INTRODUCTION

1. This document relates to the Vulnerable Witnesses (Scotland) Bill introduced in the Scottish Parliament on 23 June 2003. It has been prepared by the Scottish Executive to satisfy Rule 9.3.3(c) of the Parliament’s Standing Orders. The contents are entirely the responsibility of the Scottish Executive and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 5–EN.

POLICY OBJECTIVES OF THE BILL

2. The Scottish Executive is committed to improving the way witnesses are treated by the justice system. The Executive’s proposals are aimed at enabling better protection and assistance to be given to vulnerable witnesses, particularly children. It is also intended that the Bill will help to support the development of a culture within the justice system which enables children and other vulnerable witnesses to participate fully.

3. The policy objectives of the Bill are:
   - to widen the categories of witness who may be considered ‘vulnerable’ and in consequence eligible to benefit from the use of special measures when giving evidence;
   - to improve the quality of evidence given by vulnerable witnesses, in particular children; and
   - to enable and encourage greater use of special measures for these witnesses in all types of court proceedings.

Background

4. On 27 February 2003 the Deputy First Minister launched the Vital Voices: Helping Vulnerable Witnesses Give Evidence policy statement. The proposals contained in the statement were aimed at enabling vulnerable witnesses to give better evidence. Many of the proposals required legislative change. The Executive’s programme of work on the law of evidence started in November 1998 when the Scottish Office issued a Consultation Document, entitled Towards a Just Conclusion, on vulnerable and intimidated witnesses in criminal and civil cases. This paper was followed by an Action Plan, published in June 2000, which made commitments in relation to both the cross-examination of witnesses in sexual offence cases and in relation to vulnerable witnesses more generally. The Sexual Offences (Procedure and Evidence) (Scotland) Act 2002
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fulfilled the first commitment. The Vulnerable Witnesses (Scotland) Bill follows through on the commitment in paragraph 2.12 of the Action Plan to improve the treatment of vulnerable and intimidated witnesses by changes to the law of evidence and court procedure.

5. This Bill also complements many of the aims of the Lord Advocate’s Working Group on Child Witness Support, which made a number of recommendations, some of which are addressed by the child witness support consultation document. The proposals contained in that document, which was issued for consultation in October 2002, apply to child witnesses and/or victims under the age of 16 who are involved in the criminal justice system or children’s hearing court proceedings. The Bill is also consistent with Lord Bonomy’s review of the practices and procedures of the High Court.

Consultation – general

6. The consultation document Vital Voices: Helping Vulnerable Witnesses Give Evidence published on 1 May 2002 invited comments on whether further changes to the law of evidence and related court procedures were needed to support vulnerable witnesses in giving evidence. The paper discussed the current definition of “vulnerable person” and whether this should be extended; changes to the current procedures for existing special measures; the possibility of introducing new special measures to assist such witnesses to give evidence; the range of proceedings across which special measures should apply; and the competency test for children or other vulnerable witnesses.

7. In total almost 700 copies of the consultation document were distributed to a wide range of stakeholders including local authorities, professional bodies, universities and academics, equality groups, members of the judiciary, individuals and voluntary organisations throughout Scotland. The consultation process ended on 31 July 2002, and although a number of responses were received after that date, all were fully considered. A total of 76 responses were received. The last response was received late on 24 September 2002.

8. The Executive published the report on the analysis of responses to the consultation on Friday 20 December 2002. A copy of this report was sent to the 76 individuals and organisations that responded to the consultation. This report sets out in detail the views of the various consultees on the Executive’s proposals.

9. The Executive published on 27 February 2003 the policy statement referred to in paragraph 4 above. This document set out the Executive’s proposals for this area and was sent to a number of interested individuals and organisations, including the 76 individuals and organisations that responded to the consultation.

10. The policy statement was not specifically issued for consultation. The Executive did, however, meet with a number of interested parties to discuss the proposals, including voluntary organisations representing the interests of victims and witnesses.

11. All 3 documents (the consultation paper, report analysing the responses and the policy statement) are available on the Scottish Executive website (www.scotland.gov.uk/publications).
DEFINITION OF VULNERABLE WITNESSES (PART 1, SECTION 1)

12. It is recognised that some witnesses need extra help to enable them to give their evidence. This may be because the witness has been intimidated or the evidence they have to give is particularly distressing. The use of special measures such as giving evidence by way of a live TV link can help a vulnerable witness to be able to speak up in court. At present, the law allows a “vulnerable person” to be eligible to use special measures in criminal trials in certain restricted circumstances. It defines a “vulnerable person” as a person who comes within one of three categories:
   - a person aged under 16;
   - a person aged 16 or over who is the subject of one of a number of mental health-related court orders; and
   - a person aged 16 or over who suffers from significant impairment of intelligence and social functioning.

13. There is no automatic entitlement for special measures. The party calling the witness (i.e. the Crown or the defence) must make a specific application for a particular special measure. The court must be satisfied that the witness falls into one of the above three categories and only in such circumstances can it then exercise its discretion to allow the use of the special measure.

14. One of the aims of the new provisions is to widen the categories of witnesses eligible to use special measures. It is recognised that the current categories of eligibility are very narrow and exclude many witnesses who would benefit from assistance to help them give their best evidence in court. There will now be two categories of witness:
   - those automatically entitled to use special measures; and
   - those witnesses who have a discretionary entitlement to use special measures.

Automatic Entitlement

Children

15. This Bill will give children (aged under 16) an automatic entitlement to use special measures when they give evidence. This means that children will now have a right to use a special measure although they can express a wish to waive their entitlement. The main benefit of automatic entitlement is that it enables the witness to know what to expect from the trial experience at an early stage.

16. At the moment, if a child witness turns 16 before the trial starts then they lose their eligibility for special measures. This Bill, however, ensures that if a child is under 16 at the start of criminal proceedings then they will not lose their right to use special measures.

17. Further protection will be given to particularly vulnerable young children. In criminal cases about sexual or violent matters, the Executive’s policy is that, other than in the most exceptional cases, no child witness under 12 should have to attend court to give their evidence. The intention is to create a general rule that children under 12 in such cases will give their
evidence by a method which does not require their personal attendance at court e.g. by remote TV link, or on commission.

**Discretionary entitlement**

**Mental disorder**

18. Any person who has a mental disorder that affects their ability to give evidence will qualify for consideration for special measures. The definition of “mental disorder” is taken from section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003 and will cover a wide range of witnesses, including those with a learning disability.

**Taking wider circumstances into account**

19. The external circumstances of the witness will be able to be taken into account in determining whether the witness should be able to use special measures. This category would cover any witness where fear or distress means that there is a significant risk that the ability of the witness to give evidence in the normal way will be diminished. The amended section 271 of the Criminal Procedure (Scotland) Act 1995 sets out the factors that the Court should take into account in determining whether the person is a vulnerable witness and should be able to benefit from the use of special measures when giving evidence. This category is intended to help, amongst others, victims of sexual offences, hate crimes, domestic abuse or witnesses who have been intimidated.

**Procedure**

20. The Court will have a duty to find out if there are any vulnerable witnesses in a case and to ensure that appropriate arrangements are made for them to give evidence. Parties to cases (i.e. the Crown and the defence in a criminal case, and all sides in a civil case) will have to consider whether any witness they wish to call may qualify as a vulnerable witness, and if so, what, if any, special measure they would benefit from. The party calling the witness will have to take into account the views of the witness in deciding which special measure is the most appropriate. This is in accordance with the UN Convention on the Rights of the Child which states that children who are capable of forming a view should be given the right to express their views freely in all matters affecting them and that their view is to be given due weight in accordance with the child’s age and maturity.

**Consultation**

21. There was majority support from consultees for widening the current definition of “vulnerable person” so that more witnesses would be eligible for special measures. 52 consultees considered whether the external circumstances faced by a witness should be taken into account when deciding whether they should be eligible for special measures. 44 consultees were in favour of this proposal. The main reason given for extending the definition of “vulnerable person” was on the basis that it was seen as too restrictive. Only 15 consultees were supportive of the proposition that all categories of witness should be allowed to use special measures.
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Alternative approaches

Eligibility for special measures for victims of specific offences

22. It is the Executive’s policy that any vulnerable witness should be eligible for consideration for special measures. The vulnerability may be due to the nature of the evidence that they are to give, but other additional factors may be relevant, such as the age or mental capacity of the witness or the relationship between the accused and the witness.

23. The Bill gives an automatic entitlement to special measures for children and an eligibility to use such measures for witnesses who have a mental disorder. This still leaves many other witnesses who may be vulnerable for other reasons and in the Executive’s view the wider circumstances of the witness need to be taken into account. The Executive considered the possibility of having a number of defined categories of witness. Such a category could relate to a certain type of offence, for instance any witness in a sexual offence.

24. The drawback of making victims or witnesses of specific offences eligible is that it would still have been necessary to have a wide discretionary category. This might have the effect of creating a “hierarchy of vulnerability”, giving the impression that some types of witness are more vulnerable than others, and making it harder to justify special measures for those witnesses not so easily defined.

25. On balance, a general category designed to catch all other vulnerable witness was preferred over specific categories. The Executive considered that specific categories would inevitably exclude those witnesses where the nature of the vulnerability was more complex or individual. Equally, any category unless made prohibitively narrow would run the risk of giving special measures to those who may not need them.

Automatic entitlement to special measures

26. In the consultation paper Vital Voices: Helping Vulnerable Witnesses Give Evidence the Executive asked “Which vulnerable witnesses, if any, should be automatically entitled to use special measures?”

27. The answers received ranged from no one, or each individual should be considered on a case by case basis, through to a wide range of categories such as victims of domestic abuse, victims of sexual offences, anyone with a mental illness. The most consistently suggested category was children, and the Executive is proposing to give all children an automatic entitlement.

28. The wide-ranging discretionary category is designed to be flexible enough to help any vulnerable witness. In practice this approach rules out having any automatic entitlement for witnesses other than child witnesses, as by its very nature, this wide-ranging category requires individual witnesses to be considered on a case by case basis.

29. The Executive considers that children are a particularly special case and should always, if they wish it, receive extra assistance to give their evidence. If there were to be further automatic categories it could compound the problems set out above with regards to creating a hierarchy of
vulnerability, and run the risk of excluding some vulnerable witnesses and stigmatising others. For instance, for most older people, it would be unnecessary to automatically treat them as though they were vulnerable.

Communication and physical disabilities

30. The Executive considered whether witnesses with communication and physical disabilities should come within the “vulnerable witness” definition. Some of the consultees voiced concerns that witnesses can be vulnerable as a result of communication needs and/or physical disabilities. For instance, a person who uses BSL to communicate may find the court process more intimidating and inaccessible than someone with normal hearing.

31. The Executive agrees that there may be occasions when a physical disability may be relevant to issues of vulnerability as part of a set of wider circumstances. In general terms, however, communication or physical access needs should not automatically lead to a person being a vulnerable witness. These needs should be met automatically as a result of standard practices and procedures required to comply with obligations at common law, and under the Disability Discrimination Act 1995. Any vulnerability of a witness should accordingly be assessed on the basis that all necessary arrangements to meet their communication needs, or to accommodate a physical disability, will automatically be made.

The accused

32. The Bill acknowledges that in certain circumstances, for instance when the accused is a child, he or she may require the use of special measures to give evidence.

33. At the same time, there are some important differences between an accused person and a vulnerable witness. For instance the accused can choose whether or not to give evidence and he or she also has a right to legal representation. Another factor is that certain special measures such as screens are only appropriate as a special measure for vulnerable witnesses rather than an accused, as they are used to shield witnesses from the accused.

SPECIAL MEASURES

34. At the moment there are 3 statutory special measures:
   - video evidence on commission;
   - screens; and
   - live television link (CCTV).

35. There is also one special measure available which is not set out in statute, namely the use of a supporter.

36. The wider categories of eligibility for special measures should ensure that these measures are used more frequently to help vulnerable witnesses give evidence. The Bill also makes a supporter a statutory special measure. A “supporter” is a person who is allowed to accompany a vulnerable witness into the courtroom. The person who acts as a “supporter” should be someone
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whose physical presence alongside the witness will be comforting and give moral support to the witness. As a general rule, the only person who should not be able to undertake this role is a person who is also a witness in the particular trial. This should mean that a relative could undertake this role providing he or she is not directly involved in the case.

37. The Bill makes provision about the admission of prior statements (a previous statement made by the witness, which has been reliably recorded on video or some other way.) It makes it possible for a prior statement of a vulnerable witness to be used as the whole or part of his or her main evidence (“examination in chief”). This should enable greater use of video recorded police interviews with witnesses to be introduced in evidence. This proposal may be of particular benefit to child witnesses or victims of sexual offences.

38. It will be possible for more than one special measure to be used for a vulnerable witness e.g. the use of a supporter and screens, or a prior statement along with cross examination by live TV link.

Consultation

39. A wide range of consultees were supportive of the use of currently available special measures, and a number of consultees expressed views on how measures such as CCTV, evidence on commission etc. could be better used. 32 consultees agreed that written guidance to clarify the role of the supporter would be helpful. One consultee was against this proposal.

Alternative approaches

Video recording of cross-examination

40. The Executive considered whether video recording cross-examination should be a special measure. The video recording of the witness being cross-examined would take place before the trial and the video would be played to the judge and/or jury during the trial. Evidence on commission and video cross-examination are similar procedures and would both have to take place in the presence of all parties to the case such as the prosecution, defence and judge or a commissioner. The accused would also need to be present or at least be able to hear the evidence given against him or her. Evidence on commission involves the witness being examined and cross-examined and their testimony being video recorded in order that the recording can later be played in court. The Bill would also enable a witness’s prior statement to be admitted as their main evidence and in such cases the commission would mainly involve the cross-examination.

41. There is provision for the use of video cross examination in England and Wales although to date it has not been implemented. Evidence on commission is not a special measure available for vulnerable witnesses in England and Wales.

42. The Executive considers that separate provision for video cross-examination would have no added benefits over evidence on commission.
Intermediaries

43. The Executive also considered the use of intermediaries as a new special measure. The role of an intermediary is to enable a witness to communicate effectively with the court e.g. where a witness can only communicate by a form that only a few people can understand. Intermediaries are allowed in other jurisdictions such as South Africa. There are, however, practical difficulties in using intermediaries due to problems in determining who should act as intermediaries, what qualifications they should possess and the precise role that they should adopt or because their role has been severely limited by the court.

44. Consultees were divided on whether the use of intermediaries would be of benefit. 22 consultees were supportive of the measure but 10 were not in favour. The rest of the consultees who addressed this issue were either in favour of limited use, preferred to await the outcome of the pilot scheme on intermediaries in England and Wales or were undecided on the issue. Of those who were in favour, some expressed the view that intermediaries would aid communication and could be beneficial in cases involving children or the mentally ill. Consultees against the proposal expressed the view that an intermediary could contaminate the evidence and that there could be problems in identifying suitable people to conduct this role.

45. There is provision for the use of intermediaries in England and Wales although this is still to be implemented. This appears to be due to the authorities experiencing difficulties in finding enough trained professionals to act as intermediaries, deciding who these should be and having them assessed and registered.

46. Pilot schemes on the use of intermediaries will be shortly starting in England and Wales and the Executive has decided to await the outcome of these before considering whether to propose similar provisions for Scotland.

Amicus curiae

47. 23 consultees were in favour of the use of an amicus curiae (literally “friend of the court”) although there was some confusion on what the role of the amicus would be. Those consultees in favour considered an amicus would be beneficial in certain cases, particularly in sexual offence or child abuse cases. 21 consultees were against such a proposal and cited reasons such as the cost and the fact that the use of amicus curiae is unnecessary and would overlap with the role of the lawyers and the judge.

48. The Executive does not consider that the use of amicus curiae as a special measure is necessary. The Executive’s proposals to enable more witnesses to be eligible to use special measures and the extra measures available should reduce the need to have a person to be specially appointed by the court for the specific purpose of protecting the interests of a witness. The court must ascertain if there are any vulnerable witnesses and what arrangements are proposed for them. Once it has come to the attention of the court that a person is a vulnerable witness and requires to use a special measure, then the court itself has to ensure that appropriate arrangements are made for the witness to give evidence.
DOCK IDENTIFICATIONS (PART 1, SECTION 4)

49. The Lord Advocate’s Working Group on Child Witness Support recommended full implementation of the Scottish Law Commission’s recommendation on identification procedure in court. A witness would no longer have to identify the accused in court where there has been a previous identification. It will be possible for the Crown to instead submit evidence to the court of the previous identification such as a police identification parade. This will make it unnecessary for the witness to have to make a “dock identification” which could be distressing, particularly for vulnerable witnesses such as children.

Consultation

50. Only 2 consultees opposed the implementation of the Scottish Law Commission’s proposals on identification evidence with 25 consultees being in favour of the proposal.

EXPERT EVIDENCE (PART 1, SECTION 5)

51. The Bill will ensure that it is admissible to lead expert evidence in sexual offence cases to explain why a witness behaved in a particular way.

52. In the case of Grimmond v HMA the Crown sought to lead the evidence of a child psychologist with extensive experience of cases of sexual abuse. The accused had already been convicted of indecency involving two young boys. Subsequently, one of the children had made a fuller disclosure, which alleged that much more had taken place than the boys had originally revealed. The second child then confirmed this and the accused was charged with sodomy. The prosecution wanted to lead evidence from a psychologist on how common it was for child victims of sexual abuse to give a full account in stages over a period of time. This evidence was to help counter any negative inference regarding the credibility of the boys due to their staged disclosure. The Crown was refused permission by the court to lead this expert evidence.

53. The Bill will enable certain expert evidence to be admitted when it is relevant to the case. This is considered necessary as most people do not have any knowledge of how the behaviour of such victims can be affected and expert evidence can provide additional information to the judge or jury to help them reach their decisions. This type of evidence can be necessary to advise the court on why victims of particular offences, such as sexual abuse, may behave in a particular way such as disclosing details of the alleged offence over a period of time.

Consultation

54. 34 consultees were in favour of greater use being made of expert evidence in cases involving vulnerable witnesses. 11 consultees were against this proposal.

RESTRICTIONS ON THE PERSONAL CONDUCT OF DEFENCE (PART 1, SECTION 6)

55. The Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 changed the law so that the accused in a rape or sexual offence case must be legally represented throughout the whole trial. This prevents the accused from personally cross-examining the alleged victim. At
present the accused has the right to defend him or herself in person in all other cases if he or she so wishes. There may, however, be circumstances in such cases where a victim or witness may be intimidated or otherwise inhibited in giving evidence for example where there was a previous relationship between the accused and the witness which it is alleged was abusive.

56. The Bill will give the court a discretionary power in non-sexual offence cases to prevent an accused conducting his or her defence personally in any case where vulnerable witnesses are involved and to require the accused to be legally represented. The court would not prevent the accused conducting his or her own case if this was contrary to the interests of justice, but the interests of the vulnerable witness are to be taken into account by the court when reaching a decision on this matter.

Consultation

57. 33 consultees supported the prohibition of personal cross-examination by accused in sexual offence cases being extended to other types of case. 12 consultees did not agree with this suggestion.

Alternative approaches

Automatic prohibition of personal conduct of defence

58. An alternative to giving the court a discretionary power to prohibit the accused from conducting his or her own case is to link the prohibition to special measures. This could mean for example that wherever screens or a live television link are to be used for a witness, a notice would be served prohibiting the accused from conducting his or her own defence.

59. There would, however still need to be a discretionary prohibition to cover other cases, where perhaps other special measures were being used.

60. The Executive considers that the policy intention of protecting vulnerable witnesses from personal questioning by the accused can be achieved in those cases where it is necessary, by giving the court the discretionary power to impose such a restriction. In practice, there are few cases, other than sex offence cases, where the possibility of the accused defending him or herself would be an issue of concern in the case.

CIVIL PROCEEDINGS (PART 2, SECTIONS 7 TO 17)

61. Vulnerable witnesses in civil court proceedings will be able to use special measures (live TV link, screens, the use of a supporter and evidence on commission). Procedure in the different kinds of civil proceedings is largely governed by rules made by the court itself using its own statutory powers. The Bill amends those powers to allow specific rules to be made regarding the provision and use of special measures in civil proceedings. In line with the normal position in civil proceedings, the party calling the witness would be liable for any costs incurred by the use of that special measure. The witnesses eligible for special measures will be similar to the categories for criminal proceedings.
Automatic entitlement

62. Children under 16 will be automatically entitled to use special measures. There is to be no rule about children under 12 giving evidence away from the court, because that provision is linked to certain types of criminal offence.

Discretionary entitlement

63. Anyone with a mental disorder will be eligible to make an application for the use of special measures.

64. The circumstances of a witness will be able to be taken into account in determining whether the witness should be able to use special measures. This category would cover any witness where fear or distress means that there is a significant risk that the ability of the witness to give evidence in the normal way will be diminished.

Consultation

65. 45 consultees supported special measures being made available in civil proceedings. 2 consultees were against the proposition.

Alternative approaches

Special rule for under 12s in certain civil proceedings

66. The Executive is not proposing that there should be a rule that children under 12 in certain civil proceedings should be automatically entitled to give their evidence from a building outwith the court. In criminal proceedings the entitlement is linked to certain types of criminal cases. There is no equivalent set of cases in civil proceedings. Unlike in criminal proceedings where the type and nature of the offence can readily point to the vulnerability of the witness from the start of the trial, in civil cases this can be much more difficult to establish.

67. A party calling a witness will still be able to apply for special measures such as a live remote television link or evidence on commission, and such applications will be considered on a case by case basis.

State meeting costs for the use of special measures in civil proceedings

68. A small proportion of consultees addressed the issue of costs. The majority of these were in favour of the costs being met from the public funds, possibly through the legal aid system whilst others suggested that the costs should be met by either the party calling the witness or the parties to the proceedings generally.

69. There is a significant difference between the funding arrangements for civil and criminal proceedings. Criminal trials are publicly funded and where special measures are available these are provided through the Scottish Court Service at public expense. In civil proceedings the onus is on the parties to present a case and pay for the process as necessary unless they happen to be in receipt of legal aid. A party calling a witness is responsible for meeting that witness’s
expenses and the Executive considers it is reasonable for the party to meet the cost of any special measures that a witness may require. Where existing court facilities e.g. screens or CCTV, where available, are used, no additional charges will be levied but a party seeking to use a witness’s prior statement, or take their evidence by TV link from a remote location, or by way of a commission, would be responsible for any costs involved in this.

SPECIFIC PROVISIONS FOR COURT PROCEEDINGS ARISING FROM CHILDREN’S HEARINGS (PART 2, SECTION 18)

Restrictions on use of character and sexual history evidence

70. When the Reporter to the Children’s Panel receives information that a child may be in need of compulsory measures of care, he or she will arrange a children’s hearing to deal with the case. The grounds for referral to the hearing may not be accepted or accepted only in part, by the child and/or the relevant person, such as the parent. In such cases the Reporter, if directed to by the children’s hearing, must apply to the sheriff to find that the grounds for referral are established. Many of these cases referred to the Sheriff may involve sexual abuse allegations being made against the parent or carer. Unlike in criminal proceedings there is no statutory restriction on the use of sexual history or character evidence. It is intended that there should be restrictions on this type of evidence being lead and that it should only be allowed where it is relevant to establishing the grounds of referral.

Consultation

71. 41 consultees supported the restrictions on use of character and sexual history evidence in criminal trials being introduced to referrals from the children’s hearing system to the sheriff court. 5 consultees did not support this proposal.

Alternative approaches

Written applications to admit sexual history or character evidence

72. The Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 introduced a procedure requiring a prior written application to be submitted before the sexual history or character of a witness could be led. The Executive is not proposing to extend this formal written application to court proceedings arising from children’s hearings, but to allow parties to make an oral application.

73. The procedure used in referrals from children hearings is deliberately more informal and flexible than in criminal proceedings and the Executive has no wish to depart from this approach. The written application procedure is considered too inflexible for these proceedings and oral applications are more in keeping with existing procedures.

THE COMPETENCE TEST (PART 3, SECTION 19)

74. The competence test is to be abolished for all witnesses. The test is mainly used for children to establish whether the child understands the difference between “truth” and “lies” and the need to tell the truth in court. It usually involves a judge asking questions of the child to determine whether the child is competent (i.e. able to give evidence). Competence is assumed
for adults but a party can still challenge the competence of an adult witness. For example, it may be argued that an adult with a significant learning disability does not understand the concept of “truth” and “lies”. The main drawback of this test is that it does not test whether the witness will tell the truth. Instead, the test concentrates on whether the witness understands abstract concepts such as “truth” and “lies”. If a witness does not pass the competence test then he or she is not allowed to give evidence. This means that the evidence of some young witnesses and adults is never heard.

75. The Executive considers that it is important that all witnesses, particularly the most vulnerable, are given the opportunity to be heard. The court should also be able to consider all the relevant evidence in a case. The abolition of the competence test means that there will no longer be a preliminary examination of these witnesses by the judge. The court will still be able to exercise discretion regarding whether to put the witness on oath. The abolition of the competence test will mean that there will be no preliminary questioning of a child before they can be allowed to give evidence in the case. It will be left to the judge or jury to decide if the testimony is reliable and credible in light of all the evidence led in the case.

Consultation

76. There was little support for retaining the competence test in its current form. With regard to child witnesses the majority of consultees were in favour of either abolishing (34 consultees) or modifying (12 consultees) the test. Only 9 consultees were in favour of retaining the test in its current form. In the case of all witnesses 27 consultees wanted the test abolished, 12 wanted it modified with only 9 expressing the view that the test should be retained.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Impact on equal opportunities

77. The policy is designed to promote the best interests of justice by ensuring that vulnerable witnesses are able to give their best evidence in criminal and civil court proceedings. The Executive considers that vulnerable witnesses should be given access to the necessary measures that will assist them to participate fully in the justice system. It is acknowledged that vulnerable witnesses may currently find the court experience particularly traumatic and unsettling. The Bill should empower these witnesses so that they are as able as any other witness to give their evidence.

78. The Executive understands that whilst there is nothing about an individual’s sexuality or being physically disabled, older or from a minority ethnic community, which in and of itself makes a witness vulnerable, any one (or indeed a combination) of these factors can be a part of a witnesses’ vulnerability when coupled with other factors. These other factors could be as overt as harassment or intimidation or could be more subtle. By making these equality areas a necessary part of the consideration of vulnerability it should mean that there is a routine assessment of a witness against these elements.
Impact on human rights

79. The Executive considers that the Bill is compatible with the European Convention on Human Rights.

80. The Executive considers that only two provisions of the Bill raise possible human rights issues, in particular in respect of Article 6 of the Convention:
   (a) the provisions which do not give parties an automatic right to object to special measures proposed for witnesses; and
   (b) the provisions which allow the court to prevent an accused defending himself personally at trial.

81. As regards (a), the Bill entitles all child witnesses to give their evidence with the help of at least one special measure. The initial order can be made in the absence of the parties, although a hearing is enabled to be held in cases where the court is not satisfied. The parties are to be given an opportunity to address the court at this hearing. There is a similar procedure in relation to vulnerable witnesses other than children. In both cases there is also a further opportunity later for the parties to come in and be heard in terms of section 271D.

82. As regards (b), the Bill gives the court a discretionary power to preclude the accused from conducting his own defence if it is satisfied that it is in the interests of the vulnerable witness. The court is also given power to impose a lawyer on the accused if for some reason he is not represented. There is already an automatic ban on an accused in a sexual offence case conducting his defence personally in terms of the provisions introduced by the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002, and the same power to impose a lawyer.

83. Generally ECHR jurisprudence suggests that special measures may be compatible with the Convention, provided they are properly regulated. Provided the accused can examine the witness, there is not an unlimited right to normal procedures. Indeed in the case of sexual offences and child witnesses there is a requirement to protect the victim. Whether there is a right to an oral hearing on the question is determined by the extent to which fairness dictates that it is necessary. This is assessed by factors such as the nature of the hearing, its meaning in the context of the proceedings as a whole, and the importance of what is at stake for the parties.

84. In the Executive’s view there is no absolute right for a party to be allowed formally to object to a witness being protected. This is not a matter that is central to the fairness of the trial. It is incidental to the trial proceedings. It in no way infringes the accused’s rights to object to any evidence led or his rights to cross-examine witnesses, which are the central fairness rights stressed in the jurisprudence. Similarly with the right to conduct one’s defence personally, the ECHR jurisprudence makes it clear that there is no absolute right of an accused to conduct his own defence, provided he has the opportunity to be properly represented. The rights of the accused, the victim and society have to be balanced. The Executive considers that, as regards both the possible issues, ECHR considerations have been properly taken into account, and the Bill achieves a reasonable balance between the rights of the accused and the rights of the witness.
Impact on island and rural communities

85. The Executive considers that the Bill has no disproportionate effect on island and rural communities. The Bill retains flexibility for cases to be moved to different court buildings, which may have the appropriate facilities e.g. remote television link. This is likely to be particularly important for rural areas.

Impact on local government

86. The Bill will not have a significant impact on local government.

87. The greater use of prior statements should mean that more police interviews are video recorded. This has some resource implications not only for the police but also for social workers, who often attend these interviews if a vulnerable witness is involved. There are likely to be training requirements for social workers and the police in conducting such interviews.

88. Consideration is also being given to the most appropriate place outwith the court where young children can give evidence by remote TV link. This is likely to vary from one local area to another. For instance in England a variety of Court Service buildings, police stations, hospitals and other health centres, and local authority social work premises are used. As part of implementation, suitable locations will have to be identified and rooms equipped with the necessary technology. Some of the rooms identified may be in local government premises.

Impact on sustainable development

89. The Bill will have no negative impact on sustainable development.