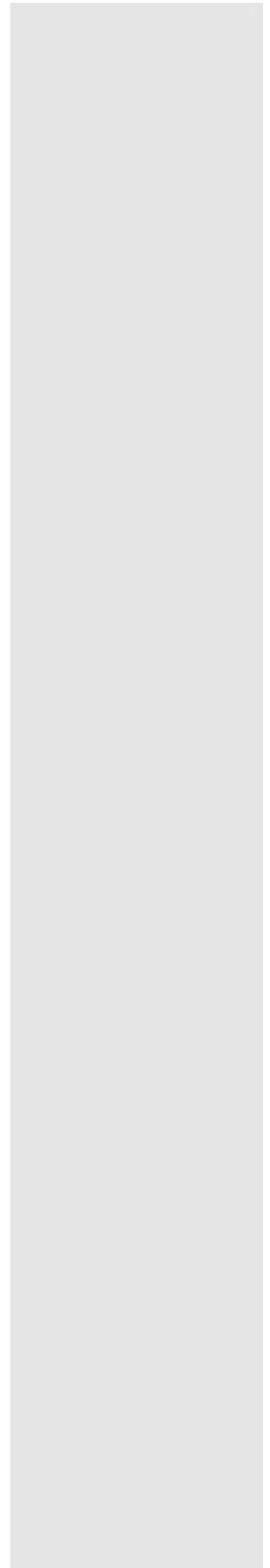


**PROTECTING CHILDREN  
FROM SEXUAL HARM:  
ANALYSIS OF  
CONSULTATION RESPONSES**



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OF CONSULTATION RESPONSES**

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**Scottish Executive**  
**2004**

## **ACKNOWLEDGEMENTS**

Thanks are expressed to all of the respondents who took the time and care to respond to the consultation. Every reply has been examined thoroughly and every effort made to represent accurately the wide range of views and opinions expressed. Copies of full non-confidential responses can be accessed on the Scottish Executive website or in the Scottish Executive library. Thanks also go to the Scottish Executive consultation team for liaison over the management of the consultation responses.

Linda Nicholson  
November 2004

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## **EXECUTIVE SUMMARY**

A Scottish Executive Justice Department consultation on Protecting Children from Sexual Harm took place between 2 July 2004 and 24 September 2004. A consultation paper was issued to which 71 responses were received from a range of individuals and organisations with an interest in improving the protection of children.

This report presents an analysis of the responses to the consultation. The findings will inform the development of proposed changes to the law to include in the forthcoming Protection of Children and Prevention of Sexual Offences (Scotland) Bill.

Despite a relatively modest volume of submissions, the response to the consultation was encouraging in terms of the participation of a variety of organisations from several different statutory and voluntary sectors. No obvious gap in respondent category was identified although it may have been useful to have encouraged more response from representative youth groups.

The consultation document highlighted specific issues on which views were particularly invited. These were:

- Proposed legislation which would make it an offence to meet or travel to meet children for the purposes of committing a sexual offence, following grooming behaviour
- A proposal for Risk of Sexual Harm Orders which are aimed at protecting children from those who display inappropriate sexual behaviour towards them
- The further use of Sexual Offence Prevention Orders, so that they can be applied to those convicted of sex offences by the court when they are sentenced

Consultees were also given the opportunity to highlight any other issues in relation to grooming a child for sexual exploitation that should be taken into consideration in the proposed Bill.

## SUMMARY OF VIEWS EXPRESSED

### Proposed Legislation Contained in Section 1 of the Draft Bill (Chapter 3)

#### **Q1: DOES THE NEW OFFENCE SET OUT IN SECTION 1 OF THE ATTACHED DRAFT BILL ACHIEVE THE OBJECTIVE OF ENSURING THAT POTENTIAL SEX OFFENDERS MEETING OR TRAVELLING TO MEET A CHILD FOLLOWING GROOMING BEHAVIOUR CAN BE PROSECUTED?**

- Most respondents, whilst generally welcoming and supporting the intent of the proposed new Sexual Grooming offence, expressed reservations about its effectiveness in practice.
- Many consultees predicted that it could be hard to achieve successful prosecutions, largely on account of difficulties in proving *intent* to sexually harm a child.
- A recurring theme was that successful prosecutions would require the co-operation of various parties, including the child and their family to support the police.
- Recommendations were made to tighten the criteria for establishing the new offence in order to address concerns that innocent people going about their routine work may inadvertently be criminalised.
- Many consultees felt that it should not be necessary to demonstrate at least 2 prior communications between an adult and a child as even one previous communication may be sufficient for a perpetrator to gain a child's trust.
- Several respondents made suggestions for improvements to the proposals including widening the criteria to cover the travel of a child to meet the perpetrator, allowing for cultural differences in practices, addressing those who sought contact with a child for their own sexual gratification (despite not arranging to meet the child), incorporating grooming behaviour within a household (where no travel may be involved) and framing the criteria around notions of what constitutes "reasonable" behaviour.

#### **Q2: DOES THE NEW OFFENCE STRIKE THE RIGHT BALANCE IN CRIMINALISING ACTIVITY WHICH INVOLVES GROOMING AND THEN MEETING OR TRAVELLING TO MEET A CHILD? OR SHOULD OTHER ACTIVITIES COMPRISE THE CRIMINAL OFFENCE?**

- Of those who provided a clear view, 62% considered that the right balance had been struck in criminalising activity which involves grooming and then meeting or travelling to meet a child. Thirty-eight per cent argued that an appropriate balance had yet to be found.
- A range of other activities was suggested to comprise the criminal offence, including internet contact with the child for the purposes of adult sexual gratification and grooming of vulnerable parents to gain access to their child.

#### **Q3: IS THE PROPOSED PENALTY SET AT THE RIGHT LEVEL?**

- Of those who provided a clear opinion, 87% agreed with the proposed penalty levels.

- However, several of these respondents qualified their support by recommending that specific requirements should be attached to the penalties.
- Amongst the minority who criticised the proposed level of penalties, the maximum imprisonment term under summary procedure was considered too short, whilst there were mixed views regarding the proposed penalty under solemn procedure.

**Q4: IS 18 THE RIGHT MINIMUM AGE FOR THE OFFENDER OR SHOULD IT BE, FOR EXAMPLE, 16?**

- Of those who provided a clear indication of their view, 69% recommended that the minimum age for the offender should be set at 16 years, 27% considered that 18 years was appropriate and 4% could not arrive at a consensus on minimum age.
- The most prevalent rationale for advocating a reduction in the minimum age to 16 years was that some 16 and 17 year olds may pose a significant risk in terms of perpetrating grooming behaviours.
- Many of those recommending a minimum age of 18 years wanted to avoid criminalising young people who may not have yet reached full maturity and were emotionally under-developed.
- Criticism was levelled at what were perceived to be inconsistencies in minimum ages across different Scottish legislation.

**Risk of Sexual Harm Orders (Chapter 4)**

**Q5: WOULD RISK OF SEXUAL HARM ORDERS BE A USEFUL MEASURE IN PREVENTING SEX OFFENCES AGAINST CHILDREN?**

- The main benefits of the RSHO were seen as their potential for early arrest of risky behaviour; as a deterrent for would be offenders; their flexibility to include additional conditions; and to bridge a gap where prosecution is awaited or has proved to be difficult.
- Concerns regarding the use of the RSHO included inadvertently including innocent parties going about their legitimate business as qualifiers for the order; potential legal challenges to their use largely on Human Rights grounds; overuse of the order as an alternative to prosecution; and the need to resource its use and enforcement adequately.
- A recurring theme was the need for thorough inter-agency work to prepare robust evidence on which to base decisions on imposing the order.
- Many respondents requested further clarification on points of detail regarding the RSHO.
- Several consultees recommended that the minimum age at which an individual could qualify for an RSHO should be reduced to 16 years.

**Q6: DOES THE PROPOSED LIST OF TRIGGER BEHAVIOUR COVER ALL RELEVANT ACTIVITIES THAT MIGHT PROMPT APPLICATION FOR A RSHO?**

- 24% of respondents who commented made a suggestion for expanding the proposed list of relevant activities that might prompt an application for an RSHO.
- A wide range of additional activities was suggested including all forms of contact by mobile phone, the giving of gifts, lying about identity and age, blackmailing, threatening, making specific promises and use of violent or aggressive images which may have a sexual connotation.
- Many respondents challenged the proposed requirement that prior to an RSHO application, sexual behaviour would need to have taken place on at least 2 occasions.
- Consultees expressed concern that legitimate adult behaviour may be captured within the net of trigger activities proposed.

**Sexual Offences Prevention Orders (Chapter 5)**

**Q7: SHOULD THE USE OF SEXUAL OFFENCES PREVENTION ORDERS BE EXTENDED TO ALLOW THEM TO BE IMPOSED AT THE TIME OF SENTENCING?**

- All but one of the 55 respondents who provided a view supported the proposal to allow SOPOs to be imposed at time of sentencing.
- The key benefits to this proposal were cited as enabling prompt and well-informed action by the court with the opportunity to tailor the order for different offenders using a variety of conditions. Benefit for victims and savings in legal aid costs were also foreseen.
- Potential problems raised by consultees focused on the extra resources which they envisaged would be required to monitor and enforce the order and concern regarding the combining of criminal and civil legislation at the time of sentencing.
- Many respondents suggested that social workers should be encouraged to consider SOPOs as a matter of routine in their SERs with a multi-agency input to providing the sentencer with background detail advocated.

**Other Issues to take into Consideration in the Proposed Bill (Chapter 6)**

**Q8: ARE THERE ANY OTHER ISSUES IN RELATION TO GROOMING A CHILD FOR SEXUAL EXPLOITATION THAT WE SHOULD TAKE INTO CONSIDERATION IN THE PROPOSED BILL?**

- The omission in the proposals most frequently identified by respondents was the lack of reference to vulnerable adults, irrespective of their age, as victims of grooming.
- Amongst the other perceived omissions were the need to address the grooming of a child by one adult for another, grooming behaviour within a household, the interface of the proposed procedures with the Children's Hearing system and methods of grooming which are not obviously sexual in nature.

- It was suggested that the law should be constantly monitored and reviewed to keep up to date with technological advances and close any developing loopholes.
- Consultees raised a number detailed language and technical points and sought clarification on a variety of specific issues.

### **Additional Comments (Chapter 7)**

- Several respondents expressed praise for the overall approach and aims of the proposals.
- There were mixed views on the extent of the need to harmonise the relevant legislation between Scotland and England and Wales
- A key theme to emerge was that the legislation by itself was not enough to tackle the problem of child sexual abuse.
- An overwhelming call was made for continued public awareness and educative initiatives aimed at informing people of the relevant issues and threats to children.
- Recommendations were made for parents and for internet providers to take on more of the responsibility for guarding against inappropriate use of the internet.
- A recurring comment was for the legislation to be underpinned by appropriate, long-term funding.
- The need to strike a balance between promoting sexual well-being and protecting against sexual harm was called for.

# CHAPTER 1: BACKGROUND TO THE CONSULTATION

## THE CONSULTATION

The Protecting Children from Sexual Harm consultation was launched by the Minister for Justice on 2 July 2004. Copies of the consultation paper were distributed to a wide range of people and organisations in the public, private and voluntary sectors. The consultation paper contained proposals for strengthening the law in the way in which it deals with convicted or suspected child sex offenders and proposed a new draft Bill.

The consultation period ran from 2 July 2004 until 24 September 2004 although a small number of responses were received shortly after this date and have been included in this analysis. A press release helped publicise the consultation paper which was made available on the Scottish Executive website. In announcing the consultation the Minister for Justice said:

*“Child sex abuse is one of the most evil, despicable crimes in society today. It can leave emotional and physical scars that last a life time and it is vital that we do all we can to support the police, courts and other organisations in tackling this problem.*

*This Executive is already taking steps to improve the protection of children through a three-year programme of reform. Today I am announcing further measures which will supplement that work by tightening up the law in the way in which it deals with convicted or suspected child sex offenders.*

*There must be no safe havens for sex offenders in Scotland. If we can add to our existing armoury of measures to protect children, then we must do so. Our new proposals will help keep our children safe and well, while punishing those individuals who try to prey on them.”*

The consultation paper highlighted specific issues on which views were invited. These were:

- Proposed legislation which would make it an offence to meet or travel to meet children for purposes of committing a sexual offence, following grooming behaviour
- A proposal for Risk of Sexual Harm Orders which are aimed at protecting children from those who display inappropriate sexual behaviour towards them
- The further use of Sexual Offence Prevention Orders, so that they can be applied to those convicted of sex offences by the court when they are sentenced

Further copies of the consultation paper were requested by respondents not on the initial distribution list and by the final cut-off date for analysis, 71 responses to the consultation

had been received and have been included in this analysis.<sup>1</sup> This report presents an analysis of these 71 responses. The findings will inform the development of proposed changes to the law to include in the forthcoming Protection of Children and Prevention of Sexual Offences (Scotland) Bill.

## CONTEXT

In recent years there has been a growing realisation throughout the UK that the laws relating to the protection of children from sexual harm need to be strengthened. The internet in particular has provided a new vehicle for those intent on sexual abuse of children to plan their actions and “groom” children with the intention of future sexual abuse of such children. “Grooming” in this context is contact with a child to facilitate the commission of a sexual offence against that child.

In England and Wales weaknesses in the relevant law were addressed by the Sexual Offences Act 2003. In Scotland, various recent initiatives have demonstrated the Government’s concern that children should be appropriately protected. For example, its 3 year programme to reform services to protect the most vulnerable children is now in its second year. The new Children’s Charter, developed by Save the Children and launched by the First Minister in April 2004 sets out what children and young people need and expect to help protect them when they are in danger of being, or already have been, harmed by another person.

A further major strand of the Scottish Executive’s agenda for increasing the protection of children is the proposal for new legislation to be contained in the Protection of Children and Prevention of Sexual Offences (Scotland) Bill. The consultation “Protecting Children from Sexual Harm” sought views on key proposals being considered for the new legislation. The consultation reflected the wish of the Scottish Executive to align the laws relating to the protection of children across different UK jurisdictions, and to signal the respective government’s determination to work together to protect children. However, the exercise also provided the opportunity to gather views on fine-tuning legislation to accommodate Scotland’s different legal traditions and approaches.

The responses to the consultation have been made publicly available in the Scottish Executive library and on the Scottish Executive website unless the respondent has specifically requested otherwise.

**The remainder of the report documents the consultation process (Chapter 2), and the findings of the analysis (Chapters 4-7).**

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<sup>1</sup> Annex 1 contains a list of those who responded to the consultation.

## **CHAPTER 2: THE CONSULTATION PROCESS**

### **TIMING OF CONSULTATION**

The consultation became “live” on 2 July 2004 and closed on 24 September 2004 although responses received shortly after this deadline have been included in the analysis. The scale of the consultation was wide in terms of distribution to stakeholders but moderate in terms of the volume of responses received. Staff in the Scottish Executive’s Justice Department supported the exercise.

### **NATURE OF CONSULTATION**

The consultation document comprised 12 pages (plus the draft Protection of Children and Prevention of Sexual Offences (Scotland) Bill). The document set out the current legal position relating to grooming behaviour and outlined plans to strengthen the law in this area. Eight specific questions were posed to seek views on the key aspects of the new proposals:

1. Does the new offence set out in Section 1 of the attached draft Bill achieve the objective of ensuring that potential sex offenders meeting or travelling to meet a child following grooming behaviour can be prosecuted?
2. Does the new offence strike the right balance in criminalising activity which involves grooming and then meeting or travelling to meet a child? Or should other activities comprise the criminal offence?
3. Is the proposed penalty set at the right level?
4. Is 18 the right minimum age for the offender or should it be, for example, 16?
5. Would Risk of Sexual Harm Orders be a useful measure in preventing sex offences against children?
6. Does the proposed list of trigger behaviour cover all relevant activities that might prompt application for a RSHO?
7. Should the use of Sexual Offences Prevention Orders be extended to allow them to be imposed at time of sentencing?
8. Are there any other issues in relation to grooming a child for sexual exploitation that we should take into consideration in the proposed Bill?

## NATURE OF RESPONSES

The structure of the consultation document provided a significant steer in promoting some consistency in form of response. Although no formal consultation response form was provided, submissions tended to be tightly structured around the consultation questions posed. In addition, many responses contained further general comments regarding the consultation exercise and/or the protection of children from sexual harm. Most respondents provided commentary on most of the questions tabled. Submissions arrived either by email or hard copy. Most ranged from one page to three pages in length, although a few respondents submitted over 10 pages of comments.

The consultation was dominated by responses from organisations as opposed to individuals. Several respondents exercised their right to remain anonymous and for their responses to be withheld from the public domain. An analysis of the “anonymous” responses is included (although anonymised) here but the full response will not be made available for public scrutiny.

## WHO WERE THE RESPONDENTS?

The full list of organisations that responded is documented at Annex 1. Respondents could be grouped into broad categories as shown in Table 1.

**Table 1: Respondents by Category**

<b>Respondent Category</b>	<b>No. of Responses</b>	<b>% of Responses</b>
Local Authority	25	35
Voluntary Sector	14	20
Legal (inc Children’s Hearings)	8	11
Educational Bodies	4	6
Police Bodies	4	6
Faith Organisations	4	6
Other Public Bodies (inc NHS)	4	6
Business	1	1
Individuals	7	10
<b>TOTAL</b>	<b>71</b>	<b>100</b>

NB Percentages may not add to 100% exactly due to rounding

Responses from local authorities comprised the largest category of submissions (35%). The voluntary sector provided the next largest category of respondents (20%), followed by legal bodies including those relating to the Children’s Hearings System (11%).

## Naming Respondents

After discussion with the client consultation team, it was agreed to preserve anonymity of individual respondents and organisations by attributing their comments and quotes to the grouped respondent category to which they fit. In this way, individual requests for

anonymity are met, but a further depth is added to the analysis by providing some contextual information about the respondent type. The terms used to describe the different category of respondent are as follows:

LA	Local Authority
Vol	Voluntary Sector
Leg	Legal (including Children's Hearings)
Educ	Educational Bodies
Pol	Police Bodies
Faith	Faith Organisations
Oth Pub	Oth Public Bodies (including NHS)
Bus	Business
Indiv	Respondents replying on an individual basis

Where similar views have been expressed by a small number of respondents, each of these consultees is referenced. Where many respondents have expressed the same view then the text refers to this without referencing all relevant responses separately.

### **Gaps in Respondent Type**

A scan of the consultee list along with a review of the respondent organisations revealed no obvious gaps. It may however have been useful to have encouraged more responses from representative youth groups to provide a further perspective on issues such as the proposed minimum age of offender.

## **APPROACH TO ANALYSIS**

### **Analytical Framework**

An electronic Excel database was used to store and assist in the analysis of the responses. This database enabled the storage of either free text or numerical data in a systematic manner whilst providing the flexibility for framework amendments should they be required as the work progressed.

The fields used to record the material were based on the questions set out in the consultation document. Once responses had been examined, a small number of additional fields were added to accommodate the further themes which arose. The result was a comprehensive list of fields which formed the headings for the consultation database of responses.

### **Quantitative Material**

Although much of the analysis was based on descriptive free text, some limited scope existed for quantitative analysis and this was exploited. This involved approximate counts of the numbers of respondents who commented on particular topics and, within these groups, the numbers of respondents holding particular views. However, because of the open nature of the consultation, which did not require people to provide a response on

every issue and the approach of many consultees in providing more general comments rather than responding to each question posed, **quantification of responses was not appropriate in all instances and should be treated as simply indicative and illustrative rather than absolute.** In addition, it should be noted that **any statistics quoted here cannot be extrapolated to a wider population outwith the consultation population.**

### **Factual Accuracy**

The views presented in this analysis have not been vetted in any way for factual accuracy. The opinions and comments submitted to the consultation may be based on fact or may, indeed, be based on what respondents perceive to be accurate from their perspective, but which others may interpret differently. It is important for the analysis to represent views from all perspectives. The report may, therefore, contain analysis of responses which may be factually inaccurate, but are objective in terms of their reflection of strongly held perceptions.

### **RESPONDENTS VIEWS ON THE CONSULTATION EXERCISE**

Several respondents from a range of different respondent categories commented on the consultation document itself and/or the consultation process. Many respondents welcomed the exercise with typical comments being:

*“...very glad that this much neglected subject is beginning to receive the amount of serious attention it deserves”* (Indiv)

*“this document is a welcome move towards recognising the range of behaviours and strategies employed by adults who wish to sexually harm children and young people”* (LA)

The consultation document itself was the subject of praise by some, for example:

*“this is a very clear and comprehensive document which is very informative about a very difficult and emotive subject”* (Oth Pub)

One respondent, however, remarked that they had experienced difficulties in providing an informed response on account of what they saw as a lack of substantive evidence provided in the consultation document (Vol). Another argued that with a longer consultation period, they may have been able to be more active partners in the consultation process rather than simply rushing in a response (Vol).

**The following 5 Chapters document the substance of the analysis, presenting the main issues, arguments and recommendations contained in the responses. These follow the ordering of questions raised in the consultation document.**

## **CHAPTER 3: PROPOSED LEGISLATION CONTAINED IN SECTION 1 OF DRAFT BILL**

The consultation stated:

The Executive is clear that the law needs to be strengthened in this area with the aim of protecting children from sexual harm. We therefore attach a draft Bill...The provisions of this draft Bill are intentionally similar to those adopted in England and Wales by the Sexual Offences Act 2003. This has the advantage that the law is clear throughout the United Kingdom and is evidence of our determination to work together to protect our children. We are however aware that our different legal tradition in Scotland may prompt a different approach in some areas, and identifying the need for any variations in approach is one of the key purposes of this consultation.

To tackle predatory sexual behaviour of grooming both on- and off-line, we propose to introduce a new offence of Sexual Grooming with a maximum penalty of 10 years imprisonment. It will be designed to catch those aged 18 or over who undertake a course of conduct with a child under 16 leading to a meeting where the adult intends to engage in sexual activity with a child. It will enable action to be taken before any sexual activity takes place where it is clear that this is what the offender intends.

The consultation asked:

**Q1: DOES THE NEW OFFENCE SET OUT IN SECTION 1 OF THE ATTACHED DRAFT BILL ACHIEVE THE OBJECTIVE OF ENSURING THAT POTENTIAL SEX OFFENDERS MEETING OR TRAVELLING TO MEET A CHILD FOLLOWING GROOMING BEHAVIOUR CAN BE PROSECUTED?**

The vast majority of respondents (87%) provided commentary in response to this question. Some articulated what they saw as the particular benefits of the proposals such as *preventing* physical harm from taking place (Vol), the focus on and acknowledgement of the *process* of grooming (Vol), the range of the legislation extending to other parts of the world (2 Vol) and bringing Scottish legislation in line with that of England and Wales (LA, Leg).

### **Effectiveness in Practice**

Only one respondent (Pol) expressed a clear “doubt” that the new offence would achieve its stated objective and remarked that evidence from England suggested that the legislation would be of little practical use. However, many of the others, whilst generally supporting the intent of the proposed legislation, expressed reservations about its effectiveness in practice. One comment captured the opinions of many respondents:

*“In introducing legislation to the Scottish Parliament it is important that the detail is not only well intentioned but will actually work to improve the*

*protection of children” (Vol)*

The view most frequently expressed view was that whilst the proposal to create a new offence of sexual grooming was very much welcomed, respondents could foresee difficulties in achieving successful prosecutions. Many commentators argued that proving *intent* to physically harm a child would be challenging (Indiv, 5 LA, Legal). One remark was that evidence may not be “tangible” (LA), another that the offence relied on inference from behaviour which may easily be shown to have an innocent explanation (Legal).

Several respondents considered that the perpetrators of grooming behaviour would become increasingly adept at circumventing the new legislation in order to carry on their grooming practices without prosecution. Some argued that it may be very difficult to disprove that the accused thought the child to be 16 or over (4 LA). Others highlighted the “secrecy” usually surrounding the grooming activity and suggested that perpetrators would go to significant lengths to conceal their behaviour (2 LA) for example by ensuring that they left a trail of only **one** lengthy communication with the child, or by travelling without any incriminating evidence on them (Faith). A few respondents commented that the offence may be difficult to ascertain unless the communication between the accused and the child was high in sexual content (3 LA).

A recurring theme was that successful prosecutions would require the co-operation of various parties to support the police. This could involve the child’s parents and possibly the child (Pol) who it was suggested would require support from the police and counselling services before, during and after any operation to apprehend a perpetrator (2 LA). To maximise help from such third parties, a few respondents highlighted the need for extensive publicity of the new offence (LA, Educ). Gathering of evidence from Internet Service Provider (ISP) records was considered of limited value by one respondent (Bus) who explained that it was unlikely that ISPs would retain the content of emails or chat-room sessions for the length of time which would normally elapse between the initial contact between adult and child and the reporting of the crime to the police.

Many respondents remained very cautious about predicting the future effectiveness of the legislation. For example, it was thought that the offence would be difficult to prove without the use of surveillance techniques (Pol) which may require specialist police input (LA) and may lead to accusations of police “entrapment” of the accused (LA). In addition, one view was that to commence surveillance, the identity of the adult would have to be ascertained and within the context of grooming of children this could be particularly difficult (LA).

However, one respondent summed up the mood of several consultees in remarking that even though the offence may be difficult to prove in practice, the creation of the offence should be welcomed as it will send out a clear message that such behaviour is not acceptable and this may be enough to deter some potential perpetrators (Vol).

## Criteria for the New Offence

The consultation stated:

Section 1 makes it an offence for an adult aged 18 or over to meet intentionally, or to travel with the intention of meeting, a child aged under 16 in any part of the world, if the adult has met or communicated with that child on at least two earlier occasions, and intends to commit a “relevant offence” against that child either at the time of the meeting or on a subsequent occasion. An offence is not committed if the adult reasonably believes the child to be 16 or over.

The course of conduct prior to the meeting that triggers the offence, may but need not necessarily, have an explicitly sexual content.

The offence would be complete when, following the earlier contacts, the adult meets the child or travels to meet the child with the intent to commit a relevant offence against the child. The intended offence does not have to take place. The evidence of the adult’s intention to commit an offence may be drawn from the communications between the adult and the child before the meeting or may be drawn from other circumstances, for example if the adult travels to the meeting with condoms and lubricants.”

The “criteria” for establishing the new offence of sexual grooming attracted much comment from consultees. A general concern expressed by several respondents, including an over-representation from the voluntary and educational sectors, was that a balance needed to be struck between enabling the intention to physically harm a child to be proved, but at the same time ensuring that innocent people going about their routine work were not criminalised. One respondent described how the range of behaviours used by paedophiles can often be within the range of behaviours that protective adults adopt when working with children and young adults. They thought that this could result in non-abusive adults being misunderstood and the:

*“..unbearable stigma of investigation and possible criminalisation will put many men off from being involved with children and young people in a voluntary capacity” (Vol)*

Likewise, other respondents remarked on the use of emails to children by many clubs, organisations and indeed absent parents and cautioned against curtailing the movements and communications of such innocent adults (LA) or the legitimate activities and travel of national and international associations of sports and social clubs (LA). It was argued that any youth worker attached to one of the numerous youth organisations across Scotland could be found guilty on the basis of several of the criteria on a daily basis but be perfectly innocent of any ill intent (Vol). Another concern was the possibility of the legislation criminalising the “natural sexual exploration” of consenting young adults aged, for example, 14/15 years and 18/19 years (Oth Pub).

A recommendation was made for the criteria to be tightened and made more rigorous in

order to address what was perceived to be their current lack of clarity and to increase the protection of the innocent (Educ). A specific example was the case of a child initiating contact with an adult by accessing an innocent adult's website. Legislation was called for which spelled out that the adult needs to have actively pushed information to a child to come under suspicion (Indiv).

Several respondents made specific comments regarding some or all of the criteria included in the proposals. A general point was that it may be difficult to witness all 4 of the criteria listed in the proposals in order to secure a conviction (LA, Oth Pub). Indeed one consultee suggested that just 2 of the 4 elements could lead to a reasonable assumption that an offence against a child was intended (Vol). However, this respondent also recommended that other elements be considered – where an adult lies about their age (also supported by LA consultee) and where their previous conversations with the child have contained a sexual element. Another highlighted as an example the likely difficulty in securing a conviction in situations where there had been no previous sexual content in communication and the perpetrator was not in possession of any overtly sexual material (Pol).

Many consultees felt that it should not be necessary to demonstrate at least 2 prior communications with the child (4 LA, Pol, Vol, 2 Leg). This criterion was perceived as a possible and unnecessary “stumbling block” (LA) when one previous communication should suffice if all other criteria have been met (LA). One respondent warned against attaching any precise figure to the number of communications necessary prior to a charge (Pol) particularly if there are sufficient circumstantial evidence and background concerns to suggest that the particular adult presents a serious risk to a child. Another explained how even one previous communication may be sufficient for a perpetrator to gain a child or young person's trust (LA) with a further view that any reference to two communications should simply be deleted (Leg). One suggestion was that the criteria should be amended to indicate one prior communication in order to more accurately reflect some children's vulnerability and some perpetrators' skills in exploiting it (Leg).

Other respondents commented that the mode of prior communication between adult and child should be specified as including all forms of contact by mobile phone such as WAP (Indiv, LA) and text messaging (LA).

A few consultees highlighted their concern that the proposals appeared to associate the carrying of condoms with ill intent and criminalisation rather than responsible and normal behaviour (2 Oth Pub, Vol).

### **Questions Regarding the Proposed Offence**

Respondents raised a small number of questions on which they sought clarity:

- If the offender travels to France to meet the child, would the offence be deemed to have been committed in Scotland? (Indiv)
- What constitutes “travelling to meet”? Purchase of the travel ticket? Embarking

- on the journey? (Leg)
- Is “reasonable belief” determined on the basis of a subjective or objective test? (Leg)
- What would be the legal situation where one adult grooms a child for another adult? (Leg)
- What would be the legal situation where the child is under 16 years when the grooming behaviour commences and is 16 years when the perpetrator travels to meet them? (Oth Pub, Vol)

### **Suggestions for Improvements**

Many respondents made suggestions for amendments to the draft. One recommendation was for the criteria to cover the travel of a child to meet the perpetrator at the perpetrator’s request (2 LA). Another was for the legislation to allow for cultural differences so that an adult man who perceived himself to be validly married to a woman under the age of 16 years should be protected (Oth Pub).

One consultee argued for the legislation to go further and address those who, even though they did not travel to meet the child, nevertheless sought contact with the child for their own sexual gratification, a behaviour which they thought could have a significant effect on a child (LA). A supporting view was that if previous communications between an adult and child had a sexual content then it could be argued that such behaviour could constitute an offence in itself (LA).

One comment was that preventative offences are notoriously difficult to prove and that perhaps the draft could be informed by S57 and S58 of the Civic Government (Scotland) Act 1982 which incorporated wording: “so that in all the circumstances it may be reasonably inferred that he intended to commit a “relevant offence” (sic) there”. In relation to S58, inference can be made from the character of the accused in addition to the circumstances (LA). Another suggestion was for the offence to be framed around notions of “reasonableness” - for example, when it could be reasonably expected for an adult to state their age (even within a banded range) in communications with a child, when there is a reasonable explanation for communication/contact with a child (Indiv). A call was made for the Scottish Executive to issue Guidelines on how to prove or quantify intent (Vol).

Finally, a call was made for the definition of grooming to incorporate grooming behaviour taking place within a household and/or by already trusted adults (Oth Pub).

### **Other Comments**

A range of other relevant comments were made. One respondent considered that successful prosecutions may have implications for both human rights and for use of appropriate technology (LA). Implications for legal aid were highlighted by another with the prediction that criminal legal aid costs may rise as the complexity of the cases may well require more preparation and involve child witnesses (Leg). Another remarked that

implementing the legislation may be problematic if the police are not appropriately resourced (Vol). One consultee considered although the legislation appeared to go far in addressing the problem of grooming, this should go hand in hand with developing support mechanisms for tackling the offending behaviour (Vol).

One viewpoint was that the offences listed in Part 1 of the Schedule included (though not exclusively) offences which also fall into the definition of Schedule 1 offences in the Criminal Procedure (Scotland) Act 1995. The consultee recommended that the new offence is itself incorporated into the definition of a Schedule 1 offence in order that the protection available to children via S52(2)(d) to (g) of the Children (Scotland) Act 1995 be extended to include the risk from perpetrators of this offence (Leg).

Another recommendation was for a requirement that the new offence be registerable under the Sex Offenders Act 1997 (LA, Leg).

### **SUMMARY POINTS**

- Most respondents, whilst generally welcoming and supporting the intent of the proposed new Sexual Grooming offence, expressed reservations about its effectiveness in practice.
- Many consultees predicted that it could be hard to achieve successful prosecutions, largely on account of difficulties in proving *intent* to sexually harm a child.
- A recurring theme was that successful prosecutions would require the co-operation of various parties, including the child and their family to support the police.
- Recommendations were made to tighten the criteria for establishing the new offence in order to address concerns that innocent people going about their routine work may inadvertently be criminalised.
- Many consultees felt that it should not be necessary to demonstrate at least 2 prior communications between an adult and a child as even one previous communication may be sufficient for a perpetrator to gain a child's trust.
- Several respondents made suggestions for improvements to the proposals including widening the criteria to cover the travel of a child to meet the perpetrator, allowing for cultural differences in practices, addressing those who sought contact with a child for their own sexual gratification (despite not arranging to meet the child), incorporating grooming behaviour within a household (where no travel may be involved) and framing the criteria around notions of what constitutes "reasonable" behaviour.

The consultation stated:

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.

The consultation asked:

**Q2: DOES THE NEW OFFENCE STRIKE THE RIGHT BALANCE IN CRIMINALISING ACTIVITY WHICH INVOLVES GROOMING AND THEN MEETING OR TRAVELLING TO MEET A CHILD? OR SHOULD OTHER ACTIVITIES COMPRISE THE CRIMINAL OFFENCE?**

To some extent the responses to this question overlapped with those provided in response to the previous question, for example, comments regarding perceived difficulty in proving intent and comments relating to the criteria for the new offence applied to both. However, 49 respondents (69%) appeared to address the specific issue of *balance* in criminalising such activity with 34 of these respondents providing a clear view on whether the offence does strike the right balance in criminalising activity which involves grooming and then meeting or travelling to meet a child. Amongst these 34 respondents, 21 (62%) considered that the right balance had been struck with 13 (38%) arguing that an appropriate balance had yet to be found. The remaining 15 respondents provided comment without giving a clear indication on the issue of balance.

Four respondents considered that such a balance was difficult to achieve (4 LA). Those providing a clear indication that in their view the right balance had been struck represented a wide range of different respondent sectors. In general, little commentary was offered to support this view. However, a few respondents provided clear arguments, for example:

*“the second leg of the offence stated in S1(a)(i) and (ii) involving meeting or travelling to meet ensures the distinction is made which marks a perpetrator from a fantasist”* (Leg)

Another consultee argued that the Act is clear that giving a false identity and the indulging in fantasy, which does not lead to any other contact, is not an offence and that one would have to prove that the false identity in itself was clearly a precursor to meeting or intending to offend which may not always be the case. They continued that although the giving of a false identity to communicate with a child is always potentially abusive it may not always be (LA).

Amongst those who suggested that the appropriate balance had yet to be found, 4 main themes emerged in their responses:

- Adult sexual fantasies could be damaging to children – (LA, Indiv, Vol) and where “*their deeds or words could corrupt a minor*”, this should be covered by this Bill (Indiv).
- The offence should not require the travelling to meet or meeting the child – it should comprise earlier stage activities, perhaps where the meeting is arranged (2 Pol, LA), activity prior to any travel (Indiv, LA), with more emphasis on the earlier grooming activity, particularly the content of the communication (2 Indiv).
- The proposals should be tightened to avoid criminalising legitimate activities – by more careful wording (2 LA) or a closer association of “grooming” with “*a clear intention to commit a sexual act*” (Educ).
- The criteria for the offence appear to be unnecessarily prescriptive and do not allow for flexibility to consider other conduct which may be liable to lead to the offence (LA).

### **Should Other Activities Comprise the Criminal Offence?**

A range of other activities was suggested, largely by local authority respondents. Other activities were recommended in response to question 1 and have been reported as appropriate above.

Contact via the internet for the sexual gratification of the adult or other adults was proposed as a further activity for consideration (LA). Another suggestion was for the grooming of vulnerable parents to gain access to their child (LA). A few respondents requested that the term “intends to engage in sexual activity with a child” in paragraph 16 of the consultation document should be replaced with “intends to engage in sexual harm with a child” (3 LA). A call was made for the legislation to allow for closer scrutiny of the suspicious activities to enable a better understanding of their pattern (LA). For example, it was argued that grooming may comprise communication about the child’s love of animals in order to gain the child’s trust.

One recommendation was for greater clarity in defining precisely what in previous communications could be included as incriminating evidence (LA). Another suggestion was that having regular contact prior to arranging a meeting could constitute an offence, dependent upon the nature and content of the contact (Educ). Finally, one respondent stated that other activities should comprise the criminal offence in order to help establish proof of “intent”, but was unable to offer any suggestions for candidates (LA).

## SUMMARY POINTS

- Of those who provided a clear view, 62% considered that the right balance had been struck in criminalising activity which involves grooming and then meeting or travelling to meet a child. Thirty-eight per cent argued that an appropriate balance had yet to be found.
- A range of other activities was suggested to comprise the criminal offence, including internet contact with the child for the purposes of adult sexual gratification and grooming of vulnerable parents to gain access to their child.

Section 1(3) of the draft Bill stated:

A person guilty of an offence under this section is liable –

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both:

(b) on conviction on indictment, to imprisonment for a term not exceeding ten years or a fine or both.

The consultation asked:

### **Q3: IS THE PROPOSED PENALTY SET AT THE RIGHT LEVEL?**

Overall, fifty consultees (70%) provided a response to the question. Of these, 47 provided a clear opinion on the level of penalties proposed with the vast majority (87%) endorsing them. A few respondents remarked that the level set would send out a strong message and provide a suitable deterrent to would be perpetrators (Leg, LA, Educ). One view was that the level was commensurate with other statutory offences involving sexual abuse (Pol). Another comment was that the proposals offered the flexibility to penalise according to the severity of the crime (Educ).

Several of those in favour of the levels of penalty proposed qualified their support by recommending, for example, that the penalty be accompanied by the requirement to participate in a treatment programme (2 Vol), by a risk management plan (LA), by a Risk of Sexual Harm Order (RSHO) (LA) or by a RSHO and the stipulation that the offender should not enter chat-rooms or use the internet (LA). Others recommended that in addition to the penalty, the offender should be placed on the sex offender register (3 LA, Oth Pub). Finally, one respondent, although favouring the proposals, remarked on what they perceived to be the large difference between levels set in summary and solemn proceedings and recommended that this be re-examined (Vol).

Amongst the minority of respondents (13% of those who provided a clear view) who criticised the proposed level of penalties, some considered the level for summary conviction to be too short (Indiv, LA, Vol). It was argued that offenders may serve only half of the sentence originally imposed (Indiv) and the length of imprisonment would give little time to address the offender's behaviour (Vol). One suggestion was for the

proposed penalty for summary conviction to be replaced by electronic tagging or some restraining order (Faith).

Views on the penalty level proposed for conviction on indictment were mixed. One argument was that the level should be higher in order to be consistent with the 14 years maximum in England (2 LA). However, a contrasting view was that the proposed level may be too high as the offence did not involve any physical contact (Indiv) and the current penalties imposed for sex offending appeared to be considerably lower (Indiv).

A few more general comments were made. One respondent described their difficulty in responding in that the circumstances of referral to either solemn or summary courts had not been spelled out in the consultation document (LA). This consultee also highlighted the challenge to sentencing created in situations where the *risk* the offender posed may be greater than the *actual* offence committed. One respondent requested clarification on the penalties available for those charged with offences against 16-18 year olds (Educ).

Two respondents demanded that penalties should be harsh, with courts encouraged to give prison sentences (Oth Pub) and treat the offending with the utmost severity to reflect the high degree of premeditation and breach of trust involved (Vol). It was suggested that penalties should be harsher where the victims are found to be vulnerable by virtue of, say, their learning difficulties or physical/sensory impairment (Vol).

#### **SUMMARY POINTS**

- Of those who provided a clear opinion, 87% agreed with the proposed penalty levels.
- However, several of these respondents qualified their support by recommending that specific requirements should be attached to the penalties.
- Amongst the minority who criticised the proposed level of penalties, the maximum imprisonment term under summary procedure was considered too short, whilst there were mixed views regarding the proposed penalty under solemn procedure.

The consultation asked:

#### **Q4: IS 18 THE RIGHT MINIMUM AGE FOR THE OFFENDER OR SHOULD IT BE, FOR EXAMPLE, 16?**

Fifty-seven (80%) respondents addressed this question with 49 consultees providing a clear indication of their view on the minimum age of the offender. Of these, over two-thirds (69%) recommended that the minimum age for the offender should be set at 16 years. Just over one-quarter (27%) of those who provided a view considered that 18 years should be the minimum age, with the remaining 4% reporting their organisation's lack of consensus on the issue.

#### **In Favour of Reducing Minimum Age**

Amongst the majority of respondents who advocated reducing the minimum age for the

offender to 16 years, the most prevalent rationale was that some 16 and 17 year olds may pose a significant risk in terms of perpetrating grooming behaviours. Examples were provided of situations where young people may target their friends' younger siblings (Indiv) or where a 17 year old man may groom a 5 year old girl (LA). It was argued that: children in the age range 10-15, typically boys are more than capable of grooming young children for sexual purposes and this ought to be criminalised (LA).

One consultee was of the view that sheriffs should be allowed to exercise discretion in deciding whether to hear a case in an adult court or whether to refer those aged between 16 and 17.5 years to the Children's Hearing system (Leg).

Another recurring rationale for reducing the minimum age to 16 years was in order to promote consistency with Scots Law and the age of sexual consent (2 Indiv, Educ, 3 Pol, LA, Faith). Others commented that 16 years was also the age at which young people could marry (LA) and may well be undertaking responsible tasks such as babysitting (Indiv).

Several respondents remarked on what they perceived to be an anomaly in the proposals in that according to the draft, 16 and 17 year olds could be neither victims nor perpetrators of sexual grooming (Faith, LA, Vol, Leg). One remark was that Children's Hearing system took care of children up to the age of 16 (Indiv) but the picture for dealing appropriately with perpetrators aged 17 years was less clear.

The view of one consultee was to reduce the minimum age to 16 years but for this younger age to be taken into account in dealing with the offence (LA).

### **In Favour of Maintaining 18 years as Minimum Age**

A sizeable minority (27%) of those who provided a view argued for maintaining 18 years as the minimum age of offender. However, many of these respondents saw both pros and cons of this recommendation and their final decision represented a balance of their views.

One general comment was that the age of 18 years appeared appropriate, "*to keep a clear distinction between adolescence and adulthood*" (LA). Others supported the notion of trying to avoid criminalising young people who had not yet reached full maturity and were emotionally under-developed (2 LA, Vol). One respondent reported the argument from The Children's Charities Coalition for Internet Safety that people under 18 years should not be prosecuted (LA). Another advocated that offences committed by those under 18 years should be dealt with in a therapeutic and constructive manner, perhaps through the Children's Hearing system (Vol). One view was that there were existing organisations which could provide programmes for adolescent sex offenders (LA).

The issue of preserving consistency with other legislation was raised and given as a reason for maintaining 18 years as a minimum age (Indiv). Another view was that although 18 years was the preferred option, this perpetuated the mixed messages given in legislation regarding minimum ages (Leg).

## **Lack of Consensus Regarding Minimum Age**

Two respondents reported that their respective organisations had not reached a consensus regarding this question. One suggested that serious consideration should be given to the possibility of prosecuting those aged 16 years and over in criminal courts (LA). The other recommended that perhaps those already known to the Children's Hearing system should continue to be dealt with by that route with others taken within the remit of the adult courts (Oth Pub).

## **Other Comments**

Several respondents provided general comments relating to the issue of the minimum age of offending. One criticism was levelled that the Scottish Executive should not randomly change the definition of a child, or age at which maturity is reached with every piece of legislation it passes. The respondent illustrated their point stating that in Scotland the age of criminal responsibility is 8, the age of consent is 16, Anti-Social Behaviour Orders can not be imposed at 12, Disclosure Scotland checks can be carried out at 16, and the Protection of Children (Scotland) Act 2003 applies to anyone over 16 (LA)

Others considered that Scotland was not always in line with the United Nation Convention on the Rights of the Child which defines a child as under 18 years (2 Vol). A further view was that the minimum age should be consistent with that of other sex offending legislation (LA).

Several voluntary organisation consultees requested further clarification on how a 16 or 17 year old victim or perpetrator would be treated under the proposals (4 Vol). One stressed that there should be no age gap for an abuser to exploit (Vol). Guidance was requested on the specific role of the Children's Hearing system regarding offenders aged under 18 years (Vol).

Concerns were raised that legitimate boyfriend/girlfriend meetings taking place before any sexual act should not be criminalised by the legislation (LA, Vol, Oth Pub) with the suggestion made that some legislative safeguard was required to address this (LA).

Finally, a different perspective was provided by a few respondents who suggested that the notion of power differential between perpetrator and victim was more relevant than an arbitrary age limit (Pol, LA). One related comment was that should the minimum age be set at 16 years, there may be less of an age difference between the accused and the alleged victim making it harder to infer any abuse of power (Vol).

## **SUMMARY POINTS**

- Of those who provided a clear indication of their view, 69% recommended that the minimum age for the offender should be set at 16 years, 27% considered that 18 years was appropriate and 4% could not arrive at a consensus on minimum age.
- The most prevalent rationale for advocating a reduction in the minimum age to 16 years was that some 16 and 17 year olds may pose a significant risk in terms of perpetrating grooming behaviours.
- Many of those recommending a minimum age of 18 years wanted to avoid criminalising young people who may not have yet reached full maturity and were emotionally under-developed.
- Criticism was levelled at what were perceived to be inconsistencies in minimum ages across different Scottish legislation.

## **CHAPTER 4: RISK OF SEXUAL HARM ORDERS**

The consultation stated:

The proposed Risk of Sexual Harm Orders (RSHOs) are a further development of Sex Offender Orders which were relevant to convicted sex offenders and were applicable for a minimum of 5 years. 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 – including still or moving images;
- Giving a child anything that relates to a sexual activity;
- Communicating with a child where any part of the communication is sexual.

The criteria for making an order will be that the court must be satisfied that it is necessary to protect the child. The person in question does not need to have been convicted of any offence. The RSHO will apply for a minimum of two years. Unlike the previous Sex Offender Orders or SOPOs...RSHOs can be made in relation to someone not convicted of any offence. RSHOs will set out specific activities that the person in question must not do. This might include contacting a particular child or going to particular locations. Breach of the RSHO would be a criminal offence and carry a maximum penalty of five years' imprisonment.

The consultation asked:

### **Q5: WOULD RISK OF SEXUAL HARM ORDERS BE A USEFUL MEASURE IN PREVENTING SEX OFFENCES AGAINST CHILDREN?**

Almost all (90%) of respondents addressed this question. In general, consultees did not present a clear “yes or no” response but tended to provide broader commentary regarding the merits and possible drawbacks of the proposal, as well as raising issues on which further clarification was sought.

#### **Perceived Benefits of RSHOs**

Many respondents highlighted what they perceived to be the potential benefits of RSHOs. Such orders were seen as providing the opportunity for early arrestment of risky behaviour before sex offending has occurred (3 LA, Vol, Leg). The orders may provide a deterrent for would-be offenders (LA) and could add support to a child protection plan (LA). They had the flexibility to include a condition of undertaking treatment to address the individual's behaviour (LA) and were seen as providing the police with meaningful, preventive powers (LA).

Several consultees stressed that sex offending could be relatively difficult to prosecute and the RSHO could provide a means of dealing with individuals who had avoided prosecution but whose behaviour was causing concern due to the risk they posed to children (2 LA, Vol, Oth Pub). Suggestions were made that the RSHO could be placed on an individual whilst their case was awaiting prosecution (LA), could be used for those who had been dealt with by the Children's Hearing system (LA) or for those under 18 who posed a significant threat (LA).

Other advantages were seen as aiding teachers, youth workers and parents in explaining to children the risks posed by internet use (LA); as promoting the sharing of case information across relevant agencies (LA); and the possibility that the existence of the order may encourage more young people to disclose details of inappropriate sexual conduct by adults (LA).

The proposal to incorporate an external assessor into the framework was welcomed (LA) although one comment was that use of such an assessor should be for the individual's lawyer to determine (LA). One respondent called for greater clarity on the external assessment proposal and suggested that it may result in increased legal aid costs (Leg).

### **Concerns Regarding Use of the Order in Practice**

Despite such support in principle, many consultees expressed concern regarding its use in practice. The issue raised most frequently in this regard was the need to tighten the drafting of the proposal in order to avoid inadvertently including parents, teachers and sexual health workers, going about their legitimate business, in the category of individuals qualifying for an RSHO. One typical comment was that the Scottish Executive should pre-empt misinformation and misunderstanding around the current legislation to ensure that it does not undermine the ability of Scottish schools and other services to provide needs based sexual health and relationships education and promote good sexual health (Vol). Another was:

*“We have to protect our voluntary workers from having to go through the disturbing experience of a wrongful accusation that has arisen out of some misunderstanding or misrepresentation of an event”* (Faith)

Another recurring theme was potential legal challenges to the use of the order. Several respondents suggested that the deployment of the order for individuals who have not been convicted may have Human Rights implications (Educ, 2 LA, Leg, 2 Vol) especially where conditions of receiving treatment are attached to the order (LA). One respondent (Educ) highlighted Article 6 of the Human Rights Act, the right to a fair trial, and Article 7, not to be punished without recourse to the law in this regard. Interestingly, despite such concerns, there was agreement that the rights of the child should take priority over those of adults in this context (3 LA). One final concern over legalities was that the proposals appeared to have a retrospective effect in that conduct taking place prior to the commencement of the Act could be taken into account in a decision over the placing of a RSHO (Leg).

Other issues raised included the caution that RSHOs should not be used as an alternative to prosecuting an offender (2 LA, Educ, Vol). One remark was that if the behaviour was sufficiently serious then the case should proceed to a prosecution (LA). Another respondent warned against use of the order becoming excessive and not matched by an appropriate volume of prosecutions, in other words, “*it may become too easy to impose an RSHO*” (Educ). Questions were raised about how the new order would fit in with existing child protection legislation (LA, Leg). It was argued that strict protocols would need to be established to ensure criminal proceedings were given priority and evidence used to support an RSHO should not be contaminated prior to any subsequent criminal prosecution (Leg).

General criticisms of the proposal included the argument that the order appeared too vague and unworkable (Vol). It appeared to sit at odds with the well established premise that a person has the right to be presumed innocent until proven guilty (Vol). It could be credible only if breaches of the order could be detected (Leg) and adequate resourcing given to its policing (3 LA). The police were invited by one respondent to specify the resources they would require to undertake such work (Vol). One view was that the order was not likely to work without 24 hour surveillance (Oth Pub). Others highlighted the need for high quality educative programmes to be available for those subject to an order (LA, Vol). A further view was that imposing an RSHO rather than proceeding to prosecution could cause a victim further pain and distress and possibly put others at risk (Vol).

Many respondents reflected that the preparation of a case for the imposition of an RSHO would require inter-agency work (4 LA, Vol, Leg). Calls were made for a robust risk assessment tool for use by the police and others in the criminal justice system (2 LA). One comment was that in order to successfully obtain an order, evidence would need to be robust, detailed and accurate (Vol). This respondent suggested that lessons could be learned from the use of interim interdicts. A concern was raised over the robustness of the evidence base and standard of proof required to secure an RSHO (Vol) and it was stressed by one consultee that Chief Constables should always consult with Social Workers prior to an RSHO application and at any review stage (LA). The proposal that previous conduct can be used in evidence was perceived as helpful (LA), however difficulties were predicted in cases where the individual is not already known to the social work and criminal justice services or where the person refuses to co-operate in giving information (2 LA).

### **Requests for Clarification**

Respondents raised a substantial number of questions regarding the proposed RSHO. These are summarised below:

- Who will be responsible for monitoring the order? (2 LA, Educ, 2 Vol)
- How will the order be enforced? (2 LA, Vol)

- Would a person be informed of the commencement of the procedure to impose an RSHO and what provision will be made for them to challenge the order? (Faith, LA, Leg)
- Will potential employers and service providers be informed that/able to find out if an individual is/has been subject to an order? (Vol, 2 LA, Faith). It was recommended that names of those in receipt of the order be placed on appropriate lists and registers so that potential employers can be made aware of their background (LA, Faith)
- At what level of disclosure will the order be relevant? Most respondents who commented recommended enhanced level (5 LA, Vol) although one recommended standard level too (LA).
- What would be the procedure on release from prison for breach of the order (LA)? Would the order continue (LA)? Concerns were raised that the individual may disappear without trace as, without a conviction for sex offending, they would not have to inform the police of their address (LA).
- What will happen on expiry of the order? Will any children who were involved be informed? (Vol)

### **Age at which an RSHO can be Applied**

Several consultees provided their view on the age at which an individual should qualify for an application for an RSHO. Opinions were mixed and whilst most recommended a reduction in age to 16 years (Pol, 2 LA, Leg), one respondent argued for the minimum age to be increased to 21 years (Oth Pub). A further view was for the order to be applicable to “any person” rather than specify a particular age limit (Pol).

#### **SUMMARY POINTS**

- The main benefits of the RSHO were seen as their potential for early arrest of risky behaviour; as a deterrent for would be offenders; their flexibility to include additional conditions; and to bridge a gap where prosecution is awaited or has proved to be difficult.
- Concerns regarding the use of the RSHO included inadvertently including innocent parties going about their legitimate business as qualifiers for the order; potential legal challenges to their use largely on Human Rights grounds; overuse of the order as an alternative to prosecution; and the need to resource its use and enforcement adequately.
- A recurring theme was the need for thorough inter-agency work to prepare robust evidence on which to base decisions on imposing the order.
- Many respondents requested further clarification on points of detail regarding the RSHO.
- Several consultees recommended that the minimum age at which an individual could qualify for an RSHO should be reduced to 16 years.

The consultation asked:

**Q6: DOES THE PROPOSED LIST OF TRIGGER BEHAVIOUR COVER ALL RELEVANT ACTIVITIES THAT MIGHT PROMPT APPLICATION FOR A RSHO?**

Fifty-one (72%) respondents provided some response to this question. Around half (49%) of these considered that the proposed list appeared to cover all relevant activities although 2 consultees suggested that more may be added to the list as lessons are learned from experience (Indiv, Leg). One respondent remarked that the list as it currently stood seemed to balance the protection of children with the protection of adults' civil liberties (Oth Pub). According to this consultee, any broadening of the list could lead to an increased risk of miscarriage of justice.

Twelve respondents (24% of those who commented) made a suggestion for expanding the list of relevant activities. Their recommendations were:

- The list should incorporate all forms of contact by mobile phone including SMS, MMS, WAP. Also, requests by the adult for personal items both new and old should be included (Indiv)
- Could add a reference to the Schedule, Part 1 and insert the words, “..and in addition any behaviour or activity which may constitute one or more of the crimes detailed in the Schedule of Part 1 of this Act” (2 Pol)
- Should include one activity designed as a “catch all” – so general as to cover any form of activity which includes children and a significant sexual element. For example, in its present form the proposal might seem that the triggers involve awareness by the child of the adult's actions but this may not be the case. The wording should be constructed so as to capture all inappropriate behaviour which is sexual and included children as a stimulus to sexual gratification of adults (LA)
- The list should include reference to text messages (2 LA)
- The list should include gifts (Pol)
- Perhaps should include blackmailing, threatening behaviours and making specific promises (Educ)
- The list is too restrictive and may need to include other behaviour that could be construed by reasonable people as being a precursor to sexual contact. More open interpretation is required. Triggers could include evidence from intelligence that an individual has the potential to sexually offend against children, eg. individuals who have in the course of therapy shown a desire or need to sexually offend against children (LA)
- Add to the list activities including the adoption of a false identity and lies regarding age (Vol)
- Include violent or aggressive images which could also have a sexual connotation (LA)
- Include the new grooming offence in the list of acts which trigger an application for an RSHO (Leg)

## Concerns Regarding the “Trigger” Activities

A recurring comment was to challenge the proposed requirement that prior to an RSHO application, sexual behaviour would need to have taken place on at least 2 occasions (6 LA, Pol, Faith). One respondent remarked that this requirement, whilst strengthening a case against the adult, would do nothing to prevent “one-off” exchanges with different children (LA).

Much of the previous commentary regarding the danger of inadvertently capturing legitimate adult behaviour within the net of trigger activities was repeated. One respondent called for tighter guidance on the proposed activities to make them less ambiguous and therefore less likely to put innocent adults through investigations which may cause irreversible damage to them and their professional reputation (Oth Pub).

One consultee expressed concern that the trigger activities would not be sufficient to pick up on early stages of grooming behaviour (LA). Another predicted difficulties created by differences in what people perceived to be “acceptable” behaviour (Oth Pub). One view was that the definition of “sexually explicit” could be problematic and that any behaviour which is of a sexual nature could be deemed sufficient to allow for an application for an order (LA).

## Requests for Clarification

A few respondents sought clarification on issues raised in the proposals. One respondent suggested that “communicate with” could perhaps be clarified to demonstrate that it included conventional forms of communication such as telephone and letter (LA). Another recommended that reference to sexual images should make clear that this relates to humans and should therefore not criminalise a family watching a wildlife programme in which animals are mating (Indiv).

Finally, a request was made for clarity regarding the mechanisms by which agencies other than the police could initiate a response to trigger behaviours (LA).

### SUMMARY POINTS

- 24% of respondents who commented made a suggestion for expanding the proposed list of relevant activities that might prompt an application for an RSHO.
- A wide range of additional activities was suggested including all forms of contact by mobile phone, the giving of gifts, lying about identity and age, blackmailing, threatening, making specific promises, and use of violent or aggressive images which may have a sexual connotation.
- Many respondents challenged the proposed requirement that prior to an RSHO application, sexual behaviour would need to have taken place on at least 2 occasions.
- Consultees expressed concern that legitimate adult behaviour may be captured within the net of trigger activities proposed.

## **CHAPTER 5: SEXUAL OFFENCES PREVENTION ORDERS**

The consultation stated:

We also propose the extension of the use of Sexual Offences Prevention Orders (SOPOs). At present the orders can be made on application by a Chief Constable in relation to a person convicted of specified offences. The orders apply for a minimum of five years and, like RSHOs, specify activities that the person concerned must not do. We propose that SOPOs should also be available for a court to impose when it sentences an offender for specified sex offences or any other offence that appears to the court to have a sexual element to it. For example, a person might be charged with and convicted of a serious assault in circumstances where the court took the view that the motive for the assault was sexual. A breach of a SOPO would be a criminal offence and be punishable with up to five years' imprisonment.

The consultation asked:

### **Q7: SHOULD THE USE OF SEXUAL OFFENCES PREVENTION ORDERS BE EXTENDED TO ALLOW THEM TO BE IMPOSED AT THE TIME OF SENTENCING?**

Fifty seven (80%) consultees provided a response to this question. Of the 55 who provided a firm view all but one supported the extension. The remaining respondent expressed concern that those offenders considered such a high risk as to merit an order should perhaps be receiving a custodial sentence with a Sexual Offences Prevention Order (SOPO) a consideration on their release (LA).

#### **Perceived Advantages of Imposing SOPOs at Time of Sentence**

A wide range of benefits to the proposal was cited by respondents. Several felt that the sentencer would be in a better position than anyone to impose the order as they would be in possession of the necessary background information on the offender and could avoid having to view the case retrospectively after a time lapse (Leg, 2 LA). The proposal was seen as enabling courts to be proactive in restricting the activities and movements of offenders (Pol) and allowing for prompt action rather than waiting for a subsequent application for an order (Faith). Others welcomed the opportunity this would provide for the sentencer to impose conditions on an offender who may not have received probation (2 LA, Pol) and to target specific risk behaviours which may have previously resulted in a Breach of the Peace (LA).

The proposal was seen by some to potentially benefit victims and their families who they considered may feel reassured by the placement of the SOPO (Leg, Vol). It was also suggested that benefits may accrue from savings in legal aid as the imposition of the SOPO at time of sentence would, it was surmised, remove the need for separate civil legal aid application (Leg).

One respondent perceived an added benefit to be increasing the role of the Social Worker in enabling them to make recommendations for SOPOs through their Social Enquiry Reports (SERs) (LA). Others welcomed the proposal that offenders would be required to register their details with the police (LA, Vol). The measure was seen as being in line with the new Sexual Offences Act which gives the court further discretion in registering offenders who have offences which are not defined as sexual and yet have sexual elements (LA)

### **Perceived Disadvantages of SOPOs**

The most commonly cited disadvantage to any extended application of SOPOs was the extra resource required for their effective monitoring and enforcement (2 LA, Oth Pub, 2 Vol). Indeed, one suggestion was that the police should always have some say in the conditions imposed if they are to be tasked with enforcing an offender's adherence to these conditions (LA).

One respondent cautioned that there may be problems in combining criminal and civil legislation at the time of sentencing (Oth Pub). Another requested clarification on whether criminal legal aid in respect of the substantive proceedings will continue to be made available at a hearing regarding the imposition of a SOPO despite the latter being described as a civil order (Leg).

A further, general drawback of the SOPO was viewed as the fact that as they are to be given at the time of sentencing, meaning that an individual must have already committed the offence and therefore leaving children still at risk (Oth Pub)

### **General Comments Regarding Extending Use of the SOPO**

A recurring theme was that the proposed arrangements would involve a range of agencies in recommending the use of the SOPO and providing the sentencer with background information to support any recommendation (Oth Pub, 2 LA, Faith). It was suggested that social workers should be encouraged to consider the SOPO as a matter of routine (4 LA). One comment was for social workers to "*think and propose SOPO*" each and every time they write a SER on a sex offender (LA). Another consultee proposed that an emphasis be placed on sentencers to request SERs in cases where a SOPO may be considered, and obtain full background information to help them with their decision (LA).

One respondent advocated extending the 3 week time period permitted for the construction of the SER to allow for a multi-agency input (LA). Another highlighted the need for an improved risk assessment tool to advise the sentencer on options such as SOPOs or custody (LA).

Other relevant comments included the recommendation that conditions to be attached to the SOPO should include the requirement to attend for treatment to address the offending

behaviour (Vol); and the call for measures to be taken to aid consistency across sentencers in the use of SOPOs and a “*more uniform response*” (Vol).

### **Clarification Sought**

Clarification was sought by one respondent on whether, should relevant evidence come to light at a later date (following court sentence where a SOPO was not imposed), the police could continue to be able to make an application to the court for such an order to be considered (LA).

A final comment was that although SOPOs will fall into the enhanced disclosure category, as civil orders they would not need to be reported by Scottish Criminal Records Office under SED Circular 5/1989. The respondent recommended further consideration be given to appropriate recording and disclosure of such cases (Educ).

### **SUMMARY POINTS**

- All but one of the 55 respondents who provided a view supported the proposal to allow SOPOs to be imposed at time of sentencing.
- The key benefits to this proposal were cited as enabling prompt and well-informed action by the court with the opportunity to tailor the order for different offenders using a variety of conditions. Benefit for victims and savings in legal aid costs were also foreseen.
- Potential problems raised by consultees focused on the extra resources which they envisaged would be required to monitor and enforce the order and concern regarding the combining of criminal and civil legislation at the time of sentencing.
- Many respondents suggested that social workers should be encouraged to consider SOPOs as a matter of routine in their SERs with a multi-agency input to providing the sentencer with background detail advocated.

## **CHAPTER 6: OTHER ISSUES TO TAKE INTO CONSIDERATION IN THE PROPOSED BILL**

The consultation asked:

### **Q8: ARE THERE ANY OTHER ISSUES IN RELATION TO GROOMING A CHILD FOR SEXUAL EXPLOITATION THAT WE SHOULD TAKE INTO CONSIDERATION IN THE PROPOSED BILL?**

Approximately half of the responses received raised other issues to take into consideration (in addition to those reported in relation to the previous sections of the consultation). Issues raised can be divided into perceived omissions, and detailed points concerning language and technical details.

#### **Perceived Omissions**

The omission most frequently identified by respondents was the **lack of reference of vulnerable adults as victims** of grooming, irrespective of their age (2 Educ, 4 LA, 2 Oth Pub, Faith). It was considered that adults with for example, special educational needs and other disabilities which render them vulnerable should be encompassed by the legislation. In addition, 2 respondents recommended that the scenario of grooming vulnerable parents with the purpose of gaining access to their children for sexual purposes should also be addressed by the Bill (2 LA).

Another perceived omission was legislation to cover the situation whereby an **adult grooms a child for the sexual exploitation by others** (2 LA, Pol, Indiv, Vol, Leg). As currently drafted, the Bill was seen to provide a potential loophole to avoid prosecution for those engaged in such practices. Similarly, the Bill did not appear to address the situation whereby a groomed child might bring another child (not previously groomed) to a meeting with an adult perpetrator (Pol).

Several respondents highlighted the prevalence of **grooming behaviour taking place within households** where meetings would not necessarily have to be pre-arranged and travelling would not need to take place (3 Vol, 2 LA).

Others requested further details on how the proposals in the Bill would **dovetail with the Children's Hearing system** and in particular, which cases should be referred to the Reporter (2 LA).

A few consultees stressed that **grooming could involve many methods which were not obviously sexual in nature** such as using drugs, alcohol and other inducements to influence and reward children (2 LA) or even enticing children with computer games or offering to babysit (LA). It was felt that these approaches should be recognised and taken into account by the legislation.

Other issues which respondents considered were not adequately addressed by the proposals comprised:

- Grooming of children to work in the vice trade (Indiv)
- Allowing for greater pro-activity to activate the legislative process by professionals involved in child protection rather than waiting for a complaint or an offence to be committed (Indiv)
- The scenario whereby adults such as ISP staff need to view sexual images in the course of helping to detect or prevent crime (Bus)
- Strengthening the evidence which can be gathered via the internet to ensure that the legislation is capable of being enforced (Bus)
- Clarifying the legal position in relation to use of third generation mobile phones in the context of grooming and generally explicit material (Faith)
- Children given mobile phones to maintain contact with an adult without the knowledge of the child's carers (LA)
- The proposal for an independent risk assessor appears to ignore the introduction of the new Risk Management Authority and its intended tasks in connection with serious and violent sexual offenders (LA)

Finally, it was suggested that the effectiveness of **the law should be constantly monitored and reviewed** in order to keep it up to date with technological advances and to close any developing loopholes which perpetrators have exploited (2 LA, Leg).

### **Detailed Language and Technical Points**

Two respondents highlighted what they perceived to be a gender imbalance towards men as perpetrators in the language of the proposed Bill (Oth Pub, LA). Other specific technical points comprised:

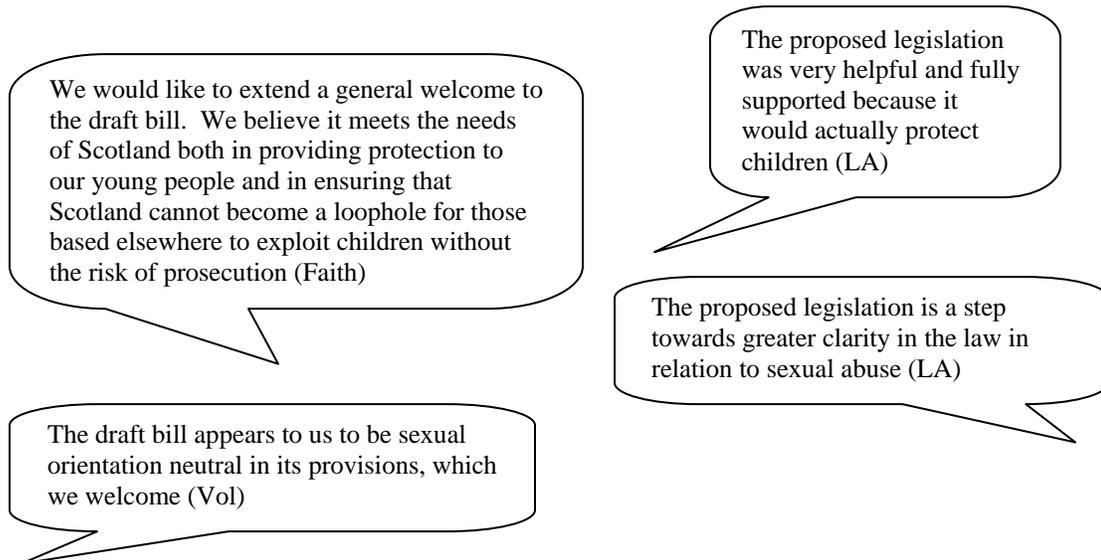
- Is a conditional discharge (Clause 7 of the Bill) a competent sentence in Scotland? (Leg)
- No police power of arrest has been specified to permit the enforcement of Section 1 of the Bill and it was considered that to allow the police to enforce the legislation effectively, a power of arrest would be necessary (Pol)
- Section 1, subsection 2 (a) states that the communications with the child can have taken place in or across any part of the world. Does the passage of time affect the legislation – there is no mention of a time limit (Pol)
- Mention is required of cross-border powers within the UK (Pol, Vol)
- A clearer definition of “relevant offence” is required (Pol)
- The Bill should not allow for a “fantasy” defence for an adult who has groomed a child online but has not actually travelled or met their target with sexual intent (Indiv)
- The Bill needs to be clearer on disclosure arrangements. For example, how does an employer know if an employee poses a risk? Should they employ someone on an interim RSHO? (Faith)

## **SUMMARY POINTS**

- The omission in the proposals most frequently identified by respondents was the lack of reference to vulnerable adults, irrespective of their age, as victims of grooming.
- Amongst the other perceived omissions were the need to address the grooming of a child by one adult for another, grooming behaviour within a household, the interface of the proposed procedures with the Children's Hearing system and methods of grooming which are not obviously sexual in nature.
- It was suggested that the law should be constantly monitored and reviewed to keep up to date with technological advances and close any developing loopholes.
- Consultees raised a number detailed language and technical points and sought clarification on a variety of specific issues.

## CHAPTER 7: ADDITIONAL COMMENTS

In addition to responding to the specific questions tabled in the consultation document, many consultees provided more general, overarching views of relevance. Several praised the overall approach and aims of the proposals. Examples included:



A few respondents welcomed the legislative interface with England and Wales (2 Vol) as enabling a UK wide approach to tackling offending and allowing for lessons learned south of the border to transfer to Scotland (Vol). One opposing view, however, was that Scotland and England have different legal systems and whilst it may appear to be beneficial that laws between Scotland and England are harmonised, the fact that a law exists in England does not necessarily mean that the same law should exist in Scotland (Vol).

A key theme evidenced in many responses was that the legislation by itself was not enough to tackle the problem of child sexual abuse. The views of several consultees could be summed up by one comment:

*“new legislation and civil orders may be one part of the solution but can never be more than that”* (Indiv)

There was concern that the new legislation would provide people with a false sense of security bearing in mind its resource implications and practical challenges (Indiv, LA). Although the proposals were welcome, one respondent commented that they dealt with a relatively small issue in relation to the overall problem of protecting children from sexual harm (LA). There was an overwhelming call from many respondents for continued public awareness and educative initiatives aimed at informing people of the relevant

issues including the threat of sexual harm to children posed by the internet (Indiv, 3 LA, Oth Pub, 3 Vol). The Scottish Executive's initiative "Click Thinking" was praised in this regard (Vol).

A greater role was seen for parents in controlling their children's internet access (Leg). One concern was that by promoting new legislation this would draw attention away from the joint efforts required by a raft of different bodies including parents in tackling a problem which was everybody's business (Indiv, 2 Vol).

Calls were made for better links between internet providers and statutory and voluntary services (Oth Pub, Vol) and for ISPs to take on more responsibility for ensuring that those who use their services do so responsibly (2 LA). The question was posed as to whether there should be regulation regarding the use of the internet by those aged under 16 (Oth Pub).

Another over-arching comment raised in relation to various aspects of the proposals was concern that the legislation should be underpinned by appropriate, long-term funding for enforcement, for victims, for associated treatment interventions, for training of professionals in the Bill's implications for them and so on (Indiv, LA, 3 Vol).

A more specific concern was to stress the importance of placing the legislation within the context of positive sexual health work currently taking place across Scotland (Oth Pub) and ensuring that an appropriate balance is struck between promoting sexual well being and protecting against sexual harm. It was remarked that there is a need to address the sexual health needs of young people in line with the proposed National Sexual Health and Relationship Strategy and the proposals may not adequately address the tension between promoting sexual health and protection from sexual harm (Oth Pub).

Finally, one respondent expressed their concern regarding what they perceived to be an ongoing trend by the Scottish Executive to blur the definition between civil and criminal law (Vol). It was argued that using civil law to deal with criminal issues, for example, by making the breach of civil orders a criminal offence, can create confusion and open up the potential for legal challenge. In addition, such practice uses civil standards of proof in cases where sexual harm is alleged.

#### **SUMMARY POINTS**

- Several respondents expressed praise for the overall approach and aims of the proposals.
- There were mixed views on the extent of the need to harmonise the relevant legislation between Scotland and England and Wales
- A key theme to emerge was that the legislation by itself was not enough to tackle the problem of child sexual abuse.
- An overwhelming call was made for continued public awareness and educative initiatives aimed at informing people of the relevant issues and threats to children.
- Recommendations were made for parents and for internet providers to take on more

of the responsibility for guarding against inappropriate use of the internet.

- A recurring comment was for the legislation to be underpinned by appropriate, long-term funding.
- The need to strike a balance between promoting sexual well-being and protecting against sexual harm was called for.

## **ANNEX 1: LIST OF THE ORGANISATIONS THAT RESPONDED**

Aberdeen City Council  
Aberdeenshire Council  
Argyll and Bute Council Children's Panel Advisory Committee  
Argyll and Bute Council Community Services  
Association of Chief Police Officers in Scotland  
Association of Scottish Police Superintendents  
Baptist Union of Scotland  
Barnardos (Scotland)  
Childline Scotland  
Children 1st  
Children in Scotland  
Church of Scotland Board of Parish Education  
City of Edinburgh Council  
Clackmannanshire Council  
CoSLA  
Dumfries and Galloway Council  
Dundee City Council  
18 and under  
East Ayrshire Council  
East Renfrewshire Children's Panel Advisory Committee  
Educational Institute of Scotland  
Equality Network  
Fairbridge  
Falkirk Council  
Fife Council  
Fife Women's Network  
General Teaching Council  
Glasgow City Council  
Highland Multi-Agency Sex Offender Management Group  
Kibble Education and Care  
Law Society of Scotland  
Linda George Family Law  
Midlothian Council  
National Deaf Children Society  
NHS Ayrshire and Arran  
NHS Greater Glasgow  
NHS Greater Glasgow LHCC Youth Health Worker Forum  
NHS Tayside/Angus Council Joint Strategic Support Unit  
North Ayrshire Council  
Open Secret  
Orkney Islands Council  
Perth and Kinross Council  
Presbytery of Ayr  
Renfrewshire Council

Salvation Army  
Scottish Association of Children's Panels  
Scottish Child Law Centre  
Scottish Children's Reporter Administration  
Scottish Council for Single Homeless  
Scottish Human Rights Centre  
Scottish Legal Aid Board  
Scottish Police College  
Scottish Police Federation  
Secondary Teachers Association  
Shetland Child Protection Committee  
South Ayrshire Council  
South Lanarkshire Council  
Stirling Council  
THUS plc  
Victim Support Scotland  
West Dunbartonshire Council  
Western Isles Child Protection Committee  
West Lothian Council  
Youthlink

In addition individual responses were submitted by Ian George, Sarah Nelson and a further 5 individuals who wish to remain anonymous.