked boxes in lock-up storage centres, put in skips or given away to random passers-by, as happened in the worst examples that were brought to the committee’s attention.

Good records management will, as has been stressed throughout the process, give much clearer guidance to authorities on what can be thrown out and, indeed, on what must be thrown out if records are to be kept in an intelligible form. I hope that the bill will achieve not only the end of protecting Scotland’s children, but of a much wider reform that will allow sensible and proportionate record keeping by all of Scotland’s public authorities. In that spirit, I urge the Parliament to support the principles of the bill.

15:15

Claire Baker (Mid Scotland and Fife) (Lab):

First, I apologise for missing much of the minister’s opening speech.

We all recognise the importance of reforming Scotland’s public records system in public authorities as well as in the private and voluntary sectors that work with them. Although it is recognised that public record keeping has, in many cases, significantly improved since the Shaw report—which revealed the truly dreadful record keeping in residential schools and children’s homes, with records scattered across organisations, archives and even countries—there is still a clear need for legislation. The evidence that the committee heard made clear the terrible consequences of poor record keeping for children and young people in the care sector. As a guard against that set of circumstances happening again, the legislation is to be welcomed.

The committee supported the view that a scheme that is underpinned by statute is more likely than a voluntary scheme to secure the necessary changes, and would lock in those changes. However, some concerns have been expressed regarding overimplementation of the legislation. Witnesses drew parallels with child protection measures that they suggested are treated at times with such caution that unnecessary measures are taken.

We must therefore be wary of misinterpretation of the legislation and we must be cautious about the risk of overburdening the voluntary sector, on which the legislation will impact. I understand that that is not the minister’s intention, but I think that we would all welcome assurances on how that will be avoided. Witnesses spoke of a gap between the understanding of the legislation by the responsible public authority and that of the individual who interprets the legislation at the point of delivery.

The minister will be familiar with the voluntary sector organisation’s continuing concerns regarding the obligation that will be placed on them as contractors. As a former policy officer at the Scottish Council for Voluntary Organisations, I have worked closely with the voluntary sector and have continued that relationship with local groups in my region. When introducing new legislation that impacts on the voluntary sector, we must be aware of the diversity of organisations and recognise the flexibility and responsiveness that they offer, and we must foster their development while ensuring that they operate within a framework that meets our legitimate expectations on public care and delivery.

Fiona Hyslop: That is an important point, whether the duty for public delivery and public
functions lies with the local authority, the health service or others. If we are moving into an area of public service reform in which we can ensure that the best providers can provide the best services—which in many cases will be from the voluntary sector—it is important that we have a robust system that is accountable and in which there is proper record keeping. There is therefore in the bill a responsibility and an opportunity for the voluntary sector, so the sector should not just be defensive about being overburdened with activity. We need to get that balance right and to be proportionate.

Claire Baker: I do not disagree with anything that the minister just stated. It is important that we recognise that the voluntary sector—the third sector—will play an increasing role in service delivery. However, we must ensure that we achieve the right balance. I think that the sector recognises that the bill is important and it wants to work with it, but it perhaps needs help and support with regard to how the eventual act will be implemented.

Although the sector has raised concerns regarding implementation, I am confident that it will—as it always does—engage with the process and do all that it can to make it work. However, the bill’s timescales have been challenging, and there are concerns that there is little awareness of it. Given the tight timescales that we are all working to, there may be a case for introducing an order-making power to the bill. I would welcome the minister’s thoughts on that.

In evidence, it was made clear that contractors are nervous about the risk of significantly varying records management plans, and they highlighted the fact that many third sector organisations contract with several local authorities. Local authorities also made it clear that they would pass that burden on to contractors. There remains uncertainty over whether a public authority would accept a contractor’s own record-keeping system or whether they would be expected to conform to a system that has been defined by the public authority. Much of that will be contained in guidance, and while we will have to wait for the detail on that and take much of the minister’s assurances on faith, it might be helpful to have consultation and co-operation with stakeholders in preparing plans and guidance documents—that was also raised by COSLA today—as well as guidance that deals specifically with the relationship between RMPs and contractors.

Finally, despite the keeper’s assurances to the committee, the voluntary sector is still concerned about the definition of public record, which again comes down to the gap between the understanding of the legislation at local authority level and its implementation on the ground. If changes are to be introduced smoothly and effectively, such issues will have to be resolved, so I believe that help and support for implementation will be welcomed.

All of us, including the third sector, should be able to approach the legislation with a commitment to improving service delivery and with the confidence that it will deliver on the crucial need for Scotland’s record keeping to be of the very highest order.

15:20

Ian McKee (Lothians) (SNP): I very much welcome today’s debate and the fact that we can all agree on the bill’s principles. It is clear that the legislation on public records, as set out in the 70-year-old public records legislation, needs to be updated. Although the subject might seem to be as dry as dust, I assure the chamber that it is not so to the many thousands of people whose emotional or physical wellbeing depends on records, often from long ago, being assembled correctly and comprehensively, and being easily and speedily accessible.

Over time, all organisations, large and small, create a considerable amount of information that needs to be managed responsibly if they are to meet statutory requirements. That is particularly the case for health services, which often need to consider data protection issues. The bill will ensure a consistent set of standards across the entire public sector, while still allowing authorities the independence to develop and manage their own records systems. As the evidence indicates, there are major inconsistencies in the public sector, with some bodies failing to provide acceptable levels of records management. Indeed, Tom Shaw made it clear in his evidence that it is vital that we change the culture and ensure that those who make records recognise that the process is a lot more than a bureaucratic chore. In the case of looked-after children, for example, it is an effective way of recording individuals’ life experiences. To that end, the Shaw report was indeed compelling, and it made clear the need for Scotland to have a system in which historical records are not only preserved but are easily accessible, in order to prevent the mistakes of the past.

Although the Looked After Children (Scotland) Regulations 2009 addressed the issue that was identified by Mr Shaw—that case records about children in care were not kept for the right periods of time—they did not deal with the records that document the services. Under the bill, all public authorities will need to be accountable and ensure that governance procedures are adequately followed. That move will close a gap and place
greater importance on the way in which organisations make their decisions.

Some organisations, particularly those in the voluntary sector, have expressed concern that the bill will place a considerable burden on their work, so I am glad that in her opening speech the minister was able to reassure them by reaffirming that the bill’s purpose is not to create more records or to determine their content or form. Instead, it will guarantee management of records, which in any case is a process in which organisations should already be engaged. Moreover, authorities will receive support from the keeper of the records of Scotland, who will provide advice and guidance on all aspects of records management. Small organisations will find that existing staff—often volunteers—will be able to carry out the tasks after some minimal training, and that there will be no obligation to employ additional staff.

I would also like to mention the importance of authorities working together. As the minister pointed out, work is under way on drawing up generic retention schedules with a view to promoting best practice. I welcome that. After all, it would not make sense for each authority to reinvent the wheel when certain organisations have undertaken the practice for years and have developed efficient records management systems. Furthermore, an efficient form of records management is undoubtedly an important business function that can bring long-term cost benefits to any organisation.

One issue of concern that was expressed by Mr Shaw, and which is not directly covered in the bill but will nevertheless be the responsibility of the keeper of the records and the relevant records management plan, is the length of time that records can be stored before being destroyed. As a general practitioner, I was surprised at being approached by hospital consultants and asked to search my patients’ notes for details of treatments, procedures and tests that they or their colleagues had initiated in the hospital, because the hospital records had been destroyed. It is undoubtedly expensive to keep records for a long time, but care must be taken not to destroy them prematurely, which might mean storing them for many decades.

As I have said, however, I welcome the fact that we all agree on the principles of the bill and I commend them to Parliament.

15:25

Christopher Harvie (Mid Scotland and Fife) (SNP): I congratulate Fiona Hyslop on bringing the Public Records (Scotland) Bill to Parliament. All of us have been made well aware of the fact that the bill was inspired by the Shaw report of 2007 into historical child abuse in residential and children’s homes. Those events were not alone—they were mirrored by events in Ireland and north Wales, which resulted in the Ryan report of 2009 on institutional child abuse in Ireland from the 1930s to the 1990s, and the Waterhouse report of 2000 on north Wales in the 1970s and 1980s.

In its recommendations to the Scottish Government, which were based on the Shaw report, the National Archives of Scotland highlighted the unfitness for purpose of the existing ways of keeping archives. The bill sets out to provide a framework for keeping public records by requiring public authorities to develop records management plans and to implement them under the supervision of, and with the approval of, the keeper of the records of Scotland.

If effective record keeping is made compulsory by law, earlier shortcomings can be avoided in the future and we can, in a sense, be future proofed. My late good friend Iain Maciver of the National Library of Scotland was thrilled to discover that I was still the owner of a double-disk-drive Commodore green-screen computer, because the library had a lot of 5.25in diskettes that could not be read. He asked me to give the computer to the library, which would be delighted to have it. I hope that, when looking at this issue, we will not discover some technological dinosaurs down in the cellar, with the requirement that another dinosaur be found to hatch the eggs.

The bill goes beyond the scope of the Shaw report. There are other areas in which I imagine it will have positive effects. Consider the piece of instant archaeology that occurred on Princes Street during the period of tramline construction there. All sorts of things—not just one, but two tramway systems—were discovered under the tarmac at that point. The former TIE chairman, David Mackay, referred at the time to “cables not being where they’re supposed to be”, which is the equivalent in modern transport technology of “there seems to be something wrong with our bloody ships”, as was famously said at the time of the battle of Jutland. We require management plans to ensure that essential utility locations are recorded with accuracy for future infrastructure projects. That would be welcome. Closer to home, just outside this building, the test drillings around Holyrood in May 2009 to collocate utility pipes and cables, ahead of the installation of our much-loved anti-terror bollards—one has to get that right—provide evidence that records were not properly kept even in the few years following the building of the Parliament.

I am convinced that the bill has the potential to reduce numerous instances of individual suffering
and financial detriment. In principle, I approve of its applying not only to public bodies but to contractors—but with one caveat, which Claire Baker has already voiced. As the Scottish Council for Voluntary Organisations pointed out, the bill could result in an increased workload for people whose prime concern is not to make notes but to offer assistance, comfort and tender loving care to people who are in their charge. As someone who is responsible for two 92 or 93-year-old parents, I am terribly grateful to the carers who come round. Sometimes having to write out what care they have given is a bit of a burden at the end of a heavy working day, so we ought to be humane when working out what we require of people.

We ought also to correspond to some extent with similar organisations in the other countries where reports have been published—Ireland and Wales—to find out whether they have come across instances of best practice or things to avoid in their study of the archiving of such evidence.

Keeping accurate, detailed and long-term records is crucial, most of all to ensure that vulnerable individuals have access to information about themselves. What emerges ought to be easy to access by people who have never before been confronted with such material.

15:30

Sandra White (Glasgow) (SNP): I thoroughly enjoyed Professor Harvie’s speech, which gave us another insight into record keeping, so I thank him for it.

As members have said, the bill is the legacy of the historical abuse systemic review, and I fully support the aims of the bill in that regard. I in no way want to dilute or take anything away from the bill but, like Ted Brocklebank, I believe that the bill could be a precursor to legislation on other matters.

I want to raise the issue of common good funds, on which the Education, Lifelong Learning and Culture Committee took evidence. Paragraph 79 on page 16 of the committee’s stage 1 report states:

“The Committee received a small number of submissions suggesting that the Bill offered an opportunity for Scottish Ministers to legislate to provide for the establishment of a common good asset register.”

That mentions “a small number” but, at a meeting that I attended in Glasgow city chambers, a large number of community council representatives—about 200—were present from throughout the region. On all their lips was the point that they cannot find out anywhere exactly what common good assets their councils have or which assets have been disposed of. There was overwhelming anger at that meeting regarding common good funds and the lack of accountability or information on common good assets.

It is not only community councillors and members of the public who are saying that; members of all parties have raised the issue in the Parliament. I have raised it, as has Robert Brown of the Lib Dems. Mary Scanlon has raised it on numerous occasions. Her most recent contribution was to ask about guidance that has been issued to local authorities on common good records and funds. The answer that she received from the Cabinet Secretary for Finance and Sustainable Growth stated:

“the Scottish Government wrote to all local authorities in 2007 to remind them of their responsibilities under accounting codes of practice, best value guidance grant conditions and statute in respect of their management of common good funds and assets.”—[Official Report, Written Answers, 12 February 2010; S3W-31278.]

Even today, people still do not know what assets are held and what has been disposed of.

Paragraph 83 of the committee’s report states that the bill is not the proper place to deal with common good funds, but it also states:

“The Committee would expect, however, that local authorities’ RMPs established under the Bill would include information on how existing records relating to common good assets were to be managed.”

I ask the minister to consider that recommendation. Do ministers intend, as part of the process of the bill, to issue further guidance or even to monitor the RMPs that are established under the bill, in relation to common good funds and assets that are held by local authorities?

I have received a huge list of the assets that local authorities have declared, although they do not have to declare them. It is amazing—it includes streets, shops and bailies’ chains. Every year in Glasgow, we have a pensioners Christmas party, which is paid for out of the common good fund. I found that out only because I asked, but most people do not know that. It might be simple, but the public want to know exactly what common good assets their councils hold, what they have disposed of and how much money is held in common good funds.

I do not want to dilute the bill in any way and I fully support what it stands for. However, I want to put down a marker regarding common good funds. We need legislation on a register, either through amendments to the bill—although I do not think that that will be possible—or through future legislation.

15:34

Hugh O’Donnell: I will be brief. The bill is important and—I hope—a step towards resolving some of the long-standing social and personal
issues that individuals who were subjected to abuse in residential homes or schools suffered. Perhaps our taking a step forward with the bill will go some way towards bringing those individuals some closure. Of course, as other members have said, that abuse was the genesis of the bill.

Professor Harvie widened out the debate a bit—and rightly so—as did Ted Brocklebank. They spoke of more general matters around record keeping and how records are kept in this country. As more and more public records have come into the public domain and have become more readily accessible over the years, the huge gaps in record keeping have become increasingly apparent, particularly if one watches genealogy programmes or whatever. The general point is this: the need to keep records is critical; they must be kept in a consistent and appropriate manner.

In a former existence, I worked for a charitable organisation. In many ways, its records were exceptionally good. What was particularly good about those records was that they were available for the children and grandchildren of the people who had been looked after, and yet the children and grandchildren knew nothing about them. They had access to the records of an individual in their family that told the story of their family’s life. In the more general scheme of things, it is important that everyone is given that opportunity. All those who are involved in record keeping have to ensure that their records are maintained to the same professional standard.

We will support the bill at stage 1. I look forward to hearing the minister’s comments on some of the more informed contributions that committee members made.

15:36

Elizabeth Smith (Mid Scotland and Fife) (Con): It is only a few weeks since the Parliament passed the Historic Environment (Amendment) (Scotland) Bill, at which time the view in the chamber on the importance of preserving and enhancing the very precious fabric of the nation’s heritage was unanimous. During that debate, there was considerable discussion on the need to ensure that we preserve all that is best for future generations; so too is that the central principle behind the bill that we debate this afternoon.

Good-quality and accessible public records and archives are an essential part of improving the welfare of society in general, if not also the democracy about which Sandra White spoke in her reference to common good funds. If I may be allowed to say so, she made a very good point in that regard. It is fair to say that records can make a life-changing difference to individuals and families; that point was made forcibly to the committee on several occasions.

While the main driving force for the bill was the very unsatisfactory circumstances that affected many of our most vulnerable people, particularly those whose cases were flagged up by the historic abuse systemic review, there are other important reasons why we must do something to improve things. I refer in particular to the need to create greater efficiency, spread good practice and keep costs to a minimum. No one doubts the need to do that if we are to ensure more of a level playing field across the country and if we are to avoid the gaps in our knowledge that poor record keeping—or, indeed, in some cases, no record keeping—can bring about. I think that we all accept that organisations that receive public money have an obligation to ensure that records are kept properly and that they are accessible and transparent.

That said, there is still a debate to be had on striking the right balance between ensuring greater efficiency and not imposing too much of a regulatory burden on bodies and including more of them under the wider net of officialdom. As the minister rightly said, we need to keep the debate in perspective. We need to remember that the debate is on how to improve the management of records, not on what records are, or are not, included under the remit of public bodies. The latter debate might, understandably, arouse even more controversy.

I heard the exchanges about the voluntary sector, in particular the exchange between the minister and Claire Baker. I, too, have concerns about the voluntary sector. These are organisations without which Scotland would be a much poorer place, particularly when it comes to looking after our most vulnerable people. I fully understand what the minister said on the subject, and I am grateful to her for her reassurances, but we must take on board the fact that the sector is under not only huge financial pressure, but legislative pressure. We must take cognisance of the pressures that the sector is under. It would be a great pity if some people felt obliged to move away from the voluntary sector because of those burdens.

My biggest concern was about the evidence from some voluntary sector groups that they could find no compelling evidence of a major issue with their existing processes and that the new legislative framework could be not only unnecessary but burdensome and time consuming for staff who have many other tasks to do, particularly when budgets are tight, which applies not just in a recession. Those concerns raised
serious issues for me, which the minister has given an assurance will be addressed at stage 2.

Linked to that is the genuine concern, which some members have mentioned, about a tendency to overimplement the bill, because of the mindset these days that we must do that. I would be concerned if workloads increased as a result, so it was good to hear the minister’s reassurance on that.

Everyone is sympathetic to the former residents of children’s homes and special schools and to their families, who have had immense difficulty in accessing the records that they require. We appreciate the emotional issues that have resulted from sometimes harrowing experiences. It is clear that those difficulties present a strong case for change and for addressing many of the inconsistencies in records management across Scotland, but it is vital that we as parliamentarians scrutinise properly all the effects of making the process legislative rather than voluntary. We are happy to support the bill’s principles.

15:41

Ken Macintosh: In my opening speech, I suggested that the bill involved three main areas of contention, all of which have been touched on. They are questions about costs and priorities; the amount of bureaucracy in implementing the bill; and the need to approach risk proportionately.

On costs and priorities, as Karen Whitefield and the minister said, many organisations have good records management systems in place and will not be unduly affected by the bill. However, it is clear that practice is inconsistent across Scotland, hence the bill’s introduction.

Ted Brocklebank highlighted COSLA’s estimate that some organisations could face costs of up to £60,000 each to implement the bill.

Fiona Hyslop: That is possibly a misunderstanding. In the background to the bill, £60,000 is the cost to the keeper and the public expense that will accrue to the Scottish Government. We are not saying that expense will not be incurred if organisations have to employ new people, but many organisations already employ people who will be able to undertake the functions. Perhaps the position has been misunderstood; I just wanted to clarify it.

Ken Macintosh: I welcome the minister’s comments. The point is that people lack certainty and that additional cost might be incurred by some organisations and particularly by voluntary organisations that have few resources. When the voluntary sector and public authorities are losing staff and cutting services, do we really want to divert resources away from front-line services to improving record keeping?

The committee heard the alternative argument that good records management can be cost-effective and can save money in the long term. However, we should be in no doubt that, if we decide to make good records management a legislative requirement, we will give it a priority among the many other duties that are expected of local authorities and voluntary organisations. By definition, that will have some impact on the services that they provide.

The voluntary sector’s concern about bureaucracy was a point well made in its evidence. Many voluntary organisations work in multiple local authority areas. Their concern is that those councils will offload all their responsibilities on their contractors. Voluntary sector organisations will face multiple records management plans in each local authority area in which they work. An organisation such as Barnardo’s already has a thorough and reliable records management system—it takes that duty seriously. Instead of having one centralised, effective, efficient and credible RMP, it could end up with 32 RMPs. Barnardo’s gave a couple of examples in relation to that in its written evidence, which said:

“A clear example of the result of not giving a common model was in the development of single shared assessments by local authorities several years ago ... The result was that every authority interpreted the guidance differently and produced quite different assessment documents and processes ... in some authorities multiple versions of the single shared assessment existed within care groups.”

That is a potential problem, although it can be tackled. It involves not just consultation but genuine engagement between Government, the keeper of the records, public authorities and the voluntary sector.

I wish to expand on that point about the need for genuine engagement, rather than just consultation. COSLA has made a number of recommendations, of which I will highlight two in particular. COSLA said:

“the Keeper should be required to go further than hold ‘consultations’ or consult on guidance and other related issues. More constructive outcomes will be achieved if the Keeper ‘engages with and has regard to’ stakeholders - the process of engagement is key’.

COSLA further suggested:

“it is not appropriate for the Keeper to require groups of authorities to have a common plan. This top-down approach undermines local autonomy and decision-making ... It is COSLA’s strong view that the legislation should remain enabling rather than giving the Keeper powers to require groups of authorities to have a common plan with all the ... unintended consequences which that would bring.”
I would welcome the minister’s comments on both those recommendations. Clearly, they could lead to amendments, and I would like to hear the minister’s views before we reach stage 2.

The matter of risk and proportionality was well covered at committee. The SCVO addressed the issue in its written evidence. It stated:

“There is an apparent lack of proportionality and no mechanism to relate the new system to levels of risk – while the original issue of poor record keeping related to looked after children, the solution is now to cover any and all public functions, and any voluntary sector organisation that is performing the functions of a public authority.”

Karen Indoo gave a particularly good example in her evidence to the Education, Lifelong Learning and Culture Committee. She said:

“In our organisation and others that I have worked with in the care sector over the years, professionals would become focused on ensuring that they are keeping those records appropriately. I can see the potential for front-line staff to be spending more and more time ensuring that they are meeting all the various requirements of the records management policies, and less and less time doing direct work. That would lead to poorer outcomes for the vulnerable people to which the care sector is providing services, rather than improving outcomes.”

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Fiona Hyslop: It is important to make a distinction here, in that the bill would not determine the content of what is kept. In the situation that Ken Macintosh has just described, the question of what is kept, and the ability of people to maintain their efforts in front-line services and in providing the care services, would be determined by the health or care, or other, professionals, not by what is in the records management plan.

Ken Macintosh: Indeed. I appreciate that—the minister gave that assurance at committee—but the point that Karen Indoo and several people in the voluntary sector have made is that the focus of an organisation will be on keeping whatever is demanded of them, rather than on providing the service. They will be more concerned with keeping a record, so that they are accountable for it, rather than delivering the service.

There is also a concern about what is kept. The joint submission of evidence from the children’s organisations showed that they are worried

“that RMPs will ... be drawn too broadly by public bodies in an attempt to ensure that there can be no possible danger that a public authority could fail to ensure the recording and retention of potentially relevant data.”

In other words, there is an issue around risk aversion. As the minister knows, that goes against the direction of travel of Government policy—it goes against the Crerrar review and against the UK Government’s report, “Common Sense Common Safety”. It is too easy to dismiss that by saying, “Yes, yes, it’ll be all right.” We need engagement between the committee, the minister and the voluntary sector.

I hope that, together, we can address the concerns that have been expressed. Strong arguments have been made, including by Professor Harvie, and Ted Brocklebank’s point about the land of Scotland was a good one. There are many reasons why we should have the proposed legislation, and there is genuine consensus, as long as we can address the clear concerns that have been expressed.

15:49

Fiona Hyslop: I thank all those members who have spoken in this thoughtful debate. I will try to address as many of the issues that have been raised as I can.

The bill is essentially a simple one—it is about improving the management of public record keeping. Records form an important part of our lives, but we tend to ignore them until something goes wrong.

The origins of the bill lie in Tom Shaw’s report, which shows precisely what the impact is when record keeping goes wrong and why the bill is important and necessary. Many members have reflected on that. Hugh O’Donnell alluded to the fact that records are about people’s lives, and if records are not kept and dealt with properly there can be a human cost.

The bill was supported by the lead committee, which agreed that Tom Shaw’s report and the experiences of former residents of care homes and residential schools in trying to trace their records formed a persuasive argument that legislation is required, and that a voluntary scheme, which is effectively what we have now, would not address known deficiencies.

The bill will fully complement existing regulatory requirements, many of which relate to which records should be kept; that is the point I made to Ken Macintosh. Tom Shaw pointed out to the committee the need for organisations to evidence whether they have delivered services properly to individuals, and the bill will provide for that.

Claire Baker and other members made the point about the need for accountability with regard to public funds, and a number of members noted the points that COSLA raised. We have been engaging with COSLA, and we will continue to do so. There are issues around the keeper’s role in producing the model plans and guidance, and we will try to ensure that by stage 2 we have enough assurances that there will be consultation and engagement. We can look at the wording on that, and ensure that we have regard to it in any consultation.
The bill is not a one-size-fits-all approach: different sectors will have different records management plans based on sector needs and their assessment of the risks that they face. It is for the professionals in the sectors—in child care, policing, health and other areas—to make those decisions within an overall management framework provided by the bill. For example, I would not expect the National Museums of Scotland, although they would be operating in the same regulatory scheme, to have records management plans similar to those of child care providers.

The Scottish Parliament is named in the bill to give an assurance of the memory of democracy in Scotland; we would expect archiving and responsible management from the Parliament, and I am sure that it has an effective records management plan in place as we speak.

Ian McKee touched on the important aspects of health and patient records. Although much of the debate has focused on provisions that relate to child care, which are the source of the concern that Tom Shaw expressed in his report, it has been quite wide ranging with regard to the areas in which the bill will have an impact.

Policies and procedures for the management of patient records in the NHS are well established. The keeper was involved in the development of the NHS code of practice on records management, and we are seeking to do that for other areas. We would not expect any change to the records management process in that area, precisely because strong procedures have been developed.

Some members, including Ted Brocklebank and Sandra White, have asked why the bill does not identify specific types of important records. Sandra White mentioned the issue of common good assets, which was raised with the committee. I am pleased that the Cabinet Secretary for Finance and Sustainable Growth is sitting beside me at this point, because the guidance that he issued in 2007 is important in terms of what people are expected to keep. I am sure that there is a common expectation that local authorities should keep records of such assets.

However, as I emphasised in my earlier remarks—and as the committee’s report reflects—the content of records is a matter for the authorities, and it would not be appropriate to deal with and define a procedure for common good assets in the bill.

I return to Ted Brocklebank’s point about which records are kept. There are different ways of dealing with that. We could, in the next session of Parliament, introduce a uniform bill that lists the records that should be kept, but we should perhaps consider individual pieces of legislation. For example, the issue of land management, which Ted Brocklebank raised, could be dealt with in that way. With regard to children, the Looked After Children (Scotland) Regulations 2009 already specifies that records should be kept for 25 years, so that issue is being kept under that piece of legislation.

Claire Baker highlighted the need for the keeper to consult public bodies in preparing the model plan and guidance. I give her an assurance that we will seek to address that and see what we can do at stage 2.

Chris Harvie made the important point that the bill is not just about child care, and he gave an interesting analogy with transport records and noted the ability to save money if one knew what existed already. He mentioned future proofing, which is one of the reasons why the public records definition is as it is. We do not know in what shape or form, or diskette, we will find public records in the future, so it is important that we have a broad definition that allows future proofing.

To sum up, the bill cannot put right what went wrong in the past, but it can help us to avoid the same problems in the future. We owe it to former residents of care homes and schools and survivors of abuse—indeed, to all future generations in this country—to make the necessary improvements to the way in which public authorities deal with records. In that way, we can safeguard people’s rights and their identities as individuals, and secure our collective memory.

Scotland has been operating under a public records act that is now over 70 years old. While it remains relevant, that legislation needs updating to carry us through into the modern records and information age.

The improvements to record keeping that are enshrined in the bill will address the problems that Shaw and the Kerelaw inquiry identified and provide a solid framework within which to improve records management in public authorities for many years to come.

Karen Whitefield referred to dialogue that currently takes place; I confirm that that will continue. I agree with Karen Whitefield and others that bodies that are in receipt of public funding should keep records properly. She, Ken Macintosh and Alasdair Allan made the point about accountability. That is another aspect. However, the moral imperative that brings us to the Parliament on the issue cannot be forgotten.

I am pleased to have the Parliament’s support in going forward, and I seek to work constructively with the committee at stage 2.
Education, Lifelong Learning and Culture Committee

Public Records (Scotland) Bill

Scottish Government response to Stage 1 report

I am writing in response to the Education Lifelong Learning and Culture Committee’s Stage 1 Report on the Public Records (Scotland) Bill. I would like to thank the Committee for its careful consideration of the Bill.

I am very pleased that the Committee has agreed that legislation is more likely to successfully improve record keeping than a voluntary route and that it recognises the importance of the Bill, particularly in relation to vulnerable people. I welcome the fact that Committee recommended that the general principles of the Bill should be agreed to by Parliament and that there was unanimous support by members for its principles following the Stage 1 debate.

I would like to respond in more detail to the specific issues raised by Committee members and the recommendations made by the Report. I am also taking the opportunity to respond to points raised by members in the Stage 1 debate and to give some advance notice of government amendments which will be lodged later in the week. My comments below follow the main headings in the Report.

A “One Size Fits All” Approach

The Committee expressed the hope that my reassurance on the use of different records management plans (RMPs) across different sectors would help to mitigate some of the concerns felt by some public authorities about the level of obligation the Bill would place on them (paragraph 47). The Committee saw this as important for those authorities who do not hold records of a particularly sensitive or personal nature. Mr Macintosh, Ms Baker and Mr Allan raised this point during the Stage 1 debate with regard to differentiation between high and low risk records.

The Bill places an obligation on the named authorities listed in the schedule to produce and implement a RMP. This will take account of all the records created and held by the authority and will allow the authority to make specific provision for categories of records, for example by means of a retention schedule. That would set out how long categories of records should be retained, how they should be disposed of, and policies relating to the security and confidentiality of categories of records.

These are decisions for the authority to make based on any sectoral legislation or guidance and its own analysis of risk. As I indicated during the Stage 1 debate, while the Bill places an obligation on the Keeper to provide guidance on the form and content of RMPs, it is for the professionals in the sectors, in child care, policing, health and the other areas, to make these decisions, within an overall management framework.
provided by this Bill. The Keeper will then approve individual RMPs if they make proper arrangements for the management of the records they cover.

This approach was supported by Tom Shaw, who in his evidence to Committee repeated his recommendation on the need for the Bill to cover all public records, and for organisations to evidence whether they have delivered services properly.

The Stage 1 Report urges that the legislation should be in the interests of service users. I agree completely. The Bill aims to create a standard of record keeping across the public sector which will protect the rights of all members of the public by ensuring that information about them and the services they use is managed properly.

To meet the concerns about a “one size fits all” approach, I intend to bring forward amendments at Stage 2 on three points. First is to clarify the point, explained above, that an authority can make different provision for the management of different kinds of public records in its RMP (taking account of, for example, the different levels of risk associated with the management of different kinds of records).

Second, the Bill currently allows the Keeper to require authorities to have more than one RMP relating to separate functions if this is appropriate. I intend to bring forward an amendment to allow authorities to decide to do this themselves, with the Keeper’s approval.

Third, I intend to bring forward an amendment which will make it clear that the Keeper will take the nature of the particular authority and of its records into account when deciding whether to approve a plan. This will mean that he will not be able to ignore the judgements made by an authority about risk and impose a ‘one size fits all’ model.

Paragraph 48 of the Report notes that it would not be appropriate for the list of public authorities in the Bill to mirror those listed in schedule 1 to the Freedom of Information (Scotland) Act 2002 (FOISA). During my evidence to Committee on 19 January, when responding to a question on this subject from Mr Allan, I said I would come back to the Committee on that point. I would now like to take the opportunity to provide some clarification.

The focus of FOISA is on information rather than records. It is therefore very different to this Bill. FOISA covers some 10,000 public authorities. It is our stated intention that this Bill should be light touch. To adopt the FOISA schedule would be disproportionate to that policy and place an unnecessary burden on some authorities who need not be included under the Bill’s provisions. Use of the wider FOISA schedule would also have imposed an additional burden on the Scottish Government to administer it.

The focus therefore is on those record creators who are most closely associated with central government including agencies and other public bodies. It also includes the courts and local authorities as major record creators who have direct responsibility for records about vulnerable people. Section 2 of the Bill allows the list of authorities to be
amended by Order so there is scope to expand the list to include additional authorities if that is considered appropriate at a later date. Such an Order would be subject to affirmative procedure.

Obligations on Contractors

Paragraph 68 of the report recommended that the Scottish Government give further consideration to the issues surrounding obligations on contractors before Stage 2. I note the Committee’s concerns that the Bill might place an administrative burden on contractors and that public authorities might “over-implement” their obligations under a records management plan.

The Committee noted that the failures in record keeping within local authorities and the voluntary sector, as identified by the Shaw Report, were the main drivers behind the Bill. The inclusion of the voluntary sector is essential to address a key recommendation by the Shaw Report.

The Bill will only affect voluntary bodies to the extent that they carry out functions on behalf of public authorities. The Bill does not place obligations directly onto contractors, nor does it give authorities any power to force contractors to do anything. The onus is on public authorities to ensure that records created and held by contractors in relation to functions carried out on behalf of the authority are managed in accordance with the authority’s own RMP.

The intention behind the Bill is to ensure that public authorities can satisfy themselves that contractors are managing records correctly. This would most likely be dealt with in the contract between them which will set out the arrangements for record keeping.

The Keeper will wish to see evidence in an authority’s RMP that it has a policy in place for dealing with the records of its contractors. Any plan which includes unreasonable policies will not be approved by the Keeper as it does not constitute “proper arrangements” for managing the records.

My officials are continuing to engage with COSLA and the voluntary sector to discuss their concerns and will work with them throughout the implementation of the legislation to put together guidance on dealing with contractors’ records. This will minimise the possibility of over-implementation by ensuring authorities understand the purpose behind the Bill. Ms Baker and Mr Macintosh both stressed the need for genuine engagement during the Stage 1 debate.

To reinforce these points, I plan to bring forward amendments at Stage 2 to provide assurance that the Keeper will consult with authorities in the preparation of guidance and the model RMP. I also intend to bring forward further amendments to section 5 of the Bill to limit the Keeper’s scope to require authorities to carry out reviews of their RMPs.
Costs

The Committee noted that there is insufficient evidence to identify accurately the overall costs of establishing an appropriate records management system under the Bill. This is very much dependent on existing practices.

I agree that engagement and sharing of good practice will be crucial to achieving the improvements to record keeping that we are seeking with the Bill. Costs to the Keeper have been factored into the Financial Memorandum and will be met from within existing resources. Two dedicated members of staff will work with stakeholders and bring together authorities to assist each other. This will help to keep down costs to authorities and contractors and mean no organisation will be left to manage implementation of the legislation on their own. Officials will continue to work with authorities during the implementation phase to disseminate guidance and ensure that existing best practice is shared.

Common Good Assets

I am pleased that the Committee agree that it is not appropriate to place a statutory requirement in the Bill for local authorities to create registers of common good assets (paragraph 83). I accept the Committee’s suggestion that local authorities’ RMPs should include information on records relating to these assets which they already create and hold. This issue was also raised at the Stage 1 debate by Ms White.

As they are created and held by a public authority, the records of common good assets are already public records under section 3(1)(a) of the Bill. Records management plans prepared under the Bill will include retention and disposal schedules, and these should make provision for records of common good assets.

Work is currently underway by the Scottish Council on Archives (SCA) to produce generic retention and disposal schedules for local authority records. My officials have begun discussions with SCA to include information on records of common good assets. Scheduling will be an important part of sectoral guidance which the Keeper will be keen to highlight.

Scottish Government Consultation

I note the Committee’s regret at the restricted time available for formal consultation on the Bill (paragraph 90). This was driven by the requirements of the tight Parliamentary timetable. I would however like to reassure the Committee that my officials are strongly committed to consultation and engagement with COSLA and the voluntary sector throughout the remaining passage of the Bill and during implementation.

I also intend to bring forward amendments at Stage 2 to meet other concerns raised by stakeholders and by members in Committee and the Chamber. These will:
• emphasise the firm policy intention that the Keeper will consult closely with public authorities and other stakeholders in the preparation and approval of RMPs and guidance;
• meet concerns about the level of the Keeper’s powers by obliging him to take additional matters into account when approving or rejecting RMPs;
• adjust the language of the Bill to emphasise the policy aim of partnership and encouraging self-improvement rather than government dictating solutions.

I also intend to bring forward an amendment in Part 2 of the Bill to address a minor technical concern in relation to records of the Scottish courts.

Conclusion

I hope that these remarks address the issues raised in the Stage 1 Report and are helpful in your further consideration of the Bill. I am keen to see legislation which achieves the improvements in record keeping which we have all agreed are necessary, but with the least possible impact on the resources of public authorities and contractors. The Stage 1 debate on 10 February showed strong cross-party support for the principles of the Bill, but with concerns about contractor records and the details of implementation. I am confident that with the amendments I propose to bring forward at Stage 2, and the continued dialogue with COSLA, the voluntary sector and other stakeholders, we will reach a satisfactory resolution to these concerns.

Fiona Hyslop
Minister for Culture and External Affairs
18 February 2011
Public Records (Scotland) Bill

Marshalled List of Amendments for Stage 2

The Bill will be considered in the following order—

Sections 1 and 2 Schedule
Sections 3 to 16 Long Title

Amendments marked * are new (including manuscript amendments) or have been altered.

Section 1

Elizabeth Smith

29 In section 1, page 1, line 10, leave out <approval> and insert <agreement>

Elizabeth Smith

30 In section 1, page 1, line 12, leave out <approved by> and insert <agreed with>

Fiona Hyslop

1 In section 1, page 1, line 24, at end insert—

<(  ) An authority’s records management plan may make different provision for the management of different kinds of public records (taking account, for example, of the different levels of risk associated with the management of different kinds of records).>

Ken Macintosh

31 In section 1, page 1, line 26, at end insert <including information on how such plans will relate to functions delivered on behalf of authorities by contractors.>

Fiona Hyslop

2 In section 1, page 1, line 26, at end insert—

<(  ) The Keeper may issue different guidance under subsection (3) in relation to different authorities.>

(  ) Before issuing guidance under subsection (3), the Keeper must—

5 (a) consult the following on a draft of the guidance, namely—

  (i) such authorities as the Keeper considers will be affected by the guidance, and

  (ii) such other persons (if any) as the Keeper considers appropriate, and

(b) have regard to any views expressed in response to the consultation.>
Ken Macintosh

2A As an amendment to amendment 2, line 7, leave out <and> and insert—

   <( ) such bodies representing contractors as the Keeper considers will be
   affected by the guidance, and>

Elizabeth Smith

32 In section 1, page 1, line 28, leave out <the Keeper’s approval> and insert <agreement with the Keeper>

Elizabeth Smith

33 In section 1, page 2, line 1, leave out <must, if the Keeper so requires> and insert <may, with the agreement of the Keeper>

Fiona Hyslop

3 In section 1, page 2, line 1, after <requires,> insert <or

   (b) may, with the Keeper’s approval,>

Elizabeth Smith

34 In section 1, page 2, line 4, leave out lines 4 and 5 and insert <may, with the agreement of the Keeper,>

Ken Macintosh

35 In section 1, page 2, line 7, at end insert <or separate functions of those authorities if required under subsection (5)>

Section 3

Ken Macintosh

36 In section 3, page 3, line 15, leave out <subsection (1)> and insert <this Part>

Elizabeth Smith

37 Leave out section 3

Section 4

Elizabeth Smith

38 In section 4, page 3, line 20, leave out <approval> and insert <agreement>

Ken Macintosh

39 In section 4, page 3, line 21, leave out <the Keeper may determine> and insert <to comply with the guidance issued under section 1(3)>
In section 4, page 3, line 24, leave out <approve> and insert <agree>

Elizabeth Smith

In section 4, page 3, line 26, leave out <reject> and insert <return>

Elizabeth Smith

In section 4, page 3, line 27, leave out subsection (4)

Ken Macintosh

In section 4, page 3, line 27, leave out <for the Keeper to determine> and insert <to be determined in the guidance issued under section 1(3)>

Elizabeth Smith

In section 4, page 3, line 28, leave out <approve or reject> and insert <agree or return>

Fiona Hyslop

In section 4, page 3, line 31, at end insert—

<( ) the nature of the authority and its public records, and
( ) any representations made by the authority.>

Fiona Hyslop

In section 4, page 3, line 31, at end insert—

<( ) Where the Keeper is considering rejecting the proposed plan, before deciding whether to do so, the Keeper must—
(a) notify the authority—
   (i) that the Keeper is considering rejecting the proposed plan, and
   (ii) of the reasons for doing so,
(b) give the authority an opportunity to make representations, and
(c) have regard to any representations made by the authority.>

Elizabeth Smith

As an amendment to amendment 5, line 2, leave out <rejecting> and insert <returning>

Elizabeth Smith

As an amendment to amendment 5, line 5, leave out <rejecting> and insert <returning>

Elizabeth Smith

In section 4, page 3, line 32, leave out <rejects> and insert <returns>
Elizabeth Smith

46 In section 4, page 3, line 34, leave out <rejection> and <return>

Elizabeth Smith

47 In section 4, page 3, line 36, leave out <approval> and insert <agreement>

Section 5

Elizabeth Smith

48 In section 5, page 4, line 6, leave out <approval> and insert <agreement>

Fiona Hyslop

6 In section 5, page 4, line 8, after <determine> insert <in accordance with subsections (1A) to (1C)>

Fiona Hyslop

7 In section 5, page 4, line 8, at end insert—

<(1A) The Keeper must not determine a review date under subsection (1)(b) which is earlier than five years after the date on which the authority’s records management plan was last approved.

(1B) In subsection (1A), reference to the plan being approved includes—

(a) approval of the plan under section 4,
(b) if the authority has been required to carry out a review of the plan under subsection (1)(b) of this section or section 6(3)(b), approval of the revised or, as the case may be, resubmitted plan, and
(c) if the authority has submitted a revised plan under subsection (3) of this section, approval of the revised plan.

(1C) If—

(a) the Keeper has determined a review date under subsection (1)(b) in relation to a plan, and
(b) before that date, the Keeper approves—

(i) a revised plan submitted by the authority under subsection (3), or
(ii) if the authority has been required to carry out a review of the plan under section 6(3)(b), a revised or, as the case may be, resubmitted plan,
the Keeper must determine a new review date and inform the authority of the new review date.>

Elizabeth Smith

7A As an amendment to amendment 7, line 4, leave out <approved> and insert <agreed>
Elizabeth Smith

7B As an amendment to amendment 7, line 6, leave out <approval> and insert <agreement>

Elizabeth Smith

7C As an amendment to amendment 7, line 8, leave out <approval> and insert <agreement>

Elizabeth Smith

7D As an amendment to amendment 7, line 11, leave out <approval> and insert <agreement>

Elizabeth Smith

7E* As an amendment to amendment 7, line 15, leave out <approves> and insert <agrees>

Elizabeth Smith

49 In section 5, page 4, line 11, leave out <approval> and insert <agreement>

Elizabeth Smith

50 In section 5, page 4, line 13, leave out <approval> and insert <agreement>

Elizabeth Smith

51 In section 5, page 4, line 15, leave out <approval> and insert <agreement>

Elizabeth Smith

52 In section 5, page 4, line 17, leave out <approval> and insert <agreement>

Elizabeth Smith

53 In section 5, page 4, line 18, leave out <approval> and insert <agreement>

Elizabeth Smith

54 In section 5, page 4, line 20, leave out <approval> and insert <agreement>

Section 6

Fiona Hyslop

8 In section 6, page 4, line 25, leave out <compliance> and insert <records management>

Ken Macintosh

55 In section 6, page 4, line 27, leave out <the Keeper may require> and insert <is reasonable>

Fiona Hyslop

9 In section 6, page 4, line 28, leave out <compliance> and insert <records management>
Fiona Hyslop
10 In section 6, page 4, line 29, leave out <compliance> and insert <records management>

Fiona Hyslop
11 In section 6, page 4, line 39, leave out <compliance> and insert <records management>

Section 7

Fiona Hyslop
12 In section 7, page 5, line 7, leave out <a “warning> and insert <an “action>

Fiona Hyslop
13 In section 7, page 5, line 9, at end insert—

<( ) Where the Keeper is considering issuing an action notice to an authority, before deciding whether to do so, the Keeper must—

(a) notify the authority—

(i) that the Keeper is considering issuing an action notice, and

(ii) of the reasons for doing so,

(b) give the authority an opportunity to make representations, and

(c) have regard to any representations made by the authority.>

Fiona Hyslop
14 In section 7, page 5, line 10, leave out <warning> and insert <action>

Fiona Hyslop
15 In section 7, page 5, line 11, leave out <warning> and insert <action>

Section 8

Ken Macintosh
56 In section 8, page 5, line 14, at end insert <which must cover the relationship between an authority’s records management plan and that of a contractor carrying out the authority’s functions.>

Fiona Hyslop
16 In section 8, page 5, line 14, at end insert—

<( ) Before publishing the model records management plan under subsection (1), the Keeper must—

(a) consult the following on a draft of the plan, namely—

(i) each authority, and
(ii) such other persons (if any) as the Keeper considers appropriate, and
(b) have regard to any views expressed in response to the consultation.>

Ken Macintosh

16A As an amendment to amendment 16, line 5, leave out <and> and insert—
<( ) bodies representing contractors, and>

Elizabeth Smith

57 In section 8, page 5, line 16, leave out <approval> and insert <agreement>

Fiona Hyslop

17 In section 8, page 5, line 19, at end insert—
<( ) Before publishing a revised model plan under subsection (3), the Keeper must—
(a) consult the following on a draft of the plan, namely—
(i) such authorities as the Keeper considers will be affected by the revisals to the plan, and
(ii) such other persons (if any) as the Keeper considers appropriate, and
(b) have regard to any views expressed in response to the consultation.>

Ken Macintosh

17A As an amendment to amendment 17, line 5, leave out <and> and insert—
<( ) such bodies representing contractors as the Keeper considers will be affected by the revisals to the plan, and>

Section 9

Fiona Hyslop

18 In section 9, page 5, line 23, at end insert—
<( ) The Keeper may issue different guidance under subsection (1) in relation to different authorities.
( ) Before issuing guidance under subsection (1), the Keeper must—
(a) consult the following on a draft of the guidance, namely—
(i) such authorities as the Keeper considers will be affected by the guidance, and
(ii) such other persons (if any) as the Keeper considers appropriate, and
(b) have regard to any views expressed in response to the consultation.>

Ken Macintosh

58 Leave out section 9
After section 9

Fiona Hyslop

19 After section 9, insert—

<Application of Part 1 in relation to sheriff court records and JP court records>

(1) This section applies in relation to the public records of a sheriff court or a justice of the peace court.

(2) The Sheriff Principal of the sheriffdom in which the court is located is responsible for carrying out the authority’s functions under this Part in relation to such public records.

(3) Accordingly, in relation to such public records, a reference in this Part to an authority (other than in section 3) is to be read as a reference to the Sheriff Principal.

Section 11

Elizabeth Smith

59 In section 11, page 6, line 7, leave out <approved by> and insert <agreed with>

Fiona Hyslop

20 In section 11, page 6, line 8, leave out <compliance> and insert <records management>

Fiona Hyslop

21 In section 11, page 6, line 10, leave out <warning> and insert <action>

Fiona Hyslop

22 In section 11, page 6, line 12, leave out <a warning> and insert <an action>

Section 12

Fiona Hyslop

23 In section 12, page 6, line 21, leave out <compliance> and insert <records management>

Fiona Hyslop

24 In section 12, page 6, line 31, leave out <warning> and insert <action>

Section 13

Fiona Hyslop

25 In section 13, page 6, line 35, at end insert—

<( ) sections 2(3) and 2A(4) of the Public Records (Scotland) Act 1937 (c.43) (care and preservation of sheriff court and JP court records),>
Section 14

Fiona Hyslop
26 In section 14, page 7, leave out lines 17 to 22 and insert—
   <( ) in subsection (4), for “subsections (1) and (3)” substitute “subsection (1)”.>

Fiona Hyslop
27 In section 14, page 7, leave out lines 28 to 33

Long Title

Fiona Hyslop
28 In the long title, page 1, line 2, leave out <court records> and insert <the transmission of court records to the Keeper of the Records of Scotland>
Public Records (Scotland) Bill

Groupings of Amendments for Stage 2

This document provides procedural information which will assist in preparing for and following proceedings on the above Bill. The information provided is as follows:

- the list of groupings (that is, the order in which amendments will be debated). Any procedural points relevant to each group are noted;
- the text of amendments to be debated during Stage 2 consideration, set out in the order in which they will be debated. THIS LIST DOES NOT REPLACE THE MARSHALLED LIST, WHICH SETS OUT THE AMENDMENTS IN THE ORDER IN WHICH THEY WILL BE DISPOSED OF.

Groupings of amendments

“Agreement” and “return” of plans rather than “approval” and “rejection”
29, 30, 32, 38, 40, 41, 42, 44, 5A, 5B, 45, 46, 47, 48, 7A, 7B, 7C, 7D, 7E, 49, 50, 51, 52, 53, 54, 57, 59

Notes on amendments in this group
Amendment 42 pre-empted amendment 43 in the group “Preparation and content of guidance and model plan, including application of plans to contractors”

Records management plans: different provisions for different records
1

Preparation and content of guidance and model plan, including application of plans in relation to contractors
31, 2, 2A, 36, 39, 43, 56, 16, 16A, 17, 17A, 18, 58

Notes on amendments in this group
Amendment 43 is pre-empted by amendment 42 in the group “Agreement” and “return” of plans rather than “approval” and “rejection”

Records management plans: separate plans and common plans
33, 3, 34, 35

Meaning of “public records”
37

Approval and rejection of plans
4, 5
Review dates
6, 7

Terminology: “records management reviews” and “action notices”
8, 9, 10, 11, 12, 14, 15, 20, 21, 22, 23, 24

Keeper’s assistance in compliance reviews
55

Action notices: right of authority to make representations
13

Court records
19, 25, 26, 27, 28
EDUCATION, LIFELONG LEARNING AND CULTURE COMMITTEE

EXTRACT FROM THE MINUTES

7th Meeting, 2011 (Session 3)

Wednesday 2 March 2011

Present:

Alasdair Allan
Kenneth Gibson (Deputy Convener)
Christina McKelvie
Margaret Smith

Claire Baker
Ken Macintosh
Elizabeth Smith
Karen Whitefield (Convener)

Also present: Fiona Hyslop MSP (Minister for Culture and External Affairs) (item 1)

Public Records (Scotland) Bill: The Committee considered the Bill at Stage 2 (Day 1).

The following amendments were agreed to (without division): 29; 30; 1, 2, 32, 3, 40, 41, 44, 4, 5A, 5B, 5, 45, 46, 47, 48, 6, 7A, 7B, 7C, 7D, 7E, 7, 49, 50, 51, 52, 53, 54, 8, 9, 10, 11, 12, 13, 14, 15, 16, 57, 17, 18, 19, 59, 20, 21, 22, 23, 24, 25, 26, 27 and 28.

The following amendments were moved and, with the agreement of the Committee, withdrawn: 31, 33, 37 and 55.

The following amendments were not moved: 2A, 34, 35, 36, 38, 39, 42, 43, 56, 16A, 17A and 58.

Sections 2, 3, 10, 15 and 16 were agreed to without amendment.

Sections 1, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14 and the long title were agreed to as amended.

The Committee completed Stage 2 consideration of the Bill.
Scottish Parliament

Education, Lifelong Learning and Culture Committee

Wednesday 2 March 2011

[The Convener opened the meeting at 10:38]

Public Records (Scotland) Bill: Stage 2

The Convener (Karen Whitefield): I open the 7th meeting in 2011 of the Education, Lifelong Learning and Culture Committee. I remind all those present that mobile phones and BlackBerrys should be switched off for the duration of the meeting.

The first item on our agenda is the committee’s consideration of the Public Records (Scotland) Bill at stage 2. First, I apologise to the Minister for Culture and External Affairs and to her officials for keeping them waiting and for the late start to the committee. I am pleased to welcome to the committee Fiona Hyslop, the Minister for Culture and External Affairs. Ms Hyslop is joined by George MacKenzie, who is the keeper of the records of Scotland, and Bruno Longmore, who is the bill team leader, from the National Archives of Scotland. They are joined by Lindsey Henderson, who is a principal legal officer for the Scottish Government, and by Willie Ferrie from the office of the Scottish parliamentary counsel. I thank you all for your attendance.

Section 1—Records management plans

The Convener: Amendment 29, in the name of Elizabeth Smith, is grouped with amendments 30, 32, 38, 40 to 42, 44, 5A, 5B, 45, 46 to 48, 7A to 7E, 49 to 54, 57 and 59. I draw members’ attention to the pre-emption information on the list of groupings.

Elizabeth Smith (Mid Scotland and Fife) (Con): I am pleased to speak to what I consider to be probing amendments. I do so following one or two concerns that I had at stage 1 and the representations that some voluntary sector groups and the Convention of Scottish Local Authorities have made to me since that time, although I also state my support for the main principles of the bill and for the Scottish Government’s desire to ensure that there is improved record keeping across Scotland, which will best be achieved by more transparent, democratic and efficient means of storing relevant information.

Although I believe that those principles are central to the Scottish Government’s thinking, I would like further assurance—especially in respect of situations in which it has been proved that potential difficulties exist because there has been either an absence of records or ineffective record keeping—that the relationship between the keeper of the records of Scotland and public authorities will be one of mutual agreement, rather than one that may, in certain circumstances, involve a more top-down approach, thus denying the relevant authorities sufficient scope to contribute to the debate about what constitutes best practice. In such situations, it is essential that there is complete clarity about the process and that, through the consultative process, all stakeholders in promoting good record keeping are in total agreement—I have chosen those words carefully—about the way forward. It is imperative that those who are responsible for keeping records are part owners of the process rather than, as they might be in some circumstances, on the receiving end of instructions about how records should be kept. The Scottish Government is probably extremely well intentioned in that respect, but I would like the minister to provide clarification.

I move amendment 29.

Ken Macintosh (Eastwood) (Lab): I speak in support of Elizabeth Smith’s amendments. The key point about the amendments is that they would improve the tone of the bill and strike the right balance between working with the voluntary sector and local authorities, and applying actions or telling them what to do. My reading of the amendments is that, in effect, they will not make much difference, in the sense that they will not limit the power of the keeper or of the Government to improve record keeping, and that they could, therefore, be accepted without difficulty. I would welcome the minister’s comments on that.

The Minister for Culture and External Affairs (Fiona Hyslop): I will respond to all the amendments in the group, with the exception of amendment 42, to which I will return later. Elizabeth Smith has made some important points. I hope that, in my letter to the committee following stage 1, I made it clear that our intention is that authorities should be fully involved in decisions by the keeper, as she suggests.

Continued dialogue with stakeholders throughout the process has resulted in consensus on a number of issues. However, I am aware, as are members of the committee, that the issue of the keeper’s powers to approve and reject an authority’s records management plan has remained a concern, particularly for COSLA.

As has been indicated, the amendments would result in a change in terminology. They would not alter the position of the keeper, who would still need to be content that records management plans that were submitted to him made proper
arrangements for the management of records. If he was not content, he would be able to return them, in accordance with section 4(6).

Elizabeth Smith's amendments are consistent with the spirit of the Government's amendments to the terminology in sections 6 and 7—to which we will come later—in that they, too, change the language of the bill to focus on continuing improvement rather than on failure. To that end, I support her amendments on the change of language. I intend to return at stage 3 with some minor amendments in relation to terminology.

Amendment 42 proposes to delete section 4(4). The amendment does not relate to a change in terminology. Section 4(4) provides that it is for the keeper to determine what constitutes “proper arrangements” in any particular case. If the subsection were removed, the keeper would still have to assess whether a draft records management plan made proper arrangements for the records that it covered. If it did not make such arrangements, he would have to return the plan to the authority under section 4(3)(b), but amendment 42 would remove a provision that makes it clear that the keeper’s judgment of what he considers proper arrangements should be made on a case-by-case basis. That issue came up at stage 1. We do not want a one-size-fits-all proposal.

10:45

Guidance and the model records management plan will be relevant in determining whether a particular plan makes proper arrangements for the records of a particular authority, but guidance alone cannot provide the answer because what is required is a case-by-case judgment. The keeper must also take the individual characteristics of an authority and its records into account when deciding whether the plan that is proposed by the authority will make proper arrangements for its records. That is why amendments 4 and 5, which we will come to later, will require the keeper to take into account the nature of an authority and its records and any representations from the authority when deciding whether to agree or return plans. I think that is what the committee wanted at stage 1. The keeper needs to take both general guidance and individual circumstances into account in making decisions, thereby ensuring there will not be a one-size-fits-all approach. Amendment 42 gives the opposite message and could suggest that a one-size-fits-all approach is appropriate.

I therefore ask Elizabeth Smith not to move amendment 42. However, the amendments on terminology go in the direction that we all want to take.

**Elizabeth Smith:** That is very helpful. We are more or less on the same page. As Ken Macintosh said, it is also a matter of tone. I note what the minister said about amendment 42, which we will come to a bit later.

**Amendment 29 agreed to.**

**Amendment 30 moved—[Elizabeth Smith]—and agreed to.**

**The Convener:** Amendment 1, in the name of the minister, is in a group on its own.

**Fiona Hyslop:** Amendment 1 addresses the issue of how risk should be taken into account in records management planning. It makes it clear that the assessment of risk is primarily a matter for authorities when deciding how to manage their different records.

Section 1(1) places a duty on named public authorities listed in the schedule to prepare records management plans that set out proper arrangements for management of their public records.

Amendment 1 makes it clear that an authority’s records management plan may make different provision for different kinds of public records and that, in doing so, it may take account of the different levels of risk associated with management of different kinds of records. That should be done according to the authority’s own assessment of the risks relating to their management.

For example, every records management plan will include a retention schedule and an information security policy. The retention schedule will set out different periods for how long different categories of records need to be retained—whether they can be destroyed after very short periods or need to be kept for longer. The information security policy will set out the rationale for assigning different security markings for different categories of records, depending on the sensitivity of the information that they contain.

Amendment 1 makes it clear that an authority should take its own decisions about risk and apply them as necessary. For example, an authority will be empowered to assess risks over, say, the loss of records about vulnerable people, as against the lesser risk over the loss of records about the purchase of library books.

Amendment 1 addresses concerns that have been raised by the voluntary sector and COSLA that the bill should focus on records that are considered to be high risk. It recognises, however, that records management plans need to address all of an authority’s records. It allows authorities to use their own expert knowledge when making decisions about different types of records, determining their status and whether different
management regimes might be appropriate. Those decisions could take into account other statutory obligations already in place, such as The Looked After Children (Scotland) Regulations 2009.

I move amendment 1.

**Ken Macintosh:** I welcome amendment 1. The issue raised concern among all members of the committee and our witnesses at stage 1. Although there might be some concern among the voluntary sector that the amendment does not quite go far enough, it is certainly a step in the right direction and we should support it.

**The Convener:** Minister, do you wish to wind up?

**Fiona Hyslop:** No. I just acknowledge that Ken Macintosh and Claire Baker raised the issue at stage 1. One of the reasons why we lodged amendment 1 was to reconcile matters that people had raised.

Amendment 1 agreed to.

**The Convener:** Amendment 31, in the name of Ken Macintosh, is grouped with amendments 2, 2A, 36, 39, 43, 56, 16, 16A, 17, 17A, 18 and 58. I draw members’ attention to the pre-emption information that is also shown in the groupings.

**Ken Macintosh:** I welcome the amendments that the Government has lodged—amendments 2, 16 and 17—which will ensure that the keeper consults widely. That is something that the Convention of Scottish Local Authorities and the voluntary sector in particular will welcome. I am pleased to support the amendments. Amendments 2A, 16A and 17A are designed simply to build on the Government’s amendments by including a duty to consult contractors, which will ensure that voluntary sector bodies are consulted, as well as the local authorities.

It is important that, when the keeper draws up the guidance, he deals not only with the local authorities but with others who may be directly involved. We heard from organisations including Barnardo’s that they already have quite robust systems of record keeping. The guidance that is drawn up must have regard to their systems as well as to the systems of local authorities. Amendments 31 and 56 build on that by suggesting that there should be guidance about the relationship between local authorities and the voluntary sector, which the voluntary sector in particular flagged up. The voluntary sector is concerned that risk-averse local authorities will offload all of their problems onto voluntary sector contractors without taking due regard of their needs. Amendments 31 and 56 suggest that any guidance that is drawn up specifically covers that relationship.

Amendment 36 is simply a consequential amendment that will ensure that the references to contractors are relevant to the whole of part 1, rather than only to one section.

Amendments 39 and 43 will improve the process for submitting plans for agreements and ensure that that is covered by guidance, too.

Amendment 55—sorry, that is for the next section.

**The Convener:** You are jumping ahead of yourself.

**Ken Macintosh:** Indeed.

Amendment 58 would remove section 9. The amendment was suggested because that section is seen as being unnecessary because, if we put in a lot of information about how guidance should be drawn up, we do not need a separate section that deals with it. However, ministers might wish to have the power to add further guidance at a later stage.

I move amendment 31.

**Fiona Hyslop:** Section 1 is important and there are a lot of amendments, so I ask members to bear with me.

The Government amendments in the group address concerns that the keeper should involve authorities and other stakeholders when preparing guidance and the model records management plan. They will require the keeper to consult and to have regard to views that are expressed before issuing those documents.

Amendments 31 and 56, in the name of Ken Macintosh, would add explicit references to contractors’ records in a number of provisions and would limit the keeper’s power in certain areas. I am concerned that some of those references could have unintended consequences and that others could be difficult to work with in practice. I will first address the issues about contractors before addressing the amendments on consultation.

Under section 1(3), the keeper must issue guidance to authorities about the form and content of records management plans. Under section 8, he must also issue a model records management plan. Guidance that is issued under section 1(3) and the model plan already have to cover contractors’ records, because those are a form of public record and each authority’s records management plan will have to cover all the authority’s records, including its contractors’ records.

In practice, RMPs will need to set out how contractors’ records are to be managed. That is likely to be closely based on the contractual terms that are agreed between the authority and the
contractor. The keeper must return a proposed plan if it fails to make proper arrangements to manage contractors’ records. That might happen if, for example, the plan suggested that contractors’ records should be retained for an unreasonable period.

Amendment 31 would require the keeper to include in the guidance “information on how such plans will relate to functions delivered on behalf of authorities by contractors.”

Amendment 56 would require the model records management plan to “cover the relationship between an authority’s records management plan and that of a contractor carrying out the authority’s functions.”

There is a delicate balance to be struck. Although the guidance and the model plan will cover contractors’ records, I do not consider it appropriate for the keeper to go further and to seek to dictate how authorities and contractors regulate their relationships. Amendments 31 and 56 would result in the keeper producing an extraordinary amount of guidance that would dictate the relationship between authorities. It is important to reflect that the issue is not just about child care in the voluntary sector. It would require in law guidance that dictated the contractual relationships of authorities including prisons, health boards and the police. The list of authorities that are covered in the schedule is extensive.

As drafted, the bill places the onus on authorities to manage their records. It does not impose duties on contractors and nor does it interfere with, or give the keeper power to interfere with, existing relationships between public authorities and contractors. The terms on which a contractor may carry out functions on behalf of an authority are for those two parties to agree separately.

As the guidance and the model RMP already cover contractors’ records, I am concerned that amendments 31 and 56 seek to go further and would require the keeper to instruct authorities and contractors on how their relationship should work. That runs contrary to the arguments that Elizabeth Smith made earlier. That situation could be seen as the keeper dictating contract terms and interfering with the freedom of authorities and contractors to negotiate their contractual relationships. That is against the light-touch intentions of the bill.

In addition, amendment 56 refers to the records management plans of contractors, which is misleading. The bill does not require contractors to have records management plans although, as Ken Macintosh said, many do. In practice, contractors might decide to have plans, but that is a decision for them and will not be a result of the bill. Instead, an authority must ensure that records that relate to functions that are carried out on its behalf by contractors are managed in accordance with the authority’s plan.

Rather than dictating contract terms, I intend the keeper to facilitate discussions between authorities and contractors about the management of contractors’ records. The discussions on those issues will take place in the newly constituted stakeholder forum. Detailed contractual terms will still be for contractors and authorities to agree, but the keeper will be on hand to provide advice and assistance on the management of contractors’ records. I therefore invite Mr Macintosh to seek to withdraw amendment 31 and not to move amendment 56.

I turn to amendments 2 and 16 to 18, which relate to consultation. Amendments 2 and 18 will require the keeper to consult on the guidance that is issued under sections 1(3) and 9. He must consult the authorities that he considers will be affected by the guidance and such other persons as he considers appropriate. That will cover consultation of stakeholders, including contractors. The amendments also require the keeper to have regard to the views that the consultees express, and they clarify that the keeper may issue different guidance in relation to different authorities, where appropriate.

Amendments 16 and 17 make similar provision in relation to the model records management plan. They require the keeper to consult on drafts of the first model plan and revised versions. He must consult each authority on the first model plan, because each will be affected but, after revisions, he must consult only authorities that he considers will be affected. As with amendments 2 and 18, he must also consult such other persons as he considers appropriate, which again includes stakeholders and, importantly, he must have regard to the views that are expressed.

11:00

Amendments 2A, 16A and 17A would amend amendments 2, 16 and 17 to provide an additional duty on the keeper to consult bodies representing contractors on the guidance under section 1(3) and on the model plan. I am concerned that the duty to consult contractor’s bodies would be difficult to operate in practice. It would require the keeper to identify contractors for more than 200 bodies, to find out which bodies represented the contractors and then to decide whether they need to be consulted. The amendments would require consultation of such bodies representing contractors as the keeper considers will be affected by the guidance or the model plan, but the bill does not place any duties or obligations directly on contractors and those bodies will not be
obliged to have regard to the guidance or the model plan. As a result, they will not be directly affected by the guidance or the model plan and the keeper will not be able to assess whom to consult. There is a danger that these amendments to the bill would add lots of bureaucracy but add no value to front-line services, which is a concern that the committee expressed at stage 1.

That is not to say that those bodies would not have an interest in the guidance and the model plan—Ken Macintosh is right. They would clearly have an interest, in the sense that the authorities that they deal with would have to have regard to the guidance and the model plan. That is why amendments 2, 16, 17 and 18 already provide for contractors’ organisations to be consulted by requiring the keeper to consult “such other persons ... as the Keeper considers appropriate”.

I therefore invite Mr Macintosh not to move amendments 2A, 16A and 17A but to support amendments 2, 16, 17 and 18.

Amendments 39 and 43 would amend section 4, which deals with the keeper’s role in agreeing to plans that are submitted by authorities. Amendment 39 would replace the keeper’s power to make a separate determination about the form and manner of the submission of particular plans with a requirement to comply with guidance under section 1. Section 4(2) is intended to give the keeper flexibility about the administrative arrangements for the submission of plans. It is not a power to determine the content of plans and could not be used as a means of placing undue burdens on authorities. Replacing that with a reference to section 1 guidance would reduce the keeper’s ability to make individual decisions, in conjunction with authorities, about what was appropriate in different cases.

Amendment 43 would amend section 4(4) by requiring decisions about whether a proposed plan made “proper arrangements” to be based solely on guidance. The concept of proper arrangements is key to the keeper’s decision about whether to agree any records management plan. However, it would be inappropriate to rely solely on guidance to assess whether a particular plan made proper arrangements for the records of a specific authority. Ken Macintosh’s amendments would diminish the keeper’s ability to be responsive to individual authorities’ needs—another theme that came through at stage 1. Instead, the keeper should take into account the general guidance and model plan and the individual characteristics of the authority. Section 4(5) already requires the keeper to take the guidance and model plan into account. Amendments 4 and 5, which we will come to in a later group, will also require the keeper to take into account the individual characteristics of an authority and any representations that are made by it.

Together, those provisions will ensure that any decision about whether a plan makes proper arrangements will be based on the correct combination of general guidance and individual circumstances. Like amendment 42, amendment 43 would prevent the keeper from making the necessary case-by-case assessment. If the amendments were accepted, it would suggest that the keeper ought to adopt a one-size-fits-all approach in deciding whether to agree or return records management plans. It is important that the keeper retain the power to make case-by-case decisions.

Amendment 58 seeks to remove section 9, which allows the keeper to issue guidance about authorities’ duties under the bill and requires authorities to have regard to it. The power is likely to be used to promote examples of best practice and generic records management tools that are drawn up by sector professionals, as well as to give guidance on the reviewing of records management plans. It is clear from responses to the original consultation and from discussions with stakeholders that the dissemination of guidance will be crucial to successful implementation of the bill. The power to issue guidance under section 9 is a key part of that, which is why we are concerned about the proposal to remove it. In its stage 1 report, the committee was supportive of the need for guidance, but amendment 58 runs counter to that shared intention. Any guidance that is issued under section 9 or any other sections will be developed in partnership with stakeholders. Amendment 18 will also require the keeper to consult before any such guidance is issued. Removing section 9 would not prevent the keeper from issuing non-statutory guidance about authorities’ duties, but they would have no obligation to have regard to it. That would lead to inconsistency of practice when the intention is to develop consistent standard practice across sectors.

I know that this has been an important area of discussion and debate, but I hope that I have been able to explain the problems that would arise from some of the amendments. Accordingly, I ask Ken Macintosh to seek to withdraw amendment 31 and not to move amendments 2A, 39, 43, 56, 16A, 17A and 58.

The Convener: No other member has a comment to make, so I ask the minister whether she has anything further to add.

Fiona Hyslop: No, convener. I think that I have said enough about that group.

The Convener: I am very glad to hear that.
Ken Macintosh: I welcome the minister's lengthy comments because these matters are important, particularly for the voluntary sector and public authorities, which have some concerns about the relationship that we are discussing. In fact, this is all about the relationship between the keeper, the records management plan and the authorities and it is important that we get that balance right.

I have to say that I have been quite convinced by the minister's arguments on all points. For example, the fact that amendment 58, which seeks to remove section 9, would remove not the keeper's power to issue guidance but authorities' obligation to have regard to it does not strike me as sensible, so I appreciate the minister's argument in that respect.

As for amendments 39 and 43, which seek to remove the phrase "may determine", I think that the intention behind them was all about tone and terminology, but the minister has assured the committee that the keeper will take others' views into account in submitting records management plans. That is the important point. In fact, I was also reassured to hear that the stakeholder forum is now up and working, given the initial concerns about that. I point out, though, that none of my amendments is designed to make the bill any more unwieldy or any more awash with guidance or bureaucracy than it already is, which in itself is quite a strong argument in favour of not being overly explicit about some of the guidance that will be necessary.

On amendments 2A, 16A and 17A, the minister said that the keeper would find it difficult to identify the bodies that should be consulted and assured us that amendments 2, 16 and 17 already cover the issue in their use of the phrase

"such other persons ... as the Keeper considers appropriate".

However, if I may, I will rethink the matter before stage 3 to ensure that we and the voluntary sector are happy with that.

On amendments 31 and 56, the minister has suggested that guidance will already cover contractors' records. However, we do not wish the keeper to impose duties in that respect; in fact, this is not about imposing such duties or interfering in that relationship. We want to ensure that the relationship is right, but it is not for the keeper to impose one view on all local or public authorities.

On that basis, I am happy to seek leave to withdraw amendment 31, not to move my other amendments in the group and to support the Government's amendments.

Amendment 31, by agreement, withdrawn.
The power to require separate plans for separate functions may also be required in the case of the Scottish ministers, who are listed as one authority in the schedule to the bill but whose functions are wide ranging and disparate.

Amendment 3 addresses concerns that child care organisations in the voluntary sector have raised about having to work with a number of different plans for different authorities, which they say would impose a huge administrative burden on their organisations and take staff time away from the provision of front-line services.

The intention behind the bill as it is drafted is to allow or require groups of two or more authorities to have a common records management plan, which will reduce the likelihood of the scenario that concerns the voluntary sector. Amendment 3 gives groups of authorities additional flexibility to decide whether to make use of separate plans, common plans for all functions or common plans for separate functions.

Section 1(5) currently requires an authority to have separate plans for separate functions, but only on the keeper’s initiative. I have explained just now why it is important for the keeper to retain that power. Amendment 3 empowers local authorities by allowing them to initiate that themselves and to choose to do it with the keeper’s approval or, as amendment 33, in the name of Elizabeth Smith, suggests, with the agreement of the keeper.

The result would be that, through a combination of subsections (5) and (6), a group of authorities would be able to propose a common plan for some of their functions and separate plans for others. For example, local authorities could together have a common plan for functions that deal with looked-after children while they each have their own separate plans for the rest of their functions. That will remain dependent on the keeper’s approval—or rather, given the amendment to which we have just agreed, the keeper’s agreement—although it will be for the authorities to make their own assessment of where it is appropriate to have common plans. We are trying to give local authorities the power that they need while balancing the interests of the voluntary sector.

Amendment 35 addresses a similar issue to amendment 3 and would clarify that authorities can have common plans for some functions and separate plans for remaining functions. Amendment 35 is not necessary, because amendment 3 already makes it possible while also giving authorities increased flexibility to ask to have separate plans. We have come at the same issue, and I appeal to the committee to agree that amendment 3 covers all the interests, in which case we do not necessarily need amendments 33, 34 or 35 in that regard.

Ken Macintosh: The minister has already addressed my concerns. We are anxious that when voluntary sector bodies provide common services across different authorities, they do not have a different plan for each one, and that the common plan would be not for authorities, but for the function. Assuming that amendment 3 covers that, I am happy.

11:15

Elizabeth Smith: The minister’s clarifications have been helpful. As Ken Macintosh said, it is important that the voluntary sector has that assurance. On the basis that amendment 3 covers the issue, I seek leave to withdraw amendment 33.

Amendment 33, by agreement, withdrawn.

Amendment 3 moved—[Fiona Hyslop]—and agreed to.

Amendments 34 and 35 not moved.

Section 1, as amended, agreed to.

Section 2 agreed to.

Section 3—Meaning of “public records”

Amendment 36 not moved.

The Convener: Amendment 37, in the name of Elizabeth Smith, is in a group on its own.

Elizabeth Smith: As things stand, the bill gives a blanket definition of public records which, as I understand it, encompasses all information that is generated by or on behalf of a public authority or a contractor, plus any information that is generated by another body and held by the public authority or the contractor.

Some voluntary sector groups have said that they are concerned that any information that they hold for virtually any purpose or as the result of a business contract could be deemed to be a public record, when that has traditionally been seen as being more private information.

The Scottish Government has stipulated clearly and carefully that the bill is about the good management of public records rather than about what is or is not held on record. However, there is some concern about the potential for all information to be treated under the same definition, irrespective of its importance or relevance. I understand that that concern was part of the reason why the Scottish Government defined the term “significant risk”, which is an important definition. However, I wonder whether that goes far enough in addressing every concern about the relative merits of different types of information and the fact that the keeper could be seen to have considerable powers, even in situations outwith the definition of significant risk.
We are aware that some voluntary sector groups have expressed concerns about additional bureaucracy and further costs. I seek some information from the minister on that point.

I move amendment 37.

**Fiona Hyslop:** Amendment 37 seeks to remove a crucial part of the bill and cuts to the heart of the bill, which is about the management of records, not the content of records. The definition of public records applies only to this bill and to the management of said records.

Section 3 defines “public records” for the purpose of part 1. The definition is essential and intentionally broad. Public records are the records that must be covered by the records management plan for an authority. Removing the section would leave the bill without a definition of public records and would strike at its very core. A definition is necessary to ensure that those who are responsible for managing records know which records fall within the scope of the bill, and the obligations that will be placed on them. A definition is also necessary to ensure that the keeper knows which records should be covered by an authority’s records management plan and can assess whether that plan makes proper arrangements for the authority’s records. It is important for the bill to be clear about which records are covered in order to prevent confusion. All public authorities need to be accountable with regard to the range of services that they provide, and to manage all their records properly.

Removing the definition would mean that, although authorities would have a duty to draft and implement a records management plan and the keeper would have a duty to consider whether those plans make proper arrangements for managing records, neither the authorities nor the keeper would be able to judge which records should be covered. The definition is broad to ensure that all records that could be created or held are covered, so that vital records are identified and retained for their correct periods, and time and resources are not wasted in storing less important and ephemeral records. The definition also helps to future-proof the bill, as it must cover records in any format.

The list of authorities that is included in the bill focuses on those record creators that are most closely associated with central Government, such as agencies and public bodies. It also includes local authorities, which are major record creators and play an important role in the provision of services. Records relating to functions that contractors provide are included, to address a key element of the Shaw report. Importantly, only those records that relate to functions that are carried out on behalf of public authorities are covered.

Both COSLA and the voluntary sector have argued that the bill should focus only on high-risk records. Managing only certain records in an organisation is not good records management practice, and the keeper would find it difficult to approve a records management plan that took that approach. It would also create uncertainty about which records were covered and who should decide whether they were low or high risk. As we have debated in the committee previously, that should not be a job for the keeper. Instead of our excluding types of records from the bill, authorities should assess levels of risk and make provision in their records management plans to manage different records differently; they are the ones who can assess the risk element. Earlier, we debated amendment 1, which makes clear that that is how risk should be addressed in records management plans.

The bill would be technically unworkable without a definition of public records. Elizabeth Smith is correct to explore the issues around that, because it has been a central theme in debates. However, unless we have such a definition, it will not be clear to authorities or to the keeper whether a records management plan covers the right records. I invite Elizabeth Smith to withdraw amendment 37, having considered the matter and heard some of the issues that have been raised.

**Elizabeth Smith:** I have nothing further to say. The minister’s comments have been helpful.

Amendment 37, by agreement, withdrawn.

Section 3 agreed to.

**Section 4—Approval of plans**

Amendments 38 and 39 not moved.

Amendments 40 and 41 moved—[Elizabeth Smith]—and agreed to.

Amendments 42 and 43 not moved.

Amendment 44 moved—[Elizabeth Smith]—and agreed to.

**The Convener:** Amendment 4, in the name of the minister, is grouped with amendment 5.

**Fiona Hyslop:** Amendments 4 and 5 will address concerns that the keeper might impose a one-size-fits-all approach when exercising his powers under the bill. The intention has always been that the keeper will work closely with authorities to ensure that the records management regime is applied in a way that takes account of their particular needs and respects the judgments that they make about risk. The amendments will make that intention clearer.

Section 4 sets out clear provision for the keeper to agree or return authorities’ records
management plans. Subsection (5) describes the matters to which the keeper must have regard when deciding whether to agree a plan. In deciding whether to agree a plan, the keeper will assess whether it makes proper arrangements for the management of an authority’s records.

Continued dialogue with stakeholders throughout the process has resulted in consensus on a number of important issues, but the issue of the keeper’s powers to agree or return an authority’s records management plan has remained a concern, particularly for COSLA. At the stakeholder forum on 8 February, COSLA representatives expressed their view that having regard to the guidance and the model records management plan was not sufficient for the keeper to determine whether an authority was making proper arrangements for the management of its records. The administrative complexity of local authority organisation means that specific needs and provisions will differ in each authority, and COSLA argued that that needs to be properly reflected in the guidance. The same issues were raised during the stage 1 debate on 10 February.

The bill is sensitive to the individual needs of authorities in relation to their record-keeping requirements. However, I concluded that it would be preferable for it to be adjusted to take account of the genuine concerns that were raised.

Amendment 4 expands the list of matters that the keeper must take into account when deciding whether to agree an authority’s plan. It requires the keeper to have regard to the nature of an authority and its public records as well as to any representations by the authority.

Amendment 5 places an obligation on the keeper when he is considering returning a plan to notify the authority so that it has an opportunity to make representations. The keeper must have regard to such representations before making a final decision.

A key element of the keeper’s decision will be an assessment of whether a draft records management plan would provide proper arrangements for the management of an authority’s records. As the bill is drafted, he must take guidance and the model plan into account in reaching a decision. The amendments will further require him to take other things into account, such as the nature of the authority concerned, the nature of the public records that are covered by the authority’s plan and any representations made by the authority. The amendments make it clear that the keeper will not adopt a one-size-fits-all approach to records management planning and must instead take into account the distinctive needs of the individual authorities that are listed in the schedule. He must also take account of an authority’s own assessment of how it should approach the risks that it faces in records management. In that sense, the amendments complement amendment 1, which we previously debated. The amendments will also prevent the keeper from returning a plan without discussing the issues with the authority concerned. It is hoped that they address the concerns that COSLA in particular raised.

I move amendment 4.

Ken Macintosh: The amendments are welcome. They help to address the issues of risk, balance and proportionality, and they address the relationship between the keeper and the public authorities without going down the line of being explicit about the nature and content of guidance, which we debated earlier. The committee should support the amendments.

Amendment 4 agreed to.

The Convener: I invite the minister to move amendment 5.

Fiona Hyslop: I am sorry, but I am finding it difficult to hear you, convener. I think that it is my hearing.

The Convener: I am sorry. I am almost deaf with the cold, so I am struggling as well. I am not sure how loudly I am speaking.

Amendment 5 moved—[Fiona Hyslop].

Amendments 5A and 5B moved—[Elizabeth Smith]—and agreed to.

Amendment 5, as amended, agreed to.

Amendments 45 to 47 moved—[Elizabeth Smith]—and agreed to.

Section 4, as amended, agreed to.

Section 5—Review of plans

Amendment 48 moved—[Elizabeth Smith]—and agreed to.

11:30

The Convener: Amendment 6, in the name of the minister, is grouped with amendment 7.

Fiona Hyslop: Amendments 6 and 7 will address the concern that the keeper might exercise his scrutiny powers in a way that places an excessive burden on authorities. The keeper must act reasonably when exercising any of his powers, but the amendments will ensure that he cannot require authorities to review and resubmit their plans too often.

Section 5 places an obligation on an authority to review its records management plan and to submit a revised plan for approval by a date that the keeper sets. Nothing in the bill restricts how often...
Amendments 6 and 7 will restrict the keeper’s power to require an authority to review and submit its plan for approval. The amendments provide that the keeper must not require a plan to be reviewed less than five years after it was previously approved. The only exception applies when the keeper carries out a compliance review under section 6 and concludes that an authority should review its plan.

I move amendment 6.

Amendment 6 agreed to.

Amendment 7 moved—[Fiona Hyslop].

Ken Macintosh: I suggest that amendments 7A to 7E should be moved en bloc.

Kenneth Gibson (Cunninghame North) (SNP): That seems sensible.

Amendments 7A to 7E moved—[Elizabeth Smith]—and agreed to.

The Convener: Does the minister wish to press or withdraw amendment 7?

Fiona Hyslop: I will press it.

The Convener: I know that asking a minister such a question is unusual, but I did so because the amendments to amendment 7 are extensive.

Amendment 7, as amended, agreed to.

Amendments 49 to 54 moved—[Elizabeth Smith]—and agreed to.

Section 5, as amended, agreed to.

Section 6—Compliance reviews

The Convener: Amendment 8, in the name of the minister, is grouped with amendments 9 to 12, 14, 15 and 20 to 24.

Fiona Hyslop: I will speak to amendments 8 to 12, 14, 15 and 20 to 24—I feel an en bloc coming on. These amendments will address concerns that some of the terminology that is used in the bill emphasises failure. The amendments will replace the term “compliance reviews” with “records management reviews” under section 6, and “warning notices” with “action notices” under section 7.

I wish to emphasise that the main focus of the bill is not about scrutiny but about making and maintaining sustainable improvements to public sector record keeping. The proposed scrutiny role for the keeper is intended to work alongside internal assessment and reporting mechanisms within public authorities. Agreement of records management plans will be an initial exercise to ascertain their fitness for purpose. Thereafter, an authority’s records management practices will be reviewed by the keeper only when there are known concerns that the authority is consistently failing in its obligations under the legislation.

COSLA has raised concerns that some of the language used in the bill focuses too much on exposing failure and punishing authorities and says that that runs counter to the stated intention of the bill to foster continuous improvement over time. COSLA points to the terms “compliance reviews” and “warning notices” as being particularly unhelpful.

I agree that it would be helpful to adjust the language of the bill to take account of those concerns and to change the perceived emphasis on failure—that is why I supported the amendments in the name of Elizabeth Smith. Amendments 8 to 11, 20 and 23 will therefore change the term “compliance review” to “records management review”, and amendments 12, 14, 15, 21, 22 and 24 will change the term “warning notice” to “action notice”.

The amendments will not make any substantive change to the effect of the bill, but they are important because they emphasise the policy of partnership and encouraging continuous self-improvement rather than the Government dictating solutions and focusing on failure and punishment. The amendments should be seen in the context of the wider empowerment of authorities as provided by other amendments, including those on consultation and approval of plans that we debated earlier, and those on procedures before action notices can be issued, which we will come to later. The amendments will also complement the amendments that refer to “agreement” and “return” of plans, rather than “approval” and “rejection”, which we discussed earlier.

I move amendment 8.

Amendment 8 agreed to.

Amendment 55, in the name of Ken Macintosh, is in a group on its own.

Ken Macintosh: Amendment 55 is about improving the tone of the bill and rebalancing the relationship between the keeper and public authorities so that the keeper is not so much telling the authorities what to do as working with them to improve records management plans.

Section 6(2) says

“An authority must provide the Keeper with such assistance as the Keeper may require”.

Amendment 55 would change that to say that the authority must provide the keeper with such assistance “as is reasonable”. Public authorities are worried that the wording in the bill as
Amendment 55 would make it explicit that authorities needed only to provide reasonable assistance to the keeper when he carried out reviews under section 6, but it would do so in a way that could undermine the keeper’s ability to carry out effective reviews. Section 6 allows the keeper to review an authority’s compliance with its records management plan. We have previously debated amendments that will rename such reviews “records management reviews”.

Section 6(2) requires authorities to give such assistance as the keeper “may require” in carrying out records management reviews. That might include, for example, providing information or documents. Amendment 55 would replace the words “the Keeper may require” with “as is reasonable”.

I wish to emphasise the main focus of the bill is not scrutiny but the maintenance of sustainable improvements to record keeping. The proposed scrutiny role for the keeper is intended to work alongside internal assessment and reporting mechanisms in public authorities. An authority’s records management practices will be reviewed by the keeper only if there are known concerns that the authority is consistently failing in its obligations under the legislation, even after it has received recommendations for improvement from the keeper. A formal review will take place only when attempts to resolve issues through informal discussions and collaborative working have not been successful.

The keeper is currently under a general duty, under established administrative case law in relation to statutory duties, to act reasonably when he exercises his powers in relation to any of his functions, including records management reviews. Amendment 55 would go further than the explicit restatement of that duty. The important point is that it would replace the keeper’s ability to require particular assistance with a general duty on authorities to provide reasonable assistance, but it is not clear who would decide what was required in the first instance. It should be for the keeper to decide what assistance he needs—of course, he must do so reasonably, as administrative law requires.

Amendment 55 would therefore make a significant change to the effect of the provision. It could make it difficult for the keeper to carry out meaningful records management reviews in the few cases in which all other routes had failed and it was necessary for him to rely on his formal review powers to address a known records management problem. Amendment 55 would tie the keeper’s hands in the few cases in which all other routes had failed.

I hope that I have explored the issue. The concerns about amendment 55 might not have been obvious to members when they read the amendment. I invite Ken Macintosh to withdraw amendment 55 and reflect on the matter.

Ken Macintosh: I thank the minister for her comments—next time, I will speak to her before I lodge an amendment, to tell her what it is about. She has made it clear that the keeper is already implicitly under a duty to be reasonable, so there is no need for that to be stated explicitly. Also, the replacement of “compliance” with “records management” by amendment 8 affects the tone of section 6. On that basis, I seek leave to withdraw amendment 55.

Amendment 55, by agreement, withdrawn.

Amendments 9 to 11 moved—[Fiona Hyslop]—and agreed to.

Section 6, as amended, agreed to.

Section 7—Warning notices

Amendment 12 moved—[Fiona Hyslop]—and agreed to.

The Convener: Amendment 13, in the name of the minister, is in a group on its own.

Fiona Hyslop: Amendment 13 will address concerns that the bill focuses on scrutiny by the keeper and emphasises failure of, rather than collaboration with, authorities—that is a theme in all the amendments in my name. The intention has always been that the power to issue action notices will be used as a last resort after full discussion with authorities and only when informal attempts to resolve records management difficulties have failed. Amendment 13 will make the intention to involve authorities clearer, by allowing them to make representations before the keeper issues an action notice.

Amendment 13 will empower an authority to make representations about the keeper’s decisions. It addresses the issuing of warning notices by the keeper, which will be renamed “action notices” under amendments 12, 14 and 15, which have been debated. Section 7, as amended by those amendments, will allow the keeper to issue an action notice to an authority when it fails to comply with its duties under the bill.
Amendment 13 will require the keeper to notify an authority of his intention to issue an action notice, to provide an explanation of his reasons for doing so and to give the authority an opportunity to make representations. The keeper must then have regard to any representations before he decides whether to issue an action notice.

11:45

The amendment emphasises that there should be full discussion between the keeper and an authority before the keeper exercises his powers to issue a formal action notice under section 7. It addresses concerns that COSLA raised about the level of the keeper’s power to issue warning notices without giving authorities the opportunity to make representations and is consistent with the underlying aim that the majority of difficulties should be resolved through discussion and cooperation between the keeper and authorities. The bill is not intended to focus on failure, and the keeper’s enforcement powers under section 7 are intended for use as a last resort.

I move amendment 13.

Amendment 13 agreed to.

Amendments 14 and 15 moved—[Fiona Hyslop]—and agreed to.

Section 7, as amended, agreed to.

Section 8—Model records management plan

Amendment 56 not moved.

Amendment 16 moved—[Fiona Hyslop].

Amendment 16A not moved.

Amendment 16 agreed to.

Amendment 57 moved—[Elizabeth Smith]—and agreed to.

Amendment 17 moved—[Fiona Hyslop].

Amendment 17A not moved.

Amendment 17 agreed to.

Section 8, as amended, agreed to.

Section 9—Guidance

Amendment 18 moved—[Fiona Hyslop]—and agreed to.

Amendment 58 not moved.

Section 9, as amended, agreed to.

After section 9

The Convener: Amendment 19, in the name of the minister, is grouped with amendments 25 to 28.

Fiona Hyslop: Amendment 19 addresses a technical issue to do with how the records management duties under part 1 of the bill will apply to records of sheriff courts and justice of the peace courts. It creates a new section that clarifies that sheriffs principal will be responsible for carrying out the management functions for sheriff and JP courts under part 1.

Amendment 25 repeals sections 2(3) and 2A(4) of the Public Records (Scotland) Act 1937, which currently require sheriffs principal to manage records of the sheriff and JP courts that are not transferred to the keeper. Amendments 26 and 27 are consequential on amendment 25.

The effect is that sheriffs principal will remain responsible for the management of sheriff and JP court records, but that responsibility will arise under part 1 of the bill and not under the 1937 act. Amendment 19 makes it clear that, although the sheriff and JP courts are listed in the schedule, the sheriffs principal will be responsible for carrying out functions under part 1.

Amendment 28 is a technical amendment to the long title of the bill in consequence of amendments 26 and 27.

I move amendment 19.

Amendment 19 agreed to.

Section 10 agreed to.

Section 11—Annual report

Amendment 59 moved—[Elizabeth Smith]—and agreed to.

Amendments 20 to 22 moved—[Fiona Hyslop]—and agreed to.

Section 11, as amended, agreed to.

Section 12—Interpretation of Part 1

Amendments 23 and 24 moved—[Fiona Hyslop]—and agreed to.

Section 12, as amended, agreed to.

Section 13—Repeals

Amendment 25 moved—[Fiona Hyslop]—and agreed to.

Section 13, as amended, agreed to.

Section 14—Court records

Amendments 26 and 27 moved—[Fiona Hyslop]—and agreed to.

Section 14, as amended, agreed to.

Sections 15 and 16 agreed to.

Long Title
Amendment 28 moved—[Fiona Hyslop]—and agreed to.

Long title, as amended, agreed to.

The Convener: That ends stage 2 consideration of the bill. I thank the minister and her officials for attending the committee.
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Public Records (Scotland) Bill

[AS AMENDED AT STAGE 2]

An Act of the Scottish Parliament to make provision about the management of records by certain authorities; to amend the Public Records (Scotland) Act 1937 (c.43) in relation to the transmission of court records to the Keeper of the Records of Scotland; and for connected purposes.

PART 1

RECORDS MANAGEMENT PLANS

1 Records management plans

(1) Every authority to which this Part applies must—

(a) prepare a plan (a “records management plan”) setting out proper arrangements for the management of the authority’s public records,

(b) submit the plan to the Keeper for agreement, and

(c) ensure that its public records are managed in accordance with the plan as agreed with the Keeper.

(2) An authority’s records management plan must—

(a) identify—

(i) the individual who is responsible for management of the authority’s public records, and

(ii) (if different) the individual who is responsible for ensuring compliance with the plan, and

(b) include, in particular, provision about—

(i) the procedures to be followed in managing the authority’s public records,

(ii) maintaining the security of information contained in the authority’s public records, and

(iii) the archiving and destruction or other disposal of the authority’s public records.

(2A) An authority’s records management plan may make different provision for the management of different kinds of public records (taking account, for example, of the different levels of risk associated with the management of different kinds of records).
(3) The Keeper must issue guidance to authorities about the form and content of records management plans.

(3A) The Keeper may issue different guidance under subsection (3) in relation to different authorities.

(3B) Before issuing guidance under subsection (3), the Keeper must—

(a) consult the following on a draft of the guidance, namely—

(i) such authorities as the Keeper considers will be affected by the guidance, and

(ii) such other persons (if any) as the Keeper considers appropriate, and

(b) have regard to any views expressed in response to the consultation.

(4) Authorities must have regard to the guidance issued by the Keeper in preparing their records management plans for agreement with the Keeper.

(5) An authority—

(a) must, if the Keeper so requires, or

(b) may, with the Keeper’s approval,

have separate records management plans for public records relating to separate functions of the authority.

(6) A group of two or more authorities—

(a) must, if the Keeper so requires, or

(b) may, with the Keeper’s approval,

have a common records management plan for both or, as the case may be, all of the authorities in the group.

2 Authorities to which Part 1 applies

(1) The authorities to which this Part applies are the bodies, office-holders and other persons listed, or of a description listed, in the schedule.

(2) The Scottish Ministers may by order made by statutory instrument amend the schedule by—

(a) adding—

(i) a body, office-holder or other person, or

(ii) a description of bodies, office-holders or other persons,

(b) removing an entry listed in it, or

(c) modifying an entry listed in it.

(3) An order under subsection (2)(a) may add a body, office-holder or other person, or a description of bodies, office-holders or other persons, only if the body, office-holder or person, or (as the case may be) each of the bodies, office-holders or persons within the description, is—

(a) a part of the Scottish Administration,

(b) a Scottish public authority with mixed functions or no reserved functions (within the meaning of the Scotland Act 1998 (c.46)), or
(c) a publicly owned company.

(4) In subsection (3)(c), “publicly owned company” means a company that is wholly owned by—

(a) the Scottish Ministers, or

(b) another authority.

(5) For that purpose, a company is wholly owned—

(a) by the Scottish Ministers if it has no members other than—

(i) the Scottish Ministers or other companies that are wholly owned by the Scottish Ministers, or

(ii) persons acting on behalf of the Scottish Ministers or of such other companies,

(b) by another authority if it has no members other than—

(i) the authority or other companies that are wholly owned by the authority, or

(ii) persons acting on behalf of the authority or of such other companies.

(6) In this section, “company” includes any body corporate.

(7) An order under subsection (2) may—

(a) include consequential, supplementary, incidental, transitional, transitory or saving provision,

(b) modify any enactment.

(8) An order under subsection (2) is not to be made unless a draft of the statutory instrument containing the order has been laid before and approved by resolution of the Scottish Parliament.

3 Meaning of “public records”

(1) In this Act, “public records”, in relation to an authority, means—

(a) records created by or on behalf of the authority in carrying out its functions,

(b) records created by or on behalf of a contractor in carrying out the authority’s functions,

(c) records created by any other person that have come into the possession of the authority or a contractor in carrying out the authority’s functions.

(2) In subsection (1) “contractor”, in relation to an authority, means a person to whom functions of the authority are delegated (whether under a contract or otherwise) by the authority.

4 Agreement of plans

(1) An authority must submit its proposed records management plan to the Keeper for approval by such date as the Keeper may determine.

(2) The proposed plan is to be submitted in such form and manner as the Keeper may determine.

(3) On receiving the proposed plan, the Keeper must—
Public Records (Scotland) Bill
Part 1—Records management plans

(a) agree it, or
(b) if the Keeper considers that it does not set out proper arrangements for the management of the authority’s public records, return it.

(4) What constitutes “proper arrangements” in any case is for the Keeper to determine.

(5) In deciding whether to agree or return the proposed plan, the Keeper must have regard to—
(a) the guidance issued by the Keeper under section 1(3),
(b) the model records management plan published under section 8,
(c) the nature of the authority and its public records, and
(d) any representations made by the authority.

(5A) Where the Keeper is considering returning the proposed plan, before deciding whether to do so, the Keeper must—
(a) notify the authority—
   (i) that the Keeper is considering returning the proposed plan, and
   (ii) of the reasons for doing so,
(b) give the authority an opportunity to make representations, and
(c) have regard to any representations made by the authority.

(6) If the Keeper returns the proposed plan—
(a) the Keeper—
   (i) must state reasons for the return, and
   (ii) may propose modifications to the proposed plan, and
(b) the authority must submit a revised plan to the Keeper for agreement by such date as the Keeper may determine.

(7) Subsections (2) to (6) apply to a revised plan submitted under subsection (6)(b) as they apply to a proposed records management plan submitted under subsection (1).

(8) The Keeper may make different determinations under this section for different authorities or different descriptions of authorities.

5 Review of plans

(1) An authority must—
(a) keep its records management plan under review, and
(b) if the Keeper so requires (whether at the time of agreement of the plan or otherwise), carry out a review of the plan by such date (the “review date”) as the Keeper may determine in accordance with subsections (1A) to (1C).
(1A) The Keeper must not determine a review date under subsection (1)(b) which is earlier than five years after the date on which the authority’s records management plan was last agreed.

(1B) In subsection (1A), reference to the plan being approved includes—

(a) agreement of the plan under section 4,

(b) if the authority has been required to carry out a review of the plan under subsection (1)(b) of this section or section 6(3)(b), agreement of the revised or, as the case may be, resubmitted plan, and

(c) if the authority has submitted a revised plan under subsection (3) of this section, agreement of the revised plan.

(1C) If—

(a) the Keeper has determined a review date under subsection (1)(b) in relation to a plan, and

(b) before that date, the Keeper agrees—

(i) a revised plan submitted by the authority under subsection (3), or

(ii) if the authority has been required to carry out a review of the plan under section 6(3)(b), a revised or, as the case may be, resubmitted plan,

the Keeper must determine a new review date and inform the authority of the new review date.

(2) After carrying out a review of its plan in accordance with subsection (1)(b), the authority must, by the review date, either—

(a) revise its plan and submit the revised plan to the Keeper for agreement, or

(b) if the authority decides not to revise its plan, resubmit its current plan to the Keeper for agreement.

(3) An authority may at any time revise its records management plan and submit the revised plan to the Keeper for agreement.

(4) Subsections (2) to (8) of section 4 apply, as they apply to a proposed records management plan submitted for agreement under that section, to—

(a) a revised records management plan submitted to the Keeper for agreement under subsection (2)(a) or (3) of this section, and

(b) a records management plan resubmitted to the Keeper for agreement under subsection (2)(b) of this section.

(5) The Keeper may make different determinations under this section for different authorities or different descriptions of authorities.

6 Records management reviews

(1) The Keeper may carry out a review (a “records management review”) of whether an authority is complying with its records management plan.

(2) An authority must provide the Keeper with such assistance as the Keeper may require for the purpose of carrying out a records management review in relation to the authority.

(3) Following a records management review, the Keeper may—
(a) make recommendations to the authority about how it complies with its records management plan, and
(b) require the authority to carry out a review of its plan by such date as the Keeper may determine.

(4) Section 5(2) applies to a review of a plan carried out under subsection (3)(b) of this section as it applies to a review of a plan carried out under section 5, but as if the reference to the review date were a reference to the date determined under subsection (3)(b) of this section.

(5) Subsection (3) does not affect the Keeper’s powers under section 7.

(6) The Keeper may carry out a records management review in relation to—
(a) a particular authority, or
(b) a group of authorities.

7 Action notices

(1) This section applies where the Keeper considers that an authority—
(a) has failed or is failing to comply with its records management plan, or
(b) otherwise has failed or is failing to comply with any duty imposed on the authority by or under this Part.

(2) The Keeper may issue to the authority a notice (an “action notice”—
(a) specifying the details of the alleged failure, and
(b) requiring the authority to take specified action by a specified date.

(2A) Where the Keeper is considering issuing an action notice to an authority, before deciding whether to do so, the Keeper must—
(a) notify the authority—
(i) that the Keeper is considering issuing an action notice, and
(ii) of the reasons for doing so,
(b) give the authority an opportunity to make representations, and
(c) have regard to any representations made by the authority.

(3) In subsection (2)(b), “specified” means specified in the action notice.

(4) If the authority fails to comply with any of the requirements of the action notice, the Keeper may take such steps as the Keeper considers appropriate to publicise the failure.

8 Model records management plan

(1) The Keeper must prepare and publish a model records management plan.

(1A) Before publishing the model records management plan under subsection (1), the Keeper must—
(a) consult the following on a draft of the plan, namely—
(i) each authority, and
(ii) such other persons (if any) as the Keeper considers appropriate, and
Part 1—Records management plans

(2) Authorities must, in preparing and revising their records management plans for the Keeper’s agreement, have regard to the model records management plan published under this section.

(3) The Keeper must keep the model records management plan under review and may revise it and publish the revised model plan.

(3A) Before publishing a revised model plan under subsection (3), the Keeper must—
(a) consult the following on a draft of the plan, namely—
(i) such authorities as the Keeper considers will be affected by the revisals to the plan, and
(ii) such other persons (if any) as the Keeper considers appropriate, and
(b) have regard to any views expressed in response to the consultation.

(4) References in this Part to the model records management plan include references to a revised model records management plan.

Guidance

(1) The Keeper may issue guidance to authorities about their duties under this Part.

(1A) The Keeper may issue different guidance under subsection (1) in relation to different authorities.

(1B) Before issuing guidance under subsection (1), the Keeper must—
(a) consult the following on a draft of the guidance, namely—
(i) such authorities as the Keeper considers will be affected by the guidance, and
(ii) such other persons (if any) as the Keeper considers appropriate, and
(b) have regard to any views expressed in response to the consultation.

(2) Authorities must have regard to any guidance issued by the Keeper under subsection (1).

Application of Part 1 in relation to sheriff court records and JP court records

(1) This section applies in relation to the public records of a sheriff court or a justice of the peace court.

(2) The Sheriff Principal of the sheriffdom in which the court is located is responsible for carrying out the authority’s functions under this Part in relation to such public records.

(3) Accordingly, in relation to such public records, a reference in this Part to an authority (other than in section 3) is to be read as a reference to the Sheriff Principal.

No right of action for failures to comply

This Part does not confer any right of action in civil proceedings in respect of any failure by an authority—
(a) to comply with its records management plan, or
(b) otherwise to comply with any duty imposed on the authority by or under this Part.
11 Annual report

(1) The Keeper must, after the end of each financial year—
   (a) prepare a report on the carrying out of the Keeper’s functions under this Part
to the Scottish Ministers.
   (b) submit the report to the Scottish Ministers.

(2) The report must—
   (a) be prepared in such form as the Scottish Ministers may direct,
   (b) contain the information specified in subsection (3) and such other information as
       the Scottish Ministers may direct, and
   (c) be submitted by such date as the Scottish Ministers may direct.

(3) The information referred to in subsection (2)(b) is—
   (a) information about records management plans and revised records management
       plans agreed with the Keeper during the year,
   (b) information about any records management reviews carried out by the Keeper
       during the year,
   (c) details of any action notices issued by the Keeper during the year,
   (d) the names of any authorities that have failed to comply with any of the
       requirements of an action notice together with details of the alleged failures.

(4) The Keeper may include in the report such other information as the Keeper considers
    appropriate.

(5) The Scottish Ministers must lay the report before the Scottish Parliament.

(6) The Keeper must, as soon as practicable after the report has been laid before the
    Parliament, publish the report in such manner as the Keeper considers appropriate.

12 Interpretation of Part 1

(1) In this Part—
   “authority” means an authority to which this Part applies (see section 2),
   “records management review” means a review carried out under section 6,
   “the Keeper” means the Keeper of the Records of Scotland,
   “management”, in relation to public records, includes keeping, storage, securing,
   archiving, preservation, destruction or other disposal (and “manage” and other
   related expressions are to be construed accordingly),
   “public records”, in relation to an authority, has the meaning given by section
   3(1),
   “record” means anything in which information is recorded in any form,
   “records management plan”, in relation to an authority, means the plan referred to
   in section 1(1),
   “action notice” means a notice issued under section 7.
(2) Except where the context requires otherwise, references in this Part to an authority’s records management plan include references to the plan as revised from time to time.

13 Repeals

The following are repealed—

(za) sections 2(3) and 2A(4) of the Public Records (Scotland) Act 1937 (c.43) (care and preservation of sheriff court and JP court records),
(a) section 53(1) to (3) of the Local Government etc. (Scotland) Act 1994 (c.39) (preservation and management of records of local authorities),
(b) section 30(1)(b) to (d) of the Environment Act 1995 (c.25) (preservation and management of records of SEPA),
(c) section 27(2) to (4) of the National Parks (Scotland) Act 2000 (asp 10) (preservation and management of records of National Park authorities), and
(d) section 58(2) to (4) of the Water Industry (Scotland) Act 2002 (asp 3) (preservation and management of records of Scottish Water).

PART 2

TRANSMISSION OF COURT RECORDS

14 Transmission of court records

(1) The Public Records (Scotland) Act 1937 (c.43) is amended as follows.

(2) In section 1 (High Court and Court of Session records), after subsection (2) add—

“(3) Before making an Act of Adjournal or an Act of Sederunt under subsection (1), the High Court of Justiciary or, as the case may be, the Court of Session must consult the Keeper.”.

(3) In section 2 (sheriff court records)—

(a) for subsection (1) substitute—

“(1) A sheriff principal may, with the agreement of the Keeper, transmit any of the sheriff court records of the sheriff principal’s sheriffdom to the Keeper.”,

(ba) in subsection (4), for “subsections (1) and (3)” substitute “subsection (1)”.

(4) In section 2A (JP court records)—

(a) for subsection (1) substitute—

“(1) A sheriff principal may, with the agreement of the Keeper, transmit any of the JP court records of the sheriff principal’s sheriffdom to the Keeper.”,

(b) subsection (2) is repealed.
PART 3
GENERAL

15 Commencement

(1) Parts 1 and 2 come into force on such day as the Scottish Ministers may appoint by order made by statutory instrument.

(2) This Part comes into force at the beginning of the day following the day on which the Bill for this Act receives Royal Assent.

(3) An order under subsection (1) may include transitional, transitory or saving provision.

16 Short title

This Act may be cited as the Public Records (Scotland) Act 2010.
SCHEDULE
(introduced by section 2(1))

AUTHORITIES TO WHICH PART 1 APPLIES

Parliament

Scottish Parliament
Scottish Parliamentary Corporate Body

Scottish Administration

Scottish Ministers
Lord Advocate

Accountant in Bankruptcy
Chief Dental Officer of the Scottish Administration
Chief Medical Officer of the Scottish Administration
Drinking Water Quality Regulator for Scotland

Her Majesty’s Chief Inspector of Constabulary and Her Majesty’s Inspectors of Constabulary (appointed under section 33 of the Police (Scotland) Act 1967 (c.77))

Her Majesty’s Chief Inspector of Fire and Rescue Authorities, Her Majesty’s Inspectors of Fire and Rescue Authorities and Assistant Inspectors of Fire and Rescue Authorities (appointed under section 43 of the Fire (Scotland) Act 2005 (asp 5))

Her Majesty’s Chief Inspector of Prisons for Scotland

Her Majesty’s Inspector of Anatomy for Scotland

Her Majesty’s inspectors of schools (that is to say, the inspectors of schools appointed by Her Majesty on the recommendation of the Scottish Ministers under the Education (Scotland) Act 1980 (c.44))

Keeper of the Records of Scotland

Keeper of the Registers of Scotland

Office of the Scottish Charity Regulator
Procurators fiscal
Queen’s and Lord Treasurer’s Remembrancer
Queen’s Printer for Scotland

Registrar General of Births, Deaths and Marriages for Scotland

Scottish Court Service
Scottish Housing Regulator

Others

Accounts Commission for Scotland

Additional Support Needs Tribunals for Scotland

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Audit Scotland
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<td>Lands Tribunal for Scotland</td>
</tr>
<tr>
<td>Learning and Teaching Scotland</td>
</tr>
<tr>
<td>Licensing Boards (continued in existence or established under section 5 of the Licensing (Scotland) Act 2005 (asp 16))</td>
</tr>
<tr>
<td>Local authorities</td>
</tr>
</tbody>
</table>
Local Government Boundary Commission for Scotland
Mental Health Tribunal for Scotland
Mental Welfare Commission for Scotland
Mobility and Access Committee for Scotland
National Convener of Children’s Hearings Scotland
National Park authorities (established by virtue of designation orders under section 6 of the National Parks (Scotland) Act 2000 (asp 10))
Parole Board for Scotland
Police Advisory Board for Scotland
Police Complaints Commissioner for Scotland
Principal Reporter
Private rented housing panel
Public Appointments Commissioner for Scotland (appointed under section 1(4) of the Scottish Parliamentary Commissions and Commissioners etc. Act 2010 (asp 11))
Public Standards Commissioner for Scotland (appointed under section 1(3) of the Scottish Parliamentary Commissions and Commissioners etc. Act 2010 (asp 11))
Public Transport Users’ Committee for Scotland
Quality Meat Scotland
Risk Management Authority
Royal Commission on the Ancient and Historical Monuments of Scotland
Safeguarders Panels (that is to say, panels established under section 30(1) of the Children’s Hearings (Scotland) Act 2011 (asp 1))
Scottish Advisory Committee on Distinction Awards
Scottish Agricultural Wages Board
Scottish Charity Appeals Panel
Scottish Children’s Reporter Administration
Scottish Commission for Human Rights
Scottish Commission for Public Audit
Scottish Crime and Drug Enforcement Agency
Scottish Criminal Cases Review Commission
Scottish Enterprise
Scottish Environment Protection Agency
Scottish Further and Higher Education Funding Council
Scottish Futures Trust Ltd (registered number SC348382)
Scottish Health Council
Scottish Information Commissioner
Scottish Land Court
Scottish Law Commission
Scottish Legal Aid Board
Scottish Legal Complaints Commission
Scottish Local Authorities Remuneration Committee
Scottish Natural Heritage
Scottish Police Services Authority
Scottish Public Services Ombudsman
Scottish Qualifications Authority
Scottish Road Works Commissioner
Scottish Social Services Council
Scottish Sports Council
Scottish Water
Sheriff courts
Skills Development Scotland Co. Ltd (registered number SC202659)
Social Care and Social Work Improvement Scotland
Special Health Boards (constituted under section 2(1)(b) of the National Health Service (Scotland) Act 1978 (c.29))
Standards Commission for Scotland
Transport Partnerships
Trustees of the National Library of Scotland
Visiting committees (appointed under section 19(3) of the Prisons (Scotland) Act 1989 (c.45) or constituted by rules made under section 39 (as read with section 8(1)) of that Act)
VisitScotland
Water Industry Commission for Scotland
Public Records (Scotland) Bill
[AS AMENDED AT STAGE 2]

An Act of the Scottish Parliament to make provision about the management of records by certain authorities; to amend the Public Records (Scotland) Act 1937 (c.43) in relation to the transmission of court records to the Keeper of the Records of Scotland; and for connected purposes.

Introduced by: Fiona Hyslop
On: 7 October 2010
Supported by: Bruce Crawford
Bill type: Executive Bill
PUBLIC RECORDS (SCOTLAND) BILL
[AS AMENDED AT STAGE 2]

REVISED EXPLANATORY NOTES

CONTENTS
1. As required under Rule 9.7.8A of the Parliament’s Standing Orders, these revised Explanatory Notes are published to accompany the Public Records (Scotland) Bill (introduced in the Scottish Parliament on 7 October 2010) as amended at Stage 2. Text has been added or deleted as necessary to reflect the amendments made to the Bill at Stage 2 and these changes are indicated by side-lining in the right margin.

INTRODUCTION
2. These Explanatory Notes have been prepared by the Scottish Government 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.

SUMMARY OF THE BILL
4. The Bill is in three parts:
   - Part 1 – Records Management Plans
   - Part 2 – Transmission of Court Records
   - Part 3 – General
PART 1 – RECORDS MANAGEMENT PLANS

5. Part 1 of the Bill imposes duties on certain public authorities, which are listed in the schedule to the Bill, to produce, implement and review records management plans. A plan must set out the arrangements for the management of records created or held by the authority and records created or held by contractors who carry out any functions of the authority. Each plan must be agreed by the Keeper of the Records of Scotland (the Keeper). It may be returned if the Keeper considers that it fails to make proper arrangements for the records it covers. The Keeper must issue guidance on the form and content of plans and must prepare a model plan and must consult authorities and other persons before doing so. Authorities must have regard to the model plan and the guidance when preparing their own plans.

6. The Bill gives the Keeper the power to review whether authorities are complying with their plans. The Keeper may issue action notices to authorities who are failing to meet their obligations under the Bill. Authorities may make representations before an action notice is issued. If an authority fails to comply with an action notice, the Keeper may publicise the failure. The Keeper must also produce an annual report in relation to the Keeper’s functions under the Bill, including details of any authority which has failed to comply with an action notice and details of the failure.

Section 1 – Records management plans

7. Subsection (1) requires certain authorities to produce a records management plan in relation to their public records and to submit this to the Keeper for agreement. Once the Keeper has agreed a plan, the authority must ensure its records are managed in accordance with the plan. Section 2 and the schedule define the public authorities to whom the duty applies. Section 3 defines public records. Section 4 deals with the submission and agreement process for plans. Section 12 contains definitions, including the meaning of “management” of public records.

8. Subsection (2) sets basic requirements about what a records management plan must contain. A plan may also make different provision for different kinds of public records, reflecting, for example, the authority’s assessment of the different levels of risk associated with the management of different kinds of public records (subsection (2A)).

9. The Keeper must also issue guidance about the form and content of plans and authorities must have regard to that guidance (subsections (3) and (4)). The Keeper may issue different guidance in relation to different authorities (subsection (3A)), for instance taking into account the nature of the functions they perform. Before issuing guidance, the Keeper must consult authorities affected by the guidance and any other persons the Keeper considers appropriate and must have regard to any views they express (subsection (3B)).

10. Subsection (5) allows authorities to produce more than one plan where the Keeper requires or agrees this should happen. This could be used to require authorities, such as the Scottish Ministers, who exercise a large number of diverse functions to have different plans in relation to different functions.

11. Subsection (6) allows a group of authorities to have a single common plan where the Keeper requires or agrees that this should happen. This could be used to allow groups of authorities of the same description (e.g. procurators fiscal) or groups of different authorities which exercise related functions to have a common plan.
12. Together, subsections (5) and (6) could be relied on to allow a group of authorities to share one common plan for a particular function while each having separate plans for the rest of their functions. For example a group of local authorities may have one common plan for records relating to the care of looked after children.

Section 2 – Authorities to which Part 1 applies

13. Subsection (1) defines the authorities that must comply with the duties in Part 1 of the Bill. The authorities are listed in the schedule. Some bodies are described rather than named individually, such as local authorities, Chief Constables of police forces and National Park authorities.

14. Subsection (2) allows the Scottish Ministers to add or remove authorities from the list in the schedule by order. Subsections (3) to (5) define the types of authorities which can be added to the list. The reference in subsection (3)(b) to an authority with mixed functions or no reserved functions is to be read in accordance with section 126 and paragraph 1 of Part III of Schedule 5 to the Scotland Act 1998. Orders under subsection (2) will be subject to affirmative procedure (see subsection (8)).

15. Subsection (7) allows orders amending the schedule to make consequential and other modifications to other legislation. If a new authority were to be added to the schedule, this power might be used to make consequential changes to any existing general records management duties which already applied to the authority.

Section 3 – Meaning of “public records”

16. This section defines “public records” for the purpose of Part 1 of the Bill. Public records are the records which must be covered by the records management plan for an authority (see section 1).

17. Subsection (1)(b) provides that records which are created by contractors in carrying out functions of an authority are public records of the authority. This means that the records management plan for the authority must set out the arrangements for managing its contractors’ records as well as records created by the authority. “Contractor” is defined in subsection (2). The definition covers persons who carry out functions on behalf of an authority. It does not cover persons who provide goods or services (such as supplying stationery) to an authority but do not deliver functions on its behalf.

18. Subsection (1)(c) provides that records which come into the possession of authorities or contractors in carrying out the authority’s functions are also public records. Examples might include correspondence, reports, evidence or statistics which relate to the functions. The authority must ensure that these records are managed in accordance with its records management plan. This subsection also covers historical records of a predecessor authority (e.g. a former local authority’s archive).
Section 4 – Agreement of plans

19. This section sets out the procedures for obtaining the Keeper’s agreement to plans. The procedures apply to an authority’s initial submission of a records management plan and to the submission of any revised plans.

20. Subsection (1) obliges public authorities to submit a proposed records management plan by a date set by the Keeper. Subsection (2) allows the Keeper to set requirements as to the form and manner in which a plan must be submitted. The Keeper may set different dates and different requirements for different authorities (subsection (8)).

21. The Keeper must agree a proposed plan or return if it does not set out “proper arrangements” for managing the authority’s records (subsection (3)). “Proper arrangements” may vary according to the authority concerned and it is for the Keeper to decide if the test is met in each case (subsections (4) and (8)). When deciding whether to agree or return a plan, subsection (5) also requires the Keeper to have regard to the model records management plan produced under section 8, the guidance issued under section 1(3), the nature of the authority and its public records and any representations made by the authority.

22. The Keeper must notify an authority before returning its proposed plan, give the authority an opportunity to make representations and have regard to these representations before making a final decision (subsection (5A)). Subsection (6) makes provision about what is to happen where the Keeper returns a proposed plan.

Section 5 – Review of plans

23. This section requires authorities to keep their plans under review and to review them when required to do so by the Keeper under subsection (1)(b). Subsection (5) allows the Keeper to set different review dates for different authorities. This could be used to allow the Keeper to consider revised plans on a phased basis.

24. The Keeper may not require an authority to review its plan less than five years after the date on which it was last agreed (subsections (1A) to (1C)). There is one exception to this rule, which allows the Keeper to require an authority to review its plan at any time, following a records management review under section 6.

25. Where the Keeper requires an authority to review its plan, subsection (2) requires the authority to submit any revised plan to the Keeper for agreement in accordance with section 4. If an authority decides that it does not need to make any changes to its plan as a result of the review the plan must still be submitted for agreement by the Keeper in accordance with section 4.

26. Subsection (3) enables authorities to revise their plans and submit revised plans to the Keeper at any time.
Section 6 – Records management reviews

27. Subsection (1) allows the Keeper to undertake a review of whether an authority is complying with its records management plan. This could be used where the Keeper becomes aware of a possible failure by a particular authority to comply. Alternatively the Keeper may decide to undertake a general review of compliance by a group of authorities (see subsection (6)).

28. Subsection (2) requires authorities to assist the Keeper in carrying out records management reviews if requested to do so. This might include, for example, providing information or documents.

29. After carrying out a records management review, the Keeper may make recommendations to the authority and may require the authority to review its plan under section 5 (subsection (3)).

Section 7 – Action notices

30. This section allows the Keeper to issue an action notice to an authority which is failing in its obligations under Part 1 of the Bill. An action notice could be issued in relation to a failure to prepare a records management plan, a failure to comply with a plan, a failure to assist in a review or any other failure under the Bill. Subsection (2) sets out the information which must be included in an action notice.

31. Subsection (2A) requires the Keeper to notify an authority before issuing an action notice, to give the authority an opportunity to make representations and to have regard to these before making his decision.

32. Where an authority fails to comply with the action notice, subsection (4) allows the Keeper to publicise the failure.

Section 8 – Model records management plan

33. This section obliges the Keeper to produce and publish a model records management plan and keep the model plan under review (subsections (1) and (3)). Authorities must have regard to the model plan when preparing and revising their own plans (see subsection (2)).

34. Before issuing the model records management plan or a revised model plan, the Keeper must consult authorities and such other persons as appropriate and must have regard to the views they express (subsections (1A) and (3A)).

Section 9 - Guidance

35. This section allows the Keeper to provide further guidance to authorities on their obligations under Part 1 of the Bill and requires authorities to have regard to such guidance. Such guidance would be in addition to the guidance about the form and content of records management plans which the Keeper is obliged to issue under section 1(3). Subsection (1A) allows the Keeper to issue different guidance in relation to different authorities, for instance taking into account the nature of the functions they perform.
36. Before issuing guidance, the Keeper must consult authorities affected by the guidance and such other persons as appropriate and must have regard to any views they express (subsection (1B)).

Section 9A – Application of Part 1 in relation to sheriff court records and JP court records

37. This section provides that the Sheriff Principal for each sheriffdom is responsible for carrying out duties in relation to the records of sheriff courts and justice of the peace courts in the sheriffdom under Part 1 of the Bill. The provision effectively replicates the existing duties imposed on Sheriffs Principal under sections 2(3) and 2A(4) of the Public Records (Scotland) Act 1937, which are repealed by section 13(za) of the Bill as a consequence.

Section 10 – No right of action for failures to comply

38. This section excludes any right of action in civil proceedings where an authority is in breach of Part 1 of the Bill. The Keeper can issue action notices in respect of failures to comply with the Bill and can publicise any failure to comply with an action notice under section 7.

Section 11 – Annual report

39. This section requires the Keeper to prepare an annual report and submit it to Scottish Ministers after the end of each financial year. “Financial year” is defined in schedule 1 to the Interpretation and Legislative Reform (Scotland) Act 2010 as a year ending with 31 March.

40. Subsections (2) to (4) specify the information which the report must contain. Subsection (2)(a) and (c) allows the Scottish Ministers to set the form and submission date of the report.

41. Once the Scottish Ministers have laid the report before the Parliament under subsection (5) the Keeper must publish it (subsection (6)).

Section 12 – Interpretation of Part 1

42. This section defines the key terms used in Part 1 of the Bill.

Section 13 - Repeals

43. This section repeals certain existing duties which require Sheriffs Principal to care for and preserve the records of sheriff courts and justice of the peace courts and which require local authorities, SEPA, National Park authorities and Scottish Water to make arrangements for the preservation and management of their records. The repeals are consequential on the introduction of the duty to prepare and comply with an approved records management plan under section 1 of the Bill.

PART 2 – TRANSMISSION OF COURT RECORDS

44. Part 2 of the Bill consists of section 14 which amends sections 1, 2 and 2A of the Public Records (Scotland) Act 1937 (c.43) (“the 1937 Act”). These sections deal with the management of court records and the arrangements for transferring these records to the Keeper.
Section 14 – Transmission of court records

45. Subsection (2) inserts a new subsection (3) into section 1 of the 1937 Act. Section 1 of that Act deals with the records of the High Court of Justiciary and the Court of Session. The records of these courts can be transmitted to the Keeper in accordance with Act of Adjournal or Act of Sederunt. The amendment places a new obligation on the High Court of Justiciary and the Court of Session 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.

46. Subsection (3) amends section 2 of the 1937 Act, which deals with sheriff court records. Subsection (4) amends section 2A of the 1937 Act which deals with Justice of the Peace (JP) court records. Sections 2 and 2A operate in the same way and the effect of the amendments is the same in each case.

47. Subsections (3) and (4) remove the requirement for an order to be made before sheriff court or JP court records can be transmitted to the Keeper and remove the limit which prevents the transmission of sheriff court records under 25 years old and JP court records under 10 years old. These provisions are replaced with a power for the sheriff principal to transmit records where the Keeper agrees to the transmission.

PART 3 – GENERAL

Section 15 – Commencement

48. This section makes provision for commencement. Subsection (1) enables the Scottish Ministers to commence Parts 1 and 2 on a date or dates appointed by order. Part 3 of the Bill (sections 15 and 16) comes into force on the day after Royal Assent.

Section 16 – Short title

49. This section provides for the short title of the Bill.

Schedule

50. The schedule lists the authorities which must comply with the records management duties under Part 1 of the Bill. The list of authorities can be amended by order under section 2.
Public Records (Scotland) Bill

Marshalled List of Amendments selected for Stage 3

The Bill will be considered in the following order—

Sections 1 to 16

Long Title

Schedule

Amendments marked * are new (including manuscript amendments) or have been altered.

Section 1

Fiona Hyslop

1 In section 1, page 2, line 15, leave out <approval> and insert <agreement>

Fiona Hyslop

2 In section 1, page 2, line 20, leave out <approval> and insert <agreement>

Section 4

Fiona Hyslop

3 In section 4, page 3, line 35, leave out <approval> and insert <agreement>

Section 5

Fiona Hyslop

4 In section 5, page 5, line 4, leave out <approved> and insert <agreed>

Schedule

Fiona Hyslop

5 In the schedule, page 13, leave out lines 21 and 22 and insert—

<Safeguarders Panel>
Groupings of Amendments for Stage 3

This document provides procedural information which will assist in preparing for and following proceedings on the above Bill. In this case, the information provided consists solely of the list of groupings (that is, the order in which the amendments will be debated). The text of the amendments set out in the order in which they will be debated is not attached on this occasion as the debating order is the same as the order in which the amendments appear in the Marshalled List.

Groupings of amendments

**Group 1: “Agreement” of plans rather than “approval”**
1, 2, 3, 4

**Group 2: Minor and technical**
5
Public Records (Scotland) Bill - Stage 3: The Bill was considered at Stage 3.

The following amendments were agreed to (without division): 1, 2, 3, 4, and 5.

Public Records (Scotland) Bill - Stage 3: The Minister for Culture and External Affairs (Fiona Hyslop) moved S3M-8129—That the Parliament agrees that the Public Records (Scotland) Bill be passed.

After debate, the motion was agreed to (DT).
The Deputy Presiding Officer (Trish Godman): The next item of business is stage 3 proceedings on the Public Records (Scotland) Bill. In dealing with amendments, members should have the bill as amended at stage 2, the marshalled list, which is SP Bill 56A-ML, and the groupings, which the Presiding Officer has agreed. The division bell will sound and proceedings will be suspended for five minutes for the first division in the proceedings. The period of voting for the first division will be 30 seconds. Thereafter, I will allow a voting period of one minute for the first division after a debate and all other divisions will be 30 seconds.

Section 1—Records management plans

The Deputy Presiding Officer: Group 1 is on the “agreement” of plans, rather than “approval”. Amendment 1, in the name of the minister, is grouped with amendments 2 to 4.

The Minister for Culture and External Affairs (Fiona Hyslop): Amendments 1 to 4 follow on from amendments that were agreed to at stage 2 that replaced references to the keeper of the records of Scotland approving plans with references to him agreeing plans. Amendments 1 to 4 pick up on remaining instances of the terms “approval” and “approved” and change them accordingly.

The amendments address the concerns of the Convention of Scottish Local Authorities that the language of the bill focused too much on failure. They change the emphasis to one of collaboration and improvement. The amendments have no effect on the situation of the keeper, who will still require to be content with plans, otherwise he will return them.

I move amendment 1.

Amendment 1 agreed to.

Amendment 2 moved—[Fiona Hyslop]—and agreed to.

Section 4—Agreement of plans

Amendment 3 moved—[Fiona Hyslop]—and agreed to.

Section 5—Review of plans

Amendment 4 moved—[Fiona Hyslop]—and agreed to.
Schedule—Authorities to which Part 1 applies

The Deputy Presiding Officer: Group 2 is on a minor and technical issue. Amendment 5, in the name of the minister, is the only amendment in the group.

Fiona Hyslop: Amendment 5 is a technical amendment that updates a reference in the schedule. The schedule currently refers to “Safeguarders Panels (that is to say, panels established under section 30(1) of the Children’s Hearings (Scotland) Act 2011 ...)”.

That reflected the Children’s Hearings (Scotland) Bill at the time when the Public Records (Scotland) Bill was introduced. After the introduction of the Public Records (Scotland) Bill in October 2010, the Children’s Hearings (Scotland) Bill was modified at stages 2 and 3 so that the Children’s Hearings (Scotland) Act 2011 now makes provision for a single safeguarders panel, in section 32. Amendment 5 will change the entry in the schedule to reflect that.

I move amendment 5.

Amendment 5 agreed to.

The Deputy Presiding Officer: That ends consideration of amendments. That must be the quickest we have ever got through a bill.

Public Records (Scotland) Bill

The Deputy Presiding Officer (Trish Godman): The next item of business is a debate on motion S3M-8129, in the name of Fiona Hyslop, on the Public Records (Scotland) Bill.

11:32

The Minister for Culture and External Affairs (Fiona Hyslop): It gives me great pleasure to open the stage 3 debate on the Public Records (Scotland) Bill and to invite members to agree to pass the bill. I thank members of the Education, Lifelong Learning and Culture Committee, the Finance Committee and the Subordinate Legislation Committee for their hard work and careful scrutiny of what is in essence a technical bill. I also thank members for their comments on the bill during its passage and the organisations and individuals who provided oral and written evidence to the committee and briefings for members on the provisions.

The bill is about improving the management of public records by named authorities. It amends the Public Records (Scotland) Act 1937 in relation to court records. It is the first bill about Scottish public records in more than 70 years. As I said during the stage 1 debate, the bill has its origins in Tom Shaw’s report on the historical abuse of looked-after children, which was published in 2007 and was accepted by all the parties in the Parliament. Tom Shaw’s powerful and compelling evidence on the bill to the Education, Lifelong Learning and Culture Committee showed the human cost of record-keeping failures. He repeated his recommendation on the need for new legislation to cover all public records. That is why we introduced a comprehensive bill that covers all the functions that are carried out by the public authorities that are listed in it.

The bill will not mean that authorities need to keep everything—far from it. Good records management involves identifying the records that are important and have long-term value and drawing up agreed schedules that say how long particular records should be kept. When authorities engage private or voluntary organisations to carry out functions on their behalf, the records that those organisations create will be covered by the bill. That addresses a key element of the Shaw report.

The bill provides a definition of “public records”, which is necessary to ensure that those responsible for managing records know which records fall within the bill’s scope and know the obligations that will be placed on them. The definition also ensures that the keeper of the records of Scotland, who will produce guidance on
the form and content of plans and who will have powers to scrutinise their implementation, knows which records an authority’s plan should cover. Only then can the keeper assess whether the plan makes proper arrangements for the management of those records.

Nowadays records can be kept in a variety of formats, the range of which clearly could not be envisaged by the 1937 legislation. The definition therefore ensures that the bill is future-proofed, as it must cover records in any format.

In its stage 1 report, the Education, Lifelong Learning and Culture Committee agreed to back the bill’s general principles, taking the view that there was a strong moral obligation on public authorities to manage personal records effectively. It agreed that Tom Shaw’s report and the experiences of former residents of residential schools and care homes in trying to trace records formed a persuasive argument for legislation to address known deficiencies. That view was fully endorsed by Parliament’s unanimous support for the bill at stage 1 and I am grateful to members of all parties who spoke in that debate.

Before stage 1, both the Convention of Scottish Local Authorities and the voluntary sector argued that the bill should focus only on high-risk records and that the definition should be removed or narrowed. However, although it makes sense in practice to concentrate on high-risk records, managing only certain records within an organisation is not good records management practice. The keeper would find it difficult to agree a records management plan that took such an approach, as it would create uncertainty about which records were covered and who decided whether they were low or high risk. Instead of excluding types of records, the bill allows authorities to assess levels of risk and to make provision in their own records management plans to manage different records differently.

The Government responded to concerns that were voiced in evidence to the committee and during the stage 1 debate. At stage 2, Elizabeth Smith and Ken Macintosh made important points about the need for the bill not to be disproportionate or to create a heavy burden on public authorities, particularly the voluntary sector. To address those issues, I moved 28 separate amendments, all of which I am pleased to say were accepted. The Government also accepted 25 non-Government amendments lodged by Elizabeth Smith that, along with the amendments that I have moved and the Parliament has agreed this morning, further improve the bill’s language and tone. I think that Elizabeth Smith probably holds the record for the number of Opposition amendments that the Parliament has accepted to a bill—she might want to check that—but together all of the amendments seek to emphasise our aim of encouraging partnership working and continuous self-improvement rather than dictating solutions.

The stage 2 amendments made it clear that the keeper will not seek to impose a one-size-fits-all approach in every case. The Government’s intention has always been that the keeper should work closely with authorities to ensure that the records management regime takes account of particular sectors’ needs and respects their judgments about risk. Different sectors will have different records management plans based on individual needs and their assessment of the risks that they face. The bill permits professionals in the various sectors—child care, policing, health and the other areas—to make such decisions within an overall management framework. Moreover, named public authorities across Scotland including the Scottish Government, Scottish Parliament, local authorities, the Scottish courts, the national health service and others will be required to produce and implement a records management plan to be approved by the keeper.

The improvements for record keeping enshrined in the bill will, I believe, address the problems identified in the Shaw report and provide a solid framework for improving records management in Scottish public authorities for many years to come.

I move.

That the Parliament agrees that the Public Records (Scotland) Bill be passed.

11:38

Ken Macintosh (Eastwood) (Lab): It might have taken all of four years, but with less than a week to go before dissolution I am pleased to conclude the Education, Lifelong Learning and Culture Committee’s work, and its final bill, on a consensual rather than acrimonious note. As members will acknowledge, there is no point in pretending that we have been the most united of committees, but I am genuinely pleased that we have been able to come together and reach broad agreement on the Public Records (Scotland) Bill and that our last debate will not be marked by our spitting unpleasantries at each other across the chamber. Given the imminent election, I suspect that my enjoyment of this moment is unlikely to last long but, in the same spirit of appreciation, I thank the minister and her team; the keeper of the records of Scotland, Mr George MacKenzie; and all those whose work and efforts have brought us to this point.

The purpose of the bill is to improve public record keeping in Scotland. It will place an obligation on certain public authorities to produce a records management plan, which will be
approved by the keeper of the records of Scotland. The keeper will publish a model RMP as part of best practice advice to authorities, and the bill will give the keeper the power to carry out a review of the implementation of RMPs. It is hoped that the duties in the bill will not be particularly onerous or costly, but the keeper will be able to issue warning notices and publicise the names of any authorities that are found to be in breach of the provisions.

In our earlier discussions about the bill, genuine worries were expressed about the impact of the proposals, and perhaps there were concerns about where the discussions and dialogue were heading. The willingness of the Executive and the bill team to meet those concerns and engage with stakeholders has assuaged most, if not all, of those anxieties, and I thank them for that.

I thank the committee clerks and the drafting team. I do not think that the bill has been the most difficult to work on, but I occasionally worry about how difficult we have been as a committee—or how demanding I have been. [Interruption.] I hear Margaret Smith saying, “Hear, hear!” I formally note my gratitude for and appreciation of the patience and thoughtfulness that our clerks have shown.

My list of thanks is reaching Oscar proportions, although so far it has been given without the histrionics.

I pay tribute to the contributions of all the witnesses, including those from COSLA and the voluntary sector, particularly the children’s organisations. There is no doubting the alarm with which some in the public sector and the voluntary sector initially viewed the bill. They expressed the fear that additional burdens and unwanted bureaucracy might be added at a time when service levels are under threat. I am not sure that that anxiety has entirely gone away, but the amendments that were agreed to at stage 2 certainly addressed some of the outstanding issues. The bill’s tone and language have changed and it is now recognised that the approach to good record keeping needs partnership rather than diktat from above. The principle of proportionality or balance of risk has also been accepted and written into the bill, although, of course, as with all such measures, we will need to see how that works in practice. Most of us in the Parliament are aware of the hard work and thought that voluntary sector groups and organisations such as COSLA put into legislation, but it is worth putting on the record how much that effort matters and the difference that it makes to the legislative process.

Finally, I thank those whose work lay behind the bill originally, and whose evidence in support of the proposals was ultimately convincing.

The systemic review of historical abuse in residential schools and children’s homes in Scotland, which was led by Tom Shaw, revealed the extent and failings of public record keeping. There is no doubt that the suffering and damage to young lives that former residents experienced have been compounded by their inability to access accurate, factual information about their upbringing. As an experience, that is perhaps not on a par with the trauma that is suffered by survivors of child abuse, but the importance and impact of good record keeping have been captured many times by the “Who Do You Think You Are?” BBC series. Even a character as sure of himself and as confident of his own identity as Jeremy Paxman broke down when he was confronted with documented evidence that his Scottish great-grandmother lost her poor relief because she had an illegitimate child. I could be wrong, but I think that he was already feeling emotionally vulnerable because of the evidence that proved that he is half Scottish. The point that I am making—which our committee witnesses put rather better—is that good record keeping is not just a bureaucratic necessity; it can be invaluable to many individuals’ lives. It is a moral obligation, and it will be a legal obligation on our public authorities.

I recommend that members support the passage of the bill.

11:43

Elizabeth Smith (Mid Scotland and Fife) (Con): To have taken part in this legislative process has been an interesting and enlightening experience, even if the passing of the Public Records (Scotland) Bill will not—I dare say—go down in history as the Parliament’s most high-profile moment. Notwithstanding that, it is important to ensure that we put in place better records management. It has also been extremely encouraging that there has been almost unanimous cross-party agreement on how best to preserve and enhance the precious fabric of the nation’s heritage.

Having good-quality, accessible public records and archives is an essential part of improving the welfare of society in general, if not democracy itself. It is fair to say that such records can make a life-changing difference to individuals and families. That point was forcibly made in some of our witness sessions—Ken Macintosh has just alluded to that.

Although the main driving force for the bill was the unsatisfactory circumstances that affected many of our most vulnerable people, especially those flagged up by the Shaw review, there are other reasons why it was important to do more to improve things, particularly in order to create
greater efficiency, spread good practice and keep costs to a minimum. We all accepted that all organisations receiving public money have an obligation to ensure that records are properly kept and that they are accessible and transparent.

That said, the debate was really about how to strike the right balance between ensuring that there was greater efficiency, not imposing too much of a regulatory burden on different bodies, and including more organisations under the wider net of officialdom. The latter was—and, I think, remains—a slight concern of several voluntary sector groups and organisations, without which Scotland would be a much poorer place, especially when it comes to looking after vulnerable people.

There were genuine concerns about whether a new legislative framework would be not only unnecessary but burdensome and time consuming for staff who have many other things to do, particularly when budgets in the voluntary sector remain tight. We give credit to the Scottish Government for taking on board all those concerns and for arriving at the bill we have before us today. It is good that the Government has listened carefully.

There was concern about possible overimplementation of the legislation and about increasing workloads and so on. The Scottish Government deserves credit for having responded to those concerns and giving cast-iron assurances about the language in the bill and the need to ensure that the relationship between the keeper and the authorities will be fully consultative and agreed by both parties. I am grateful to the minister for that.

It goes without saying that everyone was sympathetic to the former residents of children’s homes and special schools, and their families, who were able to put on record their immense difficulty and sometimes harrowing experiences in accessing the records that they required. Those difficulties presented a strong case for change and for addressing many of the inconsistencies in records management throughout Scotland. We have successfully addressed those issues.

Like other members, I strongly recommend that all members endorse the bill this afternoon.

11:47

Margaret Smith (Edinburgh West) (LD): I add my thanks to those already expressed to the clerks to the Education, Lifelong Learning and Culture Committee for their assistance during the passage of the bill. It is probably fitting that I add my thanks to them for their work over the course of the parliamentary session. Their assistance to me since I joined the committee in 2008 is much appreciated. My thanks also go to Karen Whitefield, who has convened the committee very ably. The bill may have been one of her easier tasks, given some of the tasks that she has had to endure this session. I am thinking particularly of the Education (Additional Support for Learning) (Scotland) Bill, which was not the committee’s finest hour from the point of view of consensus. This might be, however. I thank the minister and her team for their willingness to engage and to address the concerns raised by children’s organisations and the voluntary sector about the bill.

The bill has come a long way since it was debated at stage 1. As we have heard, it is part of the legacy of the historical abuse systemic review undertaken by Tom Shaw. His report, which was published in 2007, made three sets of recommendations. The bill considers the third of those, relating to the procedures for the retention of records. We all welcomed the primary intention behind the bill, which was to improve the keeping of records generated by the work of public agencies, voluntary organisations and so on.

I thank all those who gave evidence to the committee and I echo Ken Macintosh’s point about the importance of the information and evidence that we get from people who lobby and engage with Parliament. I put on record my particular thanks to Tom Shaw for his work, not only on the review but in relation to the compelling evidence that he gave us about why the bill was necessary. In fact, if legislation had been in place, the heartache that people have suffered might well have been alleviated, although that is by no means the most important part of the consequences of abuse. We kept that at the forefront of our minds throughout our work on the bill, which allowed us to realise that what we were talking about could not simply be boxed up as, potentially, additional bureaucracy. This was about ensuring that we keep the right records for the right reasons and that we keep them properly, because those records matter in people’s lives, and in the life of our country, whether they are cultural or historical records or just records that help us to know who we are.

The minister has taken on board many of our concerns and many stakeholders’ concerns. A notable shift in the bill’s tone has taken place. As a result, the bill is not heavy handed but a good response to the problems that have been identified. The stage 2 amendments were helpful in taking forward the bill’s tone.

At stage 2, the concern that the keeper might impose a one-size-fits-all approach was at least alleviated. Such an approach is not the bill’s intention. The keeper will work closely with local authorities and others to ensure that the
management system is applied in a way that takes account of their needs and respects their judgments about risk. We have probably got that right, and I thank the minister for her attitude in addressing that issue.

Concern about record keeping in relation to common good land was raised with us. Many of us across the parties have encountered that issue in a variety of ways over the years. We were told that the bill did not directly cover such records, but I hope that local authorities will address the issue, because a number of people across Scotland are concerned about it.

The case is clear for bodies in Scotland to have to keep better records and for the record-keeping process to be reviewed and continuously improved. We are happy and do not hesitate to support the bill as amended.

11:51  
**Kenneth Gibson (Cunninghame North) (SNP):** I am delighted to join this morning’s love-in—sorry, debate. I am glad to see so much consensus. The bill shows what can happen when everyone works together towards a common aim.

As has been said, the bill’s stimulus was the Shaw report in 2007, which examined child abuse in residential and children’s homes from 1950 to 1995. Tom Shaw concluded that difficulties for former residents of such homes in tracing records for identity, family or medical reasons were due to poor record keeping in the public sector. To ensure that future generations are not affected in that way, new legislation is needed to encompass fully all public records. The bill is of course that new legislation.

Mr Shaw told the Education, Lifelong Learning and Culture Committee that the bill would end “a range of weaknesses, gaps and inconsistencies”.

He also said that record keeping needed to be viewed as

“a proper way of recording the life experience and circumstances of an individual”

rather than “a bureaucratic chore” or “a storage problem.”

Mr Shaw said that his historical abuse systemic review found that record keeping was unsatisfactory in more than half the public authorities that were surveyed. He told us how one of his researchers had visited several archives and stores where records were held and described what she found:

“it sounds Dickensian—dusty storerooms where cardboard boxes that appeared not to have been opened for a long time sat. Whenever people were asked what was in the boxes, the answer was in effect, ‘We don’t know—would you like to have a look?’ … In that way, existing practice has failed … My … concern is that the longer it takes to put right,

“the more records will be lost and the more people who never access what is held on them will pass through the system.”—[Official Report, Education, Lifelong Learning and Culture Committee, 19 January 2011; c 4543, 4546-7.]

In many cases, records are simply non-existent.

The issue is about identity, as other members have said. Many unfortunate Scots have slipped through the proverbial cracks because of inadequate record keeping for too long and have grown up without knowledge of their youth, family history or who they really are. Scotland has a moral obligation to manage the populace’s personal records successfully. Moreover, the bill’s primary aim is simply to improve public record keeping. The race to keep records has—unfortunately—lagged behind technological developments and population growth.

The bill covers the management of records once they exist. Decisions on how they should be created will be left to the keeper of the records of Scotland and the authorities. Organisations with largely successful record-keeping practices will not be affected and will be able to continue good practice, whereas those that have obviously poor record keeping will feel the greatest impact of the bill and will be required to make a positive change.

In relation to the allegations about Kerelaw school, the absence of effective record keeping was undoubtedly a key factor. No longer will files be lost or hard to locate because of neglectful minds and careless storage of important documents.

The bill is about better handling of records and not about creating new records. The bill is necessary to ensure consistency across public authorities, whose records management plans will be approved by the keeper.

Children who grow up in care have often been unable to find any record of their childhood—not even a photograph of them or their family. We owe to those who are in care and to future generations the assurance that records will now be properly kept.

11:54  
**Claire Baker (Mid Scotland and Fife) (Lab):** I am pleased to speak in the stage 3 debate on the Public Records (Scotland) Bill. Although there was strong support for the bill and the changes that it set out to achieve, concerns were raised in the stage 1 debate, particularly around the capacity of the third sector to fulfil the bill’s requirements and third sector organisations’ relationships as
contractors with public authorities. I am pleased that we reached consensus and now have a better understanding of the issues than we had at stage 2. That is down to the constructive way in which the Government and members addressed the issues that were raised during stage 1.

The minister and members lodged a number of successful amendments at stage 2 that shifted the bill’s tone so that the relationship between the keeper of the records, public authorities and the third sector became one of agreement rather than instruction and direction. Although the changes do not alter the power of the keeper, who still has the final approval of any RMP, the bill emphasises agreement and focus on best practice, while allowing flexibility for all partners to achieve a working solution that best fits the service that they are focused on delivering.

At stage 2, we also addressed concerns about the relevance of stored information and requests, primarily from the third sector, for the bill to be clearer on the issue of risk. The committee received evidence that the bill could overburden some organisations, which felt that there was not sufficient distinction between relevant information and extraneous or incidental information. Although much of that will come down to judgment, the sector is looking for some direction, so the minister’s attempt to address the issue of risk is to be welcomed. The bill makes it clear that an authority’s RMP may make different provision for different kinds of public records and that, in doing so, it may take account of the different levels of risk in the management of different kinds of records. Although that will still come down to the authority’s own assessment of the level of risk, the bill should provide assurance for contractors that the issue has been recognised and that efforts will be made to keep information relevant and appropriate. Again, the partnership and agreement aspect of the bill is important in that respect, as in many cases the contractors will have a good understanding of the records that are relevant to their service and service users.

The minister acknowledged that there are concerns around the voluntary sector’s different contractual arrangements with different public bodies, which could lead to multiple contracts. The bill always proposed common records management plans, but the greater flexibility and responsiveness that were added at stage 2 will, I hope, respond to the voluntary sector’s concerns and provide local authorities with the powers that they require.

We will pass the bill today, but the next stage—guidance and practical implementation—will be crucial to the achievement of the outcomes that we all want to see. Issues such as the definition of a public record, what a model records management plan will look like and how risk is determined and balanced will continue to challenge all partners until they get it right and operate a records management system in which we can have confidence.

Although it is a short piece of legislation, the Public Records (Scotland) Bill is hugely significant. It delivers a framework for transparent, efficient and relevant record keeping and it is intended to ensure confidence in the keeping of information. It establishes a clear expectation of how public records should be managed, recognising their significance in personal situations as well as in public and historical contexts. Although the bill is in many ways a technical piece of legislation that is more about managing information and relationships between organisations, its true intention is to deliver a public records system in which people can have confidence and to ensure that we protect the rights of individuals to access information that is hugely significant to their lives.

**The Deputy Presiding Officer:** I now move to the winding-up speeches.

11:58

**Hugh O’Donnell (Central Scotland) (LD):** This will perhaps be an easier task than is often the case with winding-up speeches. Many members who are not in the chamber have missed a trick in relation to the bill. All too often, bills that are allegedly big pieces of legislation get all the headlines, but the small, significant ones slip in below the radar. From my personal perspective, that seems to be the case in relation to the Public Records (Scotland) Bill, because an accurate reflection of how we keep records lies at the heart of, and is key to, many of the things that we do in our own days, whether that involves legislation on additional support for learning or any other area. Record keeping is fundamental to the process.

We know that the bill’s genesis lies in the Shaw report. There is great diversity across local authorities, public bodies and the voluntary sector in how and why they keep records.

Some of the concerns that were raised in that regard have been mitigated by the minister’s amendments. Based on communications that I have received, I guess that the voluntary sector feels a bit easier about how everything will work. However, as Margaret Smith highlighted, questions remain about the keeping of common good records. That is particularly important as we move into times of economic stress, when we need to know what local authorities are doing with common good land and moneys.

Ken Macintosh referred to Jeremy Paxman’s participation in “Who Do You Think You Are?” The keeping of accurate records is a long-term role. I
I had imagined. Credit to Elizabeth Smith for breaking all those support the bill at decision time.

—

Government, for its engagement on the bill. I always agree on things; and the Scottish —

and Culture Committee colleagues on the Education, Lifelong Learning interesting information; all the clerks; my evidence; the lobby groups, which gave us a lot of what was very moving and accurate winding-up speech.

I will also try to set the record for the shortest amendments to the Public Records (Scotland) Bill, which is small but —

perfectly formed

—

we hope—and significant, will add to our success in presenting a public record of Scotland and its people. At the heart of many of the documents that we are discussing are the people of Scotland. It is their history, and their present, that we should be interested in.

12:02

Elizabeth Smith: If I have unwittingly hit the record for the Opposition member who got the Government to accept the largest number of amendments to the Public Records (Scotland) Bill, I will also try to set the record for the shortest winding-up speech.

I simply wish to thank all those who provided us with what was very moving and accurate evidence; the lobby groups, which gave us a lot of interesting information; all the clerks; my colleagues on the Education, Lifelong Learning and Culture Committee—I know that we do not always agree on things; and the Scottish Government, for its engagement on the bill.

I definitely encourage all my colleagues to support the bill at decision time.

12:03

Pauline McNeill (Glasgow Kelvin) (Lab): All credit to Elizabeth Smith for breaking all those records—and for getting me to my feet earlier than I had imagined.

The Public Records (Scotland) Bill is a technical but essential bill, as members have already said. It is the third important and technical bill that we are considering today—and we have not even reached lunch time yet. On one of our final days of the session, we have already had a productive meeting of the Parliament.

As we have discovered in the course of scrutinising the bill, record keeping is an important public duty. In particular, the reasons why we are here today lie in the Shaw historical abuse systemic review, which highlights poor record keeping.

Kenny Gibson, referring to child abuse cases, highlighted very well the reason why it is essential to have good public record keeping. In evidence to the Education, Lifelong Learning and Culture Committee, the keeper of the records of Scotland highlighted some examples of the storage of information in e-mail form only, a practice that perhaps needed to be looked at by the authorities that had adopted it. Authorities certainly have to think more about how they store their records, and for what purposes.

There was discussion about whether there should be a voluntary scheme. We have rightly agreed that there should be a statutory framework, because of the implications of failing to keep proper records.

Ken Macintosh entertained us when he talked about the programme “Who Do You Think You Are?” When I learn a bit more about my family history, through informal record keeping, I often think that I am fortunate to have some understanding of my past, because people bothered to keep records. Where would we be without some understanding of our past, our family histories and what our families went through? Record keeping is significant, as Claire Baker said.

Part 2 of the bill deals with Scottish court records. It is right that the High Court of Justiciary and the Court of Session will be required to consult the keeper before making an act of sederunt.

The keeper’s role is an essential part of the bill, because someone will need to work with local authorities on the best ways to operate within a flexible framework. The requirement to produce and implement a records management plan is essential in that regard. In evidence, the committee heard about a range of ways in which information should be stored. As Claire Baker said, it is important that thought is given to how information is held.

The principle is that good record keeping underpins lawful access to information and provides a good service to the public. The bill is
intended to provide a light-touch approach. It is for Parliament in a future session to monitor compliance with the new legislation, to ensure that it remains light touch, and to monitor the costs of the new arrangements, to ensure that we have got them right.

I congratulate the Education, Lifelong Learning and Culture Committee on its work and the Government on introducing a good bill. I agree with Margaret Smith—I have had many letters on this—that the Parliament should consider record keeping in relation to common good land and assets, for reasons that are obvious to members.

I welcome the bill and the work that has been done on it, and I support it.

12:07
Fiona Hyslop: I thank members for an informed, interesting and constructive debate. The debate demonstrates the extent to which members agree on the importance of and good intentions behind the bill, and the process has demonstrated how we can work collectively to ensure that we produce good legislation. I hope that future committees of the Parliament will reflect on practice in relation to this bill’s progress, in particular.

I am struck, as I was at stage 1, by members’ recognition of the importance of the bill, particularly in safeguarding the interests of vulnerable people. Although the bill cannot put right what has gone wrong in the past, it can help us to avoid the same problems in future, as Elizabeth Smith said. We owe it to former residents of care homes and survivors of abuse, and indeed to all future generations in this country, to make the necessary improvements to the way in which public authorities deal with records, to safeguard people’s rights and identities as individuals—Pauline McNeill made that important point—and to secure our collective memory.

It is my sincere hope that, in future, people who have been in care will never again experience the grief and frustration of discovering that records about their earlier lives are incomplete, inaccurate or simply not there. Kenny Gibson provided a poignant reminder of the human aspect of record keeping.

Given tight Parliament and committee timetables, I had to prioritise legislation. Although I wanted—and still want—to legislate to improve provision on the National Library of Scotland, for example, the human and moral dimension of the issue meant that the Public Records (Scotland) Bill had to take priority.

It is important to recognise that public records, as part of our collective memory, form the basis for individual rights and obligations. The bill will strengthen transparency and accountability of public authorities and it will help to secure the records of vulnerable people. It aims to create a common and consistent standard of record keeping, which will protect the rights of all members of the public by ensuring that records and information about them are managed properly.

The opportunity for members of all parties in the Parliament to acknowledge the importance of record keeping has been a plus in the bill process. As Hugh O’Donnell said, record keeping is perhaps not the most high-profile issue, but without records much cannot be done, or done properly.

I agree with some of the concerns about common good asset registers, which local authorities should keep. The bill creates a framework for good and effective record keeping. However, there is an issue about how we help local authorities to ensure that they include public records of their common good assets in their records management plans. Members from all parties raised that issue, but we need further legislation to make it happen. We are creating an agenda for the next parliamentary session in that regard.

I thank members of the Parliament and all the members of the Education, Lifelong Learning and Culture Committee for their constructive comments and invaluable support during the bill’s passage. Moreover, I extend my thanks to other organisations—particularly COSLA and, in the voluntary sector, the Scottish Council for Voluntary Organisations, Barnardo’s Scotland, Aberlour Child Care Trust, Children 1st and Action for Children—for their input. They all made constructive contributions, and I look forward to including them in continued dialogue.

Dialogue with stakeholders throughout the process resulted in consensus on a number of important issues. The keeper’s powers to agree and return an authority’s records management plan, and the impact on contractors’ records, remained issues of concern throughout the process. I will clarify one matter. The keeper must issue guidance and a model records management plan to authorities. The guidance and the model plan must cover contractors’ records where those contractors perform a function of the authority. How contractors’ records are managed is likely to be closely based on the contractual terms that the authority and the contractor agree.

Therefore, the bill strikes a delicate balance. Although the guidance and the model plan will cover contractors’ records, I do not consider it appropriate for the keeper to go further and seek to dictate how authorities and contractors regulate
their relationships. The bill places the onus on authorities to manage their records. It does not impose duties on contractors; nor does it interfere, or give the keeper power to interfere, in the existing relationships between authorities and contractors. The terms under which a contractor may carry out functions on behalf of an authority are for those two parties to agree separately. I consider that the bill fulfils the Government’s stated intention that the legislation should be light touch.

It was clear from responses to the original consultation and discussions with stakeholders that the dissemination of guidance by the keeper will be crucial to the successful implementation of the bill. Claire Baker made that point. Any guidance that is issued will be developed in partnership with stakeholders.

To that end, a new stakeholder forum has been set up in which those issues are being discussed and addressed. The keeper views that forum as integral to the process of formulating and agreeing guidance and the model plan. He and his colleagues have been immensely impressed by the contributions that the voluntary sector and authorities have already made and they look forward to working further with them.

I thank the keeper of the records of Scotland and my bill team in the National Archives of Scotland for their hard work throughout the legislative process. The bill team demonstrated responsiveness and engagement. Not only has that resulted in a better bill, but it will improve the bill’s implementation.

As I noted in my opening speech, the bill addresses problems with the management of public records and key findings of Tom Shaw’s important report. It will make improvements in existing record keeping and ensure that, where important records are created, there are proper mechanisms and structures in place for accountability for them and for their future preservation. I am confident that the new legislation will provide a framework that will allow sufficient flexibility so that the needs of individual sectors can be addressed well into the future.

In voting for the bill, we reaffirm our commitment to the appropriate care, management and future preservation of our unique public records and recognise their importance to organisations, individuals and the wider Scottish community.

This might be an opportune moment to remind members that Scotland is known not only nationally but internationally for its ability to keep records well. In the previous debate, which was on the Certification of Death (Scotland) Bill, the importance of record keeping was mentioned. The historical record keeping of medical information in particular is one of the reasons why we are at a competitive advantage in life sciences and other developing industries.

Record keeping reaches beyond the bureaucratic—it can have other impacts. It is important for this generation and future generations of Scots. The bill’s approach is attracting attention from other jurisdictions around the world. I ask that members support the motion to pass the Public Records (Scotland) Bill.
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Public Records (Scotland) Bill
[AS PASSED]

An Act of the Scottish Parliament to make provision about the management of records by certain authorities; to amend the Public Records (Scotland) Act 1937 (c.43) in relation to the transmission of court records to the Keeper of the Records of Scotland; and for connected purposes.

PART 1
RECORDS MANAGEMENT PLANS

1 Records management plans

(1) Every authority to which this Part applies must—

(a) prepare a plan (a “records management plan”) setting out proper arrangements for the management of the authority’s public records,

(b) submit the plan to the Keeper for agreement, and

(c) ensure that its public records are managed in accordance with the plan as agreed with the Keeper.

(2) An authority’s records management plan must—

(a) identify—

(i) the individual who is responsible for management of the authority’s public records, and

(ii) (if different) the individual who is responsible for ensuring compliance with the plan, and

(b) include, in particular, provision about—

(i) the procedures to be followed in managing the authority’s public records,

(ii) maintaining the security of information contained in the authority’s public records, and

(iii) the archiving and destruction or other disposal of the authority’s public records.

(2A) An authority’s records management plan may make different provision for the management of different kinds of public records (taking account, for example, of the different levels of risk associated with the management of different kinds of records).
(3) The Keeper must issue guidance to authorities about the form and content of records management plans.

(3A) The Keeper may issue different guidance under subsection (3) in relation to different authorities.

(3B) Before issuing guidance under subsection (3), the Keeper must—
(a) consult the following on a draft of the guidance, namely—
   (i) such authorities as the Keeper considers will be affected by the guidance, and
   (ii) such other persons (if any) as the Keeper considers appropriate, and
(b) have regard to any views expressed in response to the consultation.

(4) Authorities must have regard to the guidance issued by the Keeper in preparing their records management plans for agreement with the Keeper.

(5) An authority—
(a) must, if the Keeper so requires, or
(b) may, with the Keeper’s agreement,
   have separate records management plans for public records relating to separate functions of the authority.

(6) A group of two or more authorities—
(a) must, if the Keeper so requires, or
(b) may, with the Keeper’s agreement,
   have a common records management plan for both or, as the case may be, all of the authorities in the group.

2 Authorities to which Part 1 applies

(1) The authorities to which this Part applies are the bodies, office-holders and other persons listed, or of a description listed, in the schedule.

(2) The Scottish Ministers may by order made by statutory instrument amend the schedule by—
(a) adding—
   (i) a body, office-holder or other person, or
   (ii) a description of bodies, office-holders or other persons,
(b) removing an entry listed in it, or
(c) modifying an entry listed in it.

(3) An order under subsection (2)(a) may add a body, office-holder or other person, or a description of bodies, office-holders or other persons, only if the body, office-holder or person, or (as the case may be) each of the bodies, office-holders or persons within the description, is—
(a) a part of the Scottish Administration,
(b) a Scottish public authority with mixed functions or no reserved functions (within the meaning of the Scotland Act 1998 (c.46)), or
(c) a publicly owned company.

(4) In subsection (3)(c), “publicly owned company” means a company that is wholly owned by—

(a) the Scottish Ministers, or

(b) another authority.

(5) For that purpose, a company is wholly owned—

(a) by the Scottish Ministers if it has no members other than—

   (i) the Scottish Ministers or other companies that are wholly owned by the Scottish Ministers, or

   (ii) persons acting on behalf of the Scottish Ministers or of such other companies,

(b) by another authority if it has no members other than—

   (i) the authority or other companies that are wholly owned by the authority, or

   (ii) persons acting on behalf of the authority or of such other companies.

(6) In this section, “company” includes any body corporate.

(7) An order under subsection (2) may—

(a) include consequential, supplementary, incidental, transitional, transitory or saving provision,

(b) modify any enactment.

(8) An order under subsection (2) is not to be made unless a draft of the statutory instrument containing the order has been laid before and approved by resolution of the Scottish Parliament.

3 Meaning of “public records”

(1) In this Act, “public records”, in relation to an authority, means—

(a) records created by or on behalf of the authority in carrying out its functions,

(b) records created by or on behalf of a contractor in carrying out the authority’s functions,

(c) records created by any other person that have come into the possession of the authority or a contractor in carrying out the authority’s functions.

(2) In subsection (1) “contractor”, in relation to an authority, means a person to whom functions of the authority are delegated (whether under a contract or otherwise) by the authority.

4 Agreement of plans

(1) An authority must submit its proposed records management plan to the Keeper for agreement by such date as the Keeper may determine.

(2) The proposed plan is to be submitted in such form and manner as the Keeper may determine.

(3) On receiving the proposed plan, the Keeper must—
(a) agree it, or
(b) if the Keeper considers that it does not set out proper arrangements for the
management of the authority’s public records, return it.

(4) What constitutes “proper arrangements” in any case is for the Keeper to determine.

(5) In deciding whether to agree or return the proposed plan, the Keeper must have regard to—
(a) the guidance issued by the Keeper under section 1(3),
(b) the model records management plan published under section 8,
(c) the nature of the authority and its public records, and
(d) any representations made by the authority.

(5A) Where the Keeper is considering returning the proposed plan, before deciding whether
to do so, the Keeper must—
(a) notify the authority—
(i) that the Keeper is considering returning the proposed plan, and
(ii) of the reasons for doing so,
(b) give the authority an opportunity to make representations, and
(c) have regard to any representations made by the authority.

(6) If the Keeper returns the proposed plan—
(a) the Keeper—
(i) must state reasons for the return, and
(ii) may propose modifications to the proposed plan, and
(b) the authority must submit a revised plan to the Keeper for agreement by such date
as the Keeper may determine.

(7) Subsections (2) to (6) apply to a revised plan submitted under subsection (6)(b) as they
apply to a proposed records management plan submitted under subsection (1).

(8) The Keeper may make different determinations under this section for different
authorities or different descriptions of authorities.

5 Review of plans

(1) An authority must—
(a) keep its records management plan under review, and
(b) if the Keeper so requires (whether at the time of agreement of the plan or
otherwise), carry out a review of the plan by such date (the “review date”) as the
Keeper may determine in accordance with subsections (1A) to (1C).
(1A) The Keeper must not determine a review date under subsection (1)(b) which is earlier than five years after the date on which the authority’s records management plan was last agreed.

(1B) In subsection (1A), reference to the plan being agreed includes—

(a) agreement of the plan under section 4,
(b) if the authority has been required to carry out a review of the plan under subsection (1)(b) of this section or section 6(3)(b), agreement of the revised or, as the case may be, resubmitted plan, and
(c) if the authority has submitted a revised plan under subsection (3) of this section, agreement of the revised plan.

(1C) If—

(a) the Keeper has determined a review date under subsection (1)(b) in relation to a plan, and
(b) before that date, the Keeper agrees—

(i) a revised plan submitted by the authority under subsection (3), or
(ii) if the authority has been required to carry out a review of the plan under section 6(3)(b), a revised or, as the case may be, resubmitted plan,

the Keeper must determine a new review date and inform the authority of the new review date.

(2) After carrying out a review of its plan in accordance with subsection (1)(b), the authority must, by the review date, either—

(a) revise its plan and submit the revised plan to the Keeper for agreement, or
(b) if the authority decides not to revise its plan, resubmit its current plan to the Keeper for agreement.

(3) An authority may at any time revise its records management plan and submit the revised plan to the Keeper for agreement.

(4) Subsections (2) to (8) of section 4 apply, as they apply to a proposed records management plan submitted for agreement under that section, to—

(a) a revised records management plan submitted to the Keeper for agreement under subsection (2)(a) or (3) of this section, and
(b) a records management plan resubmitted to the Keeper for agreement under subsection (2)(b) of this section.

(5) The Keeper may make different determinations under this section for different authorities or different descriptions of authorities.

6 Records management reviews

(1) The Keeper may carry out a review (a “records management review”) of whether an authority is complying with its records management plan.

(2) An authority must provide the Keeper with such assistance as the Keeper may require for the purpose of carrying out a records management review in relation to the authority.

(3) Following a records management review, the Keeper may—
(a) make recommendations to the authority about how it complies with its records management plan, and
(b) require the authority to carry out a review of its plan by such date as the Keeper may determine.

Section 5(2) applies to a review of a plan carried out under subsection (3)(b) of this section as it applies to a review of a plan carried out under section 5, but as if the reference to the review date were a reference to the date determined under subsection (3)(b) of this section.

Subsection (3) does not affect the Keeper’s powers under section 7.

The Keeper may carry out a records management review in relation to—
(a) a particular authority, or
(b) a group of authorities.

**Action notices**

This section applies where the Keeper considers that an authority—
(a) has failed or is failing to comply with its records management plan, or
(b) otherwise has failed or is failing to comply with any duty imposed on the authority by or under this Part.

The Keeper may issue to the authority a notice (an “action notice”)—
(a) specifying the details of the alleged failure, and
(b) requiring the authority to take specified action by a specified date.

Where the Keeper is considering issuing an action notice to an authority, before deciding whether to do so, the Keeper must—
(a) notify the authority—
   (i) that the Keeper is considering issuing an action notice, and
   (ii) of the reasons for doing so,
(b) give the authority an opportunity to make representations, and
(c) have regard to any representations made by the authority.

In subsection (2)(b), “specified” means specified in the action notice.

If the authority fails to comply with any of the requirements of the action notice, the Keeper may take such steps as the Keeper considers appropriate to publicise the failure.

The Keeper must prepare and publish a model records management plan.

Before publishing the model records management plan under subsection (1), the Keeper must—
(a) consult the following on a draft of the plan, namely—
   (i) each authority, and
   (ii) such other persons (if any) as the Keeper considers appropriate, and
Part 1—Records management plans

(2) Authorities must, in preparing and revising their records management plans for the Keeper’s agreement, have regard to the model records management plan published under this section.

(3) The Keeper must keep the model records management plan under review and may revise it and publish the revised model plan.

(3A) Before publishing a revised model plan under subsection (3), the Keeper must—
(a) consult the following on a draft of the plan, namely—
   (i) such authorities as the Keeper considers will be affected by the revisals to the plan, and
   (ii) such other persons (if any) as the Keeper considers appropriate, and
(b) have regard to any views expressed in response to the consultation.

(4) References in this Part to the model records management plan include references to a revised model records management plan.

9 Guidance

(1) The Keeper may issue guidance to authorities about their duties under this Part.
(1A) The Keeper may issue different guidance under subsection (1) in relation to different authorities.
(1B) Before issuing guidance under subsection (1), the Keeper must—
(a) consult the following on a draft of the guidance, namely—
   (i) such authorities as the Keeper considers will be affected by the guidance, and
   (ii) such other persons (if any) as the Keeper considers appropriate, and
(b) have regard to any views expressed in response to the consultation.

(2) Authorities must have regard to any guidance issued by the Keeper under subsection (1).

9A Application of Part 1 in relation to sheriff court records and JP court records

(1) This section applies in relation to the public records of a sheriff court or a justice of the peace court.
(2) The Sheriff Principal of the sheriffdom in which the court is located is responsible for carrying out the authority’s functions under this Part in relation to such public records.
(3) Accordingly, in relation to such public records, a reference in this Part to an authority (other than in section 3) is to be read as a reference to the Sheriff Principal.

10 No right of action for failures to comply

This Part does not confer any right of action in civil proceedings in respect of any failure by an authority—
(a) to comply with its records management plan, or
(b) otherwise to comply with any duty imposed on the authority by or under this Part.
11 Annual report

(1) The Keeper must, after the end of each financial year—
   (a) prepare a report on the carrying out of the Keeper’s functions under this Part during the year, and
   (b) submit the report to the Scottish Ministers.

(2) The report must—
   (a) be prepared in such form as the Scottish Ministers may direct,
   (b) contain the information specified in subsection (3) and such other information as the Scottish Ministers may direct, and
   (c) be submitted by such date as the Scottish Ministers may direct.

(3) The information referred to in subsection (2)(b) is—
   (a) information about records management plans and revised records management plans agreed with the Keeper during the year,
   (b) information about any records management reviews carried out by the Keeper during the year,
   (c) details of any action notices issued by the Keeper during the year,
   (d) the names of any authorities that have failed to comply with any of the requirements of an action notice together with details of the alleged failures.

(4) The Keeper may include in the report such other information as the Keeper considers appropriate.

(5) The Scottish Ministers must lay the report before the Scottish Parliament.

(6) The Keeper must, as soon as practicable after the report has been laid before the Parliament, publish the report in such manner as the Keeper considers appropriate.

12 Interpretation of Part 1

(1) In this Part—
   “authority” means an authority to which this Part applies (see section 2),
   “records management review” means a review carried out under section 6,
   “the Keeper” means the Keeper of the Records of Scotland,
   “management”, in relation to public records, includes keeping, storage, securing, archiving, preservation, destruction or other disposal (and “manage” and other related expressions are to be construed accordingly),
   “public records”, in relation to an authority, has the meaning given by section 3(1),
   “record” means anything in which information is recorded in any form,
   “records management plan”, in relation to an authority, means the plan referred to in section 1(1),
   “action notice” means a notice issued under section 7.

(2) Except where the context requires otherwise, references in this Part to an authority’s records management plan include references to the plan as revised from time to time.
Repeals

The following are repealed—

(za) sections 2(3) and 2A(4) of the Public Records (Scotland) Act 1937 (c.43) (care and preservation of sheriff court and JP court records),

(a) section 53(1) to (3) of the Local Government etc. (Scotland) Act 1994 (c.39) (preservation and management of records of local authorities),

(b) section 30(1)(b) to (d) of the Environment Act 1995 (c.25) (preservation and management of records of SEPA),

(c) section 27(2) to (4) of the National Parks (Scotland) Act 2000 (asp 10) (preservation and management of records of National Park authorities), and

(d) section 58(2) to (4) of the Water Industry (Scotland) Act 2002 (asp 3) (preservation and management of records of Scottish Water).

TRANSMISSION OF COURT RECORDS

Transmission of court records

(1) The Public Records (Scotland) Act 1937 (c.43) is amended as follows.

(2) In section 1 (High Court and Court of Session records), after subsection (2) add—

“(3) Before making an Act of Adjournal or an Act of Sederunt under subsection (1), the High Court of Justiciary or, as the case may be, the Court of Session must consult the Keeper.”.

(3) In section 2 (sheriff court records)—

(a) for subsection (1) substitute—

“(1) A sheriff principal may, with the agreement of the Keeper, transmit any of the sheriff court records of the sheriff principal’s sheriffdom to the Keeper.”,

(ba) in subsection (4), for “subsections (1) and (3)” substitute “subsection (1)”.

(4) In section 2A (JP court records)—

(a) for subsection (1) substitute—

“(1) A sheriff principal may, with the agreement of the Keeper, transmit any of the JP court records of the sheriff principal’s sheriffdom to the Keeper.”,

(b) subsection (2) is repealed.

GENERAL

Commencement

(1) Parts 1 and 2 come into force on such day as the Scottish Ministers may appoint by order made by statutory instrument.

(2) This Part comes into force at the beginning of the day following the day on which the Bill for this Act receives Royal Assent.
(3) An order under subsection (1) may include transitional, transitory or saving provision.

16 Short title

This Act may be cited as the Public Records (Scotland) Act 2011.
SCHEDULE
(introduced by section 2(1))

AUTHORITIES TO WHICH PART 1 APPLIES

Parliament

Scottish Parliament
Scottish Parliamentary Corporate Body

Scottish Administration

Scottish Ministers
Lord Advocate

Accountant in Bankruptcy

Chief Dental Officer of the Scottish Administration
Chief Medical Officer of the Scottish Administration

Drinking Water Quality Regulator for Scotland

Her Majesty’s Chief Inspector of Constabulary and Her Majesty’s Inspectors of Constabulary (appointed under section 33 of the Police (Scotland) Act 1967 (c.77))

Her Majesty’s Chief Inspector of Fire and Rescue Authorities, Her Majesty’s Inspectors of Fire and Rescue Authorities and Assistant Inspectors of Fire and Rescue Authorities (appointed under section 43 of the Fire (Scotland) Act 2005 (asp 5))

Her Majesty’s Chief Inspector of Prisons for Scotland

Her Majesty’s Inspector of Anatomy for Scotland

Her Majesty’s inspectors of schools (that is to say, the inspectors of schools appointed by Her Majesty on the recommendation of the Scottish Ministers under the Education (Scotland) Act 1980 (c.44))

Keeper of the Records of Scotland
Keeper of the Registers of Scotland
Office of the Scottish Charity Regulator
Procurators fiscal
Queen’s and Lord Treasurer’s Remembrancer
Queen’s Printer for Scotland
Registrar General of Births, Deaths and Marriages for Scotland
Scottish Court Service
Scottish Housing Regulator

Others

Accounts Commission for Scotland
Additional Support Needs Tribunals for Scotland
Architecture and Design Scotland
Audit Scotland
Auditor General for Scotland
Board of Trustees for the National Galleries of Scotland
Board of Trustees of the National Museums of Scotland
Board of Trustees of the Royal Botanic Garden, Edinburgh
Bòrd na Gàidhlig
Caledonian Maritime Assets Ltd (registered number SC001854)
Chief constables of police forces in Scotland
Children’s Hearings Scotland
Children’s Panel
Commission for Ethical Standards in Public Life in Scotland
Commissioner for Children and Young People in Scotland
Common Services Agency for the Scottish Health Service
Court of the Lord Lyon
Court of Session
Creative Scotland
Crofting Commission
David MacBrayne Ltd (registered number SC015304)
General Teaching Council for Scotland
Health Boards (constituted under section 2(1)(a) of the National Health Service (Scotland) Act 1978 (c.29))
Healthcare Improvement Scotland
Her Majesty’s Chief Inspector of Prosecution in Scotland
High Court of Justiciary
Highlands and Islands Airports Ltd (registered number SC097647)
Highlands and Islands Enterprise
Joint boards (established under section 62A(1) or 62B(1) of the Local Government (Scotland) Act 1973 (c.65))
Joint police boards (constituted by virtue of section 19(2)(b) of the Police (Scotland) Act 1967 (c.77))
Judicial Appointments Board for Scotland
Justice of the peace courts
Justices of the peace advisory committees
Lands Tribunal for Scotland
Learning and Teaching Scotland
Licensing Boards (continued in existence or established under section 5 of the Licensing (Scotland) Act 2005 (asp 16))
Local authorities
Local Government Boundary Commission for Scotland
Mental Health Tribunal for Scotland
Mental Welfare Commission for Scotland
Mobility and Access Committee for Scotland
5
National Convener of Children’s Hearings Scotland
National Park authorities (established by virtue of designation orders under section 6 of the National Parks (Scotland) Act 2000 (asp 10))
Parole Board for Scotland
Police Advisory Board for Scotland
10
Police Complaints Commissioner for Scotland
Principal Reporter
Private rented housing panel
Public Appointments Commissioner for Scotland (appointed under section 1(4) of the Scottish Parliamentary Commissions and Commissioners etc. Act 2010 (asp 11))
15
Public Standards Commissioner for Scotland (appointed under section 1(3) of the Scottish Parliamentary Commissions and Commissioners etc. Act 2010 (asp 11))
Public Transport Users’ Committee for Scotland
Quality Meat Scotland
Risk Management Authority
20
Royal Commission on the Ancient and Historical Monuments of Scotland
Safeguarders Panel
Scottish Advisory Committee on Distinction Awards
Scottish Agricultural Wages Board
Scottish Charity Appeals Panel
25
Scottish Children’s Reporter Administration
Scottish Commission for Human Rights
Scottish Commission for Public Audit
Scottish Crime and Drug Enforcement Agency
Scottish Criminal Cases Review Commission
Scottish Enterprise
30
Scottish Environment Protection Agency
Scottish Further and Higher Education Funding Council
Scottish Futures Trust Ltd (registered number SC348382)
Scottish Health Council
35
Scottish Information Commissioner
Scottish Land Court
Scottish Law Commission
Scottish Legal Aid Board
Scottish Legal Complaints Commission
Scottish Local Authorities Remuneration Committee
Scottish Natural Heritage
Scottish Police Services Authority
Scottish Public Services Ombudsman
Scottish Qualifications Authority
Scottish Road Works Commissioner
Scottish Social Services Council
Scottish Sports Council
Scottish Water
Sheriff courts
Skills Development Scotland Co. Ltd (registered number SC202659)
Social Care and Social Work Improvement Scotland
Special Health Boards (constituted under section 2(1)(b) of the National Health Service (Scotland) Act 1978 (c.29))
Standards Commission for Scotland
Transport Partnerships
Trustees of the National Library of Scotland
Visiting committees (appointed under section 19(3) of the Prisons (Scotland) Act 1989 (c.45) or constituted by rules made under section 39 (as read with section 8(1)) of that Act)
VisitScotland
Water Industry Commission for Scotland
Public Records (Scotland) Bill

[AS PASSED]

An Act of the Scottish Parliament to make provision about the management of records by certain authorities; to amend the Public Records (Scotland) Act 1937 (c.43) in relation to the transmission of court records to the Keeper of the Records of Scotland; and for connected purposes.

Introduced by: Fiona Hyslop
On: 7 October 2010
Supported by: Bruce Crawford
Bill type: Executive Bill