JUSTICE 1 COMMITTEE

AGENDA

38th Meeting, 2004 (Session 2)

Wednesday 8 December 2004

The Committee will meet at 10.30 am in Committee Room 4.

1. Protection of Children and Prevention of Sexual Offences (Scotland) Bill: The Committee will take evidence from—

   Hugh Dignon, Bill team leader, and Kirsten Davidson, Bill team member, Scottish Executive Justice Department, and Paul Johnston, Senior Principal Legal Officer, Office of the Solicitor to the Scottish Executive, and Lindsey Anderson, Principal Procurator Fiscal Depute, Policy Group, the Crown Office and Procurator Fiscal Service.

Alison Walker
Clerk to the Committee
Tel: 0131 348 5195
Papers for the meeting—

Agenda item 1

Note by the clerk (PRIVATE PAPER)  J1/S2/04/37/1
Briefing by SPiCe  J1/S2/04/37/2

Documents not circulated—

A copy of the following has been supplied to the clerk—


This document is available for consultation in room T3.60. Additional copies may also be obtainable on request from the Document Supply Centre.

Forthcoming meetings—

Wednesday, 15 December 2004, CR1;
Wednesday, 22 December 2004, CR1.
PROTECTION OF CHILDREN AND PREVENTION OF SEXUAL OFFENCES (SCOTLAND) BILL

FRAZER MCCALLUM AND CAMILLA KIDNER

The Scottish Executive’s Minister for Justice introduced the Protection of Children and Prevention of Sexual Offences (Scotland) Bill in the Parliament on 29 October 2004. The Parliament’s Justice 1 Committee has been designated as lead committee for the purpose of considering the Bill.

The Policy Memorandum published with the Bill states that the primary objective of the Bill is to better protect children from sexual abuse. The Bill seeks to achieve this through the creation of: (a) a new criminal offence aimed at preventing an adult sexually abusing a child following some earlier communication between the two; and (b) a new type of civil preventative order, the Risk of Sexual Harm Order, which would allow a court to prohibit an adult from doing certain things set out in the order.

The Bill also seeks to better protect both children and adults from sex offenders through the extension of an existing type of civil preventative order, the Sexual Offences Prevention Order.

This briefing considers the background to and provisions of the Bill. It also looks at some of the main issues highlighted in response to a consultation exercise carried out by the Executive prior to the introduction of the Bill.
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KEY POINTS OF THIS BRIEFING

- in July 2004 the Scottish Executive launched, with the publication of ‘Protecting Children from Sexual Harm Consultation’, a consultation on planned legislation aimed at protecting people, especially children, from sexual abuse
- following the consultation, the Minister for Justice introduced the Protection of Children and Prevention of Sexual Offences (Scotland) Bill (‘the Bill’) in the Parliament on 29 October 2004
- the Policy Memorandum published with the Bill states that the primary policy objective of the Bill is to better protect children from sexual abuse. Two elements of the Bill focus on this objective. A third main element of the Bill seeks to better protect both adults and children from sex offenders
- ‘Meeting a child following certain preliminary contact’ – the first element of the Bill (section 1 plus the Schedule) seeks to create a new criminal offence aimed at preventing an adult sexually abusing a child, following some earlier communication between the two during which the adult seeks to gain the child’s trust. The Bill is concerned with the problem of sexual abuse following what is sometimes described as ‘grooming’. Communication amounting to grooming would not, however, be sufficient for an offence under the Bill
- Risk of Sexual Harm Orders (‘RSHOs’) – the second element of the Bill (sections 2 to 8) seeks to create a new type of civil preventative order. The Bill would allow a court to impose an RSHO, following an application by the police, prohibiting an adult from doing certain things set out in the order. The prohibitions would have to be necessary for protecting a particular child or children in general, from harm. An order could be made without any allegation of behaviour amounting to a criminal offence
- Sexual Offences Prevention Orders (‘SOPOs’) – the third main element of the Bill (section 9) seeks to extend the use of a form of civil preventative order which is already available in Scotland. The use of SOPOs is intended to protect members of the public, both adults and children, from serious sexual harm. The Bill would allow courts to impose SOPOs when dealing with people who have been prosecuted for certain offences. Courts are currently able to impose such orders following an application by the police
- the measures set out in the Bill are similar to provisions already applying to other parts of the UK contained in the Sexual Offences Act 2003
- non-confidential responses to the Scottish Executive’s consultation mainly focussed on the proposals which now form the first two elements of the Bill. In relation to proposals for the new criminal offence, issues raised included points relating to: (a) whether grooming should be an offence without any subsequent action; (b) proving the offence; and (c) age limits. In relation to proposals for RSHOs, issues raised included points relating to: (a) human rights; (b) types of behaviour giving rise to the possibility of an RSHO; and (c) age limits.
INTRODUCTION


The Policy Memorandum states that the primary policy objective of the Bill is to better protect children from sexual abuse. Two elements of the Bill focus on this objective:

• ‘Meeting a child following certain preliminary contact’ – creation of a new criminal offence aimed at preventing an adult sexually abusing a child, following some earlier communication between the two during which the adult seeks to gain the child’s trust. The Bill is concerned with the problem of sexual abuse following what is sometimes described as ‘grooming’. Communication amounting to grooming would not, however, be sufficient for an offence under the Bill
• Risk of Sexual Harm Orders (‘RSHOs’) – creation of a new type of civil preventative order. The Bill would allow a court to impose an RSHO, following an application by the police, prohibiting an adult from doing certain things set out in the order. The prohibitions would have to be necessary for protecting a particular child or children in general, from harm. An order could be made without any allegation of behaviour amounting to a criminal offence

A third element of the Bill seeks to better protect both adults and children from sex offenders:

• Sexual Offences Prevention Orders (‘SOPOs’) – allowing courts to impose SOPOs when dealing with people who have been prosecuted for certain offences. Courts are currently able to impose such orders following an application by the police

The rest of this briefing is split into four main parts looking at:

• the background to the Bill
• proposals for an offence of meeting a child following certain preliminary contact (‘grooming’)
• proposals on RSHOs
• proposals on SOPOs

BACKGROUND

In July 2004 the Scottish Executive (2004a) launched, with the publication of Protecting Children from Sexual Harm Consultation (‘the Consultation Paper’), a consultation on the proposals which now form the three elements of the Bill outlined above. The Consultation Paper included a draft bill along very similar lines to the Bill as introduced. Issues raised during the consultation are considered below (following consideration of each of the three elements of the Bill).

It should be noted that whilst the Scottish Executive received over 70 responses to the Consultation Paper, approximately half of the respondents had not expressly consented to their responses being made public at the time of writing this briefing. Where such consent has not
been provided, the response is treated as confidential by the Executive.\footnote{Non-confidential consultation responses may be viewed by MSPs and their personal staff in SPICe. The Executive is planning to publish non-confidential responses on its website in the near future. They will also be available to the public in the Executive Library in Edinburgh.} Discussion contained in this briefing is limited to those responses where consent has been provided. It should also be noted that the Executive is planning to publish a report analysing the main themes emerging from the consultation.

The proposals set out in the Consultation Paper, and now contained in the Bill, are similar to measures already applying to other parts of the UK contained in the Sexual Offences Act 2003 (‘the 2003 Act’). The Consultation Paper noted that its proposals for legislation had been “purposely framed to allow it to interlock with equivalent legislation applying in England and Wales” (p 3). Discussion of how the proposals in the Bill compare with provisions contained in the 2003 Act is included within each of the parts dealing with the three elements of the Bill.

The coverage of sexual offences in the 2003 Act is much wider than is provided for in the Bill. It includes provisions applying to England and Wales, some of which also apply to Northern Ireland, dealing with a range of sexual offences (e.g. rape and sexual assault). It is, in this context, worth noting that the Scottish Executive announced, in June of this year, that the Scottish Law Commission would carry out a review of the criminal law in Scotland in relation to rape and other sexual offences. This review is listed amongst the Commission’s current projects, with an indication that it is aiming to publish a discussion paper by the end of 2005.

Further background information on ‘grooming’ is set out below.

**OFFENCE OF MEETING A CHILD FOLLOWING CERTAIN PRELIMINARY CONTACT (‘GROOMING’)**

**PURPOSE**

The Bill (section 1 plus the Schedule) seeks to create a new offence aimed at protecting children from sexual harm. The Explanatory Notes (para 6) state that the offence is intended to cover situations where an adult establishes contact with a child (e.g. through meetings, telephone conversations or internet communications with the child), thereby gaining the child’s trust, and thus enabling the adult to arrange to meet the child for the purpose of committing a sexual offence against the child. The type of preliminary contact described above is sometimes referred to as ‘grooming’.

Although the offence is concerned with the problem of grooming, the Bill does not seek to criminalise such behaviour in the absence of any subsequent action. It is not, therefore, wholly accurate to describe the offence as one of grooming. The Executive’s Consultation Paper stated that:

“The offence aims to strike a balance in criminalising activity where it has become clear that there is an intention to commit a sexual offence without at the same time criminalising those who might engage in fantasy and use of false identity on the internet without seeking to gain any criminal or other advantage from doing so. 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.” (para 16)

The possibility of using Risk of Sexual Harm Orders (‘RSHOs’) to prevent grooming behaviour, before any subsequent action by the adult, is considered later in this briefing.

The Scottish Executive has stated that discussions with police and Crown Office suggest that introduction of the proposed offence will not produce a significant net increase in the numbers of prosecutions:

“IIn most cases where suspicious activity is reported to the police there are already prosecutions in serious cases for related offences such as lewd and licentious behaviour, or in less serious cases what appears to be ill-considered behaviour is deterred by the police inquiries.” (Explanatory Notes, para 39)

Further discussion of existing grounds for prosecution is contained in the Consultation Paper (paras 7 to 14). However, the Executive is of the view that there is a potential gap in the law which should be filled.

BACKGROUND ON ‘GROOMING’

Policy development

Although the offence in the Bill is not restricted to communications over the internet, it was cases of abuse following online contact which originally prompted calls for legislation within the UK. A representative of Childnet International referred, in September 2003, to reports that there had been at least 27 cases in the UK which had come to court where children had been abused at a meeting stemming from an initial online contact (Gardner 2003, p 8). Barnardo’s reported in 2004 that it had worked with 15 children who had been groomed online for sexual abuse offline (Palmer and Stacey 2004, pp 14 and 25).

The new offence set out in the Bill is similar to one set out in section 15 of the Sexual Offences Act 2003 (‘the 2003 Act’). Various provisions of the 2003 Act were extended to Scotland, with a Sewel Motion being agreed by the Scottish Parliament. These did not, however, include section 15. The Scottish Executive felt at the time that existing law was sufficient for the prosecution of such activities in Scotland. However, in March 2004 the Executive indicated that it would bring forward legislative proposals to deal with the problem of grooming.

Also in March 2004, Margaret Mitchell MSP lodged a proposal for a member’s bill to make provision for an offence of sexual grooming of children (the proposal fell on 12 November 2004). She also put forward, in May 2004, an unsuccessful amendment to the Antisocial Behaviour etc (Scotland) Bill, to provide for the same offence. The main argument against the amendment was that proceeding by way of the amendment would not allow adequate time for scrutiny of the proposal and that the Antisocial Behaviour etc (Scotland) Bill was not the best place to legislate for the offence.

More general information on the background to the Bill and the consultation carried out by the Executive is set out above.
As noted above, the new offence set out in the Bill is similar to that created by section 15 of the 2003 Act. Section 15 applies to England, Wales and Northern Ireland, but not Scotland, and came into force on 1 May 2004. The Home Office has indicated that it has anecdotal evidence that prosecutions under section 15 of the 2003 Act have started. It has not, however, been possible to obtain any statistics on use of the provisions at this stage.

Some of the main differences between the provisions in the Bill and those in the 2003 Act are highlighted below.

**Legal provisions outside the UK**

The United States has enacted laws, both at Federal and State level, aimed at tackling online grooming (Gillespie 2001). For example, in Maine it is an offence to solicit a child by a computer. In Canada, the criminal code was amended in 2001 to include the offence of ‘internet luring’. Details of these offences are set out in the appendix to this briefing.

**MAIN ELEMENTS OF THE NEW OFFENCE**

The alleged offender (‘the adult’) must be 18 or over and the intended victim (‘the child’) under 16. All of the following elements must exist for an offence to be committed:

- the adult has met or communicated with the child on at least two occasions (‘preliminary contact’)
- subsequent to this preliminary contact, the adult intentionally meets the child or travels with the intention of meeting the child
- at the time of such meeting or travel, the adult intends to do anything to or in respect of the child which if done would constitute the commission by the adult of a ‘relevant offence’ (considered below)
- the adult does not reasonably believe that the child is 16 or over

The Bill does not specifically require that the preliminary contact with the child had any sexual or other harmful motive. However, the nature of the preliminary contact is likely to be very relevant to any prosecution. The Explanatory Notes state that:

“The evidence of the adult’s intention to commit an offence may be drawn from the communications between the adult and the child prior to the meeting, or may be drawn from other circumstances, for example if the adult travels to the meeting with condoms and lubricants.” (para 8)

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2 The intention of the adult could be to carry out those actions at the meeting itself, or subsequent to that meeting.
Sexual Offences Act 2003

The offence created by section 15 of the 2003 Act requires the same main elements, although there are differences in the specification of what is a relevant offence. Also, in relation to Northern Ireland, the intended victim (the child) has to be under 17 rather than 16.

‘RELEVANT OFFENCE’

The Bill states that ‘relevant offence’ means either or the following:

- option 1 – any offence mentioned in the Schedule to the Bill
- option 2 – anything done outside Scotland which is not an offence mentioned in the Schedule but would be if done in Scotland

**Option 1**

Part 1 of the Schedule contains a list of 22 sexual offences. The Explanatory Notes state that these are “offences of a sexual nature that could be committed against children” (para 5).

Part 2 of the Schedule goes on to provide that all of the offences in part 1 include any attempt, conspiracy or incitement to commit the offence in question. It also provides that reference to any of the statutory offences in part 1 includes aiding, abetting, counselling or procuring the commission of the offence (already an inherent part of the common law offences).

**Option 2**

In relation to the second option, it should be noted that there is no requirement that the behaviour amounting to the relevant offence is criminal in the country where it occurs.

Sexual Offences Act 2003

Section 15 of the 2003 Act adopts a similar approach to that outlined above. The list of offences in the 2003 Act does differ from that in the Bill. This reflects the fact that the different legal jurisdictions within the UK have their own provisions dealing with sexual offences.

CONNECTION WITH SCOTLAND AND EXTRATERRITORIAL APPLICATION

The Bill does not require that all the elements of the offence set out above take place in Scotland. In fact, it specifically states that various elements may take place in any part of the world (see section 1(1) and (2)).

The Bill (section 1(1)(d)) does, however, require that at least one of the following is the case:

- one of the instances of preliminary contact with the child has a ‘relevant Scottish connection’
• the subsequent meeting, or travel for such a meeting, has a ‘relevant Scottish connection’
• the adult is a British citizen or resident in the United Kingdom

In relation to the meaning of ‘relevant Scottish connection’, section 1(2)(c) of the Bill provides that:

• a meeting or travelling has such a connection if any part of it takes place in Scotland
• a communication has such a connection if it is made from or to or takes place in Scotland

The Bill does, therefore, allow for the possibility of prosecution where most or all elements of the offence occur outside Scotland. For example, where the adult is a British citizen or is resident in the UK, he/she could be prosecuted although: (a) all of the actions necessary for the offence (i.e. the preliminary contact and the meeting with and/or travelling to meet the child) took place in another country; and (b) the actions constituting the ‘relevant offence’, if they had not been prevented, would have taken place in another country.

**Sexual Offences Act 2003**

The extraterritorial application of section 15 of the 2003 Act would appear to be slightly more limited than that set out in section 1 of the Bill.

The Explanatory Notes to the 2003 Act (para 30) state that the “travel to the meeting itself must at least partly take place in England or Wales or Northern Ireland”. This would seem to apply whether or not the adult is a British citizen or is resident in the UK. It would appear that this requirement arises, not from any specific provision within the 2003 Act itself, but rather from the general law on criminal jurisdiction. That general law may, where there is no provision expressly stating that an offence may be committed even if all of the relevant behaviour takes place outside England/Wales or Northern Ireland, require that at least some of the behaviour forming the offence takes place in one of those countries for the courts there to have jurisdiction.

**PENALTIES**

The maximum penalties for the offence are set out in section 1(3) of the Bill:

• summary prosecution – imprisonment up to six months and/or a fine up to the statutory maximum (currently £5,000)
• prosecution on indictment – imprisonment up to 10 years and/or an unlimited fine

**SUBORDINATE LEGISLATION**

Section 1(5) and (6) of the Bill would allow the Scottish Ministers to alter, by way of statutory instrument, the list of offences set out in the Schedule. The Bill provides for negative resolution procedure.
CONSULTATION RESPONSES

This section looks at some of the issues highlighted in responses to the Consultation Paper. As previously noted, this briefing only considers non-confidential responses.

General approach

There was support amongst respondents for the objective of the Executive – improving the protection of children from sexual abuse following grooming – and that this should be approached by the creation of a new criminal offence. A response from the Criminal Law Committee of the Law Society of Scotland stated:

“The Committee can see the merit in the creation of a new statutory offence to tackle sexual grooming. Although there are a range of common law and statutory offences which may currently be used to prosecute this type of behaviour, there may be some cases which will not clearly fall within any existing category of offence. It is important that those adults who seek to groom children and have a clear intention of committing a sexual offence can be prosecuted before any sexual offence takes place.” (Scottish Executive 2004b)

Responses from West Lothian Council and Children in Scotland, whilst generally welcoming the initiatives outlined in the Consultation Paper, also commented on the wider problem:

“The Council wishes to emphasise however that the proposals are only dealing with a relatively small issue in relation to the overall problem in protecting children from sexual harm”. (Scottish Executive 2004c)

And:

“In considering the proposed legislation it is important to recognise that most sexual offences against children are committed by people they already know.” (Scottish Executive 2004d)

A response from Barnardo’s Scotland generally welcomed the proposals for the new offence, but also stated that:

“Grooming within families, for example – by either the relative or an external person – will not necessarily be assisted under the proposed new offences. It would have been useful to have considered how this type of behaviour could have been covered in the legislation.” (Scottish Executive 2004e)

Respondents also highlighted the need to include other approaches in an overall strategy for dealing with grooming, including support for victims and the rehabilitation/treatment of perpetrators.

Some of the particular issues and concerns raised in response to the Consultation Paper are considered below.
Whether grooming should be an offence without any subsequent action

There was some support in consultation responses for the idea of making grooming itself a criminal offence. A response from West Dunbartonshire Council argued that:

“If it is the intention of the Executive to punish those who groom children for sexual purposes, it should not be necessary to have the requirement of travelling to meet the child as part of the offence.” (Scottish Executive 2004f)

However, there was also support for the approach taken in the Bill, with responses stating that the offence strikes a reasonable balance by requiring actions in addition to the preliminary contact with the child.

Proving intention

A number of respondents were concerned that it could be difficult to obtain the evidence required to prove all the elements of the offence and, in particular, that an adult had at the time of meeting or travelling to meet the child an intention to commit a relevant offence. A response from the Scottish Children’s Reporter Administration stated:

“The offence may be difficult to prosecute successfully due to the need to infer intention from behaviour that may easily be shown to have alternative innocent explanations, particularly since the communications need not have an explicit sexual content.” (Scottish Executive 2004g)

There was also some concern about the suggestion in the Consultation Paper (para 20), and repeated in the Explanatory Notes (para 8), that the adult’s intention to commit an offence might be based on the fact that the adult had travelled to a meeting with condoms and lubricants. It was felt that such a message might go against attempts of health professionals to reduce the incidence of unwanted pregnancies and sexually transmitted infections by encouraging the use of condoms. Whether or not carrying condoms, etc is seen as incriminating in any particular case would depend on the surrounding circumstances.

Preliminary contact

In relation to the requirement for preliminary contact (grooming), the Bill requires that the adult has met or communicated with the child on at least two occasions. Some of those responding to the Consultation Paper questioned why it should be necessary to prove that this has occurred more than once, especially given the fact that the Bill does not seek to criminalise grooming without subsequent action by the adult. A response from Dundee City Council argued:

“If one communication served to set up the meeting with the child at which the adult intends to commit a sexual offence, then that one previous communication should suffice. We suggest that evidence supports the notion that the skilled groomer can achieve his aim within one communication.” (Scottish Executive 2004h)
Age limits

The Bill provides that the alleged offender must be 18 or over and that the child (intended victim) must be under 16.

The minimum age for prosecution was one of the issues specifically highlighted for comment in the Consultation Paper. There was support for the suggested minimum age of 18 amongst some respondents, whilst others argued that it should be reduced to 16 or lower, or at least reduced in some circumstances (eg where the intended victim is particularly young). For example, responses from West Dunbartonshire Council and the General Teaching Council for Scotland stated:

“While the difference in age between the potential offender and the victim would clearly be an important factor when considering if an offence had occurred, eg a 17 year old perpetrator and a 15 year old victim, there is evidence that children younger than 18 years are capable of predatory sexual behaviour.” (Scottish Executive 2004f)

And:

“On balance eighteen may seem to be the appropriate age. However consideration might be given to a lower threshold in circumstances where the victim is under a certain age or could be deemed to be particularly vulnerable.” (Scottish Executive 2004i)

However, responses also raised concerns about criminalising consensual sexual relationships of young adults. A response from NHS Greater Glasgow, LHCC Youth Health Worker Forum stated:

“Age range of legislation should take into account current situation where 14 or 15 year olds may be in a sexual relationship (in this context the term ‘sexual’ refers to all forms of sexual contact ranging from petting to penetrative sex) with an 18 or 19 year old and may communicate in a sexualised way with them. (…) It is important that this legislation does not criminalise the natural sexual exploration of consenting young adults.” (Scottish Executive 2004j)

In relation to the maximum age of the intended victim (currently under 16), Children in Scotland noted that the proposals do not seek to protect young people over the age of 16. It noted that young people aged 16 and 17 can still be vulnerable to abuse from older adults, whilst also noting that it would be difficult to make it illegal for an adult to ‘groom’ a 16 or 17 year old without changing the age limits in other legislation.

Other vulnerable groups

The offence is aimed at protecting children under the age of 16. Some respondents argued that protection should be extended to other groups such as vulnerable adults. For example, a response from the Director of Planning and Community Care, NHS Greater Glasgow stated:
“Vulnerable adults may also be at risk of grooming and we would also propose that the issue of vulnerable adults be considered within the context of this Bill, and afforded the same protection.” (Scottish Executive 2004k)

More than one person involved in committing the offence

A number of consultation responses questioned whether the offence would cover various situations where different people are involved in the various elements of the offence. For example, a response from the Criminal Law Committee of the Law Society of Scotland stated that:

“The Committee is unclear as to whether the provisions of section 1 would cover a situation in which one adult grooms the child through an earlier meeting or communication in order that another adult can subsequently meet the child with the intention of committing a relevant sexual offence.” (Scottish Executive 2004b)

RISK OF SEXUAL HARM ORDERS

PURPOSE

The Bill (sections 2 to 8) makes provision for a new type of civil preventative order in Scotland, the Risk of Sexual Harm Order (‘RSHO’). The introduction of this order is intended to better protect children from sexual harm arising out of future acts by an adult. The police would be able to apply to the sheriff court for such an order in relation to an adult if an RSHO is thought necessary to protect a child or children from future harm. The Explanatory Notes state that:

“The RSHO is not a substitute for a criminal offence, but applies in circumstances where the behaviour of the adult gives reason to believe that a child or children are at risk from an individual’s conduct or communication and intervention at this earlier stage is necessary to protect the child or children” (para 13).

The Explanatory Notes (para 39) go on to state that it is difficult to predict how many RSHOs might be imposed, but that discussions with police and Crown Office suggest that 10 to 20 applications per annum would be a reasonable estimate.

Sexual Offences Act 2003

The provisions in the Bill on RSHOs are very similar to provisions in the Sexual Offences Act 2003. Sections 123 to 129 of the 2003 Act make provision for RSHOs in England, Wales and Northern Ireland. Those provisions came into force on 1 May 2004 but do not extend to Scotland. During the passage of the Sexual Offences Bill through the House of Lords, Lord Falconer stated that:
“At present, risk of sexual harm orders as set out in Clause 117 shall not apply to Scotland. The Scottish Executive will decide in due course whether similar provisions are to be brought forward for Scotland.” (House of Lords 2003, col 97)

The Home Office has indicated that it has anecdotal evidence which suggests that some applications for RSHOs, under the provisions in the 2003 Act, have been made. It has not, however, been possible to obtain any statistics on use of the provisions at this stage.

MAIN ELEMENTS OF THE SCHEME

The adult in relation to whom the RSHO is sought must be 18 or over. The child or children who are to be protected by the RSHO must be under 16. The following aspects of the scheme are outlined below:

- applying for RSHOs
- process of making RSHOs
- effects of RSHOs
- variation, renewal and discharge of RSHOs
- interim RSHOs
- appeals
- breach of RSHOs and interim RSHOs
- some differences between the provisions in the Bill and the equivalent provisions in the Sexual Offences Act 2003

Applying for RSHOs

Only the police (a chief constable) would be able to make an application for an RSHO. The Consultation Paper noted that:

“The fact that it is the police who apply for the order would prevent them being used by parents trying to prevent their child having contact with, for example, an 18 year old boyfriend whom they consider unsuitable for their child.” (para 32)

A chief constable would be able to apply to a sheriff court for an RSHO in relation to an adult where two conditions are met. The first is that the adult has on at least two occasions, performed an act falling within a list set out in section 2(3) of the Bill:

“(a) engaging in sexual activity involving a child or in the presence of a child;
(b) causing or inciting a child to watch a person engaging in sexual activity or to look at a moving or still image that is sexual;
(c) giving a child anything that relates to sexual activity or contains a reference to such activity
(d) communicating with a child, where any part of the communication is sexual”.

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The second condition is that, as a result of the above acts, there is reasonable cause to believe that it is necessary for an RSHO to be made. The Consultation Paper stated:

“An assessment process would need to be undertaken by the police who would need to consider the degree of risk that the individual poses at that time. It is suggested that, where appropriate, the assessment should be carried out in consultation with other relevant agencies, such as social work services and other child protection agencies. However, because a RSHO may be applied for against someone without a previous criminal conviction (unlike the other preventative orders) consideration may need to be given to using an external independent risk assessor.” (para 31)

Making RSHOs

Following an application by the police, a sheriff may make an RSHO if satisfied: (a) that the adult has performed an act in the list set out in section 2(3) of the Bill on at least two occasions; and (b) that it is necessary to make the RSHO for the purpose of protecting a particular child or children generally from harm from the adult. This protection must be protection from physical or psychological harm caused by the adult committing future acts described in section 2(3).

It is important to note that, whilst behaviour covered by the list set out in section 2(3) of the Bill might in some instances amount to a criminal offence, this need not be the case. An RSHO is a civil order and may be applied for and made without a criminal offence being committed by the adult covered by the order. In addition, the Bill does not require that the future harm, which the RSHO is aimed at preventing, is harm caused by acts amounting to criminal behaviour.

It is also possible that behaviour which is not harmful to children could be covered by the list set out in section 2(3) of the Bill. For example, an adult might give a child something that contains a reference to a sexual activity for appropriate educational purposes. However, both the police (a chief constable) and the courts would have to consider the issue of harm when deciding whether it is appropriate to apply for and make an RSHO. The police and the courts would, therefore, have an important role in ensuring that RSHOs are not used in a way which interferes with appropriate discussions about and portrayals of sexual matters.

Section 2(7) of the Bill provides that any existing RSHO ceases to have effect when a new RSHO is made in relation to the same adult. Both the police and courts would need to have regard to this fact when applying for and making an RSHO. For example, the concerns giving rise to a new application may relate to a child living in Aberdeen, whilst an existing RSHO may be aimed at protecting a child living in Edinburgh. The prohibitions in the new RSHO would have to provide for the protection of both.

The court procedures for considering whether an RSHO should be made would generally follow normal civil procedure for the sheriff courts. The adult in relation to whom the RSHO is sought would receive notification of the order and would be able to object by defending the action. The court would have to act in compliance with article 6 (right to a fair trial) of the European Convention on Human Rights. Thus, the adult would be entitled to a fair and public hearing.

Effects of RSHOs
An RSHO expressly prohibits the adult, in relation to whom it is made, from doing certain things. What an RSHO prohibits will depend on the circumstances of the case, but the Bill provides that any prohibitions imposed must be necessary for the purpose of protecting a particular child or children generally, from harm from the adult in question. The Bill also provides that an RSHO is imposed for a fixed period of not less than two years.

Given that the Bill only provides for prohibitions, an RSHO could not require the adult in question to comply with conditions requiring positive action (eg attending a course designed to address sex offending behaviour). The Bill does not contain any further guidance on what the prohibitions might involve although the Consultation Paper suggested that prohibitions might include “contacting a particular child or going to particular locations” (para 5).

Although RSHOs are not intended as a substitute for criminal prosecutions, the use of an RSHO might be an option for prohibiting further grooming behaviour where a prosecution under the offence set out in section 1 of the Bill would not be possible (eg because the adult has not met or travelled to meet the child being groomed). The grooming behaviour would, however, have to contain a sexual element which could be identified without looking into the underlying purpose of the grooming. RSHOs could, of course, also be used in a wide range of circumstances which do not involve grooming.

**Variation, renewal and discharge of RSHOs**

Section 4 of the Bill allows both the police and the adult covered by an RSHO to apply to the sheriff court for an order varying, renewing or discharging an RSHO. Both have the right to be heard by the sheriff in relation to any application.

The Explanatory Notes state that it would be open to a person to apply for an RSHO to be varied or discharged if the child concerned reached the age of 16 (para 20).

**Interim RSHOs**

Section 5 of the Bill would allow the police to apply to a sheriff court for an interim RSHO, to take effect whilst waiting for an application for an RSHO to be determined. An interim RSHO could not last for longer than it takes to determine the main application. Section 5(3) states that the sheriff may make such an order if he/she considers it just to do so.

**Appeals**

Section 6 of the Bill allows for appeals against a decision of the sheriff court granting, refusing, varying, renewing or discharging an RSHO, or interim RSHO. Both the police and the adult who is subject, or potentially subject, to the RSHO would be able to appeal.

Appeal is, in the first instance, to the relevant sheriff principal. Further appeal to the Court of Session, and ultimately to the House of Lords, may be possible – subject to the normal rules on civil appeals.

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3 See sections 2(3) and 3 of the Bill.
**Breach of RSHOs and interim RSHOs**

Although RSHOs and interim RSHOs may be made without any allegation of criminal behaviour, section 7 of the Bill provides that breach of such an order without reasonable excuse is a criminal offence.

The section creates a strict liability offence subject to an accused having a defence of reasonable excuse. For example, the prosecution would not have to prove that the accused intended to breach the restrictions or was reckless in this respect, but the accused might have a good defence if able to establish that he/she had not intended any breach and had taken reasonable precautions to avoid it.

The maximum penalties for a breach are set out in section 7(3):

- summary prosecution – imprisonment up to six months and/or a fine up to the statutory maximum (currently £5,000)
- prosecution on indictment – imprisonment up to five years and/or an unlimited fine

**Notification requirements**

Section 8 of the Bill sets out provisions on the application of the notification requirements contained in the 2003 Act – requirements to notify details to the police on a regular basis. It includes provision that conviction for breach of an RSHO leads to a person being subject to those notification requirements. The Bill does not, however, seek to make a person subject to notification requirements simply on the basis of being covered by an RSHO.

The Consultation Paper stated on this topic that:

> “Given that a person subject to a RSHO, need not have been convicted of any sexual offence, they would not be subject to the notification requirements in Part 2 of the Sexual Offences Act. However, a breach of a RSHO would be a criminal offence for which a conviction would entail compliance with the notification requirements.” (para 29)

And:

> “As a civil order, a RSHO may be disclosed under enhanced disclosure arrangements if a Chief Constable took the view that it was relevant to the post being applied for by an individual. We will consider further what other steps might need to be taken to ensure appropriate recording and disclosure in all relevant cases.” (para 36)

A number of responses to the Consultation Paper sought further clarification of whether or not RSHOs would be disclosed under enhanced disclosure arrangements.

**Sexual Offences Act 2003**
As indicated above, the relevant provisions in the 2003 Act are very similar to those in the Bill. Differences include:

- section 124 of the 2003 Act provides, in relation to Northern Ireland only, that a child is a person under the age of 17 (rather than 16)
- section 127 of the 2003 Act makes provision for appeal against the making of an RSHO, etc by the adult who would be subject to the order. It does not, however, make provision for appeal by the police

CONSULTATION RESPONSES

The section looks at some of the issues highlighted in responses to the Consultation Paper. As previously noted, this briefing only considers non-confidential responses.

General approach

There was support amongst consultation responses for the introduction of RSHOs to Scotland, with them being described by some respondents as a useful additional tool. It was also noted that prevention is better than dealing with the consequences of an offence. For example, Children in Scotland stated that:

“Protecting children before actual abuse takes place is essential if society is serious about safeguarding children and young people. Children in Scotland supports this proposed measure as a reasonable step to further safeguard children and young people from risk of personal injury or harm. (...) Children in Scotland is aware that many suspected perpetrators do not get charged with offences due to lack of evidence even although it is more than likely that an offence was committed. It is therefore believed that RSHOs are necessary to protect children and young people from predatory adults.” (Scottish Executive 2004d)

Some respondents were, however, concerned about the general approach involved in introducing RSHOs, whilst others had particular concerns about the proposals. Some of the particular issues and concerns raised in response to the Consultation Paper are considered below.

A more general concern expressed by some respondents related to RSHOs and other preventative measures such as SOPOs. Part of the concern related to the practicality of monitoring compliance with such orders. One respondent (an academic working in the Department of Sociology at Edinburgh University) asked:

“What army of people is going to monitor these new orders in the proposed legislation, and check on a daily basis if the suspects are obeying their restrictions?” (Scottish Executive 2004l)

The respondent was of the opinion that:
“there is a danger of ending up, especially in this particular field of sex offending, with a great and ever increasing number of variously named orders and bewildering sets of initials, with less and less actual ability to enforce them in any meaningful way. (...) This is because the increased legislative machinery, and civil orders with their sets of initials, rely on more and more work and bureaucratic organisation by a small number of overworked agencies, most notably the police and social work.” (Scottish Executive 2004l)

In addition to arguing that there is a need for more resources, she was of the view that a strategy to deal with sex offending should place more emphasis on empowering potential victims (eg through school programmes which challenge possessive and sexist attitudes to women).

**Human rights**

The Policy Memorandum notes that the proposals to introduce RSHOs and extend the use of SOPOs raise possible issues in terms of article 8 (right to respect for private and family life) and article 6 (right to a fair trial) of the European Convention on Human Rights (‘ECHR’). The Scottish Executive’s reasons for believing that the Bill’s provisions are compatible with the requirements of the ECHR are set out in paragraphs 17 and 18 of the Policy Memorandum.

In its response to the Consultation Paper, the Scottish Human Rights Centre argued that the Executive should reconsider its proposals for RSHOs so as to give “due consideration to the proportionality of the proposed measure and also the fairness of the proposals in terms of the right to be presumed innocent until proven guilty (article 6(2) ECHR)” (Scottish Executive 2004m). It also expressed concern that the Executive was tending to blur the distinction between civil and criminal law by using the civil law to deal with criminal issues, but making the breach of civil orders a criminal offence.

The Criminal Law Committee of the Law Society of Scotland questioned whether retrospective aspects of the proposals (section 2 of the Bill provides that an application for an RSHO may be based on acts occurring before the provisions are law) would be compliant with ECHR.

A consultation response from Children 1st also questioned whether the proposals might be open to challenge under human rights legislation, and sought assurances from the Executive that proposals for RSHOs would be implemented in a way which avoided challenge. Children in Scotland noted the above concerns but stated in relation to the proportionality argument that:

“Children in Scotland believes that a child’s right to safety should not be compromised because someone has yet to commit a sexual offence although their behaviour towards the child has been inappropriate. Children in Scotland strongly believe that in this situation a child’s rights should be the paramount consideration.” (Scottish Executive 2004d)

**Acts giving rise to an RSHO**

It has already been noted that behaviour which is not harmful to children could be covered by the list set out in section 2(3) of the Bill, and that the police and courts would play an important role in ensuring that RSHOs are not used in a way which interferes with appropriate discussions
about sexual matters (see section in ‘Main Elements of the Scheme’ on the making of RSHOs). The concern that the provisions on RSHOs might threaten important work with children and/or criminalise other innocent behaviour was raised by a number of respondents. For example, a response from NHS Greater Glasgow – LHCC Youth Health Workers Forum stated:

“As sexual health has many moral, ethical and religious dimensions to it, it is important to ensure that those who provide sexual health advice and information are not vulnerable to the threat of an RSHO (…). It is important that the legislative process does not dissuade agencies from carrying out positive sexual health work or at worst criminalise this work” (Scottish Executive 2004j)

The reason for requiring at least two instances of behaviour covered by section 2(3) of the Bill, before it is possible to seek an RSHO, was also queried.

**Age limits**

The adult in relation to whom an RSHO is sought must be 18 or over. The child or children who are to be protected must be under 16.

Some respondents commented on the minimum age requirement of 18 – either to suggest that it should be reduced (eg to 16) or raised (eg to 21). The arguments were similar to those raised in relation to the age limits applying to the offence set out in section 1 of the Bill (see above).

**SEXUAL OFFENCES PREVENTION ORDERS**

**PURPOSE**

The Bill (section 9) seeks to extend the use of a form of civil preventative order which is already available in Scotland, the Sexual Offences Prevention Order (‘SOPO’). Existing provisions are contained in the Sexual Offences Act 2003 (‘the 2003 Act’). In relation to Scotland, the current provisions on SOPOs replaced sex offender orders (introduced in the Crime and Disorder Act 1998).

The use of SOPOs is intended to protect members of the public, both adults and children, from serious sexual harm. Thus, unlike other provisions in the Bill, the proposed changes to SOPOs are aimed at enhancing the protection of adults as well as children.

Although there are very important differences, the existing scheme for SOPOs contains a number of elements which are similar to the existing scheme for RSHOs in England, Wales and Northern Ireland (set out in the 2003 Act), and the proposed scheme for RSHOs in Scotland (set out in the Bill). Similarities include:

- both types of order prohibit a person doing certain things in the future, with the aim of preventing future harm
- in both cases, the future harm is defined as having a sexual element to it
- the police may apply for both types of order
- both schemes make provision for – (a) interim orders; (b) variation, renewal and discharge of orders; and (c) appeals
a breach of either type of order is a criminal offence

Major differences between SOPOs and RSHOs include:

- unlike RSHOs, which can be made in relation to people who have never been charged or convicted of any offence, SOPOs are used in relation to people who have been prosecuted for certain trigger offences
- in relation to SOPOs, but not RSHOs, the future harm is defined in connection with the risk of committing a sexual offence
- unlike RSHOs, which are intended to protect children, SOPOs may be used to protect both children and adults

EXISTING PROVISIONS ON SOPOs

Sections 104 to 113 of the 2003 Act make provision for the use of SOPOs throughout the UK. The provisions came into force on 1 May 2004.

Given that SOPOs are already available in Scotland, the following summary of existing provisions is restricted to a brief outline of some of the main provisions, with a focus on aspects which the Bill proposes to change.

Applying for and making SOPOs

As noted above, SOPOs are used in relation to offenders who have been prosecuted for certain trigger offences. For the sake of brevity, the discussion of SOPOs below focuses on the situation where a person is convicted of a trigger offence. However, it should be noted that SOPOs may also be made in some other situations, for example, in respect of a person who has been found not guilty of one of the trigger offences by reason of insanity.

The 2003 Act (see in particular section 104) allows UK courts to make SOPOs in two types of situation:

- following a civil application to the court by the police, in respect of an offender who has previously been convicted of a trigger offence (referred to below as ‘police SOPOs’)
- by a criminal court, at the same time as sentencing, following the conviction of an offender for a trigger offence (referred to below as ‘court SOPOs’)

However, only the provisions on police SOPOs were extended to Scotland. The Bill proposes to change this (see ‘Proposed Changes in the Bill’ below). Both police and court SOPOs are available in the rest of the UK.

The trigger offences are listed in Schedules 3 and 5 to the 2003 Act. Different trigger offences are relevant depending upon where in the UK the court is situated and whether the court is

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4 Section 112 of the 2003 Act modifies the application of the Act's provisions in relation to Scotland. Subsection (1)(a) of that section, by stating that section 104(1)(b), (2) and (3) of the 2003 Act does not apply to Scotland, provides that court SOPOs are not currently available in Scotland.
dealing with the possibility of a police or court SOPO. The range of trigger offences which would apply to the proposed scheme for court SOPOs in Scotland is considered below (see ‘Proposed Changes in the Bill’).

A police SOPO may be sought where the behaviour of an offender during the period since conviction gives rise to concerns about future actions. The Explanatory Notes to the 2003 Act (para 211) state:

“All example of when the police might apply for a sexual offences prevention order is as follows. An offender has a conviction for a sexual activity with a child and has been released after his term of imprisonment. Following his release he behaves in a way that suggests that he is likely to offend again, for example by loitering around schools or inviting children back to his house.”

Where currently available (ie in England, Wales and Northern Ireland), a decision to make a court SOPO would be based on evidence available to the court at the time of conviction and sentencing. The Explanatory Notes to the Bill, in outlining the proposed extension of court SOPOs to Scotland and how a Scottish court would approach its role in determining whether to make such an order, state that:

“All evidence presented in the trial is likely to be a key factor in the formation of this judgement, together with the offender’s previous convictions, of which the sheriff would have a copy. Courts may also ask social enquiry report writers to consider the suitability of a SOPO on a non-prejudicial basis.” (para 35)

In both types of situation a court must, before making a SOPO, be satisfied that it is necessary to do so for the purpose of protecting the public, or any particular members of the public, from serious sexual harm from the person who would be covered by the SOPO. This is further defined as protection from serious physical or psychological harm caused by that person committing, in the future, various sexual offences (listed in Schedule 3 to the 2003 Act).

**Effects of SOPOs**

SOPOs are similar to RSHOs in that they expressly prohibit a person, in relation to whom the order is made, from doing certain things.\(^5\) What a SOPO prohibits will depend on the circumstances of the case, but the 2003 Act provides that any prohibitions must be necessary for the purpose of protecting the public or any particular member of the public from serious sexual harm from the person covered by the order. The Explanatory Notes to the 2003 Act (para 216) give the following examples:

“Prohibitions could include, for example, preventing an offender from contacting his victims or from taking part in sporting activities that involve close contact with children or from living in a household with girls under 16.”

SOPOs are imposed for an initial minimum period of five years (rather than the two years proposed in the draft bill for RSHOs).

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PROPOSED CHANGES IN THE BILL

Court SOPOs

Section 9 of the Bill would amend current provisions in the 2003 Act so as to allow the use of court SOPOs in Scotland. Thus, a Scottish criminal court would be able to make such an order at the time of sentencing an offender. This would bring the position in Scotland closer to that already provided for in the 2003 Act for other parts of the UK.

Trigger offences in relation to court SOPOs

The Scottish court would be able to impose a court SOPO where it deals with an offender in respect of one of the trigger offences listed in paragraphs 36 to 60 of Schedule 3 to the 2003 Act. The Explanatory Notes to the Bill (para 28) state:

“The offences listed in paragraphs 36 to 59 are all sexual offences. Paragraph 60 covers any offence committed in Scotland where the court determines that there is a significant sexual element in the offender’s behaviour in committing the offence.”

In relation to other parts of the UK, where court SOPOs are already available, the trigger offences set out in the 2003 Act include a range of non-sexual offences as well as sexual offences. Information on the reasoning behind this, which has similarities to the reasoning behind the inclusion of the paragraph 60 offences in relation to Scotland, is set out in guidance published by the Home Office (2004, pp 37-38):

“(…) in addition to the sexual offences listed in Schedule 3, a SOPO may be made against a defendant with a conviction, caution or finding for an offence listed in Schedule 5 of the 2003 Act. These offences are violent offences, including the common law offence of murder. This is a new provision; the sex offender order and the restraining order could only be made against convicted sex offenders. This new provision ensures that it is possible to take out a sexual offences prevention order in respect of an offender who, for example, raped and murdered his victim and was only charged with murder. A SOPO can only be made where it is necessary for the purposes of protecting the public from serious sexual harm – so it is not possible to take out a SOPO on a violent offender if there is only a risk of the offender committing a violent offence.”

Jurisdiction

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6 Section 9(4)(a) of the Bill would do this by repealing section 112(1)(a) of the 2003 Act, thus applying section 104(1)(b), (2) and (3) of the 2003 Act to Scotland.

7 Section 9(4)(b) of the Bill limits the trigger offences for the purposes of court SOPOs in Scotland to these offences.
Section 9 also makes adjustment to provisions for determining which courts have jurisdiction to make or otherwise deal with SOPOs.

CONSULTATION RESPONSES

This section looks at some of the issues highlighted in responses to the Consultation Paper. As previously noted, this briefing only considers non-confidential responses.

Consultation responses generally focussed on the other elements of the Executive’s legislative proposals, although most of those commenting on this area were generally supportive of the planned extension of SOPOs.

Concerns raised about not placing too much reliance on preventative orders, and possible difficulties in monitoring compliance with such orders, are outlined above in relation to RSHOs (see ‘General approach’ in the section dealing with RSHO consultation responses).

APPENDIX: EXAMPLES OF LAWS OUTSIDE THE UK AIMED AT ONLINE GROOMING

Maine Criminal Code

The criminal code provides for an offence of soliciting a child by computer. A person is guilty of soliciting a child by a computer to commit a prohibited act if the person –

- uses a computer knowingly to solicit, entice, persuade or compel another person to meet with that person;
- is 16 years of age or older;
- knows or believes the other person is less than 14 years of age;
- is at least three years older than the expressed age of the other person; and
- has the intent to engage in the following prohibited acts with the other person: (i) a sexual act, (ii) sexual contact, (iii) sexual exploitation of a minor

Canadian Criminal Code

In 2001 Canada introduced an offence of ‘luring’ under Part V (172.1) of the Canadian Criminal Code –

(1) Every person commits an offence who, by means of a computer system within the meaning of subsection 342.1(2), communicates with:

(a) a person who is, or who the accused believes is, under the age of eighteen years, for the purpose of facilitating the commission of an offence under subsection 153(1), section 155 or 163.1, subsection 212(1) or (4) or section 271, 272 or 273 with respect to that person;
(b) a person who is, or who the accused believes is, under the age of sixteen years, for the purpose of facilitating the commission of an offence under section 280 with respect to that person; or
(c) a person who is, or who the accused believes is, under the age of fourteen years, for the purpose of facilitating the commission of an offence under section 151 or 152, subsection 160(3) or 173(2) or section 281 with respect to that person.

(2) Every person who commits an offence under subsection (1) is guilty of:

(a) an indictable offence and liable to imprisonment for a term of not more than five years; or
(b) an offence punishable on summary conviction.

(3) Evidence that the person referred to in paragraph (1)(a), (b) or (c) was represented to the accused as being under the age of eighteen years, sixteen years or fourteen years, as the case may be, is, in the absence of evidence to the contrary, proof that the accused believed that the person was under that age.

(4) It is not a defence to a charge under paragraph (1)(a), (b) or (c) that the accused believed that the person referred to in that paragraph was at least eighteen years of age, sixteen years or fourteen years of age, as the case may be, unless the accused took reasonable steps to ascertain the age of the person.

**SOURCES**


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Scottish Executive. (2004c) Protecting Children from Sexual Harm Consultation: Response from West Lothian Council. [To be published]*

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Scottish Executive. (2004m) *Protecting Children from Sexual Harm Consultation: Response from the Scottish Human Rights Centre.* [To be published]*

Scottish Executive. (2004n) *Protecting Children from Sexual Harm Consultation: Response from the Children 1st.* [To be published]*


* Non-confidential consultation responses may be viewed by MSPs and their personal staff in SPICe. The Executive is planning to publish non-confidential responses on its website in the near future. They will also be available to the public in the Executive Library in Edinburgh.