

APPENDIX 1

West Dunbartonshire Council Written Evidence to the Scottish Parliament's Education Committee on the Protecting Vulnerable Groups (Scotland) Bill



General Points

West Dunbartonshire Council generally welcomes the Bill and considers that it goes some considerable way to providing more effective protection for children and vulnerable adults. Although complex the Bill does address many of the issues raised via the consultation and has the potential to provide the Council and other employers with a reasonable framework within which to operate safer recruitment practices and ensure robust Child Protection procedures. The automatic referral system cross-checking and triggering of searches in various databases, including court proceedings, is most welcome. The arrangements also appear to have successfully addressed the issue of personal employers by introducing a disclosure in relation to barred status.

Some outstanding areas of concern remain however which it is hoped can be addressed during the committee stage. The Bill does not include arrangements for provisional listing of individuals while consideration is given to a listing decision. Although a pending determination will appear on any subsequent disclosure records, and organisational employers will be notified, the individual could be working for other employers on a part-time or casual basis, a personal employer or be involved in unpaid work for organisations engaging with children or vulnerable adults. These other employers or agencies may be unaware of the individuals' conduct which has led to a referral for listing. While there may be concerns about unfairly pre-judging individuals, there must also be concern regarding a potentially unsuitable person working with vulnerable groups for a considerable period while a determination is made.

Over recent months concern has been raised via COSLA, regarding the legitimacy of Councils using disclosure information to check employees in contracted out services. This has been a particular issue for example in relation to school transport where bus drivers and supervisors are likely to be employed by bus companies, but decisions on suitability rest with the local authority whose children are being transported. As officers within the local authority would seek to retain the responsibility for safeguarding children in these circumstances, the Bill should make provision to allow for the sharing of this disclosure information.

One other significant area of concern remains in relation to applicants who originate from another country, or have lived abroad for significant periods of time. While it is appreciated that access to appropriate and quality assured information from a wide range of other nations is difficult, lack of progress in this area does represent a 'gap' in safe recruitment procedures. There is also an argument that it may lead to discrimination.

The Bill is likely to have significant impact on employers, particularly large employers like Councils. At this stage without details of how the scheme will operate in practice it is difficult to fully appreciate how the Bill will affect both personnel functions and Child Protection procedures. The introduction of two separate lists makes the legislation complex, and coupled with the introduction of the new idea of a “scheme” will clearly raise the need for considerable awareness raising and training of staff at various levels across a range of services. The more joined up approach to bringing together information on individuals and formalising the links between organisations, including governing bodies, should be of assistance to employers. There are however new responsibilities placed on employers in terms of providing information to the Vetting and Barring unit which require further clarification.

Alongside the duty on employers to refer particular individuals for consideration of listing, there requires to be clear guidance given on how information will be considered and weighted so that employers can make referrals in an effective manner. As noted in relation to Sections 21 to 24 it would be important for there to be an interactive element to the referral process so that employers gain an understanding of appropriate referrals and have the opportunity to challenge decisions not to list individuals for whom there are local concerns. Reference in the Policy Memorandum to further consultation regarding the decision making process for listing, is welcomed, but the right of appeal for employers does not appear on the face of the Bill.

The impact on employees will be variable depending on whether they have already been subject to the Disclosure Scotland check or are part of the workforce for whom retrospective checking will be relevant. For employees familiar with the Disclosure Scotland process the new proposals regarding the “short scheme record” will be helpful. (This is also a welcome development for employers). Considerable awareness raising and support may be required however in relation to the introduction of the new idea of the scheme. While the Bill and the Policy Memorandum both refer to the fact that the scheme is not compulsory, on closer reading it does not appear possible for an individual wishing to undertake “regulated work” to do so without becoming a member of the scheme. It may be more helpful to employees for this to be stated more explicitly in the Bill and the accompanying guidance.

The phasing in of the retrospective checking aspect of the Bill over a period of years, possibly 3 years, should allow employers and employees to gain a shared understanding of the processes and to develop agreed protocols around the possible listing of existing employees. Guidance on this matter at a national level would be helpful. It will be vital for consultation on the phasing issue planned for 2007 to give detailed consideration to both the personnel and financial implication of retrospective checking.

The Bill involves two separate lists, one relating to children and one to vulnerable adults. There has been considerable discussion regarding whether this is necessary and/or desirable. While having two lists certainly complicates the legislation, on balance it does appear to be necessary as there may be cases where an individual poses a risk to a specific group within the population rather than to the wider grouping of children and all vulnerable adults. The Bill relates to the assessment of risk which an individual may pose to the two separate groupings and this is in line with the approach taken in other areas for example criminal justice when assessing risk. It is therefore accepted that one single list would unduly restrict the employment opportunities of individuals whose offences or activities indicate that they may be a risk to either children or vulnerable adults, but not both.

Specific Issues with the Bill

Section 1. Duty of the Scottish Ministers to keep lists

The wording of this section implies that an individual can only be listed on one list. It should be clear that an individual can be listed in the children's list and in the adults' list.

Section 2. Referral Ground

The language used in 2a and b is general and lacking in clear definition. For example there should be further clarification of "inappropriate" in relation to conduct and medical treatment. It may not be reasonable to consider pornography as a general term but more appropriate to specify pornography involving images of children or vulnerable adults.

Section 3. Reference following Disciplinary Action

The duty on organisations to provide Ministers with information should be limited to "any relevant prescribed information".

In 3b the term 'might' is problematic. It will be difficult for employers to ascertain if an individual might have been dismissed. This is vague and open to misinterpretation.

Section 8. Reference by certain other persons

In 8 (1) (b) the form "evidence" appears for the first time, in all other sections of the Bill the word information is used. Information is a preferable term as evidence carries legal connotations.

Section

11. & 12. Consideration whether to list:

In 11 (2) (b) and (3) (b) it is unclear how Ministers will be able to make a judgement as to whether an individual “is likely to do regulated work”. There should be a safeguard however that where an individual is not engaged in regulated work with children or vulnerable adults at the point of consideration for listing, that the information is preserved so that if the person subsequently attempts to engage in regulated work that information is readily available.

Section 14. Automatic listing

In 14 (4) (b) the term “an order of a specified description ...” requires definition.

There remains concerns that the Bill does not address the issue of overseas convictions either in terms of UK nationals who commit offences overseas or foreign nationals coming to work in this country. As the number of foreign nationals coming to work in Britain is increasing this is a growing problem which requires a national/international solution. It would be unfortunate if foreign nationals were discriminated against by employing bodies due to the uncertainty or difficulty in obtaining disclosure information. Equally it would be inappropriate for individuals covered within the terms of this legislation to be discriminated against on the basis that they are subject to more rigorous disclosure checks than workers coming from abroad.

Section 17. Information relevant to listing decisions

In 17 (3) it would be helpful to have a clearer description of what “to make representations” actually means. It is not clear whether there is an expectation that representations would be written or oral. Reference to where such guidance will be set out would also be helpful.

Section 18. Police information etc

This section appears to imply that a Chief Constable will have discretion in terms of disclosing information to Ministers to assist in decision making regarding whether to list an individual. While this may be appropriate in some circumstances there requires to be further clarification that the welfare of the child is always paramount and that other considerations, for example prevention or detection of crime would normally be secondary.

Section 19. Information held by public bodies etc

The Bill does not appear to take account of circumstances in which the release of Social Work information could compromise a Police investigation. There is also an argument to consider whether Council Social Work Services should have the right to withhold information if the release of that information to Ministers would compromise a child's safety.

Section 20. Information held by regulated work providers

20 (2) (b) This section places a duty on Councils and other work providers to give information to Ministers regarding individuals who may have done regulated work in the past. There may be a conflict here with existing information and advice which requires employers to hold information on unsuccessful applicants for posts for a maximum of 6 months. The advice indicates that best practice is to destroy all such disclosure information at the earliest opportunity following a recruitment decision having been made. The disclosure information is provided to employers for the sole purpose of making decisions regarding recruitment. The Bill therefore requires to reconcile existing advice with the duty within the Bill to hold information in order to be able to provide it to Ministers in the future for the purposes of making decisions regarding listing.

Section 21. –
24.

Appeals against the listing

While it is important that individuals have a right of appeal in relation to a decision to include them in a list, there should be similar provision for an organisation/employer making a referral, to appeal if the individual is not deemed to be appropriated for listing. Any decision on the part of an organisation/employer to refer for consideration of listing will take place after a process of consideration. It would therefore be important that the referring agency received feedback about the decision both for the purposes of organisational development and also where necessary in order to clarify information/interpretations or to challenge the decision. The organisation/employer may consider that there are significant child protection issues involved and that the interests of children would be served by there being an additional stage in the appeal process.

Section 25. Application for removal from list

25 (3) The inclusion of historic court referrals in this section would appear to have implications in terms of natural justice. Although individuals would have the right of appeal where there have been changes in circumstances since the introduction of the new legislation or since the original listing took place, there is no right of appeal in relation to automatic listings which result from convictions which happened some time in the past. For example, an individual who was convicted of a crime 25 or 30 years in the past and has since demonstrated good character, appropriate engagement in society and has not offended again, could be automatically listed and barred from any work related to children or vulnerable adults. In some circumstances these individuals may have secured work which would now be regarded as “regulated work” and would require to give up that work if automatically listed. There would therefore appear to be an argument for the Bill to include grounds for removal from the list related to the period between the conviction and the automatic listing, with all other factors taken into consideration.

Section 31. This section is unclear. It would be clearer if the word “and” was added to 31 (3) (b) after “an offence against a protected adult”.

Section 37. Police Access to Lists

This section appears to give very wide licence to the Police in terms of accessing prescribed information. 37 (a) should include a reference to an ongoing or current investigation and 37 (b) should be restricted to the apprehension or prosecution of offenders where this is relevant to the protection of children or vulnerable adults.

Section 43. Statement of Barred Status

Where an individual has been listed and subsequently removed from the list it would be helpful if this section made reference to retaining a record of their initial listing.

Section 46. Vetting Information

This section raises significant concerns as it appears to place considerable responsibility on Councils to provide a wide range of information to Ministers in relation to scheme members. The lack of specificity and guidance as to what information would be considered as relevant to provide to the Vetting and Barring unit may lead to the unit being overwhelmed with information which is irrelevant or cannot be processed. There is also no indication of how information will be sent or sought. This duty on local authorities could potentially have significant implications in terms of workload for staff and resources in terms of IT systems etc.

Section 52. Disclosure Conditions

This section contains helpful descriptions of the disclosure conditions initially referred to in section 49 and therefore it would be better if the information outlined in section 52 featured earlier in the Bill, ie before section 49.

The bracketed section in Condition C appears to allow too much latitude. While delegation of responsibility will be necessary, the term “any other person” is too broad. It would be reasonable to restrict this to “any other nominated person” with some guidance to ensure that the nominated individual would be a relevant officer of sufficient status/level of responsibility.

Section 60. Power to use fingerprints to check applicant’s identity

While it may be important that this provision is included, it is unreasonable to expect Councils and other employers to fingerprint applicants for posts. This raises a number of difficult issues particularly in relation to the training, skills and authority of staff and the need for additional resources.

Section 63. Unlawful Disclosure of Scheme Records

As in Section 52 disclosure to “any of the person’s employees” is too broad and should be more clearly defined to “nominated employees”.

Within this section consideration should be given to an amendment which would enable Councils and other public bodies to undertake vetting of individuals working in contracted out services such as school transport.

Section 64. Unlawful Requests for Scheme Records

Coupled with Section 33 there is an implication that disclosure information may only be released for employment purposes. While generally that may be reasonable there may be circumstances where the release of such information for the purposes of conducting a Child Protection investigation would be desirable. To make such a release of information unlawful may not be in the interests of the welfare of children.

Section 65. Unlawful Disclosure etc: supplementary

As with Sections 52 and 63 the range of staff potentially covered, ie any civil servant or employee of the Scottish Parliament, appears too broad. There should be limitations on disclosure and some reference to the level of competency expected of those making decisions.

Section 72. Statements of barred status:

In relation to the “relevant period” it is not clear whether the referral for listing will automatically fall if is not completed within the 12 month period. It would be important to ensure that any procedural delay did not result in a dangerous individual taking up regulated work.

Part 3

Sharing Child Protection Information

Section 73. Further clarification is required as to what constitutes Child Protection information to ensure consistency of application.

Section 79. Child’s welfare to be paramount consideration

This section does not sit well in relation to existing Child Protection procedures and ethos. While it is important to emphasise that the implications of passing on information or taking particular decisions should be carefully considered in relation their possible impact on other children, this is an issue which is dealt with as a matter of course by childcare professionals. It would not be acceptable for one child to be at risk or left in an unsatisfactory situation simply because disclosure of information may have implications for the safety of another child. In these circumstances it would be a matter for the agencies involved to ensure that the needs of all the children implicated are considered and met.

Part 7

Interpretation

Section 93. Meaning of “harm”

There should be reference to physical neglect and failure to thrive as part of the definition of harm included in this section.

Section 94. Meaning of “protected adult”

The definition of protected adult in this section appears to be restricted to someone who has services provided for them. This runs the risk of missing vulnerable adults who are not in receipt of such services and of including individuals who may not consider themselves to be vulnerable but who are nevertheless in receipt of similar services for example, successful young care leavers. The definition should not be resource dependent and therefore likely to change depending on a range of other circumstances including budgetary considerations.

Part 8

Final Provisions

Section 100. Commencement

It would be important that the new Vetting and Barring arrangements should be implemented on a phased basis. If retrospective checking of the workforce undertaking regulated work is to be implemented within a 3 year period then guidance requires to be given as to how this should be phased to avoid individuals moving area or changing professional groupings in order to avoid checking. It is suggested that retrospective checking should begin with those with the longest service and move forward to the most recently appointed, many of whom will already have been subjected to the Disclosure Scotland Vetting system. There remain concerns regarding the practicalities related to retrospective checking of the workforce and it may be helpful for guidelines to be paired at a national level involving discussion with Councils, trades unions and other appropriate stakeholders.

Policy Memorandum

The Policy Memorandum was generally helpful in fleshing out and explaining most aspects of the Bill. Some sections clearly require further clarification and these are outlined above. As several key aspects of the Bill will be the subject of further consultation, it is hoped that further clarity and guidance will be available in due course.

Financial Memorandum

As much of the detail relating to the operation of the proposals within the Bill is lacking at this stage, it is difficult for local authorities to express firm views on the issues raised in the financial memorandum. The following points do raise concern however:

- it would appear premature to suggest that overall costs for the new Vetting and Barring proposals will decrease over time and that there will be no ongoing additional costs for local authorities;
- to avoid any undue negative impact on volunteers working within the statutory sector making a contribution to the community at large, the Scottish Executive should extend its proposals to meet costs of the vetting of these groups of volunteers. A simplified approach would be to provide free checks to all volunteers working with children and vulnerable adults;
- the situation regarding the vetting of carers employed under the Direct Payments scheme, an area of potential growth, seems unclear;

- the increase in vetting has the potential to represent a considerable burden on local authorities if they have responsibility in this area. Local authorities are responsible for the majority of disclosures currently processed through Disclosure Scotland and therefore an increase in the fee levels and a projected increase in volume as retrospective checking is taken forward will undoubtedly place additional financial burdens on existing over-stretched mainstream budgets. Consideration should be given to transitional funding to at least cover the period of phasing to ensure that budgetary considerations do not jeopardise the checking of the childcare and social care workforce;
- as noted elsewhere the duty on local authorities to provide information to the Vetting and Barring unit may have implications in terms of staffing and ICT facilities. This should be a matter for further consultation before conclusions are drawn on the financial implications;
- there seems some confusion and potential contradiction in the financial memorandum in terms of the expectations of employers and employees regarding who will pay for the majority of the disclosure checks. As part of good recruitment practice most local authorities pay for disclosures in respect of their employees in childcare and other designated posts. It does not therefore seem reasonable to argue that neither employers nor employees will face any additional burdens;
- the Policy Memorandum acknowledges that awareness raising and training will be vital for successful additional implementation. This will incur costs for large organisations. It is not reasonable to assume this can be simply incorporated within the existing communication and CPD procedures. Some additional funding will be required.