PUBLIC RECORDS (SCOTLAND) BILL

POLICY MEMORANDUM

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
This document relates to the Public Records (Scotland) Bill (SP Bill 56) as introduced in the Scottish Parliament on 7 October 2010

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 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 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.

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.

Amending Freedom of Information Legislation
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
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.
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POLICY MEMORANDUM


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