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DEFINING MOMENTS IN HISTORY

**Report to Scottish Ministers
on the Recommendations of
'The Report into the Historical Abuse Systemic
Review of Residential Schools and Children's Homes
in Scotland, between 1950 and 1995' by Tom Shaw,
as submitted by
the Keeper of the Records of Scotland**

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1. Background

1.1 The Report into the Historical Abuse Systemic Review of Residential Schools and Children's Homes in Scotland, was the direct outcome of a debate in the Scottish Parliament on 1 December 2004. The debate followed a motion on behalf of the Public Petitions Committee, seeking an inquiry into past institutional child abuse.

1.2 The then Minister for Education and Young People, Peter Peacock, announced his intention "*to appoint someone with experience to analyse independently the regulatory requirements of the time, the systems that were in place to monitor operation of those requirements, and, in general, to analyse how that monitoring was carried out in practice*".¹ The Scottish Parliament appointed Tom Shaw, former Chief Inspector of Education and Training in Northern Ireland, as Independent expert to lead the review.

1.3 The resulting report was published in November 2007.² Shaw stressed that this was a systemic review, about the systems of laws, rules and regulations (the regulatory framework). The report made a number of recommendations pertaining to records that are listed at **Appendix 1**.

1.4 A significant part of the Shaw Report focused on shortcomings of the legislative or regulatory framework, best exemplified by ageing public records legislation. Shaw revealed poor record keeping within the looked after children sector. It also identified problems for abuse survivors when attempting to trace records for purposes of identity, family or medical issues. It expressed a wider concern over record keeping problems throughout the sector.

1.5 Shaw stated that his review "*pointed to an urgent need to take action to preserve historical records, ensure that residents can get access to records and information about their location*"³. Recommendation 3 commented specifically on the shortcomings of the existing legislative framework stating that "*[t]he government should commission a review of public records legislation which should lead to new legislation being drafted to meet records and information needs in Scotland*."⁴

1.6 In February 2008, Scottish Ministers accepted the Shaw recommendations. In a ministerial statement to the Scottish Parliament, Adam Ingram, Minister for Children and Early Years, asked the Keeper of the Records of Scotland to conduct a review of public records legislation "*in light of the shortcomings exposed by Shaw*."⁵

1.7 This report is the conclusion of that Public Records Review (hereafter "the Review"), commissioned by Scottish Ministers, which was conducted over an 18 month period.

2. Evidence Gathering

2.1 The Review sought evidence across a broad spectrum. It obtained opinion from a variety of individuals and representative groups which included those directly working in the fields of social work and child care, central government policy, local authority and private residential care, the police, the management of public inquiries, and regulation, inspection and enforcement bodies.

2.2 The Review also consulted those who were directly involved in implementing freedom of information and data protection legislation, professional record keepers, former residents of child care homes and survivors of abuse. It examined current records management practice and legislation both in the UK and examined specific aspects of overseas practice.

2.3 Whilst the Review sought input from as broad a spectrum of stakeholder bodies and individuals as possible, it should be noted that with limited time and resource available, the total numbers consulted or involved in the surveys was limited.

2.4 After taking specialist advice from the Scottish Government Analytical Unit, the Review used a variety of different methodologies (summarised in part 3). The Keeper is therefore confident that a broad-based and accurate reflection of opinion has been obtained. It should be noted that the findings of each of the individual review elements were consistent, and the evidence gathered broadly comparable, further confirming that an accurate reflection of current opinion and the public record situation in Scotland has been obtained.

3. The Public Records Review Methodology

3.1 While the principal focus of the Review was guided by the Shaw requirement to identify perceived failures of record keeping, it was conducted within the context of a general overview of public records legislation in Scotland. This examined the legislation and processes surrounding public records, but also extended to those record keeping areas that are not defined as exclusively 'public'. This therefore took the review beyond the immediate field of residential child care.

3.2 The Review was managed within the National Archives of Scotland (NAS) by a group of senior staff under the direction of a Deputy Keeper. As a first step, an internal NAS Public Records Review Group was set up. The Review Group's remit was to examine and define the terms and specific areas for review, how best to obtain clear and informed evidence, and to interpret the precise terms of the ministerial request.

3.3 The Review Group determined that the Review must use Shaw as its starting point and address the record issues highlighted in the looked after children sector, within the context of a broad overview of public records legislation. It devised a detailed questionnaire to provide best evidence from participants within the timeframe set by ministers.

3.4 The questionnaire provided a platform for more focused investigation and activities. On its completion, the Review Group established a smaller team in the autumn of 2008, to take forward the project to the investigative and evidence-gathering stages.

3.5 This team, in discussion with the Keeper, agreed the following work elements which were conducted over a 12 month period:

1. Commissioning a consultancy study (section 4)
2. Setting up and consulting with a specialist advisory group (section 5)
3. Conducting a wider consultation (section 6)
4. Reviewing existing legislation (section 7)
5. Comparing experience overseas (section 8)
6. Comparing findings from similar Inquiries involving children (section 9)
7. Consulting former residents and abuse survivors (section 10)

4. Element 1 - The Consultancy Study

4.1 The Review commissioned work from external consultants with expertise in social research and social marketing⁶. The consultants gathered evidence over a 7 week period between 8 December 2008 and 26 January 2009. Their research had three elements: an online survey of stakeholders; structured discussion with focus groups; and one to one interviews with key informants. Their approach was guided by the findings of the initial Review Group, and they used the questionnaire devised to inform their research.

4.2 The consultants used the three different approaches to a) reach a broad cross-section of stakeholders; b) facilitate in-depth, solution-focused discussion; and c) obtain additional perspectives by means of individual phone interviews. The consultants provided a report of the full findings of their research to the Keeper, which was presented to the specialist advisory group. A copy of the full report is available at **Appendix 2**.

4.3 The consultants highlighted key themes and suggestions raised by participants, covering both public records legislation and other laws and regulations where these were referred to by respondents. Their report reflects the complexity of the legal framework that applies to records, specifically within the looked after children sector.

4.4 The on-line survey was conducted and distributed using the SG SurvivorScotland database. It included professionals involved in the field of childhood sexual abuse, survivors of abuse and also family members. The survey was also sent to records managers and archivists via the Scottish Council on Archives and the Records Management Society (Scotland). In total, 131 responses were received, the majority from organisations rather than individuals.

4.5 Perhaps not surprisingly the majority of respondents to the on-line survey, 62%, were directly involved in record-keeping. Local authorities represented just over one third of respondents, with voluntary organisations making up just under one third. There was overwhelming agreement that the records of public authorities should fall within the category of 'public records' and broad support that the records of private and voluntary organisations, which provided publicly-funded services, should also be categorised as public records.

4.6 Two focus groups were held at the Mitchell Library in Glasgow. One group brought together nine records managers and archivists, eight from the public sector and one from a faith-based voluntary sector organisation. The other focus group brought together four participants involved in the provision of child care services: one from the police; two from local authorities and one from a voluntary organisation.

4.7 During the discussions with focus groups, the consultants determined that *"[t]here was considerable common ground ... concern being expressed that existing provisions did not ensure that appropriate and adequate records were being created and that there was no consistency in handling or providing access to records. The need for clarity and national standards was a recurring theme throughout the consultation exercise."*

4.8 The consultants presented their full analysis and final report in February 2009. Their main conclusions were:

- There was a lack of awareness of the Public Records (Scotland) Act 1937 among consultees.
- The nature of the service provided, rather than that of the organisation itself, should determine whether records are deemed as public records.
- Policies and procedures vary greatly and there is a lack of consistency and an absence of national standards even after that introduction of the Children (Scotland) Act in 1995.

- It is difficult to address the issues which are being raised without a proper legislative framework, including a review of existing public records legislation.
- The code of practice on records management under section 61 of the Freedom of Information (Scotland) Act 2002 needs to be strengthened and policed.
- There is a sea of legislation surrounding child care, plus an added issue of voluntary bodies lying outwith the scope of public records legislation and freedom of information. An opportunity exists now to create a new scrutiny body which will deal with the services an organisation provides rather than the nature of the organisation (i.e. regardless of whether they are public bodies or private/voluntary organisations).
- Survivors do not know where to begin to look for their own records.

Review conclusion: Despite the relatively limited numbers who responded to the online survey or participated in the discussion groups and the short time available to the consultants, the Review concluded that they had obtained an accurate reflection of cross-sectoral views about the current operation of public records. Their findings were in line with those of the other review elements.

There was wide agreement that existing public records legislation is no longer fit for purpose. It is out of date, limited in scope and has little relevance to public authorities. Freedom of information and data protection legislation is better known and understood, but they do not address the issue of long-term preservation. Though the primary focus of these Acts is on information retrieval and access, they are frequently used to fill legislative gaps when dealing with records. The Review considers that defining a 'public record' is a necessary prerequisite to attaining a wider solution.

5. Element 2 – Consultation with a Specialist Advisory Group

5.1 A specialist Advisory Group with membership drawn from a wide cross section of professional bodies and expertise was set up in December 2008. Membership ranged from those with specific expertise in local authority governance, those who worked in child and adult support services in social work and central government, and information and record keeping specialists. Details of Advisory Group membership can be found at **Appendix 3**.

5.2 The remit of the Advisory Group was to provide advice and assistance to the Keeper in the review process. The Group met twice, firstly to review the findings of the consultant's report, and secondly to consider the broad outline and main findings of the Review report.

5.3 The Group supported the conclusions reached by the consultants, and the main findings of the Review. The Group further considered that:

- There is inconsistency in record keeping practices, which often comes to light only when former residents try to access their records;
- Public records legislation should be extended to cover voluntary and private-sector organisations, perhaps by including the records created as part of public service provision within the contract for services – the Scottish Government's Acknowledgement and Accountability project has found willingness from voluntary bodies for this to happen;
- The providers of care services have a duty of care towards those they look after, which includes creating and maintaining information about them and providing access to that information when it is requested in later years;
- Records management needs to be given a much higher priority within organisations, and should be embedded in good governance;
- Much evidence is anecdotal, therefore it is not clear how much improvements in records management in the past few years have been driven by the introduction of freedom of information legislation;
- Although some improvements in partnership working are evident, information is still not being shared between agencies.

Review conclusion: The Review concluded that the day-to-day management of care records in local authority and private care facilities, as well as the longer term value of records in these establishments, needs to attract a much higher profile. Recent experience was offered by Group members to highlight the continuing inadequacies in the system despite increased partnership and shared services working patterns in the child care sector. Records management needs to be firmly grounded in standards. The specialist Advisory Group highlighted the inconsistency of record keeping across residential care facilities which is often not uncovered until access is required. Standards should be applicable across the public and private sector particularly in relation to care establishments.

It was further recognised by the Group that records created for a business purpose often take on a different meaning in the long term. Care survivors, former residents and social workers talk about the importance of records and the information they contain to the healing process. Dialogue about this produces very strong emotions. The Review concluded there is therefore a 'moral imperative' to implement measurable change and secure improvements in record keeping

6. Element 3 – Conducting Wider Consultation

6.1 An important strand of the Review was to broaden the consultation process, ensuring that the review reached as wide a spectrum as possible. This included consultation with professionals across the variety of specialist areas involved in residential child care services including social work, the police, child care, records and archives, and compliance bodies. The Review organised meetings and canvassed for 'ad hoc' submissions. Bodies consulted are listed in **Appendix 3**.

6.2 In October 2008 NAS hosted a forum for record professionals. Representatives were drawn from the Society of Archivists Scotland and the Scottish Council on Archives. They consisted mainly of records managers and archivists from public and non-public archive services, but also included those who train record professionals or who use records as professional researchers. Representatives of the university sector also attended, and they included the former Chair of the Scottish Records Advisory Council.

6.3 The forum discussed a wide range of issues and reached the following conclusions:

- Surviving records can be random and piecemeal, across all sectors.
- There is often little documentation to explain the historical context of child care procedures and infrastructure.
- Different record keeping regimes in different local authorities can mean inconsistency when tracing a case history where the child has moved from one authority to another.
- Relations between local authority archives and social work departments are sometimes not well established.
- Sectoral guidelines on the management of records are not always followed.
- Archivists and records managers lack the skills and experience to deal with giving access to records of such a sensitive nature.
- New legislation could bring together all the disparate pieces of best practice advice and obligations which currently exist in legislation and guidance, but new legislation on its own is not enough and there needs to be sufficient enforcement.
- Participants felt that there is a role for an external scrutiny body.
- Records created in the administration of care to other vulnerable groups (for example the elderly and disabled) must also be subject to improved record keeping practices.
- The Shaw recommendations were time limited in their scope. There was seen to be a need to look beyond the period of 1995 and ensure that current records management procedures and policies are compliant with up-to-date best practice standards and remain alert to future requirements. Without these safeguards there is a serious risk of further record scandals to come.

6.4 In November 2008, the Scottish Government hosted a conference "Tom Shaw Historic Abuse Systemic Review: One year On – SurvivorScotland: Progress and Potential", to examine developments in provisions for children in care. NAS were invited to facilitate a parallel session on the Review, which was attended by records professionals, representatives from child care providers and support services and former residents. Further details are available in section 10.

6.5 An important group included those who were survivors of abuse. Particular issues and comments raised by participants included the following:

- Within the childcare sector there should be mandatory regulations relating to what information should be created and maintained, so that former residents can have a full history of their childhood.
- Organisations need to be made to be held responsible, and for this there needs to be penalties.

- Social work services can only be provided by the local authority in which a person lives, there is no choice, and so local authorities need to be made more accountable.
- Survivors of abuse want to know who should be held responsible when records have been lost. If records have been destroyed in line with agreed retention schedules, then these retention periods need to be urgently reviewed.
- There is no single point where former residents and survivors can go to access records, or even to discover where records are held.
- Where local authorities commission private bodies to provide childcare services the local authority should take ultimate responsibility for those records which are created.
- Legislation needs to reflect current multi-agency working, where all decisions and actions relating to the care of the child must be recorded.
- From survivors' perspectives, records are important to help them understand what has happened to them and why. Adult survivors should have the right to see whatever information is held about them, and records should be retained until they can decide what should happen to them.
- There is a lack of understanding of why records relating to people who have had elements of their lives taken out of their control should ever be destroyed.

Review conclusion: The Review concluded that survivors and former residents place enormous importance on records. They see them as essential in helping them to understand what has happened to them, and why. They are crucial to helping them come to terms with those experiences. Care records are essential to mapping personal histories and are critical in helping them become comfortable with their identities.

Survivors' expectation from records is understandably high, but the evidence obtained from both record professionals and former residents shows that the reality of what survives is very poor. The Review found a lack of understanding among survivors and former residents of why records were not there.

While guidance on managing records exists, there is a lack of consistency in how it is applied in Scotland, with frequent failure to extend to preservation. This inevitably leads to inefficiencies across sectors. People looking after records need access to improved training to help them to understand the issues involved in record keeping and the benefits to be derived by their organisations. Improvements in record keeping for business efficiency reasons would see wider benefits, both in terms of direct cost savings, but also as a safeguard for longer-term preservation.

Record keeping problems did not cease in 1995, and a general lack of the application of standards and consistency is undermining people's rights to access public records and information. This compromises efficient administration and good governance, as well as obscuring our historical legacy, both at a national, local and personal level.

7. Element 4 – Reviewing Existing Legislation: The Scottish Context

Rights, Existing Legislation and Records Management

7.1 Records are recognised as fundamental to guarantee individual rights. Frequently such rights are taken for granted or remain ill-considered until something goes wrong and the records that support them are found to be lost. The loss of records and the consequent impact on personal rights was forcefully expressed both by Shaw, and by in-care abuse survivors.

7.2 While Shaw highlighted problems in the area of child care, the Review found evidence to suggest that similar problems exist in other areas where the care of vulnerable individuals is entrusted to third parties, for example in the provision of care for the elderly or the disabled. It identified examples of unacceptable records management practice which has led to serious breaches of security or loss of records in situations which could potentially affect any individual.⁷

7.3 The Review examined existing records legislation, both primary and secondary, and assessed its effectiveness in ensuring personal rights and access, both within the specific child care sector and in the wider context of public records and their long-term retention. It also looked at recommendations made about public records by various bodies and previous initiatives.

The Public Records (Scotland) Act 1937

7.4 Existing public records legislation in Scotland is over 70 years old⁸. The Public Records (Scotland) Act 1937 is of very limited scope. It lacks a statutory definition of ‘public records’, and applies only to the courts and government departments, or other bodies holding records which belong to Her Majesty. Many public bodies are not covered by its scope, for example local authorities, NHS trusts and universities. Voluntary, private and religious organisations that provide publicly funded services are not covered under the Act.⁹

7.5 Even for bodies that are covered, the existing Act imposes no obligation on organisations to manage their current records properly, and only the courts are actually required to transfer any records to the Keeper’s custody. There is no provision enabling a proper response to developments in information technology and the Act takes no account of modern record formats.¹⁰

7.6 The 1937 Act set up the Scottish Records Advisory Council (SRAC) to advise the Keeper on matters affecting public records. The SRAC consistently made representations to Scottish Ministers and the Lord President on questions relating to public records, in particular their custody, preservation, indexing and cataloguing, and commented on facilities for access and examination by the public. From 1997, successive Council reports presented to Ministers were critical of the existing arrangements, and emphasised an urgent need for new archive or records legislation to help remedy the situation.¹¹ In 2007, the SRAC made a submission on the pre-election consultation by the Scottish Executive of the proposed Culture Bill. In its annual report to Scottish ministers, The Council wrote that

“The Council continues to emphasise the point that archives are not only cultural but also, and in some ways more importantly, part of the essential machinery of government....Our comment last year, that “the resultant threat to the integrity and professionalism of public archive services in Scotland, is a matter of deep concern”and it remains our view that this threat will be best averted by the creation of a modern legislative and regulatory regime for public archives.’

7.7 The SRAC was dissolved by Scottish Ministers in 2009. The recommendations it made over a 10 year period remain unfulfilled.

Local Government etc. (Scotland) Act 1994

7.8 The principal obligations of local authorities towards their records are set out in the Local Government etc. (Scotland) Act 1994, section 53.¹² The Act states that Scottish local councils shall make '*proper arrangements*' to preserve and manage any records in their care.

7.9 In terms of sec 53(1) of the Act, a local authority is obliged to make '*proper arrangements*' for its '*records*', not simply for '*archives*' which are those records that have been identified by a local authority as appropriate for permanent custody. In terms of sec 53(6), '*records*' means information '*of whatever form and in whatever medium*' and so cover an authority's electronic records and records in microform and other types of specialised media as well as paper and parchment. Proper arrangements for records therefore extend to records of any age, including those that are current or semi-current. These can include records transferred by the Keeper into their custody under the Public Records (Scotland) Act 1937.

7.10 Local authorities are also required to consult the Keeper on these arrangements or any material change to them, and to have regard to what he says. However, the Act does not provide for any form of sanction should a local council choose not to make proper arrangements or to have regard to his advice. In this respect it is of concern to the Keeper that the existing Act allows councils, potentially without proper arrangement or advice, to dispose of records they did not consider worthy of preservation.

7.11 To this end, the Keeper has thought it appropriate to draft guidance on '*proper arrangements*' for record-keeping by Scottish local authorities in support of the Act. The guidance notes will be issued by the Keeper to assist local authorities to meet their responsibilities under the Act and to look after the records in their custody in a professional and cost-effective manner. They will also be issued in the context of an increase in the number of local authority archive and records management services in Scotland, of varying standards of provision, and of increased requests to the NAS to transfer certain categories of local records into the custody of local authority archive services. This guidance will be unsupported by any effective statutory sanction.

The Scottish National Archives Policy

7.12 In 1998 the Scottish National Archives Policy Working Group published A Scottish National Archives Policy (SNAP) as a companion to the Archives Policy for the United Kingdom, but developed to meet specifically Scottish needs¹³. The Policy represented professional archive opinion throughout Scotland, including that of the NAS and the Scottish Records Advisory Council¹⁴. It set out nine broad principles, one of which was the creation of new archives legislation in Scotland and the establishment of a Scottish Archives Council. These proposals stemmed from a perceived lack of "*comprehensive and consistent legislation affecting the management of records and archives*", and the belief that "[a] *civilised society concerned to uphold the rights of the citizens, to encourage efficient administration and to ensure that its history is accessible to all, should make provision for its archives to be preserved and made available for consultation*". SNAP laid out detailed proposals for a new Scottish Archives Act which sought to provide a clear legal definition for public records and lay down obligations for their preservation and access.¹⁵ Though accepted by Scottish ministers at the time, the proposals were never implemented.

The Scottish Public Records Strategy

7.13 In 2003 the Scottish Executive conducted a Scottish Public Records Strategy (SPRS) review, which arose from concerns regarding the inadequacies of existing records' legislation, particularly in the light of the development of technology and records management practices.

7.14 The SPRS review examined existing legislation, guidance, standards and practice relating to public records and archives. An important element was to consult a wide range of interested parties through a series of workshops. These included representatives from Scottish public authorities, records managers and archivists, as well as users of records. The emphasis and evidence gathered was therefore obtained primarily from the perspective of record keepers or third party users.

7.15 The SPRS workshops identified issues which supported a strong case for new public records legislation, and which in turn reinforce the continuity of evidence submitted to the present Review. However the SPRS results were never published, and work on the Strategy ceased in 2005. At the time it was felt that the higher priority was to allow the Freedom of Information (Scotland) Act 2002 to settle in, and assess the impact of the s.61 Code of Practice on records management. The findings of the SPRS were never followed up.

Child Care Legislation

7.16 Shaw found that successive Scottish child care legislation up to and including the Children (Scotland) Act 1995 made reference to an increasing number of specific types of records that must be created to chart the care of an individual child throughout their time in residential care.¹⁶ It is a measure of the importance lawmakers placed on the creation of appropriate records that Shaw can describe the legal legacy as a “*comprehensive set of laws, rules and regulations covering the generation of records for children’s residential establishments.*” Shaw lists the nature of these records in some detail; they cover the most essential aspects of care such as health and education records, admittance and discharge records, “*punishment registers*”, “*letters from parents and guardians*” and “*personal histories*”. However, Shaw also found that although “*thousands*” of records about children’s residential services were generated as a result of improved statutory requirement over the period 1950-1995, the “*law has not been effective in ensuring these were kept and made accessible.*”¹⁷

7.17 Shaw recognises that the 1995 Act for the first time specifies the appropriate disposal periods for case records of children in care (see footnote 16). Historically it can be shown that legislation failed to make any provision for the management of these records over time, either as ‘live’ business records while the child remained in care, or as potentially historical documents once the child had become an adult and had left the care system. Neither the continuing relevance to the child of the information contained in the record nor its historical importance were considered.

7.18 A more recent piece of legislation, The Regulation of Care (Scotland) Act 2001, established a system of care regulation in Scotland. The Act’s purpose is to provide greater protection for people in need of care services. This Act, which led to the establishment of the Scottish Commission for the Regulation of Care (known as the Care Commission) is described by Shaw as “*perhaps the most significant recent development in the [provision] of care provided to children and young people [in Scotland]*”. The Commission’s greatest obligation under the Act, says Shaw, is the enforcement of registration and inspection procedures. The Commission can serve an improvement notice on any care service that does not meet the standards imposed for registration and inspection with failure to comply, leading ultimately to deregistration of a care facility. Scottish Ministers can also dictate, through regulations, how care services should be provided. This covers areas such as facilities and services, but it can also extend to recordkeeping. The Regulation of Care (Requirements as to Care Services) Scotland Regulations 2002 set out the requirements that providers of care must comply with under the Act, and this includes reference to records. However both the 2001 Act and 2002 Regulations concern themselves exclusively with the creation of records by care services and do not address the important issue of management and long term preservation.

7.19 The Public Services Reform (Scotland) Bill 2009¹⁸ proposes to bring the services provided by the Care Commission and the Social Work Services Agency together under one administrative centre. The Review discussed with the Bill Team, the possibility of the Bill accommodating an audit function for the new body to include prescribed records management functions. The Bill however had completed the drafting stage and was not available to be amended to include new instructions. The Review concluded that this new initiative is not the appropriate vehicle to amend the way that records are currently created and managed within the care sector.

The Data Protection Act 1998

7.20 Recent legislation relating to individual rights and public obligations towards the proper management of public and private information has had an important impact on child care records, but also upon wider public records in general.

7.21 The Data Protection Act 1998 (DPA) and the Freedom of Information (Scotland) Act 2002 (FOISA) oblige authorities to make proper provision for access to the information contained in their records. Where they tend to fall short is to assume the safe retention and long-term storage of the record after its creation. Freedom of Information legislation in particular is only as good as the quality of the records and other information to which it provides access. Access rights are of limited value if information cannot be found when requested, or when found, cannot be relied upon as authoritative.¹⁹

7.22 Principle 7 of the DPA states that “*Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.*”²⁰ The Review took the view that data protection and the rights of individuals could be strengthened by new public records legislation, which obligated public bodies to take the ‘*appropriate technical and organisational measures*’ to prevent such accidental loss, destruction, or damage to personal data.

7.23 The DPA does not seek to address the retention of records, indeed inherent in its provisions is the principle that “*personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes*”²¹. This militates against retention for periods longer than is necessary, and it was precisely this inherent contradiction that was identified by Shaw, when it came to survivors attempting to trace their histories. Without further statutory backing to secure records for the long-term, public bodies remain under pressure from DPA not to retain records longer than is necessary.

The Freedom of Information (Scotland) Act 2002

7.24 FOISA introduced a statutory right of access to all types of recorded information held by Scottish public authorities, as defined under the Act. Currently, it does not apply to voluntary sector or private organisations. Scottish Ministers issued a Code of Practice on Records Management, under Section 61 of the Act, to assist public authorities with the implementation of proper records management procedures to assist them in meeting the obligations under the Act. It states that all public authorities must manage their records ‘*effectively*’, led by senior managers. Responsibility for promoting ‘*observance with the Code*’ rests with the Office of the Scottish Information Commissioner (OSIC).

7.25 Failure to observe the Code may be deemed to be a failure “*in their duty under the Act*”²² and assessment by OSIC is undertaken on the basis of a public authority’s compliance with the Code. However, the Code is for guidance only and compliance by public authorities is not mandatory. It is also significant that both FOISA and DPA are driven primarily by access to information in records and not by the need to ensure implementation of proper records management procedures.

Review conclusion: Calls for the introduction of new public records legislation are not new. They have been made for many years by key bodies and separate initiatives. The Review noted the similarity of conclusions reached at different times and the continuity of evidence that continues to be presented. The consistent demand for new legislation was never addressed by government, but the requirement was firmly echoed by Shaw in 2007.

The Review concluded that existing public records legislation is no longer fit for purpose. It is out of date, limited in scope and has little relevance for the majority of public authorities. It is inadequate and could not be used as the foundation for any effective overarching national solution to address either specific sectoral requirements for child care, or wider public record needs. While the Local Government etc. (Scotland) Act 1994, requires local authorities to make '*proper arrangements*' for their records, including disposal of records not considered worthy of preservation, it exacts no sanction against those who choose not to do so.

Freedom of information and data protection are better known and understood, and both have higher profiles. They clearly identify the obligations of public authorities and define wider rights of public access. Both acts derive benefit from Government publicity and the work of the respective Information Commissioners' offices. This raised awareness has made them more meaningful to record creators, and the wider public with increased public use. However both are limited in scope, and they do not address the issue of long-term preservation, as they focus on data and information issues. Unsupported, neither DPA nor FOISA can guarantee the long-term retention of a record.

The Review concluded that existing legislative solutions fail to provide an effective overarching national solution that can address wider public access issues. Shaw identified the need to define as 'public records' those held by private and voluntary organisations which provide publicly funded child care services. Such bodies currently fall outwith the scope of existing public access legislation. The Review considers that defining a 'public record' is a necessary prerequisite to attaining a far reaching wider solution.

A new Scottish public records act would underpin and support existing legislative structures. It would build upon guidance and best practice already in place.

8. Element 5 – Comparing Experience Overseas

8.1 The Review examined legislative practice and experience in other countries. Research was necessarily restricted to archive and public record developments in the English-speaking world. Information was gathered from recent developments from the Republic of Ireland, Australia and New Zealand.

8.2 In particular the Review concentrated on the operation of the most recent legislation affecting public records, the Public Records Act of New Zealand, introduced in 2005.²³ The situation in New Zealand prior to 2005 was comparable to that in Scotland with outdated public records legislation sitting somewhat uneasily alongside new rights and access legislation for public information. New Zealand was also chosen because it is also comparable in size to Scotland.

8.3 Prior to the introduction of the 2005 Act, public record keeping in New Zealand was underpinned by a 1957 Archives Act. Archives New Zealand (Archives NZ) the national archives, was established as a government department in October 2000. This dramatically changed the nature of their relationship with Government.

8.4 New government objectives required an overhaul of the relationship between the State and the Archives to achieve a comprehensive, integrated system of record keeping. Part of that system was considered to be administrative and part legislative. Archives NZ and the State regarded legislation as critical to this new partnership and they identified five key issues which needed to be addressed by the proposed new legislation. These were:

- electronic recordkeeping;
- clarity of access regimes (including the relationship with the Official Information Act and Privacy Act);
- treatment of new organisational forms (for example state owned enterprises);
- requirement to ensure adequate records are created; and
- growing inefficiency of operating outdated legislation.

8.5 The perceived need for the proposed Public Records Bill derived from changes in the technological, legislative and administrative environment within which Government record keeping operated. The 1957 Act reflected *“the thinking of the day”*. The electronic generation and storage of records could not have been contemplated at that time. The electronic revolution was, however, recognised as having eroded traditional business rules. The task of preserving current and non-current records had substantially changed.

8.6 Good record keeping was identified as necessary for the transparent management of risk, as well as robust accountability. The provisions of the 1957 Act did not inspire confidence that record keeping in the current and future environment would be sufficient to meet the needs of Government or the Archive. The 1957 Act pre-dated more modern legislation affecting public records, such as the Treaty of Waitangi Act 1975, the Official Information Act 1982, the New Zealand Bill of Rights Act 1990, the Privacy Act 1993, and the Human Rights Act 1993. It was considered that the old public records act was not operationally sound in relation to this bank of new legislation. In essence, the 1957 Act was considered to be out of step with modern business practices, technologies and philosophies, and new legislation was considered the only efficient way to rectify this imbalance and guard against future deficiencies in record keeping.

8.7 Archives NZ has yet to conduct a formal assessment of the implementation and operational success of the newly introduced 2005 Act. There is therefore no empirical evidence to evaluate progress. Four years after its implementation, user groups, public authorities and records

management professionals in New Zealand are beginning to assess its effectiveness and impact. Comments expressed publicly have tended to focus on the estimated costs to public authorities.

8.8 The Review found only one study claiming to have assessed the costs of the New Zealand Archives Act against the perceived obligation on public authorities to implement Electronic Document and Records Management systems (EDRMs) to assist with meeting their obligations. Tech-Tonic, a Wellington-based information and enterprise content management consultancy company, suggested that the cost of implementing EDRMs across 200 public sector bodies by the compliance deadline of 2010 would be in the region of NZ\$ 140, or £50m.

8.9 Archives NZ describe this figure as “*pretty high*.” They further clarified that they were not advocating that all public authorities should install EDRMs to help them meet their statutory obligations. In fact, they urged public authorities to source alternatives to implementing full blown EDRMs to comply with the Act. They did accept however that there is a significant cost to good information governance.

8.10 Archives NZ is supported by Government in its declaration that good record keeping, based on national standards, is important for sound business. Commenting on the standards being developed by Archives NZ for the management of public information, Judith Tizard, Archives Minister, said “*Well-kept information lets us bring our past into the future and ensures government is transparent and accountable*.” She also observed that standards in record keeping “*give teeth to the Public Records Act 2005*” and helps form the basis for the independent audits of central government record keeping that are due to begin in 2010. She concluded that “*robust standards support open and accountable government and provide us with a sound way to ensure records with business and cultural value are created, managed effectively and survive for New Zealand’s heritage*.”²⁴

8.11 Archives NZ concluded that the need for a new Public Records Act was necessary to meet the challenges posed by changes in the technological, legislative and administrative environment within which Government record keeping operated. In essence, their 1957 Act was considered to be out of step with modern business practices, technologies and philosophies, and new legislation was considered the “*only efficient way to rectify the imbalance and guard against future deficiencies in record keeping*.” They were supported in this conclusion by the Minister responsible for Archives NZ, Marian Hobbs, who said “*recordkeeping is essential for efficient government as it supports day-to-day operational, legal and administrative requirements*.” She further stated that “*Records make government accountable to the Crown and the public*,” and they “*protect the rights and entitlements of New Zealanders and help provide the stories of how we developed as a nation*.”²⁵

8.12 The Review sought the opinion of Archives NZ on the implementation and operational success of the Public Records Act of New Zealand 2005. By doing so the Review sought to gather relevant information on the reception, benefits and operational issues around the Act not just for Archives NZ, but for public authorities and records managers working in the field. In response to our request for information Archives NZ indicated they intend to embark on a review of the Act after a period of at least 5 years has elapsed. They offered the following comment.

“In the absence of a formal review we can only comment in very general terms. What we can say is that the Act has given Archives New Zealand a mandate to lead, support, and improve recordkeeping throughout the New Zealand public sector. It has also given us new tools to do this including the power to issue mandatory standards, the power to require reporting on recordkeeping issues, and a requirement to conduct audits of recordkeeping in every public office. Our annual recordkeeping surveys show improvements in the state of government recordkeeping over time. Attendance at our government recordkeeping forums

has increased substantially since the Act was passed. There has been strong demand for our training courses, which we have been offering since last year. Our standards work has been taken up by other standards programmes including the New Zealand e-Government Interoperability Framework. We are currently establishing an audit programme, and our draft audit tool is currently available for comment at: <http://continuum.archives.govt.nz/public-records-act-audit-strategy.html>.²⁶

8.13 The Review considers that a new Scottish Public Records Act could provide a similar solution for Scotland, but that any proposed legislation need not be as comprehensive as that adopted by New Zealand. A Scottish 'lite' public records act option could, by confining itself to providing a definition of public records and setting the provisions to improve management of them, achieve similar results. This could negate some of the heavy financial and other burdens seemingly attracted by the much more comprehensive New Zealand Act.

8.14 There is further evidence from overseas to suggest that a 'lite' act solution would be sufficiently different from other experience in the English speaking world, for the Review to be confident of achieving a workable solution at reduced public expense. Many new and recent public records legislation enacted around English speaking countries have sought primarily to protect public records. However, some also sought to found or establish in law the remit of the national or territorial archive services responsibly for public records, e.g. the Republic of Ireland in 1986 and the Republic of South Africa in 1996. Almost all have considered issues about the provision of public access.²⁷

8.15 Scotland already benefits from an established National Archives offering high quality public access. The Freedom of Information (Scotland) Act 2002 set the standard for access to public information. The main requirement of any Scottish 'lite' public records act would be to define a public record and implement a system for regulation and audit using centrally produced best practice guidance and standards for information creation, retention and disposal.

8.16 This proposed lighter touch approach is endorsed by the Association of Commonwealth Archivists and Records Managers (ACARM) in a recent report on archival legislation.²⁸ Citing the 1985 UNESCO Records and Archives Management Programme Report (RAMP) the report noted that,

"... in only a few countries does the National Archives have statutory responsibility for the whole range of records management functions or the task of formulating standards for record systems and providing an advisory service. Elsewhere, these functions may be allocated to another agency, like a General Services Administration, or the Ministry of the Interior, or the Central Secretariat of the State. More commonly, the pre-archival role of the national archives is limited to those areas of records management, which are more directly concerned with the exercise of some degree of control over appraisal. If the records management responsibility itself is regulated, it is mostly done through regulations, circular letters etc". It also stated that "The involvement of the National Archives in records management should preferably extend only to the formulating of standards, procedures and guidelines and training of agency records offices".

8.17 The report also recommended that Chief Executive Officers should be responsible for ensuring their agencies' adherence to standards set through legislation. Information in any format is an asset that, when structured, becomes a record. Increasingly therefore, there is an appreciation that information, like any other asset, needs to be properly managed.

8.18 Any new Scottish 'lite' act would require the NAS to develop a range of record keeping products outlining the need for and value of good record keeping for all levels of staff within government. Once staff understand the requirements for standards, it is easier to ask for and

check on compliance. How agencies comply with the standards would be described in the standards themselves. This is the approach adopted by the State Records Authority of New South Wales, Australia. It has begun issuing standards, each of which has a series of principles and for each principle a set of minimum compliance requirements is given.

8.19 In Australia, the recommendation is that an external body be responsible for auditing agencies' compliance with standards. Frequently agencies are said to encourage audit, to reflect precisely where they are failing. Archival authorities have in a very few instances been given the dual tasks of setting standards and then auditing agencies' compliance. It is not considered a good idea by ACARM and their view is that,

“... it would not be inappropriate to undertake both the standard setting and compliance auditing roles.”

8.20 Overseas experience therefore points towards setting out proposals that under any proposed new Scottish Public Records Act, it is deemed to be the responsibility of the National Archives of Scotland to set and issue standards and guidelines for the management of records over the entire record life-cycle. It should also specify compliance requirements with national and international professional standards for records management and archival requirements. The legislation should outline mutual obligations associated with the implementation and monitoring of such guidelines and standards within agencies.

Review conclusion: Demand for the review, updating or implementation of new national public records legislation is a recurring theme, echoed in countries throughout the English-speaking world. In Scotland, this call has been championed for many years by a number of professional bodies and advisory groups, including the Scottish Records Advisory Council (see section 7).

The Review concluded that there were significant parallels and lessons to be drawn from the New Zealand experience, particularly given the evidence of the role afforded to a new public records act in support of modern business practices, technologies and philosophies. In New Zealand, new legislation was considered the only efficient way to rectify this and guard against future deficiencies in record keeping. The 2005 NZ Archives Act was viewed as the best method of underpinning and marrying the demands placed upon record creators by users, and the more recent information and access legislation.

The Review concludes that a new Scottish public records act could provide a similar solution, with new legislation that is both relevant and robust. A new Act on the New Zealand model would however be complex to draft and, though not considered contentious, may prove difficult to pass unaltered through Parliament. External stakeholders, particularly survivors, local authorities and voluntary sector providers, may seek to exert influence, and amend a draft Bill to encompass their particular interests.

It is difficult to assess accurately how much implementation would cost in Scotland, but it is reasonable to assume there would necessarily be some cost to the public purse. It has not been possible to find any detailed analysis of comparative overseas costs in countries where new public records legislation has been introduced. Similarly no detailed research has yet been done into the financial costs of implementing freedom of information legislation in Scotland or the UK. However as many public authorities implemented improvements in records management practice to meet the demands of freedom of information, it is possible that adherence to a new public records act would not prove overly burdensome.

9. Element 6 - Comparisons with Similar Inquiries

9.1 Since the publication of Shaw in November 2007, two further Inquiries involving care of children in a residential context have published their findings. Though separate in origin and country of investigation, they provide valuable comparative evidence from which the Review could measure its overall findings about record keeping.

9.2 Both Inquiries reported in May 2009. They were:

1. The Inquiry into Kerelaw Residential School and Secure Unit in North Ayrshire, set up by the Scottish Government in 2007.
2. The Commission to Inquire Into Child Abuse (the Ryan Commission) established by the government of the Republic of Ireland in 1999.

The Kerelaw Inquiry

9.3 In November 2007 the Scottish Government and Glasgow City Council jointly commissioned an independent inquiry into allegations of child abuse at Kerelaw Residential School and Secure Unit in North Ayrshire. This followed Glasgow Council's own internal investigation of accusations by staff of bullying and harassment by a unit manager at the school.

9.4 As in the case of Shaw, the Kerelaw Inquiry team inspected a large number of records, both in paper and electronic formats. The majority of these were held by Glasgow City Council, and the Inquiry also utilised interviews and written testimonies to build up a significant body of evidence. The Kerelaw Report was published in May 2009.²⁹

9.5 The Inquiry found many instances of poor recording of information, leading to a lack of information or inaccuracy of detail. Some records relating to individual children were misfiled and discovered only by accident among other samples. Records relating to senior management meetings and communications between Kerelaw School and the Council were missing. Records of residents were incomplete. Overall, the record situation was privately described as "*appalling*" by a senior member of the Inquiry team.

9.6 The official Inquiry report criticised "*the quality of information management by the Council and the adequacy of records relating to young people in care [which] were a cause for concern*" [para 1.41]. The Inquiry's recommendations include "*Good record-keeping to underpin effective investigation and discipline and to afford looked after children the dignity and respect they deserve*". The report also recommended that, in order to facilitate the investigation of allegations about former employees "*employers should ensure that they maintain accurate records of allegations, complaints, fact-findings and disciplinary disposals and any related material*".

The Ryan Commission

9.7 The Review looked at a comparable investigation in another EU country. In May 1999, a Commission of Inquiry was set up by the Government of the Republic of Ireland to investigate accusations of institutional child abuse within church-run schools where children had been placed under state authority. The Inquiry was given statutory backing under the Commission to Inquire Into Child Abuse Act 2000.³⁰

9.8 The Inquiry's initial purpose was to gather evidence from victims of child abuse, resulting in over 3,000 testimonies and allegations made against individuals and institutions. Following further review by the Irish Government in 2003, the focus of the Inquiry changed to examine the activities of particular institutions, backed by selected witness evidence. The Inquiry submitted its final report in May 2009, which extended to 2,600 pages over 5 volumes³¹.

9.9 While focused on the testimonies of individuals, the report details many instances of poor record keeping, and therefore bears direct comparison with the Shaw experience. Many records about children in Irish industrial schools did not survive, while information contained in those that did was either poorly recorded or erroneous. More specifically, while specific rules and regulations set out which types of records were to be kept, particularly regarding punishments,³² only two examples of punishment books were ever found over the course of the entire investigation. In many instances individual medical records were lost, leading to difficulties for survivors of child abuse in later life. Even basic information such as family name, or date and place of birth were not recorded and therefore entirely lost.

9.10 The Commission also found that 27,000 Department of Education files from the period 1936 and 1960 were missing, most likely destroyed as part of a “*general clear out*” [Vol. IV chap. 1 para 1.194].

Review conclusion: Both examples, the Kerelaw Inquiry and the Ryan Commission, cited poor record keeping as significant factors that hindered their investigations. Both recorded that the loss of records had a significant impact on the ability to measure the correct enforcement of disciplinary or punishment regimes, and directly affected the quality of later life of many of the individuals affected.

The Review concluded that in Scotland since 1995, despite improvements within the child care sector after the introduction of the Children (Scotland) Act, significant record losses and poor record keeping practice still remain. The Kerelaw Inquiry highlighted some of the more extreme examples, but evidence submitted to the Review suggests that this is not an isolated occurrence, and that poor record keeping remains an ongoing problem across a number of sectors.

In 2009 the Mental Welfare Commission and the Care Commission published a joint report into the care of people with dementia living in care homes in Scotland. Among other things they looked at the quality of care plans. Of the 182 sample plans examined, 35% recorded no life history at all, and 42% contained no record of things the patient liked to do and their interests. The report’s first key message is: “*It is important to know the person as an individual, understand their life history, their likes and dislikes and how they like to live their life in order to provide the right care to meet their needs*”.³³

The Review also identified other high profile cases of data loss, breaches of security and examples of poor records management practice reported by the media, often to the embarrassment of public authorities.³⁴ In a worst case scenario it is possible that a Shaw-style inquiry could be required again in the future.

10. Element 7 – Consulting Former Residents and Abuse Survivors

10.1 The Review did not concentrate exclusively on the views of professional groups, i.e. policy makers, social or care workers, and record specialists. Its focus was in Shaw's words, to "*meet identified needs of former residents for a range of support services, including access to records*". Shaw showed how the law had failed by extensively recording the experiences of former residents.³⁵ It was felt important therefore that the Review seek the opinion of former residents and draw upon that experience.

10.2 Organisational views of records tend to concentrate on business requirements. That need correctly focuses on the legitimate purpose of improving the business, its governance and accountability. Retaining records for other reasons, such as enabling access by those who feature in them, or those who wish to use them for longer-term historical or other research purposes, frequently does not form part of an authority's reasoning.

10.3 The Review sought opinion directly from former child care residents and attended events specifically organised for survivors of abuse. The Review team ran a workshop at the SurvivorScotland Strategy conference held in November 2008 which was attended by significant numbers of survivors. This helped to provide the Review with an alternative view.

10.4 The Review had already found that there is high expectation and demand for change across a number of sectors. The need was further echoed by survivors. Many survivor representations talked about the importance of the healing process in helping them come to terms with their past. This was expressed as part of a 'moral imperative', which demanded measurable change and tangible improvements to record keeping in order to help survivors with this process.

10.5 The Review found that there is a lack of understanding among survivors about why records relating to children, who have had elements of their lives taken out of their control, should ever be destroyed. While understandable, this view may be unrealistic, as it is a fundamental of good records management practice that records can be destroyed legitimately according to agreed retention scheduling. Not every record created will have long-term value and therefore need not be retained indefinitely.

10.6 Opinions expressed by former residents at the SurvivorScotland conference in November 2008 included demands that:

- "*It should be a priority where any child or young person has had their life taken out of their hands, to hold on to records they're likely to want to see later on.*" Young woman survivor
- "*When I disclosed the abuse, I was forced into a court case but then denied access to the records later on. This is not acceptable.*" Young woman survivor (not the same as the one above)

10.7 For many survivors therefore, those engaged as record holders or professional record keepers are not always seen as part of the solution. Rather they can be seen as raising barriers to access to records either by denying people the right to see surviving records, or as seeming to have failed in their duties to secure them for the long term.

10.8 While some survivors hold unrealistic expectations about survival of all records pertaining to former care home children, in many cases there is simple confusion over how to go about finding those that do exist, and the relative responsibilities of record creators and record keepers. The creation of the new In Care Survivors Service Scotland³⁶ will go some way towards addressing many of those information needs, but it does not address the issue of long-term retention.

10.9. The views of survivors echoed those previously expressed across a number of sectors, namely that there is a significant aspiration that government will implement improvements and take action to address concerns over conflicting demands about record keeping.

Review conclusion:

The Review concluded that survivors and former residents see records as essential in helping them understand what has happened to them and why. Care records are essential to mapping personal histories and are critical in helping them become comfortable with their identities. Their expectation from records is understandably high, but the reality of what survives is very poor. The Review found a lack of understanding among survivors and former residents of why records were not there.

Care survivors, former residents and social workers talk about the importance of records and the information they contain to assist the healing process, creating a 'moral imperative' to improve the way they are managed. Dialogue about this produces very strong emotions.

Records created for a business purpose take on a different significance in the long term. Where the system fails is that it does not take into account the long term value of records or their importance to former residents, thereby imposing no requirement upon care providers to look after them or ensure their preservation. Long term preservation of records created by care providers is not adequately covered by current statute.

11. Consultation with Scrutiny and Inspection Bodies

11.1 The external consultants, supported by the Advisory Group, recommended that the Review consult with scrutiny and inspection bodies to gauge their opinion about the support they derive from the existing legislative framework. The Review therefore took advice from three government scrutiny bodies between April and June 2009. These were Audit Scotland, Her Majesty's Inspectorate of Education and the Scottish Commission for the Regulation of Care (the Care Commission).

11.2 Shaw found that within the residential child care sector, even before 1995, the regulatory framework was extensive and "*in many respects impressive*". Over the Shaw review period it moved from a child focused to a child centred philosophy, from an approach "*based on welfare to one based on rights, needs and welfare*". Shaw further concluded that "*Most of the gaps and inadequacies in the legislation for providing, regulating and inspecting residential schools and children's homes... were addressed by or after the Children Act 1995*".³⁷

Audit Scotland

11.3 Audit Scotland (AS) is a statutory body set up in April 2000, under the Public Finance and Accountability (Scotland) Act, 2000. Within local authorities AS currently look only at financial records as part of their audit procedures. Other types of records would only be looked at as part of a national study of a particular area, but such studies are rare and record keeping would be likely to be a low priority. AS's work does not cover care homes run by charities.

11.4 AS are looking at producing a shared risk assessment together with the Social Work Inspection Agency, the Care Commission and Her Majesty's Inspectorate of Education. This would examine corporate and service level risk, with more or less scrutiny in each area as required.

Her Majesty's Inspectorate of Education

11.5 The main focus of the work of Her Majesty's Inspectorate of Education (HMIE) is raising educational standards, stimulating improvement and promoting self-evaluation to support the delivery of national and local outcomes. The Regulation of Care (Scotland) Act, 2001 requires HMIE to undertake integrated inspections with the Care Commission in centres where the provision of care includes any educational elements.

11.6 Since 2003, HMIE has been collaborating with the Care Commission in integrated inspections in the pre-school sector, mainstream and special residential schools and secure units. Inspections look at processes, such as health and safety and child protection, rather than the impact of those processes. School records are examined but records for individual children are only looked at if there is a particular cause for concern. A new system of self-inspection using quality indicators has been in operation since 2008, and will be built into child protection inspections from August 2009.

11.7 Both AS and HMIE accept the importance of records and record keeping to their scrutiny work. However their interest is mainly on current business requirements and they agreed that they do not consider the longer term aspects of retaining records of personal or historical value.

The Scottish Commission for the Regulation of Care (the Care Commission)

11.8 The Regulation of Care (Scotland) Act 2002 created the Scottish Commission for the Regulation of Care (the Care Commission), responsible for registration, inspection, complaints and enforcement regarding the standards of care services in Scotland. It is responsible for ensuring that public, private, voluntary or religious care service-providers comply with the National Care Standards (NCSs) issued by government.³⁸

11.9 NCSs are based upon the principles of dignity, privacy, choice, safety, realising potential, and equality and diversity. Standard 4 of the NCS for care homes and Standard 6 of the NCS for school care, base support on the Care Plan or personal plan. Plans should set out information about a person, their needs, what services and support are being put in place to ensure their well-being and progress.

11.10 Record keeping is therefore apparently well supported under primary statute and the inspection process, but on closer examination the supporting secondary legislation reveals significant shortcomings. Section 19 of SSI (2002) No.114³⁹ deals with the keeping and maintenance of records, where a provider shall keep a record of matters affecting the service user, persons employed and any occasion where restraint or control has been applied to a user. The regulations therefore define what records should be kept.

11.11 Inspection by the Care Commission revealed that the reality continues to be at variance with the law. Despite clear regulation and regular inspection, the Care Commission continues to pick up on failures within the regulated record keeping system. Inspections do not look at all records, and problems continue to be identified in retention of records, and the interface between a placing authority and the service provider. Producers of records regularly seek guidance from Care Commission staff seeking information about how long records need to be kept, where they should be stored and so on. Care Commission staff do not feel it is appropriate for them to provide this direction, and that instead it should come from the Scottish Government.

Review conclusion: The Review concluded that scrutiny bodies did not have a strong opinion on the requirement for new legislation. They acknowledge the importance of records and record keeping, since successful scrutiny depends upon records as evidence of processes of work. They do not see themselves as inspecting records as such, but undertaking the inspection of systems. Their focus is on the immediate business requirement of the record, and they are not equipped to consider long-term preservation issues.

Record keeping problems did not stop in 1995 with the introduction of The Children (Scotland) Act. While improvements were made, the focus remains on short term process rather than long term need. Consideration is not given to the likelihood of former residents wishing to see their records in the future. In addition, inherent tension exists between the demands of data protection and public records, with a responsibility placed upon data controllers not to retain data any longer than necessary for the purpose(s) for which it was originally held⁴⁰.

12. Review Findings - Overview

Our first four findings relate specifically to record keeping in residential child care, while the remainder are of wider relevance across the public sector.

Sector Specific Aspects

12.1 Survivors and former residents see records as essential in helping them understand what happened to them and why. Care records are essential to mapping personal histories and are critical in helping them become comfortable with their identities. Their expectation from records is therefore understandably high, but the reality of what survives is very poor. The Review found a lack of understanding among survivors and former residents of why records were not there.

12.2 Care survivors, former residents and social workers talk about the importance of records and the information they contain to assist the healing process. Dialogue about this produces very strong emotions. The Review concluded there is a 'moral imperative' to implement measurable change and secure improvements in the way they are managed.

12.3 Current audit and inspection regimes within the child care sector is necessarily focused on the short term business need of organisations. Records created for a business purpose take on a different significance in the long term. Where the system fails is that it does not take into account the long term value of records or their importance to former residents, thereby imposing no requirement upon care providers to look after them or ensure their preservation. Long term preservation of records created by care providers is not adequately covered by current statute.

12.4 Record keeping problems did not cease in 1995, the end of the Shaw review period, with the introduction of The Children (Scotland) Act. Inquiries such as Kerelaw in 2009 provides firm evidence that similar problems persist within the child care sector.

Wider Public Records Aspects

12.5 Existing legislative structures fail to provide an effective overarching national solution that can address wider public records issues. Shaw identified the need to define as 'public records' those held by private and voluntary organisations which provide publicly funded child care services. Such bodies fall outwith the scope of existing public access legislation. The Review considers that defining a 'public record' is a necessary prerequisite to attaining a far reaching wider solution.

12.6 There is wide cross-sectoral agreement that existing public records legislation is no longer fit for purpose. It is out of date, limited in scope and of little relevance for most public authorities. Freedom of information and data protection legislation is better known and understood, but they do not address the issue of long-term preservation. A consistent public records legislative solution would go some way towards achieving more effective management and preservation of public records to wider public benefit.

12.7 While guidance on managing records exists, there is a lack of consistency in how it is applied in Scotland, with frequent failure to extend to preservation. This inevitably leads to inefficiencies across sectors. People looking after records need access to improved training to help them to understand the issues involved in record keeping and the benefits to be derived by their organisations. Improvements in record keeping for business efficiency reasons would see wider benefits, both in terms of direct cost savings, but also as a safeguard for longer-term preservation.

12.8 A general lack of application of standards and consistency is undermining citizens' rights to access public records and information. It compromises efficient administration and good governance, as well as obscuring our historical legacy, both at a national, local and personal level.

13. Options for Scottish Ministers

13.1 The Review considers that doing nothing, and retaining the status quo, is not an option and this was therefore rejected.

13.2 A large body of evidence was presented to the Review, suggesting that change is necessary, and is actively sought across a number of sectors. There is high expectation that government will act to implement improvement. Anticipation of the need for change was well expressed, not least by survivors. Failure to act would disappoint aspirations and ignore a key Shaw recommendation that was previously accepted by government in 2008. Scottish Ministers could be seen as retreating from the position that they took at that time.

13.3 The Review considers that the options proposed offer Ministers an opportunity to contribute towards the national outcome on better public services, by improving accountability, increasing transparency and strengthening governance. Four options are seen as available to Ministers.

- Not legislating
- Amending secondary legislation and sectoral guidelines
- Amending existing primary legislation
- Introducing new legislation

13.4 Details of the options are given below, and a summary table of considered pros and cons is at **Appendix 6**.

Option 1. Not Legislating

13.4 This option relies exclusively on encouraging better record keeping practice by using existing guidance and relying on influence and existing inspection procedures to achieve measurable improvement.

Advantages: The option would be simple and cheap to implement. Records management in the public sector has increased significantly in recent years, and attained a much higher profile, particularly following the introduction of freedom of information legislation in 2005. A great deal of guidance and advice on records management best practice already exists. The main problem is not the lack of guidance, rather the lack of consistency in how it is applied. This has resulted in no common national standard. Encouraging improvements to records management will result in cost savings for organisations who adopt them, as well as witnessing improvements in access to public information.

Disadvantages: Supporting the use of existing guidance and practice, by public authorities and the voluntary and charitable sectors, relies almost exclusively on exhortation and influence. Despite known benefits of implementing modern records management procedures, guidance is frequently not adopted and poor practice is reflected across many sectors. Failure to convince organisations of the need for change could present ministers with a continuing unregulated problem. On its own this option could have limited effect and specifically fail to meet a key Shaw recommendation or the demands of former residents.

Costs: This option would have low financial impact on public bodies in the short term. Long-term however, failure to implement proper records management procedures could be costly as it is likely to lead to the loss of important information and records. It is estimated that in an unmanaged environment, staff waste up to 10% of their time looking for records, 45% of documents are filed in more than one place, and 85% of filed documents are never retrieved.⁴¹ Failures to introduce effective sanctions will continue to cause future record losses.

Option 2. Amending Secondary Legislation or Sectoral Guidelines

13.5 This option would involve amending secondary legislation or guidelines within specific sectors. It would be an incentive to better practice, but would be narrowly focused on individual sectors.

Advantages: Area specific legislation is narrowly focused and can resolve specific sectoral issues. Secondary legislation can be amended relatively easily and focus on those specific needs. Review evidence gathered suggests that there remains confusion about the complexity of record keeping standards, public rights of access, and a lack of clarity about what should be kept and for how long. This option could see relatively swift clarification and immediate improvements, in active management and good governance. However, it would fail to address wider records issues, in particular long term preservation and historical legacy of records.

Disadvantages: Area specific legislation is too narrowly focused and does not address wider record keeping concerns. A lack of consistency of how guidance is applied would continue across sectors. It would be difficult to monitor progress and it would be hard to police in a meaningful way. Plugging gaps in one area such as child care, would not address problems in another, e.g. care of the elderly. The Review has concluded that enforcement and regulation cannot be achieved without an element of statutory sanction, which needs to envelope all sectors. This option, while recognising the importance of records, fails to consider their long-term value across the whole spectrum of public authorities and private bodies. It also fails to address a significant recommendation of Shaw.

Costs: Sector specific updating would require indefinite government commitment for continual review, assessment, and periodic revisiting of legislation. This would impose ongoing burdens on government and on the regulatory bodies that are currently responsible for the sectors concerned.

Option 3. Amending Primary Legislation – The Freedom of Information (Scotland) Act 2002

13.7 This option would extend the Freedom of Information (Scotland) Act 2002 (FOISA) to bring improvements in the way public authorities look after records, and extend its scope to voluntary and private bodies that provide public services. It would make use of the Code of Practice on records management under s.61 mandatory. Extension of FOISA to the voluntary sector is not currently being considered by Scottish Government, who would prefer not to use this route. Informal soundings indicate that extension of FOISA would be supported by the Office of The Scottish Information Commissioner (OSIC).

Advantages: FOISA led to significant improvements in access to public information and to the records that contain it. Section 61 of the Act required Scottish Ministers to publish a Code of Practice for public authorities in connection with the 'keeping, management and destruction' of their records. A review of the s.61 Code has been agreed by Ministers and offers an opportunity to implement improvements in practice.

Disadvantages: FOISA focuses on information and not on records. It lacks any definition of a public record. The Act confers rights to information that exists, but says little about what should exist. It does not relate to the rights of individuals to access their own records. The s.61 Code of Practice is not mandatory and applies only to named public authorities. It serves a specific purpose and the current SG review of the Code will leave it simply a description of best practice that is unenforceable. Voluntary and charitable organisations, holding records relating to public functions, could only be brought within its scope by being specifically named. Future revision would be cumbersome and need frequent review. There is no clear evidence to suggest that expanding FOISA provisions would result in direct improvements in the quality of record keeping. Overall the Review considers that amendment of FOISA offers only a limited partial solution.

Costs: There would be a cost to extending FOISA to the voluntary and charitable sectors and imposing compulsory use and enforcement of the existing Code of Practice. The review was unable to identify evidence of comparative costs following initial introduction of the Act to public authorities in 2005. OSIC suggests that there would be initial one-off costs for producing a publication scheme and training staff. Extending FOISA to the voluntary and charitable sectors would therefore be likely to incur some upfront costs, and therefore resisted, but obtaining definitive figures would require further investigation and research.

Option 4. Introducing New Legislation: A Scottish Public Records Act

13.8 The Public Records (Scotland) Act 1937 is over 70 years old and not fit for purpose. It is out of date, limited in scope and of little relevance. This option seeks to introduce a new Scottish Public Records Act and repeal some or all of the existing one. Within the option, two proposals are considered.

The first, comprehensive wide ranging public records legislation following the 2005 New Zealand model.

The second, a 'lite' Act, restricted to defining such records and laying out principles for their creation, management and preservation, that would provide a framework for further guidance and strengthen freedom of information. It is designed to address the needs of a Scottish report demanding Scottish solutions.

Informal soundings indicate that both proposals would be supported by the Office of The Scottish Information Commissioner (OSIC) and are likely to be seen as helpful by survivors.

Proposal 1: Introducing New Legislation (The New Zealand Model)

13.9 This would seek to introduce a comprehensive new Public Records Act on the New Zealand model. It would define public records and impose statutory obligations on all Scottish public authorities to carry out effective and efficient records management. This would oblige authorities to create, manage, store, preserve or properly dispose of their records, and ensure that they provide public access to them. It would seek to establish the regulatory framework, including sanctions, define structure, and set new and legally binding functions for the Keeper of the Records of Scotland. It would also seek to establish appeal procedures to allow the public to challenge the archival decisions of the Keeper in relation to public records. The implementation of such an Act would carry significant costs and burdens across all sectors. It is also true that current FOI and DPA legislation operating in Scotland already provides for some of the main concerns around access to public information and the appropriate protection of personal and private information.

Advantages: A new Scottish Public Records Act would provide a definition for Scottish public records and accord a framework for improved assessment and compliance regimes to assure long-term retention of records. The Act could form the foundation on which to support other legislation, e.g. improve FOISA enforcement or implement specific sectoral changes. It would fill an existing gap in current legislative provision, assist in safeguarding personal rights, and provide an opportunity to sort record problems across a number of sectors. Legislating for the proper management of public records would put the Scottish administration to the fore in an area of growing public concern. A new Act would be strongly supported by record professionals. It would address a major Shaw recommendation and display political will to move forward as an integral part of the 'Acknowledgement and Accountability' process.

Disadvantages: Introducing a new comprehensive Public Records Act would be time consuming, complex to draft, and costly to implement. It is not considered practical within a strict drafting timeframe. Though records are essentially an administrative matter, a comprehensive Bill could prove contentious and therefore difficult to pass unaltered through Parliament were it perceived that high costs would be imposed on public authorities and the voluntary sector. Outside of record professionals a Public Records Act had little relevance for the individuals and organisations consulted, therefore low levels of public awareness may prove to be a hindrance.

Costs: It would be time consuming to implement and may prove costly for the public sector. There are no direct comparative costs to draw upon.

Proposal 2: Introducing New Legislation (A Scottish Public Records 'Lite' Model)

13.10 This would seek to introduce a limited or 'lite' Scottish Public Records Act and provide a Scottish solution tailored to the requirements of the Shaw report and the needs of the current Scottish record landscape. It would be limited to defining public records and laying out principles for their creation, management and preservation. It would provide a framework in which to develop and support existing sectoral legislation and guidance. Legislating in this area would mean developing a distinctive Scottish approach in contrast to the rest of the United Kingdom.

Advantages: A new 'lite' Scottish Public Records Act would be simpler in concept compared with the New Zealand model, and therefore easier to draft. It would be restricted to providing the essential framework in which to develop better sectoral guidance and training and increase awareness of the importance of managing records. A 'lite' Act would not of itself improve record keeping or avoid the problems that Shaw uncovered. However, it would support FOISA and safeguard personal rights. More detailed elements from the New Zealand model could be introduced in a phased manner, either as secondary legislation, or as part of improved guidance. Legislating for the proper management of public information would put the Scottish administration to the fore in an area of growing public concern, and be seen to address the 'Acknowledgement and Accountability' process. A 'lite' model could be accommodated within the 2010-2011 Parliamentary timetable.

Disadvantages: Fewer than the comprehensive NZ model. There remain low levels of public awareness and demand for a Public Records Act, and it would rely on other legislation for enforcement and scrutiny.

Costs: There are no direct comparative costs to draw upon. It is anticipated that even 'lite' legislation would still impose burdens on Scottish public authorities, as better record keeping is not without cost. However, with careful planning the burden is likely to be low. There will be long-term savings from improved access to information and from a more consistent approach to creating, managing and preserving records.

14. Conclusion and Recommendation

14.1 The Shaw report is clear evidence of the failure by many organisations to pay attention to records, and the current human cost of that failure. The Keeper believes there is a good opportunity to build on the lessons of the Shaw report and improve record keeping across the public sector through a limited piece of legislation. This would improve accountability, increase transparency and strengthen governance, **thus supporting the national outcome on better public services**. It would fulfil one of Shaw's key recommendations and go some way to meet the demands of survivors. It would also strengthen freedom of information, which crucially depends on the **quality** of records.

14.2 A Scottish Public Records Act would not by itself improve record keeping or avoid the problems that Shaw uncovered. It would however, provide the essential framework on which to develop better and more consistent sectoral guidance and training. Implementation of existing guidelines and broadening the use of tools (such as the s.61 Code of Practice), would increase awareness of the importance of records and support long-term preservation.

14.3 Records and archives are not a reserved matter, and legislating in this area would mean developing a distinctive Scottish approach in contrast to the rest of the United Kingdom. Shaw was a Scottish report demanding Scottish solutions, and there is no similar initiative for England, Wales or Northern Ireland. There is no consideration being given to equivalent legislation by the Westminster parliament.

14.4 Legislating for a Public Records Act is unlikely to be politically controversial, as records are essentially an administrative matter. Better record keeping is not without cost, but with careful planning, the burden on organisations is likely to be low, and there will be long-term savings from better access to information and from a more consistent approach to creating and managing records.

14.5 As public records are in Mr Russell's portfolio, it would be for him to lead on legislation.

14.6 Following consideration and comment by ministers, I would seek to publish this report on The National Archives of Scotland website www.nas.gov.uk.

George P MacKenzie
Keeper of the Records of Scotland
9 October 2009

Appendix 1 – Shaw Report Recommendations on Records

Chapter 7 of the Shaw Report listed a number of recommendations, grouped into three categories: current provision to ensure the welfare and safety of children in the care of the state; former residents' needs; and records. Those relating to records are as follows:

The lessons of this review point to an urgent need to take action to preserve historical records to ensure that residents can get access to records and information about their location.

3. The government should commission a review of public records legislation which should lead to new legislation being drafted to meet records and information needs in Scotland. This should also make certain that no legislation impedes people's lawful access to records. This review's objectives should address the need for permanent preservation of significant records held by private, non-statutory agencies that provide publicly funded services to children.

4. All local authorities and publicly funded organisations with responsibility for past and present children's services should undertake to use the Section 61 Code of Practice on Records Management issued on behalf of Scottish Ministers and in consultation with the Scottish Information Commissioner and the Keeper of the Records of Scotland under the terms of the Freedom of Information Scotland Act 2002.

5. Training in professional records management practice and procedures should be available to all organisations and local authorities providing children's services. This might be provided by NAS or the Scottish Information Commissioner.

6. The government should invite NAS to establish a national records working group to address issues specific to children's historical residential services records. Appendix 4 of my report contains suggested representation and terms of reference.

7. Voluntary organisations, religious organisations and local authorities, working in partnership, should commission guidance to ensure that their children's residential services records are adequately catalogued to make records readily accessible.

8. Record management practices should be evaluated regularly where records associated with children's residential establishments are held, particularly records associated with monitoring children's welfare and safety. I recommend that the Care Commission should consider taking responsibility for this.



Review of Public Records Legislation Project

**Report of Consultation Research
carried out by Barkers Social Marketing
for the Keeper of the Records of Scotland**

30 January 2009

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1. INTRODUCTION

The Keeper of the Records of Scotland (the Keeper) commissioned Barkers Social Marketing to carry out consultation research to assist with a project being conducted by the National Archives of Scotland (NAS) as part of a review of public records legislation in Scotland.

The review was commissioned as a result of report recommendations made by the Historical Abuse Systemic Review (the Shaw Report), which found failings in record keeping and records management (see Appendix I). The project is defined by the following ministerial statement made to the Scottish Parliament by Adam Ingram MSP.

“The Shaw report rightly makes important recommendations about records and record keeping. The first is the need for a review of public records legislation. There are clear advantages in such a review, as the existing law is more than 60 years old. We have therefore asked the Keeper of the Records of Scotland, in consultation, to review the legislation on public records in the light of the shortcomings that were exposed by Shaw”. Adam Ingram MSP, Minister for Children and Early Years, Scottish Parliament, 7 February 2008.

The following report presents the results of the consultation research which took place between 8 December 2008 and 26 January 2009. The research comprised three discrete elements: an online survey of stakeholders; two focus groups; individual key informant interviews. A total of 152 people participated.

The reason for using three different approaches was: to reach a broad cross-section of stakeholders through the online survey; facilitate in-depth, solution-focussed discussion through focus groups, and obtain additional perspectives through individual phone interviews.

This report contains the findings of the consultation research and highlights key themes and suggestions raised by participants. It covers both public records legislation and other laws and regulations where these were referred to by respondents. This reflects the complexity of the legal framework that applies to the records of looked after children.

Throughout the consultation research the focus remained firmly fixed on the need, identified in the Shaw Report for a new drive, ‘to meet identified needs of former residents for a range of support services, including access to records; and improve provision and practice for children’s residential services records’.

2. ONLINE SURVEY

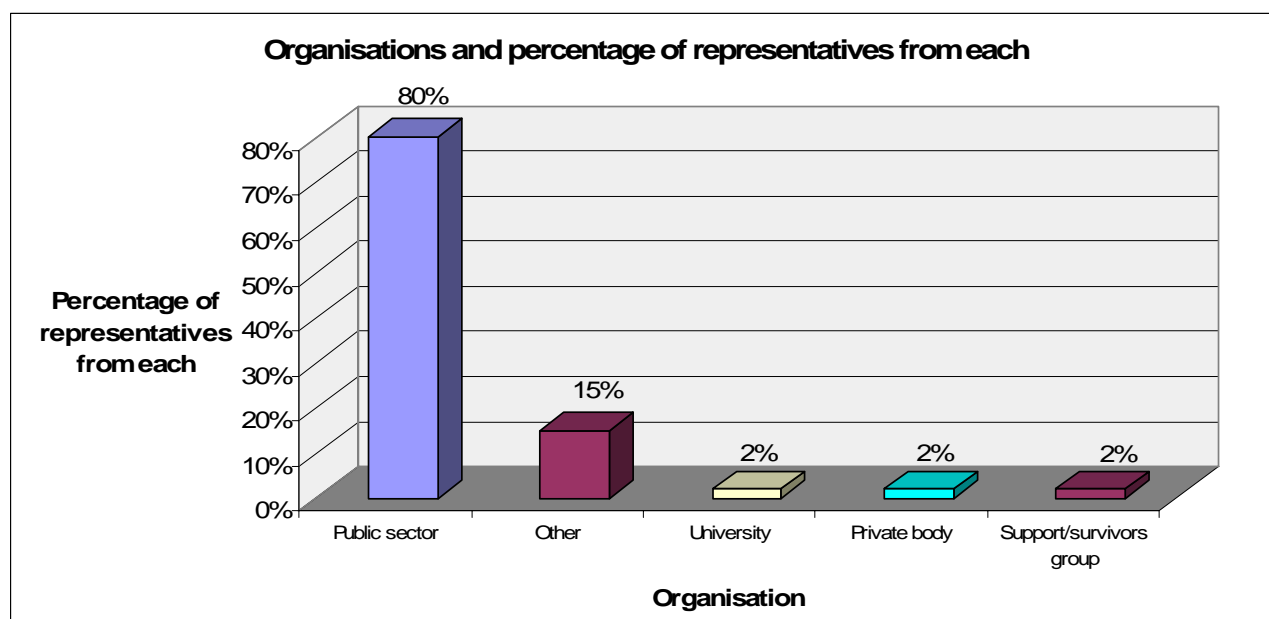
The aim of the online survey was to reach organisations involved in providing care services for children, as well as organisations involved in providing support for people who experienced abuse while in residential care as children. It also targeted records management professionals and archivists.

While the survey was designed primarily to obtain the views of organisations, it was made clear that views on public records legislation would also be welcomed from individuals with experience of the residential child care sector, either as staff or as former residents. The survey therefore included a set of questions about respondents' individual experiences of records.

The survey questions were based on a draft survey which had been previously developed but not carried out by the National Archives of Scotland

The survey was distributed via Survivor Scotland's database which includes professionals involved in the field of childhood sexual abuse, survivors and also family members. The survey was also sent to records managers and archivists through the Scottish Council on Archives and the Records Management Society (Scotland). A covering email explaining the purpose of the survey encouraged recipients to forward the survey to others who may have an interest in the subject.

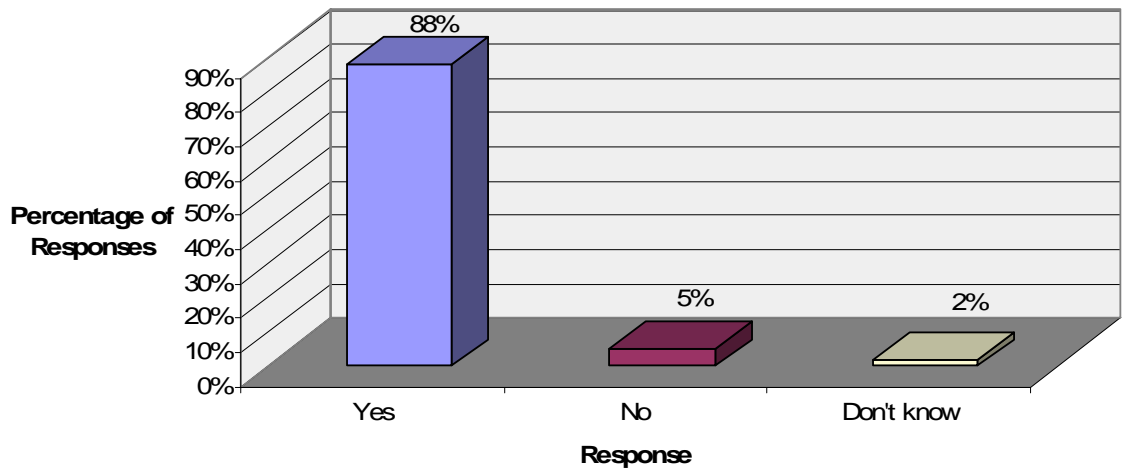
A total of 131 responses were received. The survey was divided into questions for organisations in the first section, followed from, Question 20 by questions for individual respondents. Not all respondents completed the survey. The following charts show the results for completed questions, which explains variations in the number of responses to individual questions.



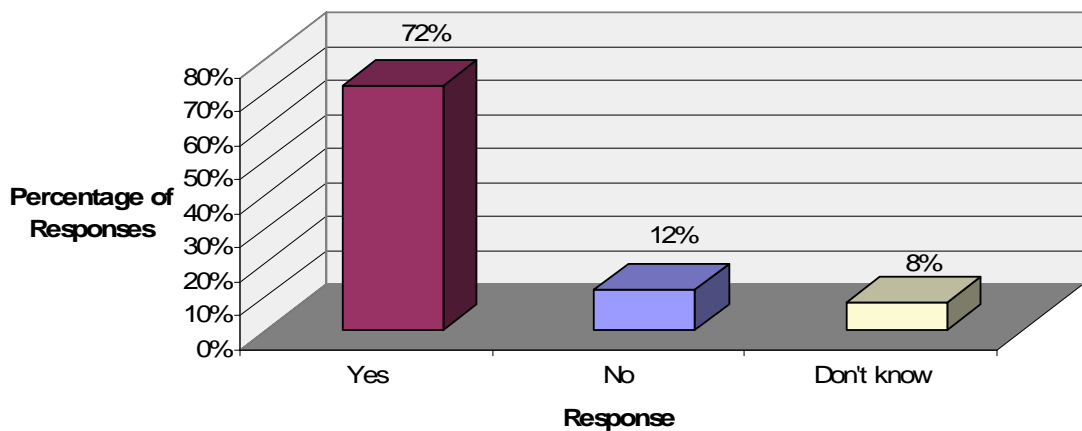
Local authorities represented just over one third of respondents, with voluntary organisations making up just under one third of respondents. The remainder was a mix of other bodies. Sixty two percent of respondents were directly involved in record-keeping while 38% were not.

There was overwhelming agreement that the records of public authorities should fall within the category of 'public records' and broad support for the records of private and voluntary organisations providing publicly-funded services also to be categorised as public records.

Percentage of organisations who consider that the records of public sector authorities should fall within the category of public records



Percentage of organisations who consider that private or voluntary organisations which are funded by public authorities to provide public services should fall within the category of public records



Question 7 asked respondents to specify which public records laws, child care laws or other statutory regulations applied to respondents' organisations, a range of legislation and regulations was cited, including:

- The Data Protection Act 1998
- The Freedom of Information (Scotland) Act 2002
- The Children (Scotland) Act 1995
- The Arrangements to Look After Children Act (Scotland) Regulations 1996
- Adoption Agencies (Scotland) Regulations 1996
- The Social Work (Scotland) Act 1968
- The Local Government (Scotland) Act 1994
- The Regulation of Care (Scotland) Act 2001
- Charity Law
- Health & Safety at Work laws

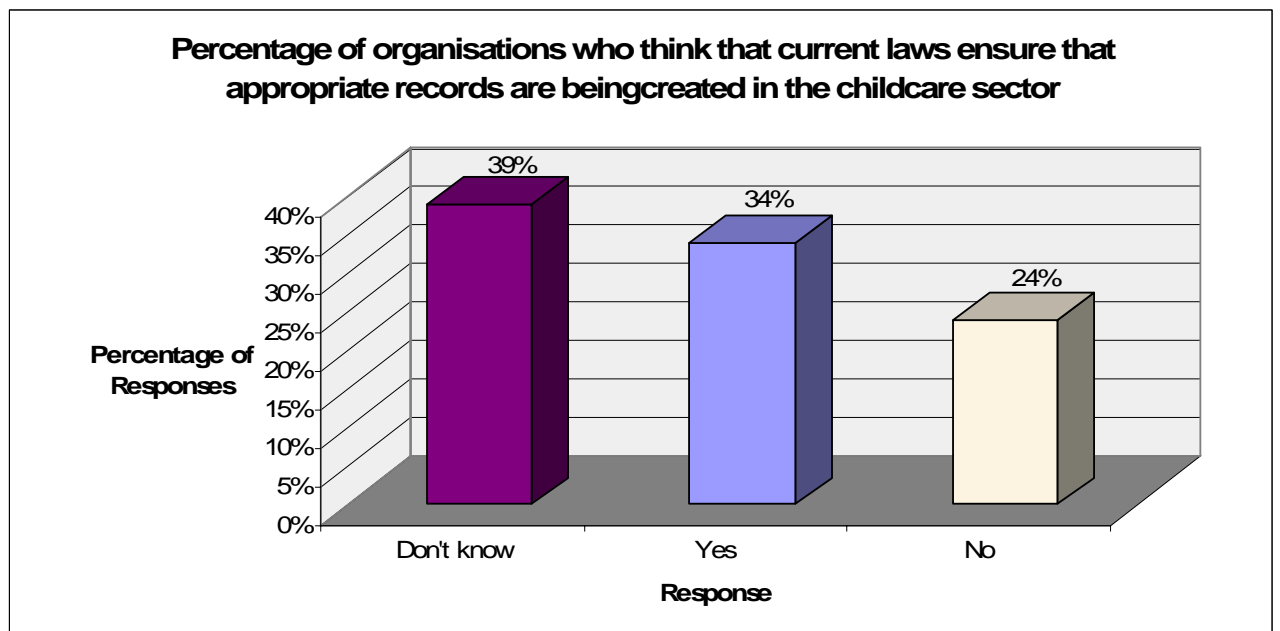
- Company law
- The Human Rights Act 1998
- Disclosure Scotland.

The Public Records Act 1937 was mentioned by three respondents, all of whom were records managers or archivists, one of them being an office-bearer in the Society of Archivists. It was not listed by any other respondents.

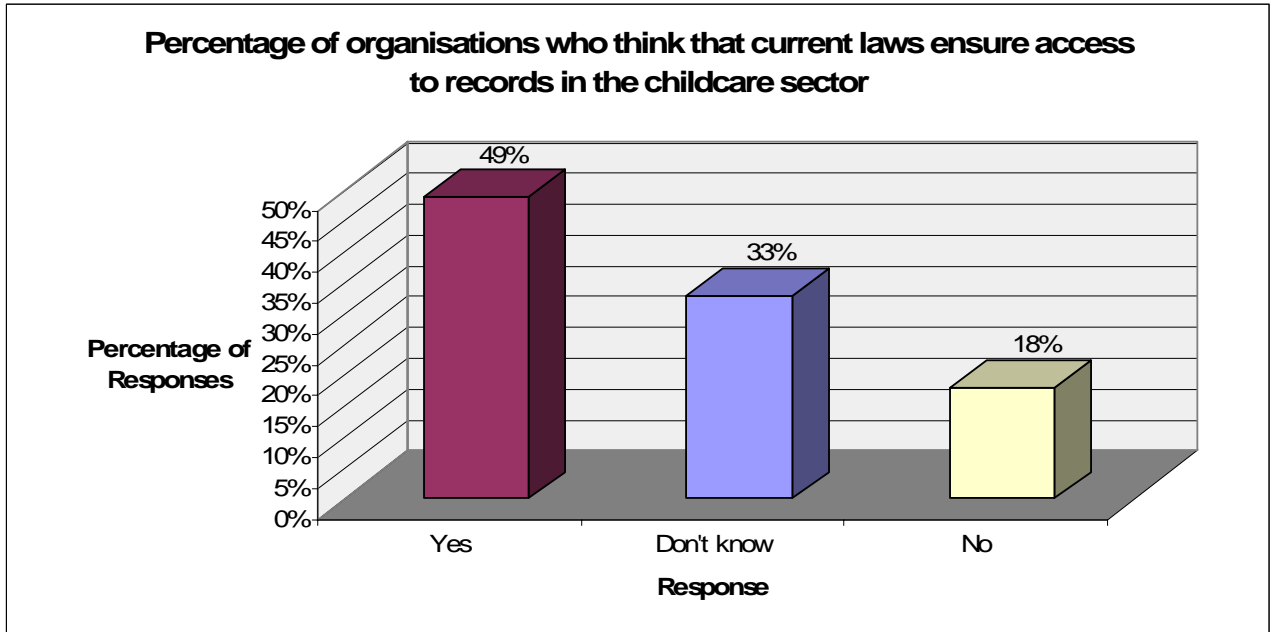
The Code of Practice on Records Management under Section 61 of the Freedom of Information (Scotland) Act 2002 was used by 68% of respondents. Almost one third of those surveyed (28%) did not know if their organisation used it or not, while two organisations stated that they did not.

Non-statutory guidelines were used in the creation, maintenance, storage, access or disposal of records in just over half of the organisations who responded while 28% did not use any such guidelines and 15% did not know if they did.

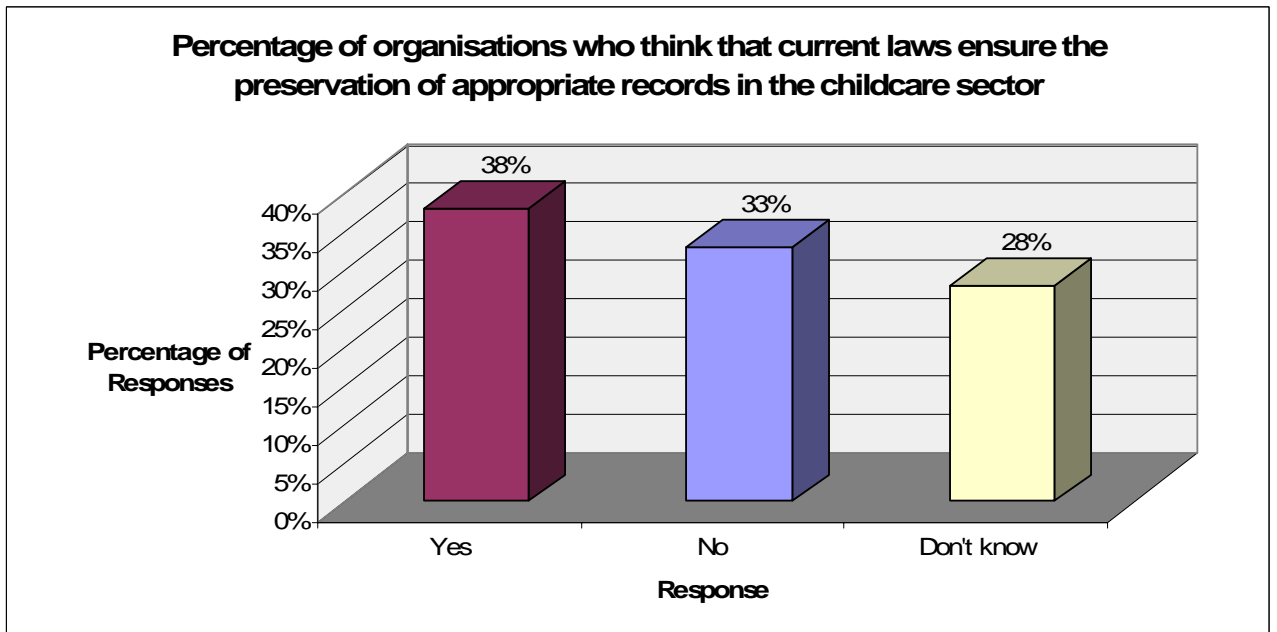
The second section of the survey contained questions about the adequacy of current laws in the creation of appropriate records, access to records and preservation of records in the child care sector.



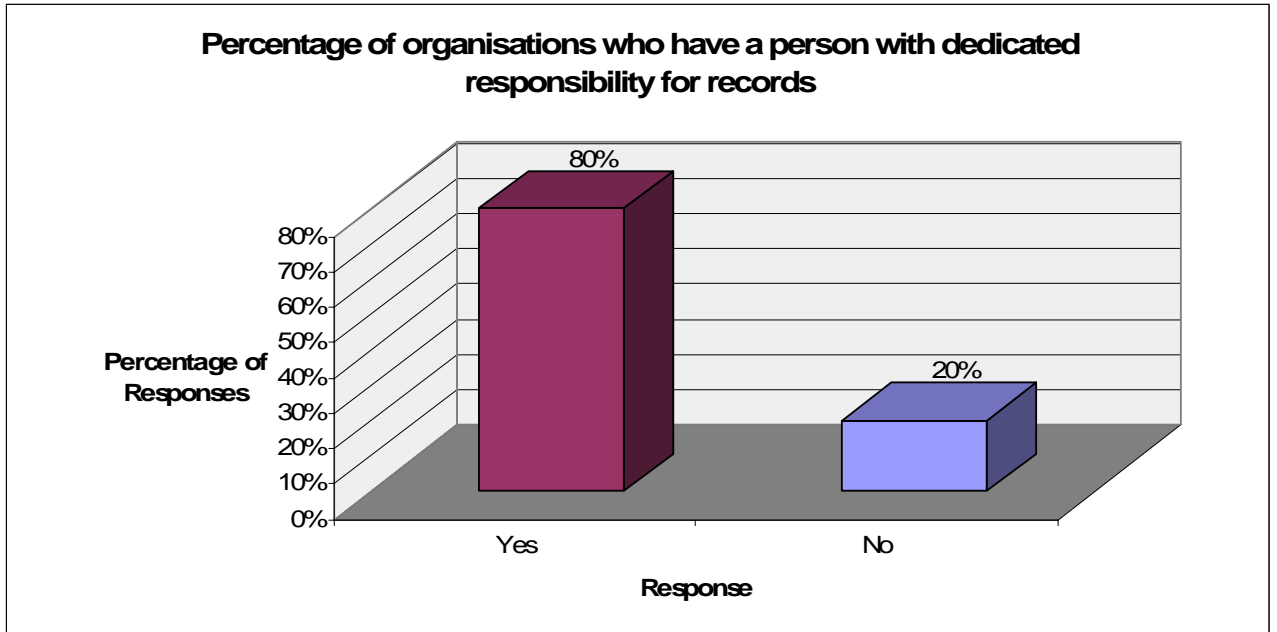
Around one third (34%) of respondents felt that current laws ensure that appropriate records are being created in the child care sector, with 24% disagreeing. However 39% stated that they did not know whether they did or not.



Almost half of respondents (49%) thought that current laws ensure access to records with nearly one in five (18%) stating that they did not. Again, a significant minority of 33% did not know if the law ensured access to records.

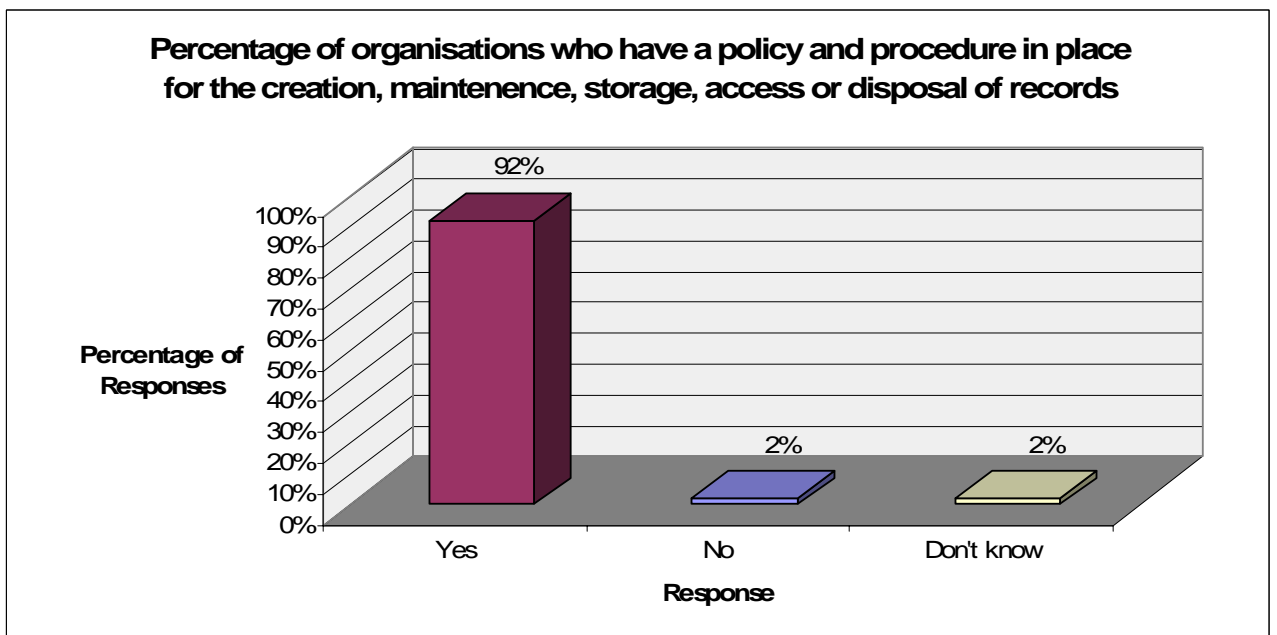


Respondents were split three ways when asked whether current laws ensured the preservation of records, with 38% agreeing that they did, 33% believing that they did not and 28% not knowing whether they did.

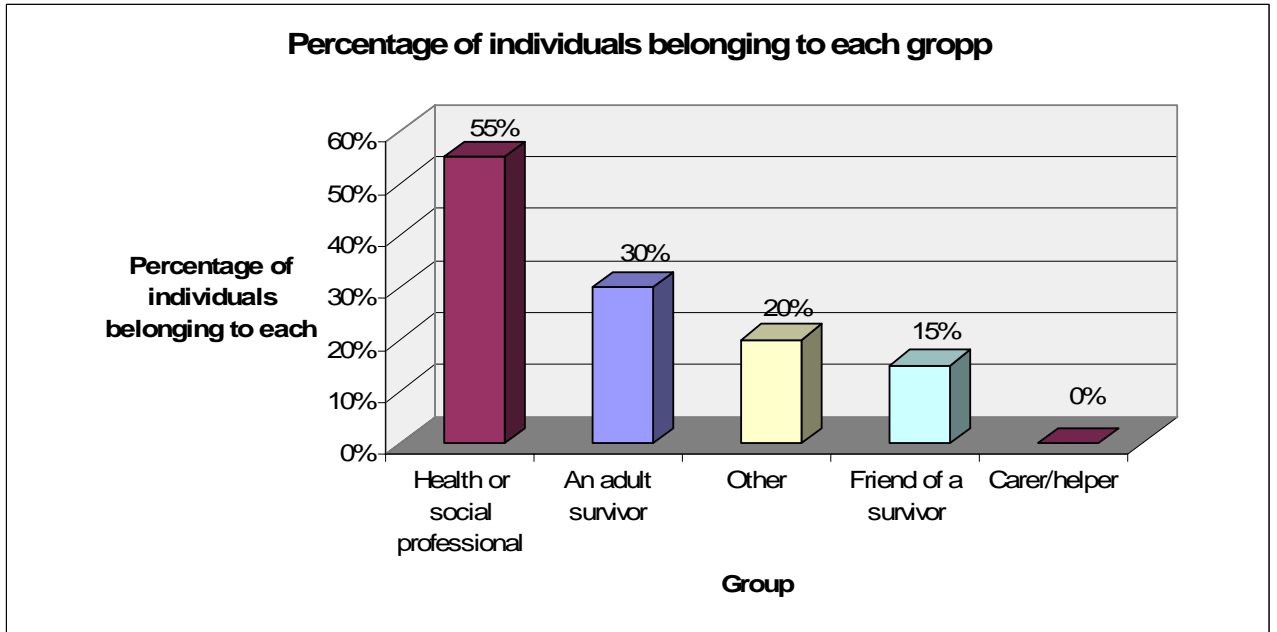


A substantial majority (80%) of respondents stated that their organisation does have someone with dedicated responsibility for records but one in five (20%) do not.

An overwhelming majority (92%) do have policies and procedures that apply to the creation, maintenance, storage, access and disposal of records. Staff training and guidance on records management policy and procedures was provided in 80% of organizations.



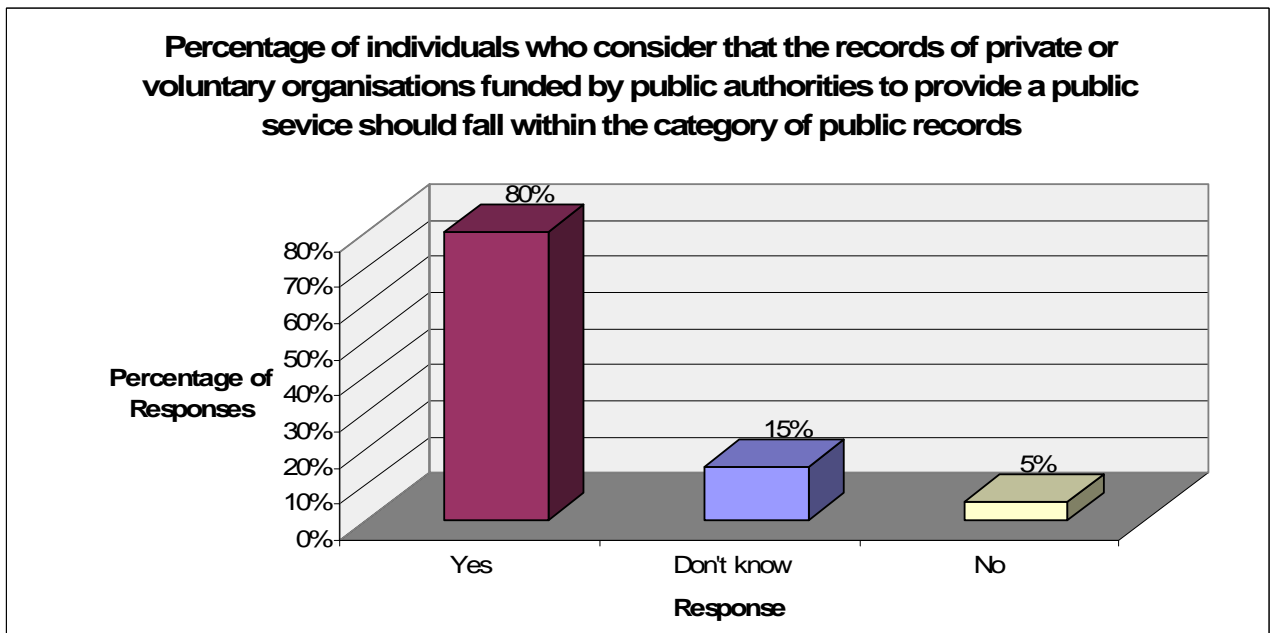
Twenty nine people responded as individuals rather than representatives of organisations.



Question 21 onwards recorded the views of those responding as individuals.

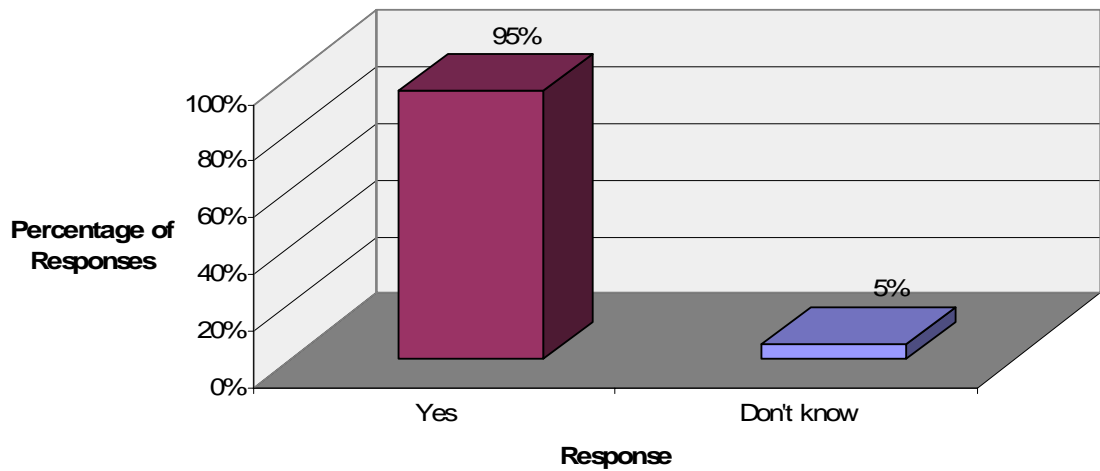
Of the 60% who had tried to access public records, half had succeeded while the other half did not know if they had obtained the records they wanted. Comments revealed varying degrees of difficulty in accessing records.

'I have had access to my late mother's records from Glasgow Social Work. In spite of my mother being in several children's homes and with two foster families, the information held is pitifully limited. The process was incredibly lengthy and frustrating.'



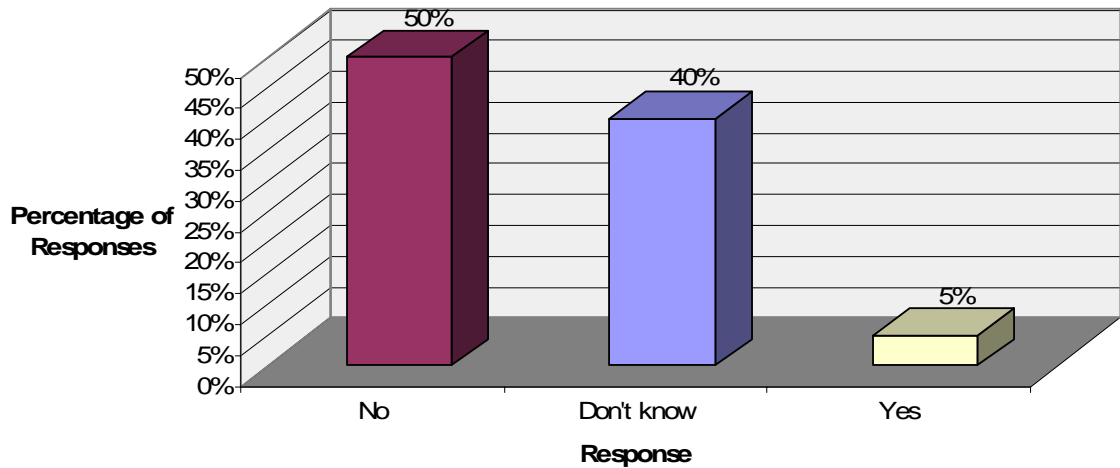
Most individual respondents agreed that records of publicly funded services provided by either voluntary or public organisations should be regarded as public records.

Percentage of individuals who consider that the records of public authorities should fall within the category of public records

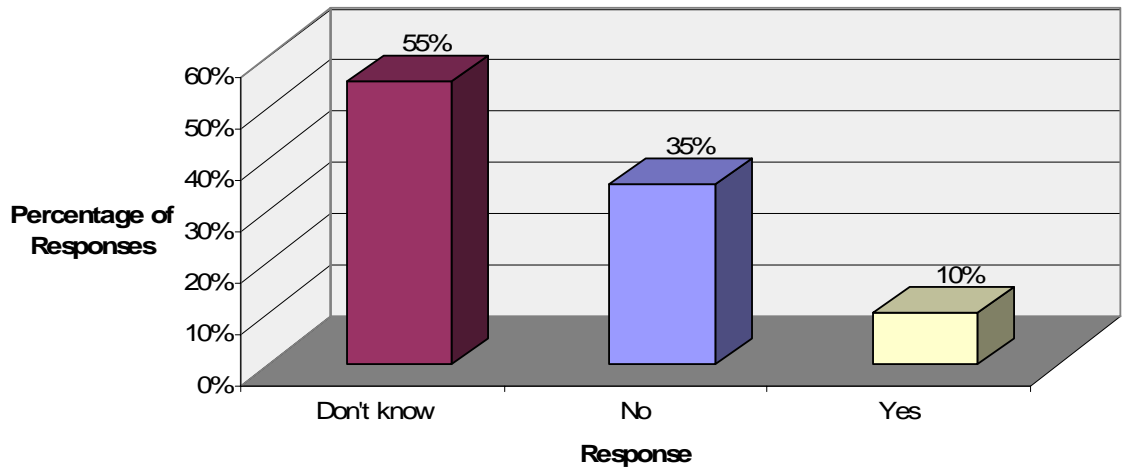


A majority felt that current laws did not ensure that appropriate records were being created and 90% were unsure or did not believe that the law ensured preservation of records. This compares with a 50/50 split in view from organisational respondents. On the issue of access, 89% of individuals either did not think that existing laws ensured access or were not sure if they did.

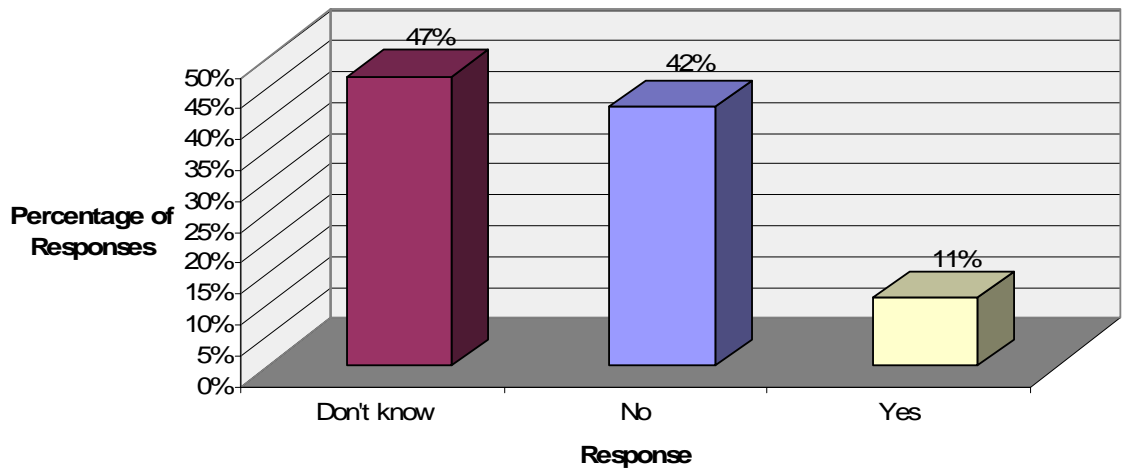
Percentage of individuals who think that current laws ensure appropriate records are being created in the childcare sector



Percentage of individuals who think current laws ensure the preservation of appropriate records in the childcare sector



Percentage of individuals who think current laws ensure access to records in the childcare sector



3. FOCUS GROUPS AND KEY INFORMANT INTERVIEWS

Two focus groups were held at the Mitchell Library in Glasgow to:

- Explore in greater depth issues arising from the online survey;
- Identify additional issues relating to public records legislation;
- Generate discussion about whether and what changes might be introduced to address the issues raised, particularly but not solely in relation to public records legislation.

One focus group brought together nine records managers and archivists, eight from the public sector and one from a faith-based voluntary sector organisation. Participants came from Edinburgh, Glasgow, Dundee, Stirling and Lanarkshire.

The other focus group brought together four participants involved in the provision of child care services: one from the police; two from local authorities and one from a voluntary organisation. They came from Glasgow, Inverclyde, South Lanarkshire and Central Scotland. An observer from the National Archives of Scotland attended this focus group.

This section also reflects the views of telephone interviewees. Interviews were carried out with a sample of individuals involved in records management, freedom of information, the provision of child care services, the regulation of services and with one of Tom Shaw's researchers.

“The current lack of modern records legislation weakens democracy and transparency in Scotland due to inconsistency and neglect by many public bodies in managing records.”

Focus groups began with a brief introduction to the consultation. All participants were familiar with the Shaw Report and some had responded to the online survey. Focus group participants were asked to identify the main issues and problems associated with record keeping, which continue to be problematic. These were noted on a flipchart and formed the basis of the group discussion. The final task for the focus group was to bring forward comments or suggestions about possible changes to public records legislation, or to other laws or regulations, to address the failings identified by the Shaw Report.

Key issues raised by the records managers and archivists focus group (Focus Group A) were:

- No national standards, resulting in a lack of consistency in policy and practice.
- Existing public records legislation out of date and limited in scope.
- A lack of statutory responsibility on service providers to look after records.
- No single point of access or signposting for people seeking records.
- Negative perceptions among professionals about record-keeping.
- Lack of leadership from senior managers, resulting in lack of prioritisation and under-resourcing of record keeping.

The group felt that a definition of 'public records' would be helpful. The creation of a list of organisations with responsibilities for public records, similar to the list of public bodies covered by the Freedom of Information (Scotland) Act 2002, was seen as a

possible model. However, it was also recognised that child care services were provided by organisations that were currently excluded from the provisions of FoI legislation, and that this would have to be addressed.

“Code of Practice under Section 61 of FOISA is a great help to record keeping. Could do with stronger guidance from government.”

There was considerable discussion around the need for a consistent approach to record keeping in different geographical areas and in the various organisations involved in the provision of child care services. The group felt that the nature of the service provided, rather than the nature of the organisational provider, should determine its record keeping obligations.

The need for enforceable national standards was unanimously supported. This should encompass not only the creation of records but also records management, retention, access and disposal. Existing requirements, such as those within the Data Protection Act (1998) or in regulations like the National Care Standards (enforced by the Care Commission) were seen as being insufficiently prescriptive or too narrow in scope to ensure clarity and consistency.

Monitoring of compliance and external audit generated a great deal of discussion. Participants saw a role for Audit Scotland and other regulatory bodies in enforcing statutory record keeping obligations, which they argued should be assessed as an essential component of organisational performance. There was a view that where organisations fell short on record keeping standards, this should be reflected in the audit or inspection reports published by the scrutiny bodies. Without sanctions, it was felt that it would be impossible to ensure compliance.

“Public authorities will responds to auditors, to damaged reputations, NOT to legislation.”

It was recognised that improving the current situation would need additional resources, particularly for training but also for archiving, storing and providing access to records. This was likely to present challenges to organisations in the public, voluntary and private sectors.

Good record keeping was felt to have a low priority in many organisations and among professionals for whom it was not the main point of their jobs. Social workers were given as an example of professionals doing a very demanding job, where the primary focus is on the welfare of families rather than on what they might regard as ‘bureaucracy’. It was felt that such attitudes needed to be challenged on the basis that good record keeping was key to ensuring the quality of the services being delivered. It was also seen as crucial in enabling those receiving services to participate in decisions that affect them or to understand, later in life, the decisions that had been taken about their care as children.

This was reflected in the comments of one respondent to the online questionnaire;

“As a social worker, I am aware that my own and my colleagues’ attention to our standards of case noting and report writing about our clients rose when legislation about Rights of Access was introduced, and we knew the subject of our writing could/would request sight of their files. It is a matter of professionalism, accountability and respect.”

There was considerable common ground between Focus Group A and Focus Group B with concern being expressed that existing provisions did not ensure that

appropriate and adequate records were being created and that there was no consistency in handling or providing access to records. The need for clarity and national standards was a recurring theme throughout the consultation exercise.

The issue of retention of records was raised by, among others, the representative from the police. This is of particular relevance to historical child abuse cases but is also of current concern. For example, there is a tension between the human rights of individual teachers and the need to retain disciplinary records of teaching staff, which might help reveal a pattern of abuse by a single individual in different schools over a long period of time. The lack of records could undermine efforts to build a case against an alleged perpetrator.

“Our service user files are open to access by the individual service user but we are clear that the files are our property, therefore, any worker notes and support plans cannot be removed. Files are archived for 7 years then destroyed.”

Participants also raised the problem of there being no centrally held record of complaints against those working with children and young people in residential care settings. This could result in the failure to spot a pattern of abuse.

Participants in both focus groups discussed the way in which new public records legislation could assist organisations to improve record keeping practice by placing an obligation on service-providers (through the local authority) to adhere to regulations. It was suggested that regulations accompanying the new public records legislation could cover all aspects of record keeping, including retention and access, and could provide clear guidance on how different types of records should be categorised or scheduled. Scheduling would then determine how records should be dealt with. This would enable organisational records, such as staff rotas, to be dealt with differently from individual care plans, for example.

“Record keeping relies on willingness of staff to make an effort and record whatever needs recording. Seen as bureaucracy and time-wasting rather than capturing evidence and information.”

Key informant interviews also brought out issues relating to the inadequacy of existing public records legislation. They highlighted instances where it was simply not known whether records had ever existed at all. They also spoke of the need to ensure that record keeping was carried out in a professional manner.

Access to historical records was also highlighted as a problem area in both focus groups and phone interviews, with concern expressed that some people become upset when they read records about their own past. It was acknowledged that the right to access records should be clarified and that it should be much easier to track down records. However, the impact of obtaining access could cause extreme distress and participants would like to see more support available to people when they do get access so that it does not fall to archivists to do so.

The issue of confidentiality arose in response to the survey, during focus groups and in interviews. There was a concern that a ‘public records’ designation could result in records being inappropriately accessible. Safeguards were felt to be important to prevent personal information becoming publicly available.

One situation where the issue of confidentiality is of particular concern is where records of therapeutic interventions are sought in the course of court proceedings against someone accused of abuse. The basis of counselling, for example, is trust and confidentiality. Sharing records of what has been said or done during therapy sessions can have damaging consequences for the client/therapist relationship or for

the emotional well-being of the individual concerned. This is an issue which should be taken into account in the development of any new public records legislation.

4. DISCUSSION AND CONCLUSIONS

Public Records Legislation

Participants in the consultation research cited a plethora of legislation and regulation governing records, both personal and organisational. The fact that very few mentioned the Public Records Act 1937 reflects its perceived lack of relevance compared with, for example, the Data Protection Act 1998, the Children (Scotland) Act 1995 or the Freedom of Information (Scotland) Act 2002. Low levels of awareness of the 1937 Act do not however mean that a new Public Records Act would not be well received.

There is scope for a new Public Records Act to resolve the issues set out in the Shaw Report and issues raised by participants in the consultative research. Many participants felt that there was a need for an overarching legislative framework covering records associated with the provision of services, particularly but not confined to, services delivered by or paid for from public funds.

Importantly, it is worth noting that there was agreement that it is the nature of the service or activity, rather than the nature of the organisation, which should determine whether records would be deemed to be public records. Thus, the records of a voluntary or private sector residential child care service would be 'public records' under the terms of a new Public Records Act.

The need to enforce legislation, and any associated regulations, was regarded as key to assuring consistency and quality of record keeping across Scotland. Focus group participants and key informants discussed the potential role of audit and inspection agencies in this context. This is in keeping with the proposal by the Scottish Records Advisory Council that 'public records' should be those records which are created *or received by* a public body.

Scrutiny bodies such as HMIE and the Care Commission are examples of public bodies which receive records from service-providers in the public, voluntary and private sector. Their regulatory activity is determined by the nature of the service, not the nature of the providing organisation so they already have a locus in the field.

The establishment of a new scrutiny body for care and social work will bring together the child protection functions of the Social Work Inspection Agency (SWIA), the Care Commission and HMIE. This development creates an opportunity for Ministers to review the record keeping standards required of service providers so that it is in line with any new public records legislation.

Scrutiny bodies, while they do place certain requirements on service-providers' record keeping practice, do so for the purposes of regulation and inspection. Their remit does not, for the most part, extend to issues of records management, storage, access (other than access by the scrutiny body), retention or disposal. A new Public Records Act would create an opportunity to introduce standards for all public records.

All new legislation must comply with the Human Rights Act 1998. This would ensure that any new Public Records legislation would take into account the human rights of service-users and those involved in providing services.

Code of Practice on Records Management under Section 61 of the Freedom of Information (Scotland) Act 2002

The consultation research examined the scope to increase the use of the Section 61 Code. While some public bodies use it at present, others do not. Some use in-house or professional Records Management protocols or guidance, while the Code

only applies to organisations designated as public bodies under the terms of the Freedom of Information (Scotland) Act 2002, so would not be applied to voluntary or private organisations providing child care services.

Focus group participants felt that the Code was too vague and unenforceable in its current form and would need to be strengthened significantly, and supported by sanctions, for it to become a means of improving record keeping.

The Code therefore has limited scope, as it currently stands, to complement or support new public records legislation.

Adequacy of current laws in ensuring the creation, preservation and accessibility of records in the child care sector

The consultation research found general agreement that various pieces of legislation introduced from 1995 onwards had helped improve the generation, handling and accessibility of records. There is however still a concern that the law does not ensure a consistent approach to the creation, preservation and accessibility of records.

The retention and disposal of records are matters of concern, with confusion about how long different types of records should be kept. Relatively short disposal timescales (for example of 7 years) can result in the loss of records that are potentially of material significance to successful prosecution of perpetrators of historical abuse.

The introduction of new public records legislation would create an opportunity to review other laws and regulations which have a bearing on record keeping in child care services.

Accessing records

The idea of having a single point of access for people who want to find records was raised by a number of respondents, including focus group participants and telephone interviewees.

There was a concern that people can find it difficult to know where to begin looking for records. A well publicised single point of contact could help individuals establish what records are likely to exist and where they might be. It could also provide some support for people seeking records and/or help them find other sources of support, particularly if there are concerns about the impact of reading records about their own past lives or that of a loved one.

Conclusion

The consultation research has found that legislative changes since 1995 have helped address some of the issues associated with records highlighted in the Shaw Report. However, the prevailing view appears to be that there is a need for national standards, consistency and enforcement across Scotland, which is not being provided by current legislation.

New public records legislation would create a legal framework for setting national standards and putting in place mechanisms to ensure compliance. It would also provide an opportunity to review statutory retention periods for different kinds of records in the light of both the Shaw Report and the concerns expressed by the police in the course of this consultation.

The Audit Commission and scrutiny bodies such as HMIE and the Care Commission, which regulate and inspect schools and care providers in the public, private and voluntary sector, could take greater responsibility for holding organisations to account on the quality of their record keeping practices, based on new national standards.

5. APPENDIX 1 – SHAW REPORT RECOMMENDATION

Historical Abuse Systemic Review

Residential Schools and Children's Homes in Scotland 1950 to 1995

An independent review led by Tom Shaw

Recommendation 6

To establish a national records working group to address issues specific to children's historical residential services records. This working group should consist of all relevant stakeholders and may include - but should not be restricted to - former residents, archivists, records managers, social historians, information technology specialists and persons representing social services, education, health and law. This working group should be led by an independent person, or group, with knowledge of records legislation. The terms of reference might include:

- leading an initiative to ensure that all significant historical records associated with children's residential services are identified, catalogued and preserved;
- identifying records associated with children's residential services, including public and privately held records, for placement on a records retention and disposal schedule;
- developing standards and guidance specific to records associated with children's residential services;
- identifying what records associated with children's residential services may be considered sensitive and developing guidelines on the management of such records;
- developing a model 'access to records' policy that recognize the particular needs of former residents;
- developing and instituting processes for regular evaluation and monitoring of record management practices for records identified as significant for protecting children and monitoring their safety, promoting children's well-being and contributing to their sense of identity;
- developing standards and guidance to protect the integrity of records, particularly those children's residential services records that may be required for evidence in future inquiries, court proceedings, or both of these;
- developing records transfer standards and guidance for records generated within children's residential establishments; and
- advising government and administering authorities on matters affecting children's residential services records preservation, such as electronic record-keeping.

6. APPENDIX 2 – PARTICIPANT DETAILS

Organisations participating

- Aberdeenshire Council
- Angus Council
- Association of Chief Police Officers of Scotland
- Barnardos
- Borders Independent Advocacy Service
- Business Archives Council of Scotland
- Care Commission
- CEC Children and Families Department
- Central Scotland Police
- Children 1st
- City of Edinburgh Council
- Dundee University
- Falkirk Council
- Glasgow City Council
- Greater Glasgow and Clyde NHS
- Inverclyde Council
- Keycomm
- National Archives of Scotland
- NHS Education for Scotland
- NHS Practitioner Services
- North Lanarkshire Council
- Northern Health Services Archives
- Office of the Scottish Charity Regulator
- Office of the Scottish Information Commissioner
- Open Secret
- Safe Space
- SAY Women
- Scottish Borders Council
- Scottish Catholic Archives
- Scottish Government
- Sense Scotland
- Shakti Women's Aid
- Social Work Inspection Agency
- South Ayrshire Council
- South Lanarkshire Council
- Stirling Council
- Taking Steps Penumbra
- The Moray Council
- The Mungo Foundation
- University of Dundee.
- University of Edinburgh
- University of Glasgow
- Victim Support Scotland
- West Lothian Council

Appendix 3 – Organisations and Individuals Consulted by the Keeper’s Review of Public Records Legislation

Membership of Advisory Group

Anne McDonald, Scottish Government - Adult Care and Support Division
Carolyn Wales, Scottish Government - Looked After Children
Frank Rankin, NHS Education for Scotland
Hector MacQueen, University of Edinburgh / Chair of the Scottish Records Advisory Council
Kenny Meechan, Glasgow City Council
Luke Cavanagh, Scottish Government - Europe, External Affairs and Culture Analytical Unit
Margo Dymock, Dundee City Council / Association of Directors of Social Work
Michael Moss, Glasgow University / National Archives of Scotland Non-Executive Director
Peter Daniels, former local authority Chief Executive
Sarah Hutchison, Office of the Scottish Information Commissioner

Society of Archivists / Scottish Council on Archives Forum 3 October 2008

Aberdeen City Archives
Edinburgh City Archives
Glasgow City Council Archives
Lothian Health Services Archive
Perth & Kinross Council Archive
Scottish Borders Archive
Scottish Catholic Archive
Scottish Records Advisory Council
Stirling Council Archives
University of Dundee Archive Services
University of Edinburgh Records Management Section

Tom Shaw Historic Abuse Systemic Review: One Year On / SurvivorScotland: Progress and Potential – Scottish Government Seminar 25 November 2008

Aberdeenshire Council Records Management
Barkers Social Marketing
Care Commission
Children 1st
City of Edinburgh Council
Cross Party Group on Survivors of Child Sexual Abuse
De La Salle Brothers
Glasgow City Council Archives
Glasgow Women’s Aid
In Care Abuse Survivors
Kerelaw Independent Inquiry
Open Secret
Partners in Advocacy Edinburgh
Quarriers
Safe Space
See-Change Consultancy
Sisters of Nazareth Glasgow
Sisters of Notre Dame Glasgow
SurvivorScotland National Reference Group

Taking Steps: Penumbra Borders
Whitespace Edinburgh
Who Cares? Scotland

Barkers Social Marketing Consultation December 2008-January 2009

Aberdeenshire Council
Angus Council
Association of Chief Police Officers of Scotland
Barnardos
Borders Independent Advocacy Service
Business Archives Council of Scotland
Scottish Commission for the Regulation of Care (Care Commission)
CEC Children and Families Department
Central Scotland Police
Children 1st
City of Edinburgh Council
Dundee University
Falkirk Council
Glasgow City Council
Greater Glasgow and Clyde NHS
Inverclyde Council
Keycomm
National Archives of Scotland
NHS Education for Scotland
NHS Practitioner Services
North Lanarkshire Council
Northern Health Services Archives
Office of the Scottish Charity Regulator
Office of the Scottish Information Commissioner
Open Secret
Safe Space
SAY Women
Scottish Borders Council
Scottish Catholic Archives
Scottish Government
Sense Scotland
Shakti Women's Aid
Social Work Inspection Agency
South Ayrshire Council
South Lanarkshire Council
Stirling Council
Taking Steps Penumbra
The Moray Council
The Mungo Foundation
University of Dundee.
University of Edinburgh
University of Glasgow
Victim Support Scotland
West Lothian Council

Other Contacts

Archives New Zealand
Audit Scotland

Her Majesty's Inspectorate of Education
Historic Abuse Systemic Review (Shaw Inquiry)
Kerelaw Inquiry
Scottish Commission for the Regulation of Care (The Care Commission)
Scottish Government

Appendix 4 – Legislation Consulted by the Keeper’s Review of Public Records Legislation

The Historical Abuse Systemic Review presented its findings to Ministers in November 2007 (Shaw Report). It highlighted a number of failures in the system of child care provision in Scotland and it made several recommendations for the consideration of the Minister. Record-keeping procedures were recognised as being inadequate and were identified as contributing to failures in the system. The Minister subsequently asked the Keeper of the Records of Scotland to embark on a review of public records legislation in Scotland. This was to have particular regard to the issues raised by Shaw in relation to information created for looked after children and children in care, but the remit also asked the Keeper to review public records legislation in general.

As part his review the Keeper considered the legislation in place across Scotland, the UK and internationally which currently impacts on public records and records created for looked after children.

The main pieces of legislation governing public records and information in Scotland and the UK are:

- The Public Records (Scotland) Act 1937
- Public Registers and Records (Scotland) Act 1948
- Public Records Act 1958
- Public Records Act 1967
- The Inquiries Act 2005

- Local Government (Scotland) Act 1973
- Local Government (Access to Information) Act 1985
- Local Government etc. (Scotland) Act 1994

- Data Protection Act 1998
- Human Rights Act 1998
- Freedom of Information (Scotland) Act 2002

- The Environmental Information (Scotland) Regulations

Secondary legislation governing public records and information in the UK and Scotland includes:

- The Disposal of Records (Scotland) Regulations 1992 No 3247
- The Disposal of Records (Scotland) Amendment Regulations 2003 No 522
- The Disposal of Court Records (Scotland) Regulations 1990 No 106
- Section 3(4) of the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc of Acts of the Scottish Parliament) Order 1999 No 1379

International legislation reviewed includes:

- New Zealand Public Records Act 2005 (No 40)
- Library and Archives of Canada Act (2004, c. 11)
- National Archives Act 1986 (Ireland)
- National Archives Act 1986 Regulations (Ireland)

Legislation governing children in care in Scotland and which impacts on record keeping issues includes:

- Children and Young Persons (Scotland) Act 1937
- Children Act 1948
- Social Work (Scotland) Act 1968
- Social Work (Residential Child Care) Regulations 1987
- Joint Inspection of Children's Services and Inspection of Social Work Services (Scotland) Act 2006
- The Regulation of Care (Scotland) Act 2001
- Protection of Children (Scotland) Act 2003
- Children (Scotland) Act 2005

Secondary legislation governing children in care in Scotland and which impacts on record keeping issues includes:

- Administration of Children's Homes Regulations 1951
- The Boarding out of Children Regulations 1959
- Social Work Inspection (Scotland) Regulations 2006 (SSI 2006 No.531)
- The Regulation of Care (Requirements as to Care Services) (Scotland) Regulations 2002 (SSI 2006 No. 274)

Appendix 5 – Freedom of Information: Review of the s.61 Code of Practice on Records Management

In 2008, Scottish Ministers agreed to the review of the Codes of Practice associated with the Freedom of Information (Scotland) Act ('FOISA') and the Environmental Information (Scotland) Regulations, with a view to updating and revising them.

The **Code of Practice on Records Management** was issued by Scottish Ministers under section 61 of FOISA and laid before the Scottish Parliament in November 2003. The Code provides guidance to Scottish public authorities as to the practice which would, in the opinion of the Scottish Ministers, be desirable for them to follow in connection with the keeping, management and destruction of their records. The provisions of the s.61 Code are not mandatory, but if an authority fails to have regard to the Code it may be failing in its duty under FOISA.

Under its Enforcement Strategy, the Office of the Scottish Information Commissioner increasingly looks at the record-keeping arrangements of public authorities. If it finds that an authority is failing to meet best practice within the Code it may issue a Practice Recommendation, following consultation with the Keeper of the Records of Scotland.

The Code was developed in consultation with the Scottish Information Commissioner and the Keeper of the Records of Scotland prior to FOISA coming into force in 2005. Work is underway by the Lord Chancellor to amend the equivalent section 46 of the UK FOI code (which is broadly similar to the Section 61 Code), in order to reflect the changes over the past years in records management and to clarify its provisions (See footnote 22).

In 2006, a general review of FOISA, conducted by the Scottish Government, sought comments on the Section 61 Code. Some key points emerged from these;

- ◆ The Code is difficult to follow and too technical for non-professionals
- ◆ Conversely, more detailed content is needed
- ◆ The Code should focus on outcomes rather than methods
- ◆ It is currently geared towards central government
- ◆ It needs simplification, particularly for smaller authorities and non-professionals
- ◆ It needs to make clearer links between records management and compliance with FOI
- ◆ It needs to be clearer who enforces the Code.

Issues raised more recently highlighted the need for updating guidance on managing digital records.

The suggested revision of the Section 61 Code will take the following starting points:-

- ◆ The Code should focus more on outcomes rather than detailed processes
- ◆ It should be streamlined and avoid technical language to make it more user-friendly for those without records management expertise
- ◆ It should stress the importance of records management
- ◆ Guidance on handling digital records should be updated
- ◆ It should be 'future proof' as far as possible, to avoid becoming rapidly out of date.

Appendix 6 – Summary of Reasons For and Against Options Proposed

1. Using Existing Tools and Resources:	
Pros	Cons
1. A great deal of guidance and advice on best practice is already available in the public and private sectors.	1. No lack of available guidance, but there remains a significant lack of consistency of use.
2. No new demands on the public purse.	2. There is no statutory definition of a public record.
3. Wealth of existing professional expertise to draw on from within the public sector.	3. Voluntary and charitable sectors will continue to remain outwith existing legislative scope, leading to problems when seeking to improve access to public records and information.
4. Speedier implementation of action by public authorities.	4. Improvements rely on exhortation and influence alone.
5. Building initiatives	5. No enforceable national standards will result and be put in place.
	6. High profile cases of information or record losses are likely to continue and Ministers could be left with a continuing unregulated problem.
	7. It will not meet the demand for change from former residents and abuse survivors, nor address the needs of other vulnerable adult groups.
	8. It does not address the demand by Shaw for an urgent need to preserve historical records.

2. Amend Sectoral Secondary Legislation or Guidelines:

Pros	Cons
1. Amendments can be made more easily and implemented relatively swiftly providing quick resolution of some issues in some sectors.	1. To achieve consistency of standards would require regular monitoring and supervision of legislation and guidance across all sectors, resulting in ongoing costs.
2. Improvements would assist good governance and improve procedures and administration.	2. Plugging gaps in one area e.g. child care, may not address problems in others, e.g. care of the elderly.
3. It could meet certain demands for change from abuse survivors and former residents concerning more recent records.	3. Regulations may not adequately cover people's access needs nor address long term preservation of records.
4. Scheduling of record groups could be adopted within individual sectors to ensure long-term preservation.	4. It will not produce a general definition of a public record.
5. Could permit retention of records by individuals, who would act as record keepers of own information. Remove costs of long-term preservation from public purse.	5. It does not address the demand by Shaw for an urgent need to preserve historical records.
	6. It will not meet the demand for change from abuse survivors, former residents nor address the needs of other vulnerable adult groups.

3. Amend Primary Legislation: Amendment of FOISA

Pros	Cons
1. It could be tasked with defining a public record.	1. FOISA would remain limited in its scope and principally focused on access to information not records. The Act does not refer to what information should exist, and cannot address problems such as consistency of record keeping, as highlighted by Shaw.
2. It is well established, widely understood and applied across public authorities.	2. Voluntary and charitable sectors currently remain outwith existing FOI scope. Their inclusion could prove to be controversial and difficult to implement. Further work would be required to scope the possibility of extending an Order under s.5 of the Act.
3. It already includes link to good records management practice through the s.61 Code of Practice.	3. There could be an element of cost to extending the s.61 Code of Practice to voluntary and charitable sectors. Determining which bodies could be covered by any extensions of the Act could be difficult, controversial and very time-consuming. It may be strongly resisted.
4. It includes an enforcement regime option that already has links with the Keeper of the Records.	4. The s.61 Code of Practice currently has no compulsion. It serves a specific purpose and the existing SG review of the Code will leave it simply a description of best practice that is unenforceable.
5. It is specifically focused on information, therefore it can easily be amended to include provision for records.	5. Expanding FOISA provisions may not result in direct improvements in record keeping. No clear evidence to suggest that this has happened since 2005.
6. Scheduling of record groups could be adopted within individual sectors to ensure long-term preservation.	6. It does not address the demand by Shaw for an urgent need to preserve historical records.
7. Most decisions by the OSIC are applicant driven. Current investigations therefore already look to s.61 compliance.	7. Difficult to define a 'public function' and extend use of the Code to that body.
8. Receipt of public funding and implementation of standards could be conditional on the use of the s.61 Code.	

4.1 Introducing New Legislation: Scottish Public Records Act (the New Zealand Model)

Pros	Cons
1. The Public Records (Scotland) Act 1937 is over 70 years old and not fit for purpose.	1. Full and complex piece of legislation requiring the application of full Parliamentary procedure. It would be time-consuming to draft.
2. It would provide a robust definition of a public record, and include electronic records.	2. It could mean significant cost and impose additional burdens across all sectors.
3. It would underline the continuing importance of public records to safeguard citizens' rights.	3. Potentially controversial and difficult to explain the requirement. It is unlikely to gain much public support or understanding.
4. It would provide specific national provision rather than relying on sector specific solutions to plug legislative gaps.	4. It may not be seen as meeting the demand for change from abuse survivors and former residents.
5. It would ensure consistency of record keeping, and guide practice principles as to the creation, retention and disposal of public information across all sectors.	5. It could result in confusion over authorities' responsibilities for record and information provision.
6. It would provide enforcement and scrutiny models and accord a framework for compliance.	6. No systematic review yet undertaken of the NZ Act to provide definitive evidence of significant improvements in record keeping.
7. It would support FOISA enforcement.	7. Difficult to define what bodies would be included within provisions, their responsibilities and how they are defined.
8. It would address the demand by Shaw for an urgent need to preserve historical records.	8. No direct comparative costs.
9. Provides a mandate to lead, support and improve recordkeeping throughout the public sector.	
10. Provides tools and power to issue mandatory standards, and requires submission of reporting and conduct of audits in every public office.	
11. Provides strong emphasise and demand for training.	
12. Provides a stated purpose of enhancing accessibility of records to secure historical and cultural heritage and a sense of national identity.	
13. Displays political will to move forward as an integral part of the 'Acknowledgement and Accountability' process.	

4.2 Introduce New Legislation: Scottish Public Records Act 'Lite' Model

Pros	Cons
1. The Public Records (Scotland) Act 1937 is over 70 years old and not fit for purpose	1. It still requires Parliamentary procedure and time.
2. It would provide a robust definition of a public record, and include electronic records.	2. It would still introduce burdens on public authorities.
3. It would underline the continuing importance of public records to safeguard citizens' rights.	3. Less controversial it would still be difficult to explain the requirement. It is unlikely to gain much public support or understanding.
4. It would ground and support other sectoral specific solutions.	4. There would be complexity in building it alongside existing legislation and guidance.
5. It would be a less complex piece of legislation to draft than a full public records Bill.	5. It would rely on other legislation for enforcement and scrutiny.
6. It would be an over-arching legislative provision rather than sector specific thereby plugging the gaps	6. Difficult to define what bodies would be included within provisions, their responsibilities and how they are defined.
7. More detailed elements from the New Zealand model could be introduced under this model in a phased manner as secondary legislation.	

¹ Stated in the Scottish Parliament on 1 December 2004.

² *Historical Abuse Systemic Review: Residential Schools and Children's Homes in Scotland 1950-1995* (HASR), ISBN: 978-0-7559-5613-5.

³ HASR, p.130.

⁴ HASR. Recommendation 3 states that: "*The government should commission a review of public records legislation which should lead to new legislation being drafted to meet records and information needs in Scotland. This should also make certain that no legislation impedes people's lawful access to records. This review's objectives should address the need for permanent preservation of significant records held by private, non-statutory agencies that provide publicly funded services to children.*".

⁵ Adam Ingram MSP, Minister for Children and Early Years, stated the following in the Scottish Parliament on 7 February 2008: "*The Shaw report rightly makes important recommendations about records and record keeping. The first is the need for a review of public records legislation. There are clear advantages in such a review, as the existing law is more than 60 years old. We have therefore asked the Keeper of the Records of Scotland, in consultation, to review the legislation on public records in the light of the shortcomings that were exposed by Shaw*".

⁶ Barkers Social Marketing, 18 Rutland Square, Edinburgh EH1 2BH, <http://www.barkerssocialmarketing.com/>.

⁷ Various incidences of data loss and breaches of security have been reported in the media, see http://news.bbc.co.uk/1/hi/scotland/south_of_scotland/5339204.stm, http://news.bbc.co.uk/1/hi/uk_politics/7472814.stm, http://news.bbc.co.uk/1/hi/scotland/glasgow_and_west/7978368.stm.

⁸ The Public Records (Scotland) Act, 1937, 1937 Ch.43 1 Edw 8 and 1 Geo 6.

⁹ *The Laws of Scotland – Stair Memorial Encyclopaedia* Volume 19 (1990) states that "*there is in Scotland no statutory definition of "public records"*". It suggests ways in which the term "public records" could be interpreted, and types of records which could be covered.

¹⁰ Prof. H.L. MacQueen, 'Reform of Archival Legislation' *Journal of the Society of Archivists*, Vol.26, No.2, October 2005.

¹¹ Reports of the Scottish Records Advisory Council – Annual Report of the Keeper of the Records of Scotland.

¹² The Local Government etc. (Scotland) Act 1994, ch.39. Section 53 states that '*A local authority shall, in accordance with the provisions of this section, make proper arrangements for the preservation and management of [their] records ...and shall, before putting any such arrangements into effect, or making any material change to such arrangements, consult the Keeper of the Records of Scotland, and have regard to any comments which he may make on the proposed arrangements or changes.*'.

¹³ *A Scottish National Archives Policy*, prepared by the Scottish National Archives Policy Working Group for Archivists in Scotland Local Authority Working Group, Business Archives Council for Scotland, National Library of Scotland, Scottish Records Association, Scottish Records Advisory Council, Society of Archivists (Scottish Region), Scottish Record Office, and Scottish Universities Special Collections and Archives Group, 1998.

¹⁴ Report of the Scottish Records Advisory Council for 1996-97, September 1997.

¹⁵ A Scottish National Archives Policy, 1999, Principle 3 – Legislation, stated "*There should be comprehensive and consistent legislation affecting the management of records and archives. This should be regularly reviewed.*".

¹⁶ HASR, p.88. Shaw states that after 1995 emphasis on having to keep records was stressed by requiring local authorities to keep a written case record for each child it looked after. This had to include: a copy of the care plan; a copy of any report they had that concerned the child's welfare; review documents; and details of any arrangements for anyone to act on behalf of the local authority that placed the child. A case record had to be kept until the 75th birthday of the person it related to. If a child died before reaching 18, the record had to be kept for 25 years from the date of death. (S.I 1996/3262 para.12(2)).

¹⁷ HASR, p.124.

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- ¹⁸ Public Services Reform (Scotland) Bill (SP Bill 26) (introduced on 28 May 2009)
“A Bill to make provision for the purpose of simplifying public bodies, including the transfer and delegation of certain functions, the dissolution of certain bodies and provision in relation to the regulation of officers of court; to enable provision to be made for the purpose of improving the exercise of public functions and for removing and reducing burdens resulting from legislation.”.
- ¹⁹ *Lord Chancellor’s Code of Practice on the management of records issued under section 46 of the Freedom of Information Act 2000*, presented to Parliament by the Lord Chancellor in 2009.
- ²⁰ Data Protection Act, 1998 ch.29 (Schedule 1, The Data Protection Principles).
- ²¹ *Ibid*, Principle 5.
- ²² Freedom of Information (Scotland) Act 2002, 2002 ASP 13, Code of Practice on Records Management, November 2003.
- ²³ The Public Records NZ Act 2005 (Public Act 2005 No.40).
- ²⁴ Scoop.co.nz. 27 August 2008 (online report from New Zealand Parliament, (ministerial statements)).
- ²⁵ Hon. Marian Hobbs, Minister Responsible for National Library and National Archives NZ. Media Statement 14 April 2005.
- ²⁶ Patrick Power, Manager, Government Recordkeeping Programme, Archives New Zealand - Te Rua Mahara o te Kawanatanga. 01.05.2009.
- ²⁷ Archival Legislation for Commonwealth Countries. Dagmar Parer, 2001, pp. 46-56.
- ²⁸ *Ibid*, p. 31.
- ²⁹ Independent Inquiry Into Abuse at Kerelaw Residential School and Secure Unit, Scottish Government 2009, available at <http://www.scotland.gov.uk/Publications/2009/05/08090356/0>.
- ³⁰ Commission to Inquire Into Child Abuse Act 2000, number 7 of 2000.
- ³¹ Report of the Commission to Inquire Into Child Abuse, 2009, available at <http://www.childabusecommission.com/rpt/>.
- ³² Rules and Regulations for the Certified Industrial Schools in Saorstát Éireann, 1933.
- ³³ Remember I’m Still Me: Care Commission and Mental Welfare Commission joint report on the quality of care for people with dementia living in care homes in Scotland available at http://www.mwscot.org.uk/web/FILES/Publications/CC_MWC_joint_report.pdf.
- ³⁴ Between April 2005 and May 2008 abandoned records containing detailed patient information were discovered at the decommissioned Strathmartine Hospital site in Dundee. A report into the incident found that NHS Tayside had been repeatedly warned about clearing records but had failed to act. In July 2008 NHS Quality Improvement Scotland issued a report containing a number of recommendations, and in November 2008 the Information Commissioner found the board guilty of breaching the Data Protection Act. In a similar incident NHS Lanarkshire were also found guilty of breaches of the Act in 2008 after x-rays, photographs and other documents marked “confidential” were found by an amateur photographer in the former Law Hospital in Carluke.
- ³⁵ HASR, chapter 6, Former Residents’ Experiences.
- ³⁶ <http://www.incaresurvivors.org.uk/>.
- ³⁷ HASR, p.103.
- ³⁸ National Care Standards: Care Homes for Children and Young People, 2005; National Care Standards: School Care Accommodation Services, 2005.
- ³⁹ The Regulation of Care (Requirements as to Care Services) (Scotland) Regulations 2002.
- ⁴⁰ Data Protection Principle 5: Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes.

⁴¹ Parker, E. *Managing Your Organisation's Records*. London: Library Association, 1999. p22.