

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

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## **POLICY MEMORANDUM**

### **INTRODUCTION**

1. This document relates to the Protection of Children and Prevention of Sexual Offences (Scotland) Bill introduced in the Scottish Parliament on 29 October 2004. It has been prepared by the Scottish Executive to satisfy Rule 9.3.3(c) of the Parliament's Standing Orders. The contents are entirely the responsibility of the Scottish Executive and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 30–EN.

### **POLICY OBJECTIVES OF THE BILL**

2. The primary policy objective of this Bill is to better protect children from sex offenders. The Bill does this by strengthening the law to deal with those offenders who seek to “groom” children for the purpose of committing sexual offences. The Bill seeks to further enhance protection of children by introducing a new order that will impose restrictions on adults who display inappropriate sexual behaviour towards children. The Bill also extends protection to the wider public by allowing the use of sexual offence prevention orders to be applied to convicted offenders at the point of sentence rather than following subsequent evidence of inappropriate actions.

#### **Grooming offence**

3. Sex offenders have always sought to gain the confidence of child victims. However the development of new communications technologies, in particular the internet, while bringing widespread benefits, has also been shown to be used by predatory sex offenders seeking to make contact with and establish a relationship with potential child victims. This process is commonly known as grooming. Grooming is not however limited to the internet. It can take place through any communication medium or during face-to-face contact.

4. The law as it currently stands is able to deal with many cases that involve grooming behaviour. Possible offences include fraud; offences under the Communications Act 2003; offences under the Civic Government (Scotland) Act 1982; lewd and libidinous practices; and breach of the peace. It is conceivable however that at present someone could carefully tailor their behaviour to ensure that no offence was committed during the course of grooming. (Any subsequent sexual assault would of course constitute a serious offence.) At present therefore the

police could detect and stop grooming activity, but in some situations no charges might be brought.

5. The Bill aims to provide additional protection for children by creating a new offence which will have a maximum penalty of 10 years imprisonment on indictment. It is designed to catch those aged 18 or over who undertake a course of conduct with a child under 16 leading either to a meeting during or after which the adult intends to engage in sexual activity with the child or travelling with the intention of having such a meeting. It will enable action to be taken before any sexual activity takes place where it is clear that that is what the offender intends. The Bill is intended to catch conduct that takes place in any part of the world, provided some aspect of the communicating, meeting or travelling takes place in Scotland or the offender is a British citizen or UK national.

### **Risk of sexual harm orders**

6. The Bill introduces a new civil order, the risk of sexual harm order (RSHO), intended to protect children under 16 from inappropriate sexual behaviour by adults aged 18 or over. This would assist the police to impose early restrictions on those persons believed to be a risk to the safety of our children. The RSHO is a further development of sex offender orders which were relevant to convicted sex offenders. This order would be made by the courts, on application of the police, in respect of an adult who is deemed to be acting in such a way as to present a risk of sexual harm to children, irrespective of whether such a person has previously been convicted of a sex offence or not. An order will have effect for a fixed period of at least 2 years.

7. The order will contain such conditions as are necessary to protect a particular child or children in general from the person concerned. It is intended to complement the new criminal offence of grooming but will cover a much wider spectrum of behaviour, for example explicit communication with children via email or in chatrooms or loitering around schools or playgrounds. The penalty for breach of the order will be a maximum of five years imprisonment, a fine or both.

8. RSHOs can be applied for by a chief constable in respect of an adult of 18 or more who has displayed sexual behaviour in relation to a child of under 16. The sexual behaviour would need to have taken place on at least two occasions and would need to fall within one of the following categories:

- engaging in sexual activity involving or in the presence of a child;
- causing a child to watch a person engaging in sexual activity or to look at still or moving images that are sexual;
- giving a child anything that relates to a sexual activity;
- communicating with a child where any part of the communication is sexual.

9. In addition, prior to making an RSHO, the court must be satisfied that the order is necessary to protect children (or a particular child) from harm from the person to whom the order would apply.

## **Sexual offences prevention orders**

10. Sexual offences prevention orders (SOPOs) are preventative orders designed to protect the public from serious sexual harm. A SOPO will specify certain actions, behaviour or locations which the offender must avoid. They were introduced in the Sexual Offences Act 2003. In Scotland, a SOPO can at present only be made on application to a sheriff court by a chief constable in respect of a defender with a previous conviction for an offence listed in Schedules 3 or 5 to the Sexual Offences Act 2003. The court must be satisfied that an order is necessary to protect the public or an individual from serious sexual harm from the defender. There may however be occasions when it would be appropriate for a court to impose a SOPO at the point of imposing sentence, rather than requiring a chief constable to make an application for an order. This would mean that the SOPO could apply to an offender immediately without waiting for subsequent evidence of risk to the public before applying for the order. The Bill addresses this policy objective by providing for courts to make a SOPO at the point of conviction of an offender for an offence listed at paragraphs 36 to 60 of Schedule 3 to the Sexual Offences Act 2003.

## **Cross-border issues**

11. It will be important to ensure that SOPOs and RSHOs made in Scotland will be enforceable in England and Wales, and vice versa. Discussions are taking place with the UK Government about the best way of dealing with these issues. Section 104 of the Scotland Act 1998 enables the UK Government to make subordinate legislation to deal with the consequences of provisions made by an Act of the Scottish Parliament, and it is likely that this will be used to ensure cross-border enforcement.

## **ALTERNATIVE APPROACHES**

12. In relation to the proposed new offence, the two main alternatives would be to leave the law as it stands or to seek to criminalise grooming activity in itself without any further evidence of intention to commit a sex offence. While the law in Scotland does already provide a number of ways of dealing with grooming, the fact that grooming behaviour could be constructed to avoid prosecution indicated that strengthening the law was a necessary step. In relation to the second alternative, the Bill seeks to strike a balance between ensuring that the police and Procurator Fiscal Service have the tools at their disposal to deal with grooming behaviour, but without criminalising what might be innocent activity. It is for this reason that the offence becomes complete when an adult meets or travels to meet a child following grooming activity, and that what might be perceived as grooming activity is not sufficient itself for the offence to have been committed.

13. No alternatives to providing protection to children and the wider public through RSHOs and SOPOs were identified.

## **CONSULTATION**

14. A consultation paper was issued on 2 July to a wide range of bodies with an interest in justice and child protection issues. The consultation has now closed and seventy-two responses have been received from a wide range of groups and individuals. In the responses received there

was widespread support for the proposed new offence, introduction of RSHOs and the extension of SOPOs to allow them to be imposed at time of sentence. All responses to the consultation with the exception of those specified as confidential will be lodged in the Scottish Executive Library and made available to SPICe. A summary and analysis of the main themes emerging from the consultation will also be made available on the consultation pages of the Scottish Executive website by the end of November.

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

### **Equal opportunities**

15. The purpose of the Bill is to create a specific offence of meeting a child following certain preliminary conduct, to introduce RSHOs and extend the use of SOPOs to allow them to be imposed at time of trial. It is not anticipated that this will have a differential effect on women or men, on different social groups or communities, on disabled or non disabled persons or on different ethnic or religious groups. No adverse comments were raised on this issue in the consultation responses.

### **Human rights**

16. The proposals to introduce RSHOs and to extend the use of SOPOs raise issues in terms of article 8.1 of the ECHR and the right to a fair hearing under Article 6.1 of the ECHR.

17. Prohibiting a person from visiting certain locations and using certain means of communication interferes with the right to private and potentially also family life. However Article 8 is not an absolute right and the Executive considers that the limitation serves a legitimate aim and is proportionate to that aim. The aim is the prevention of disorder and crime, the protection of health and morals and the protection of the rights and freedoms of others. In the case of RSHOs which can be imposed on a person without a conviction, the interference is proportionate on account of the need to protect children from the significant physical and psychological harm flowing from instances of sexual abuse. Similarly in relation to SOPOs, the interference is proportionate on account of the need to protect the community from person with sexual convictions who pose a risk to the community. There is judicial control of the orders in both cases.

18. The Executive also considers that the proceedings for RSHOs would be regarded as civil for the purposes of Article 6 of the ECHR and that they do not involve the determination of a criminal charge. The aim of an RSHO is not to punish offenders but rather to protect the public and prevent harm. A similar approach was taken by the courts in relation to sex offender orders in the case of *B v Chief Constable of Avon and Somerset 2002 WLR 312*. The Executive also considers that there is sufficient protection in the court procedures to satisfy the requirements of Article 6.

### **Island communities, local government and sustainable development**

19. The Bill has no special implications for island communities and sustainable development.

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

*This document relates to the Protection of Children and Prevention of Sexual Offences (Scotland) Bill (SP Bill 30) as introduced in the Scottish Parliament on 29 October 2004*

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