The Victims and Witnesses (Scotland) Bill was introduced in the Scottish Parliament on 6 February 2013 by the Cabinet Secretary for Justice Kenny MacAskill MSP. The Bill seeks to make provision for:

- rights and support for victims and witnesses (primarily in relation to criminal cases)
- the establishment of a National Confidential Forum (functioning as a committee of the Mental Welfare Commission) to provide a forum for adults who were in institutional care as children, including those who were abused, or who witnessed such abuse, whilst in such care

This briefing provides information on the background to the Bill and the key proposals contained therein.
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EXECUTIVE SUMMARY

- The Victims and Witnesses (Scotland) Bill seeks to make provision in two main policy areas – improving and increasing rights and support for victims and witnesses (primarily in relation to criminal cases); and the establishment of a National Confidential Forum to provide a forum for adults who were in institutional care as children, including those who were abused, or who witnessed such abuse, whilst in such care.

- Key proposals relating to victim and witnesses include, amongst other things, giving victims and witnesses a right to certain information about their case; creating a duty on organisations and agencies within the criminal justice system to set clear standards of service for victims and witnesses; creating a presumption that certain categories of victim are vulnerable and giving such victims the right to utilise special measures when giving evidence; introducing a victim surcharge which will see offenders contribute to the cost of supporting victims; and introducing restitution orders which will contribute to the cost of specialist, non-NHS support services which assist in the recovery of police officers who have been assaulted in the course of their duty.

- The establishment of a National Confidential Forum (NCF) will create an opportunity for adults who were placed in institutional care as children to recount their experiences, including abuse, in a confidential, non-judgemental and supportive setting. It is intended that the NCF will contribute to the improvement of health and wellbeing for people placed in institutional care as children by offering acknowledgement of their experiences, including experiences of abuse and neglect.

- The key functions of the NCF are to receive and listen in private, to the experiences of adults placed in institutional care as children and to offer acknowledgement of those experiences; to contribute to the prevention of abuse of children placed in institutional care in the future by making proposals to inform policy and practice based on the experiences recounted in hearings of the NCF; and to signpost services to participants and their families which can offer support, advocacy, advice and information before during and after testimony is given.
INTRODUCTION

The Victims and Witnesses (Scotland) Bill was, together with explanatory notes and a policy memorandum, introduced in the Scottish Parliament on 6 February 2013 by the Cabinet Secretary for Justice Kenny MacAskill MSP. There are two main policy areas in the Bill: reforms to the justice system relating to victims and witnesses; and the establishment of a National Confidential Forum for adults placed in institutional forms of care as children.

The Parliament’s Justice Committee was designated as lead committee on the Bill and will consider proposals in the Bill relating to victims and witnesses. The Health Committee was designated as a secondary committee and will consider the proposals in relation to the National Confidential Forum.

Key proposals in relation to victims and witnesses include:

- creating a duty on organisations within the justice system to set clear standards of service for victims and witnesses
- giving victims and witnesses a right to certain information about their case
- creating a presumption that certain categories of victim are vulnerable and giving such victims the right to utilise special measures when giving evidence
- introducing a victim surcharge so that offenders contribute to the cost of supporting victims
- introducing restitution orders which will allow the courts to require that offenders who assault police officers pay to support specialist non-NHS services which assist in the recovery of such officers

The Bill also provides for a National Confidential Forum (NCF) to be established in order to give adults who were placed in institutional care as children the opportunity to recount their experiences, including experience of abuse, in a confidential and non-judgmental setting, to an independent panel.

The creation of the NCF is a central component of the Government’s Survivor Scotland Strategy which seeks to improve the health and wellbeing of all survivors of abuse in childhood. The Forum will operate on a national basis, independent of Government, and is based on the experience of the ‘Time To Be Heard’ Pilot Forum which gave former residents of Quarriers Village the opportunity to recount their experiences of being in care to a confidential panel. The Bill will place the NCF within a legal framework, enabling statutory protection to be offered to participants.

The policy memorandum to the Bill provides extensive background information on both the formulation of policy with regard to victims and witnesses, and the NCF. A summary of that information in relation to victims and witnesses is provided below with further detail on the background to the NCF provided later in this briefing.
Scottish Strategy for Victims

The Scottish Strategy for Victims was published in 2001. It set out an action plan which was based on three core principles - that victims should be provided with generic and case specific information; that they should receive appropriate support; and that they should have their voice heard. In 2005, the National Standards for Victims of Crime set out the level of service that victims and witnesses should expect in their dealings with the criminal justice and children’s hearing systems.

Making Justice Work

The Making Justice Work (MJW) programme was set up in 2010 by the Scottish Government and brings together a range of reforms to the structure and processes of the courts, access to justice and tribunals and administrative justice. It has been developed and is being delivered with partners across the justice system, including the Crown Office and Procurator Fiscal Service (COPFS); Scottish Court Service; Scottish Legal Aid Board; Scottish Tribunals Service; Judicial Advisers; and the Association of Chief Police Officers in Scotland.

Five major projects form the MJW programme. Improving the experience of victims and witnesses is a key objective in the MJW programme (forming part of project 2 below) and the Bill is one part of that on-going work:

MJW Project 2: Improving procedures and case management - To improve the procedures of the justice system and to introduce active and effective management of cases, in order to minimise delays and adjournments to ensure the most cost effective use of precious court time.

EU Directive 2012/29/EU

In late 2012, an EU Directive establishing minimum standards on the rights, support and protection of victims of crime (2012/29/EU) (the EU Directive) was finalised. It is part of a package of measures which aim to strengthen the rights and protection of victims of crime, especially in court proceedings and includes a proposal for a regulation on mutual recognition of civil protection measures. The objectives of the EU Directive are to ensure that all victims of crime receive appropriate protection and support, are able to participate in criminal proceedings and are recognised and treated respectfully, sensitively and professionally without discrimination in all contacts with any public authority.

The Directive is intended to ensure that, in all EU countries:

- victims are treated with respect and police, prosecutors and judges are trained to properly deal with them
- victims get information on their rights and their case in a way they understand
- victim support exists
- victims can participate in proceedings if they want and are helped to attend the trial
- vulnerable victims are identified – such as children, victims of rape, or those with disabilities – and are properly protected
- victims are protected during the police investigation and court proceedings
While Scotland already complies with much of the EU Directive, both legislative and non-legislative changes to the justice system will be required to ensure compliance and the Scottish Government is taking this forward in discussions with justice partner organisations - in particular, the Scottish Court Service and the Crown Office and Procurator Fiscal Service.

With regard to policy on witnesses, much of the work in recent years has focused on implementing the Vulnerable Witnesses (Scotland) Act 2004 (“the 2004 Act”) which was phased in between 2005 and 2008. The 2004 Act makes provision for the use of special measures – such as a screen to prevent the witness seeing the accused or CCTV links to give evidence remotely – for the purpose of taking evidence from children or other vulnerable witnesses. It has provided a much greater focus on the needs of witnesses (including victims) when giving evidence, helping to identify and explore vulnerability, considering the impact this may have on their ability to give their best evidence and what special measures and/or additional support will make a difference.

**Consultation**

In May 2012, the Scottish Government launched the [Making Justice Work for Victims and Witnesses consultation](https://www.gov.scot/consultations/justice-witnesses/) outlining its key proposals for the improvement of services for victims and witnesses. The consultation posed a series of 54 questions in relation to the proposals and received 77 responses (59 from organisations and 18 from individuals). Key themes emerging from the responses included:

- the need for access to information that is consistent, clear and accessible to all victims and witnesses
- support for information sharing between agencies, but also concerns over sharing information and the need to take into account data protection issues
- the need to ensure that all relevant agencies have access to adequate training, support and resources
- a need to ensure that victims’ and witnesses’ expectations are managed and that they understand that information they provide is only one element of the process
- a need to ensure that offenders’ rights are recognised and that a balance between reparation and rehabilitation is managed effectively
KEY PROPOSALS IN THE BILL

VICTIMS AND WITNESSES

Statement of General Principles

The Scottish Government has identified a number of key principles which it considers to be vital to improving the experience of victims and witnesses throughout their involvement with the criminal justice system. These principles are set out on the face of the Bill:

- that a victim or witness should be able to obtain information about what is happening in an investigation or proceedings concerned with their case
- that the safety of a victim or witness should be ensured during and after the investigation and proceedings
- that a victim or witness should have access to appropriate support during and after the investigation of proceedings
- that, in so far as it would be appropriate to do so, a victim or witness should be able to participate effectively in the investigation and proceedings

The Bill provides that the following persons/bodies must have regard to these principles when carrying out their statutory functions (in so far as these relate to victims and witnesses): the Lord Advocate; the Scottish Ministers; the chief constable of the Police Service of Scotland; the Scottish Court Service; and the Parole Board for Scotland. The explanatory notes to the Bill state that, in relation to the Scottish Ministers, the duty to have regard to the principles will primarily fall on the Scottish Prison Service (SPS). As a result of its legal status as an Executive Agency, the duty has to be placed on Scottish Ministers generally.

Duty on Justice Organisations to set out Standards of Service

The Bill also requires those persons/bodies mentioned above to set and publish standards in relation to carrying out any functions in relation to a person who is or appears to be a victim or witness in relation to a criminal investigation or criminal proceedings, and also to set out a procedure for making and resolving complaints about the way in which those functions are carried out.

The duty placed upon the Lord Advocate only applies in relation to the investigation and prosecution of crime; and the duty on the Scottish Ministers only applies in relation to functions relating to prisons and young offenders’ institutions and the persons detained in them. The purpose of these restrictions is to identify the COPFS and SPS as the particular bodies to which this duty applies. The policy memorandum points out that as the COPFS is a Ministerial Department the actual duty will be placed on the Lord Advocate in relation to functions relating to the investigation and prosecution of crime. Similarly, as the SPS is an Executive Agency, the actual duty will be placed on the Scottish Ministers in relation to functions relating to prisons and young offenders institutions and the persons detained in them. However, both the COPFS and SPS will be expected to set out distinct standards of service and a complaints procedure (Policy memorandum, para 58).
In its response to the Making Justice Work consultation (the MJW consultation – see above), Victim Support Scotland (VSS) stated that the development of minimum quality standards for services to victims and witnesses was one of the main calls in its manifesto No Going Back, which was published in advance of the 2011 Scottish parliamentary election. VSS stated that it agreed with the assessment in the consultation that such standards would help to clarify exactly what victims and witnesses could expect from the various organisations and agencies they come into contact with. The VSS submission went on to say that by making the introduction of standards a statutory requirement but not defining what those standards should be, would enable new services to be developed and any service delivery to be amended and adjusted in response to new demands and extended responsibilities (Scottish Government 2012a).

In its response to the consultation, the Scottish Court Service stated that it agreed that it was necessary to ensure that victims and witnesses have a clear understanding of the services and support they can expect. It also noted that an important issue in relation to setting out standards of services would be the interaction between the standards adopted by individual justice organisations and how these ensure a coherent, “user-focussed” approach, as victims and witnesses progress through the justice process.

Access to Case Specific Information

Article 6 of the EU Directive requires that the following information be made available to victims of crime:

- any decision not to proceed with or to end an investigation or not to prosecute an alleged offender and the reason for that decision
- the time and place of any trial
- the nature of any charges
- any final judgment in a trial and the reasons for that decision (except in the case of a jury decision or a decision where the reasons are confidential)
- the current state of proceedings
- notification that a person in custody has been released or has escaped and any measures taken for the protection of the victim

The policy memorandum to the Bill points out that while much of this information is currently available, there is no right for individuals to access such information as a matter of course. The Bill therefore places a duty on the COPFS, the Scottish Court Service and the police to provide certain information to victims and witnesses about their case, on request. These bodies have been selected as they will hold most of the practical information which victims and witnesses are likely to find useful. Information will also be available to a person who has given a statement in relation to a case to the police or the procurator fiscal.

The information to be provided will initially be that covered by Article 6 of the EU Directive, with the exception of information relating to persons in custody as this will be covered by an extension to the existing Victim Notification Scheme (see below).

The Scottish Government also intends to examine the possibility of building on the right to information by carrying out a feasibility study (in 2013) on creating an online information hub which could gather information from various organisations within the criminal justice system, and which would allow direct access to specific data at appropriate times by individual victims.
and witnesses. The policy memorandum to the Bill points out that such a hub could provide case-specific information but also more generic information about the criminal justice system.

In its response to the MJW consultation, the COPFS welcomed the Government’s plans to commission the feasibility study on creating an online information hub, but cautioned that it was important to remember that information is only of use if it can be easily understood and that the Government may wish to reflect on the importance of plain language by stating this as a principle within the legislation (Scottish Government 2012a).

The Scottish Centre for Crime and Justice Research commented that while an information hub would be useful for victims and witnesses, it would need to include post-case information and, potentially, pre-release information for victims where offenders are returning back to the community in which they reside, particularly in relation to very serious offences (Scottish Government 2012a).

The Victim Notification Scheme

Currently, under provisions contained in the Criminal Justice (Scotland) Act 2003 (the 2003 Act), victims have a right, in certain criminal cases, to receive information about the release of an offender (and some other relevant details) through the Victim Notification Scheme (VNS). The VNS came into force on 1 November 2004, providing victims of offenders who had been sentenced to four years or more with the right to receive information about the offender’s progression within prison and eventual release. On 15 May 2008, the VNS was extended to include offenders who have been sentenced to 18 months or more. Victims can apply to join the scheme regardless of when the crime was committed. The scheme has two parts and victims can opt to receive information under either or both parts.

Part 1 entitles victims to receive information about the offender’s:

- release
- date of death, if they die before being released
- date of transfer, if they are transferred to a place outwith Scotland
- eligibility for temporary release (for example, for training and rehabilitation programmes or home leave in preparation for release)
- escape or absconding from prison
- return to prison for any reason

Part 2 of the scheme entitles victims to information about the offender being considered either for parole or temporary release on Home Detention Curfew (HDC). When the Parole Board for Scotland is due to consider the case affecting the victim, the victim will be given the chance to send written comments to the Board. Victims can also send written comments to the Scottish Prison Service when it is considering a prisoner’s release on HDC. The victim will be told whether the Board recommends or directs the release of the offender and if the prisoner is released on licence, of any conditions attached to that licence which relate to them or their family.

After sentencing, the Procurator Fiscal or Victim Information and Advice officer provides victims with a form which should be completed and sent to the Scottish Prison Service (SPS) if the above information is required. When the offender is due to be released, the SPS will send a letter informing the victim of the date of release. The SPS cannot give details about an
offender’s whereabouts after their release. Victims can register for the VNS at any time until the offender reaches the point in the sentence when they are due to be released.

The VNS is not currently open to all victims of crime, only those where the offender has committed an offence set out in the Victim Notification (Prescribed Offences) (Scotland) Order 2004 and received a custodial sentence of 18 months or longer. The EU Directive requires simply that victims should be able to access information about the release and escape of prisoners and while that is, essentially, the purpose of the VNS, the Scottish Government considers that it should be extended slightly to better reflect the Directive. The Directive does not specify any threshold on the length of sentence before victims should have the right to be informed although it does suggest that cases involving minor offences should be excluded.

The Bill seeks to amend the 2003 Act to make changes to the VNS in relation to: (a) a victim’s ability to make representations when offenders are first eligible for temporary release; (b) the list of prescribed offences set out in the 2004 Order; and (c) the ability to make oral representations to the Parole Board for Scotland in the case of life sentence prisoners who are due to be considered for release.

Temporary release is part of the process of managing a prisoner’s progress through the prison estate and preparing them for release and reintegration into the community. The SPS writes to the victim and the letter invites the recipient to contact SPS if they wish to discuss the case. While the victim is free to contact SPS with any concerns, they are not expressly invited to make representations in the same way that victims are in relation to the release of prisoners on licence.

The Scottish Government believes that the ability of victims to make representations about the release of prisoners should not be limited in this way and that the current ability to make formal written representations should be extended to include eligibility for temporary release as well as release on licence. Under provisions in the Bill, victims will be given the right to make written representations when prisoners are first eligible for temporary release, and will be able to raise any concerns they have about the conditions that are placed on offenders upon release.

The Bill also seeks to remove the list of prescribed offences set out in the 2004 Order so that victims of all offences will potentially be eligible. In addition, the Scottish Government intends to lower the sentence threshold (using existing order-making powers) so that victims of offenders sentenced to 12 months or more, rather than the current 18 months or more, are eligible to participate in the VNS. The policy memorandum to the Bill indicates that sentences of less than 12 months are considered to be in relation to relatively minor offences and that the VNS should not be extended to cover these (Policy memorandum, para 52).

As pointed out above, the VNS allows certain victims of crime to make written representations to the Parole Board for Scotland (the Board) when the offender is being considered for release and/or when licence conditions are being set. When coming to a decision on release or licence conditions, the Board considers representations along with other relevant information, and if a licence condition is imposed which relates to the victim’s representations, they will be informed of that decision.

While the Board does take these representations into account, it is primarily concerned with the assessment of risk to the public should a prisoner be released. The Scottish Government has stated that the intention behind the policy of allowing victims of crime to make oral representations is that they should feel more involved in the criminal justice process, with the option of making representations in person if they feel that this would enable them to better convey their feelings and views (Policy memorandum, para 112).
The Bill therefore seeks to allow certain victims who are registered on the VNS to make oral representations to a Board member, who is not dealing with the convicted person’s case as respects their release, if they so wish. It is intended that the Board member will convey any concerns the victim has to those members of the Board comprising the tribunal considering the case for release. For the time being, the Bill provides that oral representations in this manner will only apply in the case of life prisoners although this may be extended by order by the Scottish Ministers to include other categories of prisoner.

In its response to the MJW consultation on this issue, the COPFS stated that the VNS is currently operated on an opt-in basis and the Government may wish to consider that if there is a high level of participation in the scheme, it may be more appropriate to operate it on an opt-out basis (Scottish Government 2012a).

The Parole Board for Scotland stated, in its response, that making provision for victims to meet a member of the Board will provide an opportunity to explain to victims what the basis of decision making is. The Board’s response pointed out that, at present, the majority of written representations made by victims oppose the release of prisoners on the basis that not enough time has been served in custody. Whilst the Board recognises that this is an understandable view from the perspective of victims, it is not the Board’s responsibility to consider whether the punishment period of an offender’s sentence has been sufficiently long. The Board’s remit is simply to consider whether the risk to the public will be manageable if the prisoner is released. The Board expressed concern that under current arrangements, victims may well feel that their views have not been taken into account and a personal meeting may prove to be of value in assisting the victim’s understanding of the Board’s remit and responsibilities (Scottish Government 2012a).

**Improving Support for Vulnerable Witnesses**

The Vulnerable Witnesses (Scotland) Act 2004 (the 2004 Act) deals with evidential and procedural matters for vulnerable witnesses (including victims) giving evidence in both criminal and civil proceedings. With the exception of one section, the Bill deals with matters in criminal proceedings.

The 2004 Act sets out special measures available to vulnerable witnesses and the procedures to be followed in criminal proceedings to enable such measures to be used. It defines a “vulnerable witness” as being either:

- a child (generally a person under 16 at the time the complaint or indictment is served on the accused)
- an adult witness, the quality of whose evidence may be diminished either as a result of a mental disorder or due to fear/distress associated with giving evidence

Special measures include:

- taking of evidence by a commissioner
- use of a live television link
- use of screen

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1 Section 18 of the Bill amends the definition of a “child witness” in civil proceedings to include anyone under the age of 18 rather than 16, and inserts an order-making power to allow Scottish Ministers to extend the definition of vulnerable witness to include specified types of witnesses, and witnesses in specified types of actions.
use of a supporter

giving evidence in chief in the form of a prior statement

such other measures as the Scottish Ministers may, by order made by statutory instrument, prescribe

The policy memorandum to the Bill states:

“Being a witness is an important civic duty but giving evidence in court can be an unfamiliar and uncomfortable experience and vulnerable witnesses may need extra help to give their best evidence. Witnesses are a crucial part of the justice system and if witnesses are to come forward and report what they saw or heard, they must feel confident that their contribution will be worthwhile, valued and supported. The aim [of the Bill] is to ensure vulnerability is identified and to widen access to special measures for vulnerable witnesses so that they can give their best evidence while, at the same time, ensuring that the justice process is fair to the accused.” (para 61)

The Bill contains a number of reforms to improve the identification and support available to enable vulnerable witnesses to give their best evidence and these are outlined below.

As outlined above, the definition of “child witness” in relation to special measures only includes those up to age 16 (unless they are witnesses in human trafficking cases, in which case it includes 16 and 17 year olds). The Bill will bring the definition of child witness into line with the rest of the UK and provide that all those under the age of 18 will automatically be entitled to use special measures to assist them in giving evidence. The EU Directive also defines child witnesses for the purposes of criminal proceedings as those below 18 years of age.2

The Bill also amends the definition of vulnerable witness in criminal proceedings to include victims of sexual offences, domestic abuse, human trafficking, or stalking (for the purposes of the Bill identified as “deemed vulnerable witnesses”). Although the Scottish Government accepts that vulnerability cannot be identified solely by virtue of what offences witnesses may have been the victims of, and that not all victims of these offences will be vulnerable, the nature of these crimes is such that the Government considers it appropriate to create a presumption in criminal proceedings that relevant victims will be considered to be vulnerable and entitled to use special measures when giving evidence. Under the Bill, deemed vulnerable witnesses will be automatically entitled to the use of certain special measures known as standard special measures – these are the use of a live television link, a screen (to avoid the witness seeing the accused whilst giving evidence in court) and the use of a supporter.

The Bill includes provisions to allow any party to criminal proceedings involving child or deemed vulnerable witnesses to object to a notice requesting special measures. An “objection notice” must detail the special measures that are considered to be inappropriate along with any reasons for an objection to the measures being used. An objection notice must be lodged within seven days of a vulnerable witness notice being lodged (although this period may be extended with the permission of the court).

The Bill also seeks to provide that any witness may be considered to be vulnerable following an individual assessment. In most cases, it will be the COPFS who will be citing the witness and who will be responsible for carrying out individual assessments of each of their intended witnesses to determine whether they are vulnerable and if they are, to submit an application to the court specifying which special measures would be appropriate in assisting them in giving evidence. It will be for the court to determine whether such a witness is vulnerable and if the

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2 The Bill also amends restrictions on reporting court proceedings involving children so that they apply to persons under the age of 18 rather than 16 which is currently the case.
measures suggested are the most appropriate. Factors which may be taken into account when making assessments include the nature and circumstances of the alleged offence; the nature of the evidence likely to be given; the person’s age and maturity; and any other matters which the court may consider to be relevant such as sexual orientation, social and cultural background, and any physical disability or impairment. Again, the Bill provides for an objection notice to be lodged against the application for special measures for a witness who is not a child or deemed vulnerable witness.

The following table (taken from the policy memorandum to the Bill) sets out the current position in relation to automatic entitlement to standard special measures (SSMs) and special measures (SMs) and what the position will be should the provisions of the Bill as introduced become law:

<table>
<thead>
<tr>
<th>Current position</th>
<th>Position after Bill provisions come into force</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Automatic entitlement to SSMs</strong></td>
<td><strong>Automatic entitlement to SSMs</strong></td>
</tr>
<tr>
<td>Children under age 16 (under 18 in human trafficking cases) have an automatic entitlement to use SSMs, which are as follows:</td>
<td>Children under age 18, victims of sexual offences, domestic abuse, human trafficking and stalking will have an automatic entitlement to use SSMs, which will be as follows:</td>
</tr>
<tr>
<td>• a live TV link where the witness is in another part of the court building</td>
<td>• a live TV link</td>
</tr>
<tr>
<td>• a screen</td>
<td>• a screen</td>
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<tr>
<td>• a supporter in conjunction with either of the above</td>
<td>• a supporter</td>
</tr>
<tr>
<td>In addition, the party citing such a witness can apply to the court to use the following SMs:</td>
<td>In addition, the party citing such a witness will be able to apply to the court to use the following SMs:</td>
</tr>
<tr>
<td>• a live TV link outwith the court building</td>
<td>• giving evidence in chief in the form of a prior statement</td>
</tr>
<tr>
<td>• a supporter as a stand alone measure</td>
<td>• taking evidence by commissioner</td>
</tr>
<tr>
<td>• giving evidence in chief in the form of a prior statement</td>
<td>• a closed court</td>
</tr>
<tr>
<td>• taking evidence by commissioner</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Applications for SMs</th>
<th>Applications for SMs</th>
</tr>
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<tbody>
<tr>
<td>Witnesses who do not fall within the description above are considered to be vulnerable witnesses:</td>
<td>Witnesses who do not fall within the description above will be considered to be a vulnerable witness:</td>
</tr>
<tr>
<td>• where there is a significant risk that the quality of their evidence will be diminished by reason of mental disorder (within the meaning of s328 of the Mental Health (Care &amp; Treatment) (Scotland) Act 2003), or fear or distress in connection with giving evidence at the trial</td>
<td>• where there is a significant risk that the quality of their evidence will be diminished by reason of: mental disorder (within the meaning of s328 of the Mental Health (Care &amp; Treatment) (Scotland) Act 2003), or fear or distress in connection with giving evidence at the trial</td>
</tr>
<tr>
<td>The party citing a vulnerable witness can apply to use the following SMs:</td>
<td>• where there is considered to be a significant risk of harm to the person as a result of giving evidence (this will be assessed in the first instance by the party citing the witness, who will conduct an individual assessment</td>
</tr>
</tbody>
</table>
- a supporter
- giving evidence in chief in the form of a prior statement
- taking evidence by commissioner

Use of all SMs is at the discretion of the court

taking account of their personal characteristics, the type or nature of the crime and the circumstances of the crime

The party citing a vulnerable witness will be able to apply to use the following SMs:
- a live television link
- a screen
- a supporter
- giving evidence in chief in the form of a prior statement
- taking evidence by commissioner
- a closed court

Use of all SMs will be at the discretion of the court

The accused in a case, if classed as vulnerable, will also be entitled to use special measures (but not a screen or a closed court) to assist them to give their evidence.

The Scottish Government has stated that both parties to a case should be able to object to a vulnerable witness application requesting special measures if they consider that such a request is inappropriate in the circumstances. To that end, the Bill provides that objections to special measures can be lodged for both child and deemed vulnerable witnesses, and other vulnerable witnesses. In all cases, objection notices must be lodged within seven days (or later with the permission of the court) of a vulnerable witness notice being lodged, and must detail the special measures that the party considers inappropriate, along with the reasons for their objection.

The Bill also provides Scottish Ministers with powers to create additional special measures to be used for a temporary period and also to add new special measures and amend or delete existing special measures. Orders made by the Scottish Ministers in both circumstances would be subject to the affirmative procedure. With regard to temporary additional special measures, the Bill provides that an order for such measures must specify the area in which the additional measures may be used; the period during which they may be used; and procedures to be followed when such measures are to be used. It is envisaged that this power may be used to pilot such measures before taking a decision on whether they should be introduced more widely.

In their response to the MJW consultation, the Sheriff’s Association stated that if closed courts were to be included as a special measure, the likelihood would be that a significant number of lay witnesses would prefer to give evidence in such an environment. The Association pointed out that as provisions in the Bill were seeking to extend the definition of vulnerable witnesses that this may result in evidence being heard from a significant number of witnesses in private, which would tend to undermine the principle that court proceedings are heard in public (Scottish Government 2012a).

In its response to the MJW consultation, the Faculty of Advocates stated that automatic entitlement to the use of standard special measures should be restricted to children. The

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3 Policy memorandum, para 80.
Faculty considered that with adult witnesses, the vulnerability should relate to an individual’s ability to give evidence at the date of the trial (Scottish Government 2012a).

In contrast, Scottish Women’s Aid stated that they were pleased that the Scottish Government had acknowledged that victims of sexual offences and domestic abuse have, by definition, a greater need for protection in giving evidence due to the very personal nature of such crimes and the relationship between the accused and the victim in many of these cases:

“Women experiencing domestic abuse may feel distressed and humiliated by having to give evidence about their lives and the nature of the abuse, which may involve personal and sensitive details being disclosed and discussed in a public forum in the presence of the abuser. As a consequence of the dynamics of domestic abuse and the power and control the abuser has exercised over them, they may feel intimidated and threatened by the accused’s very presence in the court, which will impact on their ability to give their best evidence freely and without feeling duress.” (Scottish Government 2012a)

Duty to have Regard to Guidance on Joint Investigative Interviews

The policy memorandum to the Bill states:

“Joint Investigative Interviews (JIIs) with children are planned interviews undertaken with a child by a trained police officer and social worker to establish the facts regarding a potential crime or offence against the child. The JII provides a structured opportunity to hear the child’s account of what happened. From a police perspective the purpose of the interview is to establish whether a crime has been committed and, from a social work perspective, to gather evidence to determine the source and level of any risk of harm and to assess whether that child (or any other child) is in need of protection.” (Policy memorandum, para 99)

Revised Guidance on Joint Investigative Interviewing of Child Witnesses in Scotland, published in 2011, seeks to promote best practice for both police and social workers tasked with undertaking such interviews and emphasises that the best interests of the child must be the paramount consideration when making decisions about interviewing children. The guidance also makes clear that such interviews should be visually recorded unless there is a good reason why this would not be appropriate (eg where such recording was a feature of the alleged offence in question).

While the existing Guidance is being used, it currently has no statutory basis and the Scottish Government considers that it should be placed on a statutory footing to ensure both its effectiveness and to reflect particular requirements set out in the EU Directive. To that end, section 4 of the Bill provides that police officers and social workers must have regard to such guidance issued by Scottish Ministers when carrying out JIIs with a child witness under the age of 18 in relation to criminal proceedings (or a matter which may lead to criminal proceedings). The Bill also provides Ministers with the power to modify the list of persons (ie police officers and social workers) to whom the obligation applies.

Sexual Offences – Right for Victim to Choose Gender of Interviewer

The EU Directive requires that all interviews with victims of sexual violence, gender-based violence or violence in close relationships (unless the interviews are conducted by a public prosecutor or judge), are conducted by a person of the same sex, if the victim wishes. It is recognised that interviews in such circumstances may be particularly distressing, particularly when the crime involved is of a very personal nature.
The Bill proposes that a victim should have the right to choose the gender of any police officer ("an investigating officer") who has reason to interview them in the course of criminal proceedings where certain offences are alleged. Although the Bill provides that the provision only applies to interviews by police officers, the Scottish Ministers would be given the power to prescribe other persons as investigating officers by order. The types of offences where a victim will be able to choose the gender of their interviewer are sexual offences; human trafficking; domestic abuse; and stalking. Again, the Bill provides that Ministers may modify the list of the types of offences to be included.

The Bill contains an exception to the general right for a victim to specify the gender of an interviewer where complying with the right would be likely to prejudice a criminal investigation, or where it would not be reasonably practicable to do so. The Bill also provides that failure to comply in giving the victim the opportunity to specify the gender of the interviewer in relation to a particular relevant interview has no effect on the validity of any criminal proceedings to which that interview relates.

In their response to the MJW consultation, Scottish Women’s Aid commented that due to the nature of sexual offences, very personal and sensitive details about a woman’s life and the offence will be discussed, and given the low level of reporting of sexual offences, they support any measure that would have the consequence of increasing reporting and making women feel more safe and secure in doing so (Scottish Government 2012a).

In its response, Victim Support Scotland reiterated the points put forward by Scottish Women’s Aid and also suggested that the proposal be extended to include a right for victims in sexual offence cases to choose the gender of a doctor tasked with carrying out any examinations following such an offence. VSS stated that since police medical examinations are also undoubtedly a source of great distress for victims, this is likely to be compounded for many victims should a doctor be the same sex as an accused (Scottish Government 2012a).

**Victim Statements**

From 1 April 2009, victims of serious crimes (or in some cases their relatives) have been able to inform the court of any physical, emotional or financial impact which a crime has had on them. A victim statement is a written document provided to the court to help inform its approach to sentencing an offender. Arrangements for the submission of victim statements by the prosecution are set out in section 14 of the Criminal Justice (Scotland) Act 2003.

The Bill provides for more flexibility in relation to when a victim statement can be submitted to the court, stating that this can be done at any time after the prosecutor moves for sentence, or the accused pleads guilty or is found guilty, but before sentence is passed. This seeks to ensure that if, for example, the statement is not available at the time of a guilty plea, this would not prejudicially affect the victim in the case.

The Bill also amends the arrangements for victim statements in relation to children under the age of 14. Currently, children under this age are entitled to have a victim statement made on their behalf by a carer, only if they are the direct victim of a crime. The Bill seeks to change this and provide that a statement may be made by a carer on behalf of a child under the age of 14 who is not the direct victim of a crime (eg a child whose parents have been killed).

**Compensation Orders**

Compensation orders can be imposed by the courts in respect of things such as personal injury, loss or damage caused to the victim. Such orders involve payment from the offender to the victim. Currently, there is no obligation for the court to consider whether it should make a
compensation order in cases where it could make such an order. The Bill seeks to amend the existing legislation in this area, providing that in any case where it would be competent for the court to make a compensation order it must consider whether to do so.

**Introduction of Victim Surcharge**

As outlined above, the courts can make direct compensation orders to victims. However, in circumstances where there is no identifiable victim, this would not be appropriate. The Scottish Government has stated that, regardless of whether or not the court imposes a direct compensation order, offenders should be made more accountable for any harm or damage caused by their actions and should contribute to supporting the needs of victims of crime more generally (Policy memorandum, para 126).

Provisions in the Bill will require the courts to impose a victim surcharge on offenders who are subject to any sentence prescribed by the Scottish Ministers in regulations. Scottish Ministers will also set out in regulations which offences are/are not covered. A victim surcharge is not to be imposed where a restitution order has been imposed (see below). Scottish Ministers will, again by regulations, set out the amount of the victims surcharge which may be different for different types of offence, etc – this would, for example, allow a scale to be established to reflect different sentences imposed. Scottish Ministers may also set out other circumstances where a court is not to impose a victim surcharge. Regulations made by the Scottish Ministers in relation to all aspects of the victim surcharge would be subject to affirmative procedure.

The Bill seeks to establish a “Victim Surcharge Fund” (the VSF) to help meet the immediate needs of victims of crime. The Bill provides that the VSF can only be used to make payments to victims or to those who provide or secure the provision of services to victims. It provides that support services in relation to victims means any type of service or treatment which is intended to benefit the physical or mental health, or well-being of victims. Such services might include financial assistance for funeral costs, to increase security in the home or replacement of essential furnishings damaged during the course of an offence.

Where an offender incurs more than one financial penalty in relation to the same proceedings, payments must be made in the following order: payment towards any direct compensation order to the victim, then to the victim surcharge and then to a fine.

The Scottish Government has indicated that no final decisions have been taken on how the amount of the surcharge will be calculated, although the policy memorandum to the Bill sets out a model which may be used, linking the amount of the surcharge to the amount of the court fine by way of a scale set out in secondary legislation:

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In its response to the MJW consultation, Victim Support Scotland argued that a victim surcharge should be applied to all people convicted of an offence, including those given “out-of-court” disposals (presumably those offenders who are in receipt of a direct measure following an offence such as a fiscal fine) (Scottish Government 2012a).

In its response, the Scottish Court Service stated that the introduction of a victim surcharge would most likely result in substantial changes to SCS information technology systems and administrative procedures which would be likely to involve increased resources in these areas being required (Scottish Government 2012a).

### Introduction of Restitution Orders

The Bill seeks to introduce restitution orders (alongside other penalties such as imprisonment, fines, etc) for those who are convicted of the statutory offence of assaulting a police officer/police staff as set out at section 90(1) of the Police and Fire Reform (Scotland) Act 2012 (the 2012 Act). The Bill provides that such orders will not exceed the prescribed sum of £10,000 as set out in section 225(8) of the Criminal Procedure (Scotland) Act 1995 and also provides that this amount may be amended by Scottish Ministers (under regulations subject to the negative procedure).

The policy memorandum to the Bill states that in comparison with other forms of employment, the police are at disproportionate risk of being assaulted while carrying out their duties – a risk which is reflected in the arrangements that exist to support those who have been assaulted (eg the Police Benevolent Fund and Police Treatment Centres which are paid for by the police themselves). Even where there is not a direct compensation order imposed following an assault, the Scottish Government is keen to ensure that individuals who carry out such assaults are punished in such a way that means they contribute to the care and support their actions make necessary for the police (Scottish Government 2012a).

A restitution order would contribute to the cost of providing services which care for, treat and rehabilitate police officers, where they have been victims of the above mentioned statutory offence, but would not replace compensation orders for criminal injuries to individual police officers or staff and would not prevent such individuals from seeking redress and compensation through the civil courts. They would, however, replace the victim surcharge discussed above.

Restitution orders would be collected by the Scottish Court Service and the receipts credited to a “Restitution Fund” which would initially be administered by the Scottish Government.

There is a possibility that an offender convicted of an offence under section 90(1) of the 2012 Act could have a sentence imposed which would include three financial penalties: a restitution order; a compensation order; and a fine. It is likely that there will be occasions where an offender does not have sufficient means to pay all three penalties and as such, the Bill provides that the court should, in such circumstances, move to imposing a compensation order, then a restitution order and finally a fine. Similarly, where a court considers that two financial penalties should be imposed i.e. a restitution order and either a compensation order or a fine, and that the offender does not have sufficient means to pay both, again, the Bill provides that the court should prefer a compensation order and then a restitution order over a fine.

The Bill also provides that where a court has actually imposed a restitution order and either or both of a compensation order and a fine, that any payment made by the convicted individual is
applied first to any compensation order, until such time as it is fully paid, then to any restitution order, until such time as that has been full paid, and then to any fine.

In its response to the MJW consultation, the Sheriff's Association observed that in most instances of police assault, the consequences to officers are relatively minor. The Association pointed out that in imposing a sentence generally the court, amongst other factors, takes into account the circumstances of the offence and any effects it has on any victim. The Association asked on what basis a restitution order would be made if a police officer (who has been the victim of an assault) does not require specialist non-NHS services. Is it anticipated that any offence against an officer could attract such an order irrespective of the circumstances? The Association stated that if this was the case, then the restitution order would appear to be a penalty incurred not as a result of the consequences of the offender’s actions, but rather incurred as a levy based on the character of the victim (Scottish Government 2012a).

The Scottish Police Federation stated that “any attack on a police officer is an attack on society itself” and that society should afford the necessary protections for police officers. The Federation also stated that it had shared details of this particular proposal with other police unions across the world, all of whom had praised the initiative and indicated their desire to seek similar legislation in their own jurisdictions (Scottish Government 2012a).

**NATIONAL CONFIDENTIAL FORUM**

The policy memorandum to the Bill states that the principal policy objective behind the establishment of a National Confidential Forum (NCF) is to offer adults, who were placed in institutional care as children, with an option under which their experiences, including abuse and neglect, can be acknowledged. It goes on to say that the value of such recognition, in terms of improved health and well-being, was evident in the experience of the Time to be Heard (TTBH) pilot forum which is discussed below.

The creation of the NCF is a central component of the Government’s Survivor Scotland Strategy which seeks to improve the health and wellbeing of all survivors of abuse in childhood. The NCF will operate on a national basis, independent of Government, and is based on the experience of the Time To Be Heard pilot forum which gave former residents of Quarriers Village the opportunity to recount their experiences of being in care to a confidential panel. The Bill will place the NCF within a legal framework, enabling statutory protection to be offered to participants – including both those relating their experiences and those receiving such testimony.

In 2004, the then First Minister, Jack McConnell MSP offered a “sincere and full apology on behalf of the people of Scotland” to those who were subject to abuse and neglect as children in residential care homes in the past. This was followed by the launch of the Survivor Scotland Strategy in 2005 which contributed to the development of services for survivors of abuse. The Scottish Government also commissioned an independent investigation into historical abuse. The investigation report Historical Abuse Systemic Review: Residential Schools and Children’s Homes in Scotland 1950 to 1995 was published in 2007. It noted that many former residents wished to have their experiences as children in residential establishments heard and recorded as a means of listening to and acknowledging what they needed to recount.

In 2008, the Scottish Government issued a discussion paper on Developing an Acknowledgement and Accountability Forum for Adult Survivors of Childhood Abuse in care and following this, in 2009, Ministers agreed to an independent TTBH pilot forum to hear testimony from adults who had been in certain residential childcare institutions.
The aims of the TTBH pilot were:

- to listen to former residents
- to acknowledge their experiences
- to provide a historical record
- to signpost available services for survivors and provide support, advocacy, advice and information about those services
- to test out a particular model for listening to former residents

The pilot sought to test the appropriateness and effectiveness of a confidential forum in giving former residents of residential schools and children’s homes the opportunity to recount their experiences in care, especially abusive experiences, to an independent and non-judgemental panel. The TTBH pilot was designed to serve both as a means of acknowledging their past and a context in which they could find some release from their suffering. It also offered advice and guidance on the action they could take if they wished to report a crime. It was modelled on the Confidential Committee of the Irish Commission to Inquire into Child Abuse (CICA).

Because the TTBH pilot was set up without a legislative basis, it did not have the benefit of the statutory protections enjoyed by the Irish model that it sought to emulate. The essence of the confidential committee model is, as its name implies, its confidentiality. Because the pilot did not have statutory protection for confidentiality, its Chair and Commissioners (informed by independent legal advice) developed practices to mitigate any risks that information provided in confidence might need to be disclosed. This was achieved through minimising the amount of identifiable information held, seeking to anonymise it wherever and as soon as possible, and exploring with participants whether they were involved in legal proceedings as this could increase the risk of a court ordering the production of information.

The Scottish Government observed that despite these difficulties, the TTBH pilot proceeded effectively but that it was essential that any future forum be established on a statutory basis thus providing necessary protections.

During the pilot, 98 former residents of Quarriers residential homes contributed their stories and history. The Scottish Government carried out an Options Appraisal on the choice of institution for the Pilot Forum. The report on the TTBH pilot (see below) stated:

“The options considered were to work with one organisation or to select the first 100 people who applied to take part. Either way, there would have been an element of discrimination as we agreed to prioritise older and ill applicants.

Quarriers was one of the largest institutions in Scotland providing residential care for young people and accommodated children from all parts of the country, with up to 1,500 children living in the Village at any one time. In total over 30,000 children had been cared for since its inception in the late 19th century to the closure of mainstream residential child care provision in the 1980s. Drawing from Quarriers former residents meant that valuable information could be gathered about people from all over Scotland.” (page 79)

The scope of pilot was therefore limited to one institution.

An independent report on the experience of TTBH pilot (Time To Be Heard: A Pilot Forum) published in 2011 stated that:
“The experience of TTBH has shown clearly the benefits of a confidential forum. The large majority of participants have confirmed, in terms of release or partial release from the burden of the past, its encouragement of self-worth and self-confidence, and its contribution to moving on and getting closure. TTBH also afforded them a means of contributing to making provision of care better for children today.” (page 104)

During the pilot, institutions and alleged or convicted abusers were not present, lawyers were not involved and the forum did not carry out any investigations. The former residents were listened to in good faith and were able to bring family members, friends or other persons to provide support at the hearing. All of those who decided to take part in the pilot forum were offered support, help and advice before, during and after giving testimony, and were provided with full information about the forum and other options for survivors of in-care abuse through specialist services that were available locally to them.

Human Rights Framework

In 2009, the Scottish Government commissioned the Scottish Human Rights Commission (SHRC) to produce a human rights framework for the design and implementation of a forum for survivors of historic child abuse in Scotland (the SHRC Framework).

The policy memorandum to the Bill states that the SHRC Framework outlines what the SHRC regards as a “comprehensive approach to ensuring effective access to justice, remedies and reparation for childhood abuse” (Policy memorandum, para 167). The confidential committee model adopted for the TTBH pilot focused on acknowledgement rather than accountability. As such, the SHRC Framework addressed wider issues than those addressed by pilot:

“These matters are now being taken forward in the InterAction, a process which is being led by the Centre for Excellence for Looked After Children in Scotland (CELCIS) and in respect of which the Scottish Government is participating. CELCIS has stated that the aim of the InterAction is to “give those affected by historic child abuse while in care in Scotland, as well as government, institutions, civil society and others with an interest, a voice on how the Human Rights Framework should be implemented” (Policy memorandum, para 167).

The policy memorandum to the Bill points out that there are some stakeholders who consider that the National Confidential Forum (NCF) should be empowered to discharge functions in addition to those provided for in the Bill. In particular, some stakeholders consider that the NCF should be able to conduct investigations and inquiries into abuse and to provide financial compensation.

The Chair and Commissioners of the TTBH pilot did not consider this approach to be advisable and indicated this to the Parliament’s Petitions Committee in response to a question from the Chair, Bill Butler, about combining accountability with acknowledgement:

“Comment[ing] on a combination of acknowledgement and accountability in one, I would say that that is impossible if we want to have the beneficial outcomes of the confidential hearing committee. If we introduce an investigative or accountability dimension, we instantly introduce an adversarial element into the forum, which would prevent a number of the people from whom we heard from coming forward to be heard. Those people do not want to be challenged and disbelieved again; it is sufficiently traumatic for them to come back, remember the experience and recount it to people such as us. It would change the whole dimension, operation and experience of that. That is not to say that there should not be such an opportunity; however, in my opinion, there is a need for a

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4 During consideration of Petition PE1351 – ‘Time for all to be heard’.
confidential forum that does not involve that. We provided people, if they wished, with guidance on what other action they could take. That was one way of helping them. However, we do not see accountability forming a practical combination with acknowledgement.” (Scottish Parliament 2011)

The Scottish Government’s response to the SHRC Framework (2011) echoed this position, noting the importance that participants in the TTBH pilot attached to the confidential nature of the process and the supportive approach taken in what were non-legal, informal proceedings. In its response, the Scottish Government stated that introducing an investigatory requirement would change the nature of the process in significant ways, pointing out that institutions would need to be given the opportunity to present their account and to be parties to the process, and survivors’ accounts would have to be open to challenge, either by the institutions (drawing on an adversarial model) or by the Chair and Commissioners. Also, the proceedings themselves would need to be reframed to reflect elements of a legal, or certainly a formal, process, including legal representation and some form of adjudication.

Consultation

Following the TTBH pilot, the Scottish Government announced its intention to establish a national acknowledgement forum, building on the positive experience of the pilot. On 23 July 2012, the Scottish Government launched a consultation – National Confidential Forum – a consultation on the creation of a Forum for Adult Survivors of Childhood Abuse in Residential Care (“the NCF consultation”). It proposed a forum giving adult survivors of abuse in residential care as children the opportunity to relate their experiences.

Fifty one written responses to the consultation document were received and fifty four attendees participated in consultation events held across Scotland. The Scottish Government stated that the written responses, together with discussion and feedback at consultation events, provided a rich range and depth of views as to the proposal to establish an NCF. The following information taken from the analysis of consultation responses provides a brief summary of respondents’ views on the proposal:

- Almost all respondents to the consultation agreed with the purpose proposed for it as an acknowledgement forum. This general view was reinforced at each of the consultation events, with widespread agreement of the focus on, and need for, acknowledgment
- Respondents to the consultation saw benefits for former, current and future residents of institutional care as a direct result of the establishment of the NCF, specifically in contributing to the improved health and wellbeing of participants and informing improvements to policy and practice
- Most respondents agreed that the NCF should operate independently of Government. The option preferred by respondents was for the NCF to be established as a separate unit within an existing public body
- A large majority of respondents agreed that all people who were placed in residential care by the state should be eligible to take part in the NCF. The Scottish Government considers it important that the opportunity of acknowledgement be extended to all people placed in residential care, irrespective of whether they were placed there by the state or their family. It is intended, therefore, that the NCF will be open to all of those people

5 Forty-five out of 51 agreed, with one respondent disagreeing and five not providing a response.
A large majority of respondents agreed that the types of residential care listed in the consultation document (residential schools and children’s homes; residential educational provision for children with special needs; long-stay hospital provision for children with acute medical and/or mental health needs; and secure accommodation) should be included within the scope of the NCF. Some respondents also proposed that foster care should be included.

The Scottish Government has indicated that it has considered in depth the issue of eligibility to participate in the NCF, and proposes that the principal criteria for participating in the forum will be the experience of having been placed in institutional care as a child, which may include abuse and neglect. It will be that experience which will be the starting point for determining eligibility to participate. It is intended that the scope of the NCF will encompass all forms of institutional care into which children can be placed, including long-stay hospitals and secure units.

Most respondents agreed that the process to be followed in hearings of the NCF should be the same for all participants, regardless of whether they identify themselves as survivors of abuse or intend to disclose abuse. A majority also agreed that people engaged with the forum should be protected from any form of legal action as a result of either participating in hearings or working for the forum. Several respondents expressed the view that, in order for participants to feel comfortable and willing to recount their experiences, they should be protected and feel able to do so without fear of legal action as a result of what they say during hearings.

The general view expressed in consultation responses was that support was required for participants (and their carers and family members) before, during and after participation in the NCF. A high proportion of respondents made suggestions as to the range and types of support they considered would be helpful to participants (Scottish Government 2013).

The provisions in the Bill relating to the NCF provide a framework within which the it will operate and seek to reflect the recommendation in the TTBH Report that appropriate legislation should be introduced to give the necessary protection for the effective operation of a forum (policy memorandum, para 175).

**Key Proposals in the Bill relating to the National Confidential Forum**

The following sections of the briefing examine the key proposals in the Bill for the establishment of a National Confidential Forum.

**Establishment of the NCF as a Committee of the Mental Welfare Commission**

The Bill makes provision for the hosting of the NCF by the Mental Welfare Commission (MWC), with the policy memorandum to the Bill stating that:

“the MWC is a relevant and appropriate body to host the NCF as there are strategic links between the role and functions of the respective bodies in promoting the health and wellbeing of people. The MWC also has expertise and capacity to support the development of the NCF, while at the same time affording it operational autonomy”. (para 187)

The legislation under which the MWC currently operates (the Mental Health (Care and Treatment) (Scotland) Act 2003) is amended by the Bill.

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6 Forty-three out of 51 agreed, with one disagreeing and seven not providing a response.
The Bill provides that the MWC must establish and maintain a committee to be known as the NCF and that the members of the forum will be responsible for the effective operational discharge of its functions (see below). The membership of the NCF will consist of an NCF head and at least two other members, all of whom will be appointed by the Scottish Ministers. The Bill provides that in making these appointments, the Scottish Ministers must have regard to the recommendation of a selection panel which is established by the Bill.

In their response to the NCF consultation, Former Boys and Girls Abused in Quarriers Homes (FBGA) stated:

“The National Confidential Forum should operate effectively and wholly independently. Its functions must be separate from any such integration into any public body and must not be constrained or prohibited in carrying out its duties and functions by any such integration. The National Confidential Forum must have separate legal obligations and legal protections within a legal statutory framework separate from any said public body.” (Scottish Government 2012b)

Functions

The general functions of the NCF are set out on the face of the Bill as follows:

- to provide the means for persons who were placed in institutional care as children to describe, in confidence (such descriptions being referred to as “testimony”), experiences of that care including any abuse experienced during the period spent in care
- to acknowledge testimony by enabling it to be given at hearings established by the NCF or by written or other means
- based on testimony received to identify any patterns and trends in the experiences of persons placed in institutional care as children (including the causes, nature, scale and circumstances of any abuse experienced)
- to make recommendations about policy and practice which the NCF considers will improve institutional care (including by protecting children from, preventing or reducing the incidence of, abuse)
- while preserving the anonymity of participants, establishments providing institutional care and other persons, to prepare reports of the testimony it receives and its recommendations in relation to that testimony
- to make a contribution to the permanent record of life in care, enhancing public knowledge and understanding of an important part of Scotland’s history
- to provide information about advice and assistance available to persons giving, or proposing to give, testimony to the NCF

In its response to the NCF consultation, the Scottish Human Rights Commission (SHRC) recommended that the Scottish Government (and the Parliament) should seek to address barriers faced by victims seeking access to relevant information relating to their care. This recommendation followed work undertaken in establishing the SHRC Framework (see above):

“This element of the right to an effective remedy requires informing the general public and, in particular, survivors of their rights and the remedies available to them. It includes information on all available legal, medical, psychological, social, administrative and all other services to which victims may have a right of access. Moreover, victims and their representatives should be entitled to seek and obtain information on the causes [of the abuse of their human rights, both the immediate causes as well as the systematic causes] and to learn the truth in regard to these violations.” (Scottish Government 2012b)
The SHRC response went on to say that the provision of appropriate forms of support would be particularly important in enabling the successful participation of those individuals who may be marginalised and/or in vulnerable situations. Such support would include psychological support; dedicated support workers or advocacy support before, during and after testimony; mechanisms and materials to support involvement; and the capacity to provide testimony by video link. It stated that such support would also be likely to be needed for current and former members of staff of institutions and forum staff.

In its submission to the NCF consultation, Victim Support Scotland agreed that a support team should be in place within the forum (based on that of the TTBH pilot) to offer support before, during and after hearings, and that such a team should consist of individuals with sufficient training, skills and understanding to support and meet the needs of survivors of childhood abuse. The submission went on to say:

“It is essential that the process, and all those working within it, adopt a participant centred approach, with all actions and decisions made in the interests of the participant. This should not be overshadowed by any other/specific objectives or aims of the Forum. Crucially, such an approach should include: keeping victims informed and involved in the process; allowing participants to express any concerns and to have these addressed; supporters/Forum staff being attuned to the suitability/readiness of participants to take part in hearings; and ensuring participants have adequate support in place to meet their needs and limit the risk of re-traumatisation.

Some participants, at the time of coming to the Forum, may well already be receiving, or have received, support from another agency. By enabling participants to bring a supporter from an external agency, this will facilitate a seamless and effective throughcare process for the participant, ensuring all the professionals/supporters involved in the process are better equipped to understand and respond to the needs of participants.” (Scottish Government 2012b)

The Victim Support Scotland response also pointed out that many other potential participants in the Forum may never have received or be receiving support from other services or agencies and that it will be important that such participants are informed of, and where appropriate, referred to, those services.

Eligibility to participate

The principal criterion for participating in the NCF would be the experience of having been placed in institutional care as a child. The scope of ‘institutional’ care is significantly wider than the scope of TTBH pilot (which was open to residents of only one institution), and the traditional scope of ‘residential child care’, encompassing all forms of institutional care into which children can be placed, including long stay hospitals and secure units. The policy memorandum to the Bill states that:

“The extension of the scope of the NCF, as compared with that of TTBH, is based on evidence which demonstrates that the confidential forum model works for people placed in institutional forms of care as children, including, but not confined to, people who have experienced abuse”. (Policy memorandum, para 178)

The Bill provides that the NCF will be open to any person aged 18 or over, who was placed in an establishment providing institutional care as a child, either by the state or under a private arrangement, for any length of time and who is no longer in care. “Institutional care” for the purposes of the NCF, means a care or health service which provided residential accommodation to children in Scotland. It is important to point out that the scope of the NCF as proposed in the Bill is purposely not restricted solely to hearing about experiences of abuse as
this would not provide a balanced view of life in care. The policy memorandum to the Bill points out that a fifth of participants in TTBH identified their experience of Quarriers as positive. It goes on to say that not all people who have experienced abuse in care necessarily identify themselves as having done so and do not consider themselves to be either victims or survivors (policy memorandum, para 181):

“Identity is a key issue for many survivors of abuse in care and also for former residents generally. Some people who were in care as children do not identify themselves as ‘survivors’ in spite of the fact that they describe harsh treatment that others would consider abusive. The TTBH Report confirms this and considers the fact that the Pilot Forum was open to any former resident to describe their experiences, regardless of whether they saw themselves as having experienced abuse. We, therefore note recommendation 9 in the TTBH Report that an ‘open approach’ be adopted in a nationwide programme of confidential hearings.” (Scottish Government 2011)

The Centre for Looked After Children in Scotland (CELCIS) commented:

“One of the pieces of feedback from some participants in the Time to Be Heard pilot was that they considered that there was too much of an emphasis on historic abuse and that they had come forward precisely so that they could counter this and report their positive experience of the placement in Quarriers. We consider that it is important that this balance is maintained in the work of the National Confidential Forum. This is particularly important in terms of the impact of the National Confidential Forum on current and future child care services. A total focus on historic abuse could reaffirm negative messages about residential and foster care, and increase the stigma linked to these services. We therefore consider that it is important that the National Confidential Forum should hear a balanced range of testimony from adults who have experienced care as children.”

(Scottish Government 2012b)

In its response, Children in Scotland encouraged the Government to increase the extent and depth at which children and young people who are currently in institutional or community care are heard:

“It is right to seek out the views and experiences of adult survivors of child abuse – and then, to take positive action that will improve their current and future well-being. It also is right not to wait until today’s children and young people who are looked after, accommodated or otherwise subject to corporate parenting become adults before they, too, can be properly listened to and assisted. More could and should be done to meaningfully engage, consult with and involve children and young people in the here and now.”

(Scottish Government 2012b)

Confidentiality

The Bill makes provision to safeguard the confidentiality of information held by the NCF, including testimony given by participants and other information held by the forum in discharging its functions. The Bill sets out a general prohibition on the disclosure of information provided to the NCF in the fulfilment of its functions, principally concerning information provided by people in confidential hearings of the forum. Such information will be exempt from the Freedom of Information regime.

Notwithstanding the above, the Bill sets out the circumstances in which a member of the NCF must disclose information to the police. Those circumstances are where, in the opinion of the member acting in good faith, such disclosure is reasonably necessary to prevent the commission of an offence involving the abuse of a child. The Bill also provides that a member of the NCF may disclose information to the police where an allegation is made by a person giving
testimony that an offence involving the abuse of a child has been committed. Provision is also made whereby a court may order the disclosure of information held by the NCF for the purposes of legal proceedings (whether criminal or civil), including for the purposes of investigating any offence or suspected offence, if it is satisfied that such disclosure is necessary in the interests of justice.

The Bill also includes provision for the protection of participants, members and staff of the NCF from action for defamation. These provisions are intended to allow people to be given assurances, as far as possible and in advance of participation, that what they say in hearings of the forum will be treated in confidence and will be protected from founding an action for defamation. The policy memorandum states that they strike an appropriate and reasonable balance between the need to offer protection to participants in the NCF and the right of any person who may be accused of abuse to take action (Policy memorandum, para 181).

With regard to confidentiality, the Information Commissioner’s Office (ICO) response to the NCF consultation stated that the Data Protection Act 1998 (DPA) requires that individuals are given information about who is collecting their personal information, the purpose that information will be used for and where any possible disclosure of their personal information may be made. The ICO would expect each individual to be provided with a privacy notice in advance of their making an application to join the forum. The ICO also stated that it would be keen to work with the public body which is given responsibility for the forum to ensure that the policies and procedures for the protection of the personal information recorded by the forum are robust (Scottish Government 2012b).

Conduct of hearings

As outlined above, the Bill includes provision to require the NCF to make appropriate arrangements for participants to give testimony, either at a hearing of the NCF or by other means of communication. Where the NCF receives testimony at a forum hearing, it must ensure that at least two members of the NCF are present while the testimony is given and that the hearing is held in private. A hearing is deemed to be held in private if the only persons present are the person giving the testimony; any person accompanying that person whose attendance has been approved by the NCF; members of the NCF; and NCF staff.

The Bill provides that the NCF may record testimony and any other information received from eligible persons in such manner as it thinks fit. In practice, this may include audio recording or recording in writing and could be undertaken face-to-face with participants or remotely.

Reports

The Bill makes provision for the production of an annual report by the NCF, setting out progress in discharging its functions. The Bill would also empower the NCF to produce reports with general proposals based on the testimony it receives in hearings. All reports produced by the NCF will contain information from which it will not be possible to identify individuals or particular institutions.

Health and Sport Committee consideration

As pointed out above, the Parliament’s Health and Sport Committee was designated as a secondary committee on the Bill to consider the proposals in relation to the National Confidential Forum. The Committee held its first evidence session on proposals relating to the establishment of the NCF on 26 March 2013, taking evidence from David Whelan, a spokesperson for Former Boys and Girls Abused in Quarriers Homes (FBGA); Jim Kane, a committee member from In Care Abuse Survivors; and Helen Holland and Chris Daly who originally lodged Petition 1351, ‘Time for all to be heard’.
SOURCES


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