Passage of the

Victims and Witnesses (Scotland) Bill 2013

SPPB 194
Passage of the
Victims and Witnesses (Scotland) Bill 2013
SP Bill 23 (Session 4), subsequently 2014 asp 1

SPPB 194

EDINBURGH: APS GROUP SCOTLAND
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Foreword

Purpose of the series

The aim of this series is to bring together in a single place all the official Parliamentary documents relating to the passage of the Bill that becomes an Act of the Scottish Parliament (ASP). The list of documents included in any particular volume will depend on the nature of the Bill and the circumstances of its passage, but a typical volume will include:

- every print of the Bill (usually three – “AsIntroduced”, “As Amended at Stage 2” and “As Passed”);
- the accompanying documents published with the “As Introduced” print of the Bill (and any revised versions published at later Stages);
- every Marshalled List of amendments from Stages 2 and 3;
- every Groupings list from Stages 2 and 3;
- the lead Committee’s “Stage 1 report” (which itself includes reports of other committees involved in the Stage 1 process, relevant committee Minutes and extracts from the Official Report of Stage 1 proceedings);
- the Official Report of the Stage 1 and Stage 3 debates in the Parliament;
- the Official Report of Stage 2 committee consideration;
- the Minutes (or relevant extracts) of relevant Committee meetings and of the Parliament for Stages 1 and 3.

All documents included are re-printed in the original layout and format, but with minor typographical and layout errors corrected. An exception is the groupings of amendments for Stage 2 and Stage 3 (a list of amendments in debating order was included in the original documents to assist members during actual proceedings but is omitted here as the text of amendments is already contained in the relevant marshalled list).

Where documents in the volume include web-links to external sources or to documents not incorporated in this volume, these links have been checked and are correct at the time of publishing this volume. The Scottish Parliament is not responsible for the content of external Internet sites. The links in this volume will not be monitored after publication, and no guarantee can be given that all links will continue to be effective.

Documents in each volume are arranged in the order in which they relate to the passage of the Bill through its various stages, from introduction to passing. The Act itself is not included on the grounds that it is already generally available and is, in any case, not a Parliamentary publication.

Outline of the legislative process

Bills in the Scottish Parliament follow a three-stage process. The fundamentals of the process are laid down by section 36(1) of the Scotland Act 1998, and amplified by Chapter 9 of the Parliament’s Standing Orders. In outline, the process is as follows:
• Introduction, followed by publication of the Bill and its accompanying documents;
• Stage 1: the Bill is first referred to a relevant committee, which produces a report informed by evidence from interested parties, then the Parliament debates the Bill and decides whether to agree to its general principles;
• Stage 2: the Bill returns to a committee for detailed consideration of amendments;
• Stage 3: the Bill is considered by the Parliament, with consideration of further amendments followed by a debate and a decision on whether to pass the Bill.

After a Bill is passed, three law officers and the Secretary of State have a period of four weeks within which they may challenge the Bill under sections 33 and 35 of the Scotland Act respectively. The Bill may then be submitted for Royal Assent, at which point it becomes an Act.

Standing Orders allow for some variations from the above pattern in some cases. For example, Bills may be referred back to a committee during Stage 3 for further Stage 2 consideration. In addition, the procedures vary for certain categories of Bills, such as Committee Bills or Emergency Bills. For some volumes in the series, relevant proceedings prior to introduction (such as pre-legislative scrutiny of a draft Bill) may be included.

The reader who is unfamiliar with Bill procedures, or with the terminology of legislation more generally, is advised to consult in the first instance the Guidance on Public Bills published by the Parliament. That Guidance, and the Standing Orders, are available free of charge on the Parliament’s website (www.scottish.parliament.uk).

The series is produced by the Legislation Team within the Parliament’s Chamber Office. Comments on this volume or on the series as a whole may be sent to the Legislation Team at the Scottish Parliament, Edinburgh EH99 1SP.

Notes on this volume

The Bill to which this volume relates followed the standard three-stage process described above.

The Parliament designated the Justice Committee as the lead committee in consideration of the Bill at Stage 1 and the Health and Sport Committee as secondary committee. The Justice Committee examined sections 1 to 25 and sections 28 to 31 of the Bill, while the Health and Sport Committee focused on section 26 and 27, which provided for the establishment of the National Confidential Forum. This division of responsibilities was replicated at Stage 2 consideration.

The Justice Committee Committee’s Stage 1 Report did not include the oral and written evidence received by the Committee. This material was originally published on the web only, and is now included in full in this volume.

Similarly, the Health and Sport Committee’s report to the Justice Committee did not include the oral and written evidence received by the Committee. This material was originally published on the web only, and is now included in full in this volume.
The Subordinate Legislation Committee’s report at Stage 1 is included after the oral evidence taken by the Health and Sport Committee. The Subordinate Legislation Committee did not take oral evidence on the Bill and agreed its report in private. No extracts from the minutes or the Official Report of the relevant meeting of the Committee are, therefore, included in this volume.

The Finance Committee did not produce a report to the Justice Committee. The written evidence it received is included following the report by the Subordinate Legislation Committee.

The Delegated Powers and Law Reform Committee (formerly the Subordinate Legislation Committee) considered the delegated powers in the Bill after Stage 2 and reported to the Parliament. That report is included in this volume. However, the Committee agreed its report without debate and no extracts from the minutes or the Official Report of the relevant meeting of the Committee are, therefore, included.
# Victims and Witnesses (Scotland) Bill

[AS INTRODUCED]

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National Confidential Forum

NCF: constitution and operation

General

Interpretation
Ancillary provision
Commencement
Short title
Victims and Witnesses (Scotland) Bill  
[AS INTRODUCED]

An Act of the Scottish Parliament to make provision for certain rights and support for victims and witnesses, including provision for implementing Directive 2012/29/EU of the European Parliament and the Council; and to make provision for the establishment of a committee of the Mental Welfare Commission with functions relating to persons who were placed in institutional care as children.

General principles

1 General principles

(1) Each person mentioned in subsection (2) must have regard to the principles mentioned in subsection (3) in carrying out functions conferred on the person by or under any enactment in so far as those functions relate to a person who is or appears to be a victim or witness in relation to a criminal investigation or criminal proceedings.

(2) The persons are—

(a) the Lord Advocate,
(b) the Scottish Ministers,
(c) the chief constable of the Police Service of Scotland,
(d) the Scottish Court Service,
(e) the Parole Board for Scotland.

(3) The principles are—

(a) that a victim or witness should be able to obtain information about what is happening in the investigation or proceedings,
(b) that the safety of a victim or witness should be ensured during and after the investigation and proceedings,
(c) that a victim or witness should have access to appropriate support during and after the investigation and proceedings,
(d) 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.

(4) The Scottish Ministers may by order modify subsection (2).

(5) An order under subsection (4) is subject to the affirmative procedure.
Standards of service

(1) Each person mentioned in subsection (2) must set and publish standards in relation to—
   (a) the carrying out of any of the person’s 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,
   (b) the person’s procedure for making and resolving complaints about the way in which the person carries out those functions.

(2) The persons are—
   (a) the Lord Advocate, but only in relation to functions mentioned in subsection (3)(a),
   (b) the Scottish Ministers, but only in relation to functions mentioned in subsection (3)(b),
   (c) the chief constable of the Police Service of Scotland,
   (d) the Scottish Court Service,
   (e) the Parole Board for Scotland.

(3) The functions are—
   (a) functions relating to the investigation and prosecution of crime,
   (b) functions relating to prisons and young offenders institutions and persons detained in them.

(4) The Scottish Ministers may by order modify subsection (2).

(5) In this section—
   “prison” and “young offenders institution” have the meanings given by section 307(1) of the 1995 Act,
   “victim” includes a prescribed relative of a victim.

(6) In subsection (5), “prescribed” means prescribed by the Scottish Ministers by order.

(7) An order under subsection (4) is subject to the affirmative procedure.

(8) An order under subsection (6) is subject to the negative procedure.

Disclosure of information

(1) A person mentioned in subsection (2) (a “requester”) may at any time request a qualifying person to disclose to the requester qualifying information in relation to an offence or alleged offence and any criminal investigation or criminal proceedings relating to it.

(2) The persons are—
   (a) a person who appears to be a victim of the offence or alleged offence,
   (b) a person who is to give, or is likely to give, evidence in criminal proceedings which have been, or are likely to be, instituted against a person in respect of the offence or alleged offence,
(c) a person who has given a statement in relation to the offence or alleged offence to a constable or the prosecutor.

(3) Where a request is made under subsection (1), the qualifying person must disclose to the requester any qualifying information which the person holds.

(4) A qualifying person need not comply with a request under subsection (1) in so far as the qualifying person considers that it would be inappropriate to disclose any qualifying information.

(5) In this section—

“qualifying information” means information that—

(a) falls within subsection (6),
(b) relates to the offence or alleged offence, and
(c) is specified in the request under subsection (1),

“qualifying person” means—

(a) the chief constable of the Police Service of Scotland,
(b) a prosecutor (as defined in section 307(1) of the 1995 Act),
(c) the Scottish Court Service.

(6) Information falls within this subsection if it is—

(a) a decision not to proceed with a criminal investigation and any reasons for it,
(b) a decision to end a criminal investigation and any reasons for it,
(c) a decision not to institute criminal proceedings against a person and any reasons for it,
(d) the place in which a trial is to be held,
(e) the date on which and time at which a trial is to be held,
(f) the nature of charges libelled against a person,
(g) the stage that criminal proceedings have reached,
(h) the final disposal in criminal proceedings and any reasons for it.

(7) The Scottish Ministers may by order modify—

(a) the definition of “qualifying person” in subsection (5),
(b) subsection (6).

(8) An order under subsection (7) is subject to the affirmative procedure.

Interviews

4 Interviews with children: guidance

(1) Subsection (2) applies where the persons mentioned in subsection (3) are jointly carrying out an interview with a child in relation to—

(a) criminal proceedings which have been instituted against some other person, or
(b) a matter which might result in criminal proceedings being instituted against some other person.
Victims and Witnesses (Scotland) Bill

(2) The persons must have regard to any guidance issued by the Scottish Ministers about the carrying out of interviews with a child in relation to those matters.

(3) The persons are—
   (a) a constable,
   (b) a social worker (as defined in section 77 of the Regulation of Care (Scotland) Act 2001 (asp 8)).

(4) The Scottish Ministers may by order modify subsection (3).

(5) An order under subsection (4) is subject to the negative procedure.

(6) In this section, “child” means a person under 18 years of age.

Certain sexual offences: victim’s right to specify gender of interviewer

(1) This section applies where an investigating officer intends to carry out a relevant interview with a person who is or appears to be the victim of an offence of a type mentioned in subsection (5).

(2) Before the relevant interview takes place, the investigating officer must give the person who is to be interviewed the opportunity to specify the gender of the investigating officer who is to carry out the interview.

(3) If the person who is to be interviewed specifies a gender under subsection (2), the relevant interview may be carried out only by an investigating officer of that gender.

(4) The investigating officer need not comply with subsection (2) if—
   (a) complying with it would be likely to prejudice a criminal investigation, or
   (b) it would not be reasonably practicable to do so.

(5) The types of offence are—
   (a) an offence listed in any of paragraphs 36 to 60 of Schedule 3 to the Sexual Offences Act 2003 (c.42),
   (b) an offence under section 22 of the 2003 Act (traffic in prostitution etc.),
   (c) an offence under section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (c.19) (trafficking people for exploitation),
   (d) an offence consisting of domestic abuse,
   (e) stalking.

(6) Failure to comply with subsection (2) in relation to a particular relevant interview has no effect on any criminal proceedings to which the interview relates.

(7) The Scottish Ministers may by order modify subsection (5).

(8) In this section—
   “investigating officer” means—
   (a) a constable, or
   (b) a person of such other description as the Scottish Ministers may by order prescribe,

“relevant interview” means—
(a) questioning of a person in the course of criminal proceedings which have been instituted in relation to another person, or
(b) questioning of a person with a view to instituting criminal proceedings against another person.

(9) Any reference in this section (other than subsection (10)) to an investigating officer includes a reference to two or more investigating officers acting jointly.

(10) An order under subsection (7) or paragraph (b) of the definition of “investigating officer” in subsection (8) is subject to the negative procedure.

Vulnerable witnesses

Vulnerable witnesses: main definitions

In section 271 of the 1995 Act (vulnerable witnesses: main definitions)—

(a) for subsection (1), substitute—

“(1) For the purposes of this Act, a person who is giving or is to give evidence at, or for the purposes of, a hearing in relevant criminal proceedings is a vulnerable witness if—

(a) the person is under the age of 18 on the date of commencement of the proceedings in which the hearing is being or is to be held,

(b) there is a significant risk that the quality of the evidence to be given by the person will be diminished by reason of—

(i) mental disorder (within the meaning of section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13)), or

(ii) fear or distress in connection with giving evidence at the hearing,

(c) the offence is alleged to have been committed against the person in proceedings for—

(i) an offence listed in any of paragraphs 36 to 60 of Schedule 3 to the Sexual Offences Act 2003 (c.42),

(ii) an offence under section 22 of the Criminal Justice (Scotland) Act 2003 (asp 7) (traffic in prostitution etc.),

(iii) an offence under section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (c.19) (trafficking people for exploitation),

(iv) an offence consisting of domestic abuse,

(v) an offence of stalking, or

(d) there is considered to be a significant risk of harm to the person by reason only of the fact that the person is giving or is to give evidence in the proceedings.”,

(b) after subsection (1), insert—

“(1AA) The Scottish Ministers may by order subject to the affirmative procedure modify subsection (1)(c).”,

(c) subsection (1A) is repealed,

(d) in subsection (2), after “(1)(b)” insert “or (d)”, and
(e) after subsection (4), insert—

“(4A) In determining whether a person is a vulnerable witness under subsection (1)(b) or (d), the court must—

(a) have regard to the best interests of the witness, and

(b) take account of any views expressed by the witness.”.

7 Child and deemed vulnerable witnesses

(1) In section 71(2XA) of the 1995 Act (first diet), for “child” substitute “vulnerable”.

(2) In section 72(6)(b)(ii) of the 1995 Act (preliminary hearing procedure), for “child” substitute “vulnerable”.

(3) In section 271(5) of the 1995 Act (definitions for sections 271A to 271M of the 1995 Act)—

(a) before the definition of “court”, insert—

““child witness” means a vulnerable witness referred to in subsection (1)(a),”, and

(b) after that definition, insert—

““deemed vulnerable witness” means a vulnerable witness referred to in subsection (1)(c).”.

(4) In section 271A of the 1995 Act (child witnesses)—

(a) in subsection (1)—

(i) after “child witness”, where it first occurs, insert “or a deemed vulnerable witness”, and

(ii) the word “child”, where it second occurs, is repealed,

(b) in subsection (2)—

(i) after “child witness”, where it first occurs, insert “or a deemed vulnerable witness”, and

(ii) for “child”, where it second occurs, substitute “vulnerable”, and

(iii) in each of paragraphs (a) and (b), the word “child” is repealed,

(c) in each of subsections (3) and (4), for “child” substitute “vulnerable”,

(d) in subsection (5)—

(i) for “child”, where it first occurs, substitute “vulnerable”, and

(ii) in paragraphs (a), (b) and (c), the word “child”, in each place where it occurs, is repealed,

(e) in subsection (5A)—

(i) in paragraph (a), for “child” substitute “vulnerable”, and

(ii) in paragraph (b), for “child” substitute “vulnerable”,

(f) in subsection (6)—

(i) in paragraph (a), after “child witness” insert “or a deemed vulnerable witness”, and
(ii) in paragraph (b), for “child”, where it first occurs, substitute “vulnerable”,
(iii) in paragraph (b), the word “child”, where it second occurs, is repealed,
(iv) in paragraph (c), for “child”, where it first occurs, substitute “vulnerable”, and
(v) in paragraph (c), the word “child”, where it second occurs, is repealed,

(g) in subsection (7)(a)—
(i) for “child”, where it first occurs, substitute “vulnerable”, and
(ii) the word “child”, where it second occurs, is repealed,

(h) in subsection (8A)(a)—
(i) in sub-paragraph (i), for “child” substitute “vulnerable”, and
(ii) in paragraph (ii), the word “above”, where it second occurs, is repealed,

(i) in subsection (9), the word “child”, in each place where it occurs, is repealed,
(j) in subsection (10), the word “child”, in each place where it occurs, is repealed,
(k) in subsection (11)(a), the word “child” is repealed, and
(l) in subsection (13), for “child” substitute “vulnerable”.


(6) The title of section 271C of the 1995 Act becomes “Vulnerable witness application”.

(7) In section 271E(1)(a) of the 1995 Act (party considering vulnerable witness notice or application), for “child” substitute “vulnerable”.

(8) In section 271F(2)(a) of the 1995 Act (modifications of section 271 in relation to accused giving evidence as a child witness)—

(a) in paragraph (a)(i), for “child witness (except in the phrase “child witness notice”)” substitute “witness”, and
(b) in paragraph (a)(ii), the word “child” is repealed.

(9) In section 288E of the 1995 Act (prohibition of personal conduct of defence in certain cases involving child witnesses under the age of 12), in each of subsections (5) and (7) for “child” substitute “vulnerable”.

8 Child and deemed vulnerable witnesses: standard special measures

In section 271A of the 1995 Act (the standard special measures)—

(a) in subsection (14)—

(i) in paragraph (a), the words from “where” to the end are repealed, and
(ii) in paragraph (c), the words from “in”, where it second occurs, to the end are repealed, and

(b) after that subsection, insert—

“(15) The Scottish Ministers may, by order subject to the affirmative procedure—

(a) modify subsection (14),
(b) in consequence of any modification made under paragraph (a)—
(i) prescribe the procedure to be followed when standard special measures are used, and

(ii) so far as is necessary, modify sections 271A to 271M of this Act.”.

9 Objections to special measures: child and deemed vulnerable witnesses

In section 271A of the 1995 Act (child witnesses)—

(a) after subsection (4), insert—

“(4A) Any party to the proceedings may, not later than 7 days after a vulnerable witness notice has been lodged, lodge with the court a notice (referred to in this section as an “objection notice”) stating—

(a) an objection to any special measure specified in the vulnerable witness notice that the party considers to be inappropriate, and

(b) the reasons for that objection.

(4B) The court may, on cause shown, allow an objection notice to be lodged after the period referred to in subsection (4A).

(4C) If an objection notice is lodged in accordance with subsection (4A) or (4B)—

(a) subsection (5) does not apply to the vulnerable witness notice, and

(b) the court must make an order under subsection (5A).”,

(b) in subsection (5), for “later than 7” substitute “earlier than 7 days and not later than 14”, and

(c) in subsection (13), after “notice” insert “or an objection notice”.

10 Child witnesses

(1) In section 271B of the 1995 Act (further special provision for child witnesses under the age of 12), for subsection (3), substitute—

“(3) Subsection (4) applies if the child witness expresses a wish to be present in the court-room for the purpose of giving evidence.

(4) The court must make an order under section 271A or, as the case may be, 271D which has the effect of requiring the child witness to be present in the court-room for the purpose of giving evidence unless the court considers that it would not be appropriate for the child witness to be present there for that purpose.

(5) Subsection (6) applies if the child witness—

(a) does not express a wish to be present in the court-room for the purpose of giving evidence, or

(b) expresses a wish to give evidence in some other way.

(6) The court may not make an order under section 271A or 271D having the effect mentioned in subsection (4) unless the court considers that—

(a) the giving of evidence by the child witness in some way other than by being present in the court-room for that purpose would give rise to a significant risk of prejudice to the fairness of the trial or otherwise to the interests of justice, and
(b) that risk significantly outweighs any risk of prejudice to the interests of the child witness if the order were to be made.”.

(2) In section 271A(5) of the 1995 Act (orders authorising special measures), for “271B(3)” substitute “271B”.

(3) In section 271D of the 1995 Act (review of arrangements for child witnesses and certain other witnesses), after subsection (6), add—

“(7) This section is subject to section 271B.”.

11 Reporting of proceedings involving children

In section 47 of the 1995 Act (restriction on report of proceedings involving children), in each of subsections (1), (2) and (3)(a), for “16”, wherever it occurs, substitute “18”.

12 Other vulnerable witnesses: assessment and application

(1) After section 271B of the 1995 Act, insert—

“271BA Assessment of witnesses

(1) This section applies where a party intends to cite a witness other than a child witness or a deemed vulnerable witness to give evidence at, or for the purposes of, a hearing in relevant criminal proceedings.

(2) The party intending to cite the witness must take reasonable steps to carry out an assessment under subsection (3).

(3) An assessment must determine whether the person—

(a) is likely to be a vulnerable witness, and

(b) if so, what special measure or combination of special measures ought to be used for the purpose of taking the person's evidence.

(4) In determining under subsection (3)(a) whether a person is likely to be a vulnerable witness the party must—

(a) take into account the matters mentioned in section 271(2),

(b) have regard to the best interests of the person, and

(c) take account of any views expressed by the person.”.

(2) In section 271C(1) of the 1995 Act (citation of vulnerable witnesses)—

(a) after “witness”, where it first occurs, insert “or a deemed vulnerable witness”, and

(b) before “considers” insert “and, having carried out an assessment under section 271BA,”.

13 Objections to special measures: other vulnerable witnesses

In section 271C of the 1995 Act (other vulnerable witnesses)—

(a) after subsection (4), insert—

“(4A) Any party to the proceedings may, not later than 7 days after a vulnerable witness application has been lodged, lodge with the court a notice (referred to in this section as “an objection notice”) stating—
(a) an objection to any special measure specified in the vulnerable witness application that the party considers to be inappropriate, and

(b) the reasons for that objection.

(4B) The court may, on cause shown, allow an objection notice to be lodged after the period referred to in subsection (4A).

(4C) If an objection notice is lodged in accordance with subsection (4A) or (4B)—

(a) subsection (5) does not apply to the vulnerable witness application, and

(b) the court must make an order under subsection (5A).”;

(b) in subsection (5), for “later than 7” substitute “earlier than 7 days and not later than 14”, and

(c) in subsection (11)—

(i) after “application”, where it first occurs, insert “or an objection notice”,

(ii) after “application”, where it second occurs, insert “or, as the case may be, the notice”.

14 **Review of arrangements for vulnerable witnesses**

In section 271D(1)(a) of the 1995 Act (application for review of arrangements for vulnerable witnesses), for “the party citing or intending to cite the witness” substitute “any party to the proceedings”.

15 **Temporary additional special measures**

After section 271H of the 1995 Act, insert—

“**271HA Temporary additional special measures**

(1) The Scottish Ministers may, by order subject to the affirmative procedure, specify additional measures which for the time being are to be treated as special measures listed in section 271H(1).

(2) An order under subsection (1) may make different provision for different courts or descriptions of court or different proceedings or types of proceedings.

(3) An order under subsection (1) must specify—

(a) the area in which the additional measures may be used,

(b) the period during which the additional measures may be used, and

(c) the procedure to be followed when the additional measures are used.”.

16 **Special measures: closed courts**

(1) In section 271H(1) of the 1995 Act (the special measures), after paragraph (e) insert—

“(ea) excluding the public during the taking of the evidence in accordance with section 271HB of this Act,”.

(2) After section 271HA of the 1995 Act (inserted by section 15 of this Act), insert—
“271HB Excluding the public while taking evidence
(1) This section applies where the special measure to be used in respect of a vulnerable witness is excluding the public during the taking of the evidence of the vulnerable witness.
(2) The court may direct that all or any persons other than those mentioned in subsection (3) are excluded from the court during the taking of the evidence.
(3) The persons are—
(a) members or officers of the court,
(b) parties to the case before the court, their counsel or solicitors or persons otherwise directly concerned in the case,
(c) bona fide representatives of news gathering or reporting organisations present for the purpose of the preparation of contemporaneous reports of the proceedings,
(d) such other persons as the court may specially authorise to be present.”.

(3) In section 271F(8)(a) of the 1995 Act (special measures not applying in relation to a vulnerable witness who is the accused), after “271H(1)(c)” insert “and (ea)”.

17 Power to prescribe further special measures
In section 271H of the 1995 Act (the special measures)—
(a) in subsection (1), paragraph (f) is repealed,
(b) after subsection (1), insert—
“(1A) The Scottish Ministers may, by order subject to the affirmative procedure—
(a) modify subsection (1),
(b) in consequence of any modification made under paragraph (a)—
(i) prescribe the procedure to be followed when special measures are used, and
(ii) so far as is necessary, modify sections 271A to 271M of this Act.”,
and
(c) subsection (2) is repealed.

18 Vulnerable witnesses: civil proceedings
In section 11(1) of the Vulnerable Witnesses (Scotland) Act 2004 (asp 3) (vulnerable witnesses: civil proceedings)—
(a) in paragraph (a), for “16” substitute “18”,
(b) the word “or” immediately after that paragraph is repealed, and
(c) after paragraph (b), insert “, or
(c) the person is of such description or is a witness in such proceedings as the Scottish Ministers may by order subject to the affirmative procedure prescribe.”.
Victim statements

(1) Section 14 of the 2003 Act (victim statements) is amended as follows.

(2) In subsection (5)—
   (a) in paragraph (a)—
      (i) after “when”, insert “or after”, and
      (ii) after “offence”, insert “but before sentence is imposed”;
   (b) in paragraph (b)—
      (i) after “when”, insert “or after”, and
      (ii) after “offence”, insert “but before sentence is imposed”.

(3) In subsection (6)(b)—
   (a) in sub-paragraph (i), after “subsection (10)” insert “(taking no account of qualifying persons who have not attained the age of 14 years)”,
   (b) the word “or” immediately after sub-paragraph (i) is repealed,
   (c) sub-paragraph (ii) is repealed, and
   (d) after that sub-paragraph, the words “or as the case may be to the child” are repealed.

(4) In subsection (8)—
   (a) for “neither” substitute “not”, and
   (b) the words “nor a child such as is mentioned in sub-paragraph (ii) of that paragraph” are repealed.

(5) After subsection (11), insert—
   “(11A) Where a child who has not attained the age of 14 years has (but for this subsection) the opportunity to make a statement by virtue of subsection (2), (3) or (6)(a)(i)—
   (a) any statement made by virtue of the subsection must instead be made by a carer of the child, but
   (b) those subsections otherwise apply as if references in them to a person and to the maker of a statement are to the child.

(11B) For the purposes of subsection (11A), “carer of the child” means—
   (a) a person who cared for the child when the offence or (apparent offence) was perpetrated,
   (b) a person who cares for the child when the statement is made,
   (c) a person who has cared for the child at any other time.

(11C) If more than one person comes within the meaning of “carer of the child” the persons may agree which carer is to make the statement after, so far as practicable and having regard to the age and maturity of the child—
   (a) giving the child an opportunity to express any views on which carer is to make the statement, and
(b) taking account of any views expressed by the child.

(11D) If no agreement is reached in accordance with subsection (11C)—

(a) the statement may be made by each person coming within the description in subsection (11B)(a), and

(b) if there is no such person, the statement may be made by each person coming within the description in subsection (11B)(b).

(11E) In subsection (11B), the expressions “cared for” and “cares for” are to be construed in accordance with the definition of “someone who cares for” in paragraph 20 of schedule 12 to the Public Services Reform (Scotland) Act 2010 (asp 8).

(6) In subsection (12)(a)—

(a) for “subsection (6)(b)(ii)” substitute “this section”, and

(b) for “there” substitute “in any part of this section”.

Sentencing

20 Duty to consider making compensation order

In section 249 of the 1995 Act (compensation order against convicted person), after subsection (4) insert—

“(4A) In any case where it would be competent for the court to make a compensation order, the court must consider whether to make a compensation order.”.

21 Restitution order

After section 253 of the 1995 Act, insert—

“Restitution order

253A Restitution order where conviction of police assault etc.

(1) This section applies where a person (“P”) is convicted of an offence under section 90(1) of the Police and Fire Reform (Scotland) Act 2012 (asp 8) (police assault etc.).

(2) The court, instead of or in addition to dealing with P in any other way, may make an order to be known as a restitution order requiring P to pay an amount not exceeding the prescribed sum (as defined in section 225(8)).

(3) The Scottish Ministers may by regulations amend subsection (2) so as to substitute for the amount for the time being specified such other amount as may be prescribed by, or determined in accordance with, the regulations.

(4) Any amount paid in respect of a restitution order is to be paid to the clerk of any court or any other person (or class of person) authorised by the Scottish Ministers for the purpose.

(5) Regulations under subsection (3) are subject to the negative procedure.

253B The Restitution Fund

(1) A person to whom any amount is paid under section 253A in respect of a restitution order must pay the amount to the Scottish Ministers.
(2) The Scottish Ministers must pay any amount received by virtue of subsection (1) into a fund to be known as the Restitution Fund.

(3) The Scottish Ministers must establish and maintain the Restitution Fund for the purpose of securing the provision of support services for persons who have been assaulted as mentioned in section 90(1) of the Police and Fire Reform (Scotland) Act 2012 (asp 8) (“victims”).

(4) Any payment out of the fund may be made only to a person who provides or secures the provision of support services for victims.

(5) The Scottish Ministers may delegate to such person as they may specify by order the duties imposed on them by subsection (3) of establishing and maintaining the Restitution Fund.

(6) The Scottish Ministers may by order make further provision about the Restitution Fund including provision for or in connection with—

(a) the operation of the fund,
(b) the administration of the fund,
(c) specifying persons or classes of person to or in respect of whom payments may be made out of the fund (but subject to subsection (4)),
(d) the making of payments out of the fund,
(e) requiring financial or other records to be kept,
(f) the making of reports to the Scottish Government containing such information and in respect of such periods as may be specified.

(7) An order under subsection (5) or (6) is subject to the affirmative procedure.

(8) In this section, “support services”, in relation to a victim, means any type of service or treatment which is intended to benefit the physical or mental health or well-being of the victim.

253C Restitution order, fine and compensation order: order of preference

(1) Subsection (2) applies where a court considers in relation to an offence that it would be appropriate—

(a) to make a restitution order,
(b) to impose a fine, and
(c) to make a compensation order.

(2) If the person convicted of the offence (“P”) has insufficient means to pay an appropriate amount under a restitution order, to pay an appropriate fine and to pay an appropriate amount in compensation, the court should prefer a compensation order and then a restitution order over a fine.

(3) Subsection (4) applies where a court considers in relation to an offence that it would be appropriate—

(a) to make a restitution order, and
(b) to impose a fine or make a compensation order.
(4) If P has insufficient means to pay an appropriate amount under a restitution order and to pay an appropriate fine or, as the case may be, an appropriate amount in compensation, the court should prefer a compensation order and then a restitution order over a fine.

253D **Application of receipts**

(1) This section applies where the court makes a restitution order in relation to a person (“P”) convicted of an offence and also in respect of the same offence or different offences in the same proceedings—

(a) imposes a fine and makes a compensation order, or

(b) imposes a fine or makes a compensation order.

(2) A payment by P must be applied in the following order—

(a) the payment must first be applied in satisfaction of the compensation order,

(b) the payment must next be applied in satisfaction of the restitution order,

(c) the payment must then be applied in satisfaction of the fine.

253E **Enforcement: application of certain provisions relating to fines**

(1) The provisions of this Act specified in subsection (2) apply in relation to restitution orders as they apply in relation to fines but subject to the modifications mentioned in subsection (2) and to any other necessary modifications.

(2) The provisions are—

(a) section 211(3) and (7),

(b) section 212,

(c) section 213 (with the modification that subsection (2) is to be read as if the words “or (4)” were omitted),

(d) section 214(1) to (4) and (6) to (9) (with the modification that subsection (4) is to be read as if the words from “unless” to “decision” were omitted),

(e) sections 215 to 217,

(f) subject to subsection (3) below, section 219(1)(b), (2), (3), (5), (6) and (8),

(g) sections 220 to 224,

(h) section 248B.

(3) In the application of the provisions of section 219 mentioned in subsection (2)(f) for the purposes of subsection (1)—

(a) a court may impose imprisonment in respect of a fine and decline to impose imprisonment in respect of a restitution order but not vice-versa,

(b) where a court imposes imprisonment both in respect of a fine and a restitution order, the amounts in respect of which imprisonment is imposed are to be aggregated for the purposes of section 219(2).”.
22 Victim surcharge

After section 253E of the 1995 Act (inserted by section 21), insert—

“Victim surcharge

253F Victim surcharge

(1) This section applies where—

(a) a person (“P”) is convicted of an offence other than an offence, or an offence of a class, that is prescribed by regulations by the Scottish Ministers,

(b) the court does not make a restitution order, and

(c) the court imposes a sentence, or sentence of a class, that is so prescribed.

(2) Except in such circumstances as may be prescribed by regulations by the Scottish Ministers, the court, in addition to dealing with P in any other way, must order P to pay a victim surcharge of such amount as may be so prescribed.

(3) Despite subsection (2), if P is convicted of two or more offences in the same proceedings, the court must order P to pay only one victim surcharge in respect of both or, as the case may be, all the offences.

(4) Any sum paid in respect of a victim surcharge is to be paid to the clerk of any court or any other person (or class of person) authorised by the Scottish Ministers for the purpose.

(5) Regulations under this section may make different provision for different cases and in particular may include provision—

(a) prescribing different amounts for different descriptions of offender,

(b) prescribing different amounts for different circumstances.

(6) Where provision is made by virtue of subsection (5), the Scottish Ministers may by regulations make provision for determining which victim surcharge is payable in the circumstances mentioned in subsection (3).

(7) Regulations under this section are subject to the affirmative procedure.

253G The Victim Surcharge Fund

(1) A person to whom any sum is paid under section 253F(4) in respect of a victim surcharge must pay the sum to the Scottish Ministers.

(2) The Scottish Ministers must pay any sum received by virtue of subsection (1) into a fund to be known as the Victim Surcharge Fund.

(3) The Scottish Ministers must establish and maintain the Victim Surcharge Fund for the purpose of securing the provision of support services for persons who have been the victims of crime (“victims”).

(4) Any payment out of the fund may be made only to—

(a) a victim, or

(b) a person who provides or secures the provision of support services for victims.
(5) The Scottish Ministers may delegate to such person as they may specify by order the duties imposed on them by subsection (3) of establishing and maintaining the Victim Surcharge Fund.

(6) The Scottish Ministers may by order make further provision about the Victim Surcharge Fund including provision for or in connection with—

(a) the operation of the fund,
(b) the administration of the fund,
(c) specifying persons or classes of person to or in respect of whom payments may be made out of the fund (but subject to subsection (4)),
(d) the making of payments out of the fund,
(e) the keeping of financial and other records,
(f) the making of reports to the Scottish Government containing such information and in respect of such periods as may be specified.

(7) An order under subsection (5) or (6) is subject to the affirmative procedure.

(8) In this section, “support services”, in relation to a victim, means any type of service or treatment which is intended to benefit the physical or mental health or well-being of the victim.

253H Application of receipts

(1) This section applies where the court orders the payment of a victim surcharge in relation to a person (“P”) convicted of an offence and also in respect of the same offence or different offences in the same proceedings—

(a) imposes a fine and makes a compensation order, or
(b) imposes a fine or makes a compensation order.

(2) A payment by P must be applied in the following order—

(a) the payment must first be applied in satisfaction of the compensation order,
(b) the payment must next be applied in satisfaction of the victim surcharge,
(c) the payment must then be applied in satisfaction of the fine.

253J Enforcement: application of certain provisions relating to fines

(1) The provisions of this Act specified in subsection (2) apply in relation to victim surcharges as they apply in relation to fines but subject to the modifications mentioned in subsection (2) and to any other necessary modifications.

(2) The provisions are—

(a) section 211(3) and (4),
(b) section 212,
(c) section 213 (with the modification that subsection (2) is to be read as if the words “or (4)” were omitted),
(d) section 214(1) to (4) and (6) to (9) (with the modification that subsection (4) is to be read as if the words from “unless” to “decision” were omitted),

(e) sections 215 to 218,

(f) subject to subsection (3) below, section 219(1)(b), (2), (3), (5), (6) and (8),

(g) sections 220 to 224,

(h) section 248B.

(3) In the application of the provisions of section 219 mentioned in subsection (2)(f) for the purposes of subsection (1)—

(a) a court may impose imprisonment in respect of a fine and decline to impose imprisonment in respect of a victim surcharge but not vice-versa,

(b) where a court imposes imprisonment both in respect of a fine and a victim surcharge, the amounts in respect of which imprisonment is imposed are to be aggregated for the purposes of section 219(2).”.

Release of offender: victim’s rights

23 Victim’s right to receive information about release of offender etc.

In section 16 of the 2003 Act (victim’s right to receive information about release of offender etc.)—

(a) in subsection (1), for the words from “a”, where it first occurs, to “offence)” substitute “an offence”, and

(b) in subsection (3), for paragraph (d) substitute—

“(d) that the convicted person is for the first time entitled to be considered for temporary release by virtue of rules under section 39(6) of the Prisons (Scotland) Act 1989 (c.45),”.

24 Life prisoners: victim’s right to make oral representations before release on licence

In section 17 of the 2003 Act (release on licence: right of victim to receive information and make representations)—

(a) in subsection (1)—

(i) the words from “be”, where it first occurs, to the end become paragraph (a) of the subsection, and

(ii) after that paragraph, add—

“(b) if the convicted person is serving a sentence of life imprisonment, be afforded an opportunity to make oral representations to a member of the Parole Board for Scotland who is not dealing with the convicted person’s case as respects such release and as to conditions which might be specified in the licence in question.”,

(b) in subsection (4)—

(i) after “how” insert “written”, and
(ii) at the end add “and how oral representations under that subsection should be made”,

(c) after subsection (10), insert—

“(10A) In complying with the duty imposed on them by subsection (5), the Scottish Ministers may fix different times in relation to written and oral representations respectively.”, and

(d) after subsection (12), add—

“(13) The Scottish Ministers may by order modify the description or descriptions of convicted person for the time being specified in subsection (1)(b).”.

Temporary release: victim’s right to make representations

After section 17 of the 2003 Act, insert—

“17A Temporary release: victim’s right to make representations about conditions

(1) This section applies where by virtue of subsection (1) or (5) of section 16 a person (the “victim”) is given the information mentioned in subsection (3)(d) of that section as respects a convicted person.

(2) On the first occasion on which the convicted person is entitled to be considered for temporary release by virtue of rules under section 39(6) of the Prisons (Scotland) Act 1989 (c.45), the Scottish Ministers must give the victim an opportunity to make written representations to them about any conditions that the victim considers should be imposed in relation to the temporary release.

(3) Subsection (2) applies only if the victim has notified the Scottish Ministers that the victim wishes to be given the opportunity to make representations under that subsection.

(4) The Scottish Ministers must—

(a) fix a time within which any written representations under subsection (2) require to be made to them if they are to be considered by them, and

(b) notify the victim of the time fixed.”.

National Confidential Forum

After section 4 of the Mental Health Act, insert—

“4ZA National Confidential Forum

(1) The Commission must establish and maintain a committee to be known as the National Confidential Forum (“NCF”) for the purpose of carrying out the following functions (referred to in this Act as “NCF functions”—

(a) the general functions mentioned in section 4ZB,

(b) the functions conferred on NCF in schedule 1A.

(2) Schedule 1A makes further provision about NCF.
4ZB  General functions of NCF

The general functions of NCF are—

(a) to provide means for persons who were placed in institutional care as children to describe in confidence (such descriptions being referred to in this Act as “testimony”)—

(i) experiences of that care,

(ii) any abuse experienced during the period spent in that care,

(b) to acknowledge testimony by enabling it to be given at hearings established by NCF or by written or other means,

(c) based on testimony received—

(i) 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), and

(ii) to make recommendations about policy and practice which NCF considers will improve institutional care (including by protecting children from, and preventing or reducing the incidence of, abuse),

(d) 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 them,

(e) to provide information about advice and assistance available to persons giving, or proposing to give, testimony.

4ZC  Carrying out NCF functions

(1) The Commission must delegate the NCF functions to NCF.

(2) The person appointed to chair NCF (the “NCF Head”) must account to the Commission for the carrying out of the NCF functions.

(3) Subsections (1) and (2) do not affect the responsibility of the Commission for the carrying out of the NCF functions.

4ZD  Modifications in relation to NCF

(1) The following modifications of this Part apply in relation to the NCF functions—

(a) sections 5, 6, 9A, 10, 16 and 19 do not apply,

(b) in section 17(1), references to the Commission (except in the phrase “Commission Visitor”) are to be read as if they were references to NCF,

(c) the Commission must not include in its annual report mentioned in section 18(1), any information which must not be included in an NCF report in accordance with paragraph 11(2) of schedule 1A,

(d) section 20 is to be read as if after subsection (1) there were inserted—

“(1A) For the purposes of the law of defamation—

(a) any statement made in good faith by NCF, its members or NCF staff in carrying out any of the NCF functions is privileged,
(b) any statement made by an eligible person in accordance with arrangements made by NCF under paragraph 8(2) of schedule 1A is privileged.

(1B) A word or expression used in subsection (1A) has the same meaning as it has in schedule 1A.”.

5

(2) Section 1 of the Public Records (Scotland) Act 2011 (asp 12) is to be read as if after subsection (8) there were inserted—

“(8A) The Mental Welfare Commission for Scotland must have a separate records management plan in relation to the public records created in carrying out the NCF functions (within the meaning of section 4ZA(1) of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13)).”.”.

27 NCF: constitution and operation

(1) In schedule 1 to the Mental Health Act—

(a) in paragraph 2A(1)(b), for “6 nor more than 8” substitute “7 nor more than 9”,

(b) omit the word “and” immediately preceding paragraph 2B(2)(b), and

(c) at the end of that paragraph, insert “and

(c) one person who has such skills, knowledge and experience as the Scottish Ministers consider to be relevant in relation to the carrying out of the NCF functions.”.

15

(2) After schedule 1 to the Mental Health Act, insert—

“SCHEDULE 1A
(introduced by section 4ZA(2))

NATIONAL CONFIDENTIAL FORUM

PART 1

MEMBERS OF NCF ETC.

Membership

1 (1) NCF is to consist of—

(a) the NCF Head, appointed by the Scottish Ministers, and

(b) at least 2 other members, appointed by the Scottish Ministers.

20

(2) The Scottish Ministers must, when appointing a person under sub-paragraph (1)(a) or (b), have regard to the recommendation of the selection panel mentioned in paragraph 2(1).

(3) Each member—

(a) is to be appointed for such period as the Scottish Ministers think fit, and

(b) holds and vacates office in accordance with the terms of appointment.

(4) A member may by written notice to the Scottish Ministers resign office as a member.

(5) The Scottish Ministers must, as soon as practicable after receiving a resignation notice, inform the Commission of the notice.
Membership selection panel

2 (1) The selection panel is to consist of—
(a) a representative of the Scottish Ministers,
(b) the person appointed in accordance with paragraph 2A(1)(a) of schedule 1 to chair the Commission, and
(c) other persons of such number and description as may be determined by the Scottish Ministers.

(2) The selection panel may recommend for appointment only persons who the panel consider to have such skills, knowledge and experience as the panel consider to be relevant to the carrying out of the NCF functions.

(3) The selection panel may not recommend for appointment persons who are members of the Commission.

(4) The selection panel is to determine the selection process to be applied in determining persons to be recommended for appointment.

NCF staff

3 (1) This paragraph applies where—
(a) the Commission proposes, in accordance with paragraph 7(1)(b) of schedule 1, to appoint a member of staff, and
(b) the employment of that person is to relate to the carrying out of NCF functions.

(2) The person may be appointed only if—
(a) the person has been recommended for appointment by the NCF Head,
(b) the terms of the person’s appointment would prevent the person from carrying out any other function conferred on the Commission during the period when the Commission is required to establish and maintain NCF.

NCF powers and procedure

4 (1) NCF may do anything which appears to it to be necessary or expedient for the purposes of, or in connection with, the carrying out of the NCF functions.

(2) It is for the NCF Head to determine NCF’s procedure, having regard to the views of the other NCF members.

(3) In carrying out its functions and in determining its procedure, NCF must have regard to the need to avoid any unnecessary costs to public funds, eligible persons and others.

(4) The validity of any proceedings of NCF is not affected by—
(a) any vacancy in its membership,
(b) any defect in the appointment of a member.

(5) Members of the Scottish Government and persons authorised by the Scottish Government may not attend or take part in meetings of NCF.
Application of schedule 1 to NCF

5 (1) The provisions of schedule 1 mentioned in sub-paragraph (2) do not apply in relation to NCF.

(2) The provisions are—

(a) paragraph 7D,
(b) paragraph 7E,
(c) paragraph 7G.

PART 2
DELEGATION OF FUNCTIONS

Delegation by NCF

6 (1) NCF must delegate the NCF functions to the persons mentioned in sub-paragraph (3), to the extent determined by the NCF Head.

(2) NCF may otherwise delegate the NCF functions to those persons, to the extent determined by NCF.

(3) Those persons are—

(a) the NCF Head,
(b) any other member of NCF,
(b) any member of NCF staff.

(4) This paragraph does not affect—

(a) NCF’s responsibility for the delegated functions, or
(b) the NCF Head’s accountability for the carrying out of the NCF functions under section 4ZC(2).

PART 3
ELIGIBILITY TO PARTICIPATE IN FORUM

Eligibility

7 (1) NCF may receive testimony from any eligible person whose application to provide testimony has been accepted by NCF.

(2) An “eligible person” is a person who—

(a) is 18 years of age or over,
(b) was placed in an establishment providing institutional care during the person’s childhood, and
(c) is no longer in that care.

(3) In this schedule “institutional care” means a care or health service which meets the conditions in sub-paragraph (4) and otherwise is of a description or type prescribed by order made by the Scottish Ministers.

(4) An order under sub-paragraph (3) must prescribe a description of type of care or health service which—
(a) was provided to children in Scotland at some time (whether or not the service is still provided),
(b) included residential accommodation for the children placed in care, and
(c) was provided by a body corporate or unincorporated.

(5) An order under sub-paragraph (3) may not prescribe a service provided at premises used wholly or mainly as a private dwelling.

(6) An order under sub-paragraph (3) is subject to the affirmative procedure.

PART 4
CONDUCT OF HEARINGS ETC

Testimony given to NCF

8 (1) NCF must make provision for receiving testimony under paragraph 7(1).

(2) NCF must make arrangements for testimony to be given—
   (a) at a hearing established by NCF (a “forum hearing”), or
   (b) by other means of communication (whether oral or written).

(3) Where NCF receives testimony at a forum hearing it must ensure that—
   (a) at least 2 members of NCF are present while the forum hearing is receiving the testimony, and
   (b) the forum hearing is held in private.

(4) For the purposes of sub-paragraph (3), a forum hearing is held in private if the only persons present are—
   (a) the person giving the testimony,
   (b) any person accompanying that person whose attendance has been approved by NCF,
   (c) members of NCF,
   (d) NCF staff.

(5) It is otherwise for NCF to determine procedures for receiving testimony, taking account of—
   (a) any procedures determined under paragraph 4(2), and
   (b) the duty in paragraph 4(3).

Recording of testimony

9 (1) NCF may record testimony and any other information received from eligible persons in such manner as it thinks fit.

(2) NCF must as soon as reasonably practicable after receiving any information from an eligible person take such steps as it thinks fit to organise the information in such a way as to preserve the anonymity of—
   (a) the person providing the information,
   (b) any individual mentioned in the testimony, and
(c) any establishment providing institutional care mentioned in the testimony.

Payment of expenses

10 NCF may require the Commission to pay such expenses as NCF considers reasonable—

(a) to eligible persons, and

(b) to persons accompanying eligible persons to forum hearings.

PART 5
REPORTING

Reports by NCF

11 (1) NCF may prepare—

(a) reports based on testimony received,

(b) reports setting out, in relation to the testimony, matters it identifies and recommendations made by virtue of section 4ZB(c).

15 (2) A report prepared under this paragraph must not—

(a) identify or include information which could lead to the identification of—

(i) a person who has been in institutional care during childhood,

(ii) a person alleged to have experienced or committed abuse,

(iii) an establishment providing institutional care, or

(b) include any other information which is subject to a confidentiality restriction under paragraph 13.

(3) It is otherwise for NCF to determine the form and content of a report prepared under this paragraph.

Annual NCF reports

12 (1) As soon as practicable after 31 March in each year, NCF must submit to the Scottish Ministers a report on the discharge of the NCF functions during the period of 12 months ending on 31 March.

(2) NCF must consult the Commission before preparing a report under this paragraph.

(3) A report prepared under this paragraph must not include the information mentioned in paragraph 11(2).

(4) NCF must send a copy of each report prepared under this paragraph to the Commission.

(5) The Scottish Ministers must lay before the Scottish Parliament a copy of each report submitted to them under sub-paragraph (1).
PART 6

CONFIDENTIALITY

Disclosure of information

13(1) This paragraph applies to—

(a) the Commission,
(b) a person who is or has been a member of the Commission,
(c) NCF,
(d) a person who is or has been a member of NCF,
(e) a person who is or has been an employee of the Commission,
(f) a person who has been given information by a person carrying out NCF functions for the purpose of storing or preserving that information.

(2) A person must not disclose any information which—

(a) has been provided to the person in connection with the carrying out of the NCF functions, and
(b) is not otherwise in the public domain.

(3) Sub-paragraph (2) does not prevent disclosure of any information by the person in so far as—

(a) the disclosure is to another person mentioned in sub-paragraph (1) and is necessary for the purpose of enabling or assisting the carrying out by NCF or the Commission of any of its functions under this Act,
(b) the disclosure is necessary for the purpose of enabling NCF to prepare a report in accordance with paragraph 11,
(c) the disclosure is in accordance with sub-paragraph (4), (5) or (6).

(4) A member of NCF must disclose to a constable information received by that member to the extent that it is, in the opinion of the member acting in good faith, reasonably necessary to prevent the commission of an offence involving the abuse of a child.

(5) A member of NCF may disclose to a constable information received by that member to the extent that—

(a) it relates to an allegation made by a person who has given testimony that another identifiable person has committed an offence involving the abuse of a child, and
(b) it is, in the opinion of the member acting in good faith, in the public interest to do so.

(6) A court may order disclosure of information in, or for the purposes of, civil or criminal proceedings (including the purposes of the investigation of any offence or suspected offence) if it is satisfied that—

(a) the disclosure is necessary in the interests of justice, and
(b) the extent of the disclosure is necessary in the interests of justice.
PART 7

GENERAL

14 In this schedule—

“child” means a person who is under 18 years of age,
“childhood” means the period when a person is under 18 years of age,
“eligible person” has the meaning given by paragraph 7(2),
“forum hearing” has the meaning given by paragraph 8(2),
“institutional care” has the meaning given by paragraph 7(3),
“NCF staff” means persons appointed in accordance with paragraph 3.”.

(3) In schedule 2 to the Public Appointments and Public Bodies etc. (Scotland) Act 2003 (asp 4) (specified authorities), before the entry for “Accounts Commission for Scotland” (and the italic cross-heading immediately preceding it), insert—

“NCF Head and any other member of the National Confidential Forum established under section 4ZA(1) of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13)”.

28 Interpretation

In this Act—

“the 1995 Act” means the Criminal Procedure (Scotland) Act 1995 (c.46),
“the 2003 Act” means the Criminal Justice (Scotland) Act 2003 (asp 7), and
“the Mental Health Act” means the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13).

29 Ancillary provision

(1) The Scottish Ministers may by order make such supplementary, incidental, consequential, transitional, transitory or saving provision as they consider appropriate for the purposes of, in consequence of, or for giving full effect to, any provision of this Act.

(2) An order under this section may modify any enactment (including this Act).

(3) An order under subsection (1) containing provisions which add to, replace or omit any part of the text of an Act is subject to the affirmative procedure.

(4) Otherwise, an order under subsection (1) is subject to the negative procedure.

30 Commencement

(1) This section and sections 28, 29 and 31 come into force on the day after Royal Assent.

(2) The other provisions of this Act come into force on such day as the Scottish Ministers may by order appoint.

(3) An order under subsection (2) may contain transitory or transitional provision or savings.
31 **Short title**

The short title of this Act is the Victims and Witnesses (Scotland) Act 2013.
Victims and Witnesses (Scotland) Bill
[AS INTRODUCED]

An Act of the Scottish Parliament to make provision for certain rights and support for victims and witnesses, including provision for implementing Directive 2012/29/EU of the European Parliament and the Council; and to make provision for the establishment of a committee of the Mental Welfare Commission with functions relating to persons who were placed in institutional care as children.

Introduced by: Kenny MacAskill
On: 6 February 2013
Bill type: Government Bill
VICTIMS AND WITNESSES (SCOTLAND) BILL

EXPLANATORY NOTES

(AND OTHER ACCOMPANYING DOCUMENTS)

CONTENTS

1. As required under Rule 9.3 of the Parliament’s Standing Orders, the following documents are published to accompany the Victims and Witnesses (Scotland) Bill introduced in the Scottish Parliament on 6 February 2013:

   - Explanatory Notes;
   - a Financial Memorandum;
   - a Scottish Government Statement on legislative competence; and
   - the Presiding Officer’s Statement on legislative competence.

A Policy Memorandum is printed separately as SP Bill 23–PM.
EXPLANATORY NOTES

INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

OVERVIEW OF THE BILL

4. 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 (NCF) for adults placed in institutional forms of care as children.

5. The proposed reforms relating to victims and witnesses will improve the support available for such individuals. Key proposals include:
   - giving victims and witnesses a right to certain information about their case;
   - creating a duty on organisations within the 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 certain special measures when giving evidence;
   - requiring the court to consider compensation to victims in relevant cases;
   - introducing a victim surcharge so that offenders contribute to the cost of supporting victims; and
   - introducing restitution orders, allowing the court to require that offenders who assault police officers pay to support the specialist non-NHS services which assist in the recovery of such individuals.

6. The establishment of the NCF will provide an opportunity for adults who were placed in institutional care as children to recount their experiences of being in care in a confidential, non-judgemental and supportive setting.

7. The key proposals in the Bill which relate to the NCF are as follows:
   - The functions of the NCF are set out in a clear and distinct way, the main function being to offer adults placed in institutional care the opportunity of acknowledgement of their experiences, in particular those of abuse;
   - The scope of the NCF is defined to enable all adults placed in institutional care as children the opportunity to participate in hearings;
These documents relate to the Victims and Witnesses (Scotland) Bill (SP Bill 23) as introduced in the Scottish Parliament on 6 February 2013

- The testimony of persons who participate in the NCF is protected from disclosure and those persons will be protected from the threat of defamation as a result of testimony they give. Members of the NCF who will conduct hearings, receive testimony and offer acknowledgement, and its staff, will also be protected from the threat of action for defamation where they have acted in good faith in discharging the functions of the Forum;

- The arrangements by which the NCF is to be hosted by an existing public body, specifically the Mental Welfare Commission, are set out, including the mechanisms to safeguard the respective operational autonomy of the Forum and Commission.

COMMENTARY ON SECTIONS

General principles

Section 1 - General principles

8. Section 1 provides that certain identified persons must take account of four general principles whilst carrying out any statutory functions they have in relation to victims and witnesses. The persons so identified in subsection (2) are the Lord Advocate, the Scottish Ministers, the chief constable of the Police Service of Scotland, the Scottish Court Service (SCS), and the Parole Board for Scotland (PBS).

9. In relation to the Scottish Ministers, the duty to have regard to the principles will primarily fall on the Scottish Prison Service (SPS), which routinely deals with victims and witnesses. SPS is not named specifically in subsection (2) and, as a result of its legal status as an Executive Agency, the duty has to be placed on the Scottish Ministers generally.

10. The principles listed set out that victims and witnesses should be able to obtain information about what is happening in their cases; should have their safety ensured; should be able to access appropriate support; and should be able to participate effectively where that is appropriate.

11. Subsection (4) enables the Scottish Ministers to modify by order the list of persons to whom the duty applies.

Standards of service

Section 2 - Standards of Service

12. Section 2 provides that certain persons must set and publish standards in relation to the services which those bodies provide to victims and witnesses, and set out their complaints procedure. The persons are the Lord Advocate, the Scottish Ministers, the chief constable of the Police Service of Scotland, SCS, and PBS.

13. Subsection (2)(a) and (3)(a) provide that the duty on the Lord Advocate only applies in relation to functions relating to the investigation and prosecution of crime. Subsection (2)(b) and (3)(b) provide that 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 documents relate to the Victims and Witnesses (Scotland) Bill (SP Bill 23) as introduced in the Scottish Parliament on 6 February 2013

these restrictions is to identify COPFS and SPS as the particular bodies to which this duty is intended to apply. As described in relation to section 1, the duty cannot be placed specifically on SPS, and the same is true of COPFS, which is a Ministerial Department. Both COPFS and SPS will be expected to set out distinct standards of service.

14. This section also enables the Scottish Ministers to modify, under subsection (4), the list of persons to whom the obligation applies. Subsection (5) provides that the term “victim” includes a prescribed relative of a victim, and subsection (6) enables the Scottish Ministers to prescribe by order those to be regarded as such a relative.

Disclosure of information

Section 3 – Disclosure of information about criminal proceedings

15. Section 3 requires the chief constable of the Police Service of Scotland, SCS, and any prosecutor to disclose certain information to victims and witnesses of criminal offences (or alleged criminal offences) on request. The persons who can seek information are those who appear to be a victim of the offence or alleged offence; those who are to give, or are likely to give, evidence in criminal proceedings in relation to the offence or alleged offence; and those who have given a statement to a police officer or prosecutor in relation to the offence or alleged offence. The information to be disclosed is set out in subsection (6).

16. The exception to this obligation to provide information to those detailed in subsection (2), is set out in subsection (4).

17. Subsection (4) provides that information need not be disclosed in so far as the person on whom the obligation falls (the qualifying person) considers that disclosure would be inappropriate.

18. Subsection (5) provides that the information which can be requested (referred to as “qualifying information”) must fall within the types of information set out in subsection (6); relate to the offence or alleged offence; and be specified in a request under subsection (1).

19. The Scottish Ministers may, under subsection (7), modify the list of information which must be provided and the list of persons who must provide such information detailed in subsection (5).

Interviews

Section 4 - Interviews with children: guidance

20. This section provides that police officers and social workers must have regard to guidance issued by the Scottish Ministers when carrying out joint investigative interviews with a child witness under the age of 18 in relation to criminal proceedings or a matter which may lead to criminal proceedings. Subsection (4) allows the Scottish Ministers to modify by order the list of persons to whom the obligation applies. Defining “child” as anyone under 18 is in line with the EU Directive establishing minimum standards on the rights, support and protection of victims of crime (2012/29/EU) (which defines “child witness” for the purposes of criminal
proceedings as any person below 18 years of age) and various other Directives (e.g. on trafficking of human beings and child sexual exploitation). Lord Carloway’s Report into criminal law and practice also recommends that “for the purposes of arrest, detention and questioning, a child should be defined as anyone under the age of 18 years.”

Section 5 – Certain sexual offences: victim’s right to specify gender of interviewer

21. This section allows victims or alleged victims of certain types of offence to specify the gender of the investigating officer who is to carry out the interview. The types of offences are sexual offences; human trafficking; domestic abuse and stalking.

22. Subsection (4) provides that the investigating officer need not comply with a request for a specified gender of interviewer if doing so would be likely to prejudice the criminal investigation (for example, if the investigation is time critical and no officers of the specified gender are currently available), or if doing so would not be reasonably practicable. Subsection (6) provides that any failure to comply has no effect on any relevant criminal proceedings.

23. The section also allows the Scottish Ministers to modify by order the list of types of offences to which this section applies and the persons carrying out the interview.

Vulnerable witnesses

Section 6 – Vulnerable witnesses: main definitions

24. This section, along with sections 7-9 and 11-17, amends the Criminal Procedure (Scotland) Act 1995 (the 1995 Act). These sections redefine vulnerable witness, including child witness, to improve the identification and the support available to enable them to give their best evidence and sets out the special measures available to these witnesses along with the procedure to be followed in criminal proceedings to enable such special measures to be used.

25. Section 6(a) replaces section 271(1) of the 1995 Act, and provides that the following categories of person are to be regarded as vulnerable witnesses:

- children (i.e. those under age 18 at the date of the commencement of the proceedings in which the hearing is being or to be held);
- adult witnesses whose quality of evidence (as defined in section 271(4) of the 1995 Act) is at significant risk of being diminished either as a result of a mental disorder (as defined by section 328 of the Mental Health (Care and treatment) (Scotland) Act 2003), or due to fear or distress in connection to giving evidence;
- victims of alleged sexual offences, human trafficking, domestic abuse or stalking who are giving evidence in proceedings which relate to that particular offence;
- witnesses who are considered by the court to be at significant risk of harm by reason of them giving evidence.

26. Section 6(b) inserts subsection (1AA) which gives the Scottish Ministers an order-making power to modify the categories of witness to be presumed vulnerable (in addition to victims of
sexual offences (paragraph (c)(i)), human trafficking (paragraphs (c)(ii) and (c)(iii)), domestic abuse (paragraph (c)(iv)), and stalking (paragraph (c)(v))).

27. Section 6(c) removes subsection (1A), which currently provides that those under the age of 18 are to be considered child witnesses for the purposes of human trafficking cases. Given that section 6(a) provides that all those under 18 are to be considered child witnesses, this is no longer necessary.

28. Section (6)(e) inserts subsection (4A) which requires the court to consider the best interests and views of the witness in deciding whether they are vulnerable either because the quality of their evidence is likely to be diminished (subsection (1)(b)) or they are likely to be at significant risk from harm in giving their evidence (subsection (1)(d)).

Section 7 – Child and deemed vulnerable witnesses

29. This section inserts the definitions of “child witness” (a witness under the age of 18) and “deemed vulnerable witness” (a witness who is considered vulnerable as a result of being an alleged victim of a sexual offence, human trafficking, domestic abuse or stalking) into section 271(5) of the 1995 Act. It makes various changes to section 271A (which currently details how child witnesses are to be treated in relation to special measures) and other parts of the 1995 Act which currently relate only to child witnesses to ensure that deemed vulnerable witnesses are subject to the same provisions as child witnesses are at present.

30. In particular, deemed vulnerable witnesses will be automatically entitled to the use of certain special measures known as standard special measures (as only child witnesses are currently). These standard special measures are the use of a television link, a screen (to avoid the witness seeing the accused), and a supporter. In addition, the procedures for child witnesses are expanded to encompass deemed vulnerable witnesses.

Section 8 – Child and deemed vulnerable witnesses: standard special measures

31. This section amends section 271A of the 1995 Act to remove the current restriction that a live television link has to be in another room within the court and a supporter has to be used in conjunction with either a live television link or a screen when being used as standard special measures (under section 271A(14) of the 1995 Act). It also gives the Scottish Ministers an order making power so that they can add new standard special measures, amend or delete existing standard special measures and also modify sections 271A – 271M. Sections 271A - 271G set out the process to be followed in applying for special measures, and some related matters, while 271H - 271M specify what the special measures are and how they are to be used (e.g. 271K specifies that if a screen is to be used so that a vulnerable witness cannot see the accused, the accused should still be able to see and hear the vulnerable witness).

Section 9 – Objections to special measures; child and deemed vulnerable witnesses

32. This section amends the 1995 Act to allow any party to criminal proceedings to object to a notice requesting special measures for a child witness or deemed vulnerable witness. Such an “objection notice” 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 reason for their objection.
33. If a notice under this section is lodged, the court must make an order that the notice must be considered at the appropriate diet (depending on the level of the court). Subsections (b) and (c) make the necessary consequential changes to section 271A(5) of the 1995 Act so that the time limit for the court’s consideration of a vulnerable witness application is extended to take account of the possibility of an objection notice being lodged and to section 271A(13) of the 1995 Act to include intimation by the party lodging the objection notice to special measures to other parties to the proceedings as they do at present in relation to an application for special measures.

Section 10 – Child witnesses
34. This section amends the current procedures about children giving evidence in the court, set out in section 271B of the 1995 Act, to place greater emphasis on the wishes of the child. Where a child wishes to be present in the court to give evidence, the court must make an order requiring the child to be present, unless the court considers that would not be appropriate. Where a child does not express a wish to give evidence in the court, or expresses a wish to give evidence from some other location, the court may not make an order requiring the child to give evidence in the court, unless this would prejudice the fairness of the trial or the interests of justice.

Section 11 – Reporting of proceedings involving children
35. This section amends restrictions on reporting proceedings involving children in section 47 of the 1995 Act so that they apply to a person under 18, rather than under 16. Section 47 of the 1995 Act puts certain restrictions on newspapers to prevent them revealing the identity of persons under 16 who are involved in criminal proceedings (as the person against or in respect of whom the proceedings are taken, or as a witness). However, the court has discretion to dispense with these requirements if it is satisfied that it is in the public interest to do so. The provisions also apply to sound and television programmes.

Section 12 – Other vulnerable witnesses: assessment and application
36. The section provides that any party intending to cite a witness, other than a child or deemed vulnerable witness, must take reasonable steps to determine whether they are likely to be vulnerable and if so, what special measures should be used in order to take that person’s evidence. It also sets out the matters to be considered in making an assessment of vulnerability which include the nature and circumstances of the alleged offence, the nature of the evidence likely to be given, the person’s age and maturity, along with any other matters the court considers relevant including, social and cultural background and ethnic origins, sexual orientation and any physical disability or impairment.

Section 13 – Objections to special measures: other vulnerable witnesses
37. This section amends the 1995 Act to allow any party to criminal proceedings to object to a vulnerable witness application requesting special measures for a witness who is not a child witness or deemed vulnerable witness. The process involved is similar to that set out for objection notices in section 9. An “objection notice” must be lodged with the court within seven days (or later with the permission of the court) of a vulnerable witness application being lodged, setting out any objection to the special measures in the application that the party considers inappropriate and the reason for their objection.
38. If a notice under this section is lodged, the court must make an order that the notice must be considered at the appropriate diet (depending on the level of the court). Subsections (b) and (c) make the necessary consequential changes to sections 271C(5) of the 1995 Act so that the time limit for the court’s consideration of a vulnerable witness application is extended to take account of the possibility of an objection notice being lodged and to section 271C(11) of the 1995 Act to include intimation by the party lodging the objection notice to special measures to other parties to the proceedings as they do at present in relation to an application for special measures.

Section 14 – Review of arrangements for vulnerable witnesses

39. Section 271D(1)(a) of the 1995 Act currently allows a party citing or intending to cite a witness to request that the court review the arrangements for taking the witnesses evidence. Section 14 expands this ability to any party to the proceedings so that the non-citing party (normally the defence) can also request the court to review these arrangements.

Section 15 – Temporary additional special measures

40. Section 271H of the 1995 Act specifies a range of special measures that may be used to assist vulnerable witnesses to give their evidence to the court. Section 15 allows the Scottish Ministers to create additional special measures by order for a temporary period. This may be used to pilot additional special measures before any decision on whether or not to introduce these more widely (section 17 deals with order making powers to prescribe further special measures). The order must specify where the temporary special measure should take place, the procedures to be used, and for how long it should operate. The order can also set out in what type of proceedings and in what circumstances the additional special measures are to be used.

Section 16 – Special measures: closed court

41. This section amends the list of special measures in section 271H(1) of the 1995 Act, to add an additional special measure of having a closed court (i.e. excluding the public during the taking of evidence from the vulnerable witness). Section 16 also inserts a description of how this new special measure is to operate, providing that members or officers of the court, parties to the case before the court, counsel or solicitors or other persons otherwise directly concerned in the case, bona fide representatives of news gathering or reporting organisations present or such other persons as the court may specially authorise to be present should not be excluded from the court.

42. Section 16 also amends section 271F(8) of the 1995 Act so that this special measure does not apply where the vulnerable witness is the accused.

Section 17 – Power to prescribe further special measures

43. This section repeals the existing order making power in section 271H which allows the Scottish Ministers to prescribe further special measures. It inserts section 271H(1)(1A) which enables the Scottish ministers to add new special measures, amend or delete existing special measures and also modify sections 271A – 271M which detail how such special measures are to operate (see explanation of these sections under section 8).
Section 18 – Vulnerable witnesses: civil proceedings

44. This section amends the definition of a “child witness” in civil proceedings in section 11 of the Vulnerable Witnesses (Scotland) Act 2004 to include anyone under the age of 18 (currently this definition only includes those under 16). It also inserts an order making power to allow the Scottish Ministers to extend the definition of vulnerable witness to include specified types of witnesses, and witnesses in specified types of actions. This is the only section in the Bill which relates to civil proceedings, rather than criminal proceedings.

Victim statements

Section 19 – Victim statements

45. Victim statements allow victims and close relatives to tell the court about the physical, emotional and financial impact of a crime on them. Section 14 of the Criminal Justice (Scotland) Act 2003 (“the 2003 Act”) sets out the arrangements for the submission of victim statements in court. In solemn proceedings, a victim statement is laid before the court when moving for sentence. Section 19 of the Bill allows victim statements to be submitted to the court at any time after the prosecutor moves for sentence (or the accused pleads guilty or is found guilty), but before sentence is passed. This is to ensure that, if the statement is not available at the time of the guilty plea, this does not prejudice the victim in the case. This section also changes victim statement arrangements in relation to children under the age of 14. At present, children under the age of 14 are entitled to have a victim statement made on their behalf by a carer only if they are the direct victim of crime. The Bill provides that a child under the age of 14 who is not the direct victim of the crime (for example, a child whose parents have been killed) can have a victim statement made on their behalf by a carer.

Sentencing

Section 20 – Duty to consider making compensation order

46. This section amends section 249 of the 1995 Act to provide that, in cases where the court could make a compensation order, it must consider whether to do so. Currently, there is no obligation for the court to consider doing so in relevant cases. Relevant cases include, as defined in section 249 of the 1995 Act, those where the offender has caused any personal injury, loss or damage either directly or indirectly to the victim (but not cases which result in death or are linked to a motoring accident, unless the offender was using the vehicle unlawfully).

Section 21 – Restitution order

47. This section inserts new sections 253A - 253E into the 1995 Act, to deal with the establishment and operation of restitution orders.

48. Subsection (1) of new section 253A establishes that that section shall apply to persons who are convicted of assault on police or police staff, as provided for in the offence in section 90(1) of the Police and Fire Reform (Scotland) Act 2012 (“the 2012 Act”).

49. Subsection (2) establishes the restitution order alongside other penalties (such as imprisonment, fines, Community Payback Orders etc) as a penalty to which persons convicted under section 90(1) of the 2012 Act are liable. It also sets the upper limit of these orders in line
with the prescribed sum (as defined in section 225(8) of the 1995 Act). Subsection (3) establishes that the Scottish Ministers have the power to vary this upper limit. This power is to be exercised, in terms of subsection (5), through the negative procedure.

50. Subsection (4) requires that the proceeds of restitution orders are to be paid to the clerk of court or any other person authorised by the Scottish Ministers. This is the same as for fines.

51. Subsection (1) of new section 253B establishes that the person to whom, under new section 253A(3) the proceeds of a restitution order are paid, must pass those proceeds on to the Scottish Ministers. Subsection (2) provides that, in turn, the Scottish Ministers must pass on the proceeds to a new fund, to be called the Restitution Fund.

52. Subsection (3) provides for the establishment of the Restitution Fund for the purpose of securing the provision of support services to police officers and staff who have been the victim of criminal assaults, and subsection (4) ensures that payments may be made only for that purpose. Subsection (8) defines that “support services” mean, in relation to a victim, any type of service or treatment which is intended to benefit the physical or mental health or well-being of the victim.

53. Subsection (5) allows the Scottish Ministers to contract the establishment and operation of the Restitution Fund to another individual or body. Subsection (6) allows the Scottish Ministers to set rules and directions for the operation and administration of the Restitution Fund, including who may benefit from it, payments out of it, and its record keeping and reports. Both these powers are to be exercised, in terms of subsection (7), through the affirmative procedure.

54. Subsection (1) of new section 253C introduces the possibility that a person found guilty of an offence under section 90(1) of the 2012 Act may have a sentence imposed which could include three different financial penalties: a restitution order, a fine and a compensation order. The convicted person may have insufficient means to pay all three. In this case, in accordance with subsection (2), the court is to prefer imposing a compensation order, then a restitution order, and finally a fine.

55. Subsection (3) applies where a court considers it would be appropriate to impose two financial penalties; a restitution order and either a compensation order or a fine. In this case, under subsection (4), where the convicted person may have insufficient means to pay both, again the court should consider imposing a compensation order before a restitution order, and a restitution order before a fine.

56. Subsection (1) of new section 253D applies where a court has actually imposed a restitution order and either or both of a compensation order and a fine. Subsection (2) adopts the same logic as in new section 253C, and ensures 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.

57. Subsection (1) of new section 253E states that a number of provisions in the 1995 Act shall apply to restitution orders in the same way as they do to fines. The provisions in question
are listed in subsection (2). These include matters to do with the enforcement (sections 211 and 212 of the 1995 Act, remission (section 213), part-payment (section 220), recovery (section 221), transfer (sections 222 and 223) and mutual recognition of fines (sections 223A-T), as well as what to do in the case of default (section 216) and provisions about time for their payment (sections 214 and 215), disqualification from driving (section 248B) and imprisonment as means of enforcement or punishment for default (section 219), and discharge (section 224). All these are to apply to restitution orders as well as to fines. Subsection (3), moreover, provides that a court may impose imprisonment as a means of punishing default on payment of a fine, but decline to do so for a restitution order but not vice versa. In addition, by virtue of that subsection, where imprisonment is used to punish default on payment of both a fine and a restitution order their amounts shall be aggregated to establish the appropriate duration of that imprisonment.

Section 22 – Victim surcharge

58. This section inserts sections 253F to 253J into the 1995 Act, establishing a victim surcharge and providing for its operation.

59. Section 253F provides that the court must impose a victim surcharge on offenders who are subject to any sentence prescribed by the Scottish Ministers by regulations. However, a victim surcharge is not to be imposed where a restitution order has been imposed, or where the Scottish Ministers have set out, by regulations, that this is not the case for the particular offence (or class of offence) in question. The Scottish Ministers may, by regulations, set out the amount of the victim surcharge, which can be different for different types of offender or for different circumstances (for example, this would allow a scale of surcharge amounts to be established, to reflect different sentences imposed). The Scottish Ministers may also, by regulations, set out circumstances in which the court is not to impose a victim surcharge. Subsection (3) sets out that if a person is convicted of multiple offences in the same proceedings, there will only be one surcharge imposed. Subsection (4) sets out that the surcharge is to be ingathered by the clerk of court or any other person authorised by the Scottish Ministers.

60. Section 253G establishes the Victim Surcharge Fund (VSF). Subsections (1) and (2) provide that the person who collects the victim surcharge (SCS, unless the Scottish Ministers authorise anyone else for this purpose under section 253F(4)) must pass the sum collected to the Scottish Ministers; and that the Scottish Ministers must then pay this amount into the VSF. The Scottish Ministers are given an order making power in section 253G(6) to prescribe how the fund will be administered. Subsection (4) sets out 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. Subsection (5) allows the Scottish Ministers to delegate responsibility for establishing and administering the VSF to a third party. Subsection (8) provides a definition of “support services”; such services might, for example, include financial assistance to fit or repair security locks, or the replacement of essential furnishings damaged during the course of a criminal offence.

61. Section 253H details the order in which payments must be made when an offender incurs more than one financial penalty in relation to the same proceedings. Payments must be made towards any direct compensation order to the victim, then to the victim surcharge, then the fine.

62. Section 253J provides that the provisions in the 1995 Act listed in subsection (2) shall apply to the victim surcharge in the same way as they do to fines. As with restitution orders (see
paragraph 57), these include matters to do with the enforcement, remission, part-payment, recovery, transfer and mutual recognition of fines, as well as what to do in the case of default and provisions about time for their payment, disqualification from driving and imprisonment as means of enforcement or punishment for default, and discharge. All these are to apply to the victim surcharge as well as to fines. Subsection (3), moreover, provides that a court may impose imprisonment as a means of punishing default on payment of a fine, but decline to do so for the victim surcharge but not vice versa. In addition, by virtue of that subsection, where imprisonment is used to punish default on payment of both a fine and the victim surcharge their amounts shall be aggregated to establish the appropriate duration of that imprisonment.

Release of offender: victim’s rights

Section 23 – Victim’s right to receive information about release of offender etc.

63. At present, victims of certain prescribed offences can receive information about the release of offenders (and some other relevant information) under section 16 of the 2003 Act. The information relates to the circumstances in which a prisoner leaves prison. This may be due to temporary release, an escape, transfer to a prison outwith Scotland, release on licence or parole, death of the prisoner or end of sentence. Section 23 amends section 16 of the 2003 Act to remove the list of prescribed offences. As a result, victims of any offence will be able to receive information under this section.

Section 24 – Life prisoners: victim’s right to make oral representations before release on licence

64. This section amends section 17 of the 2003 Act to enable victims to make oral representations to the Parole Board, as well as written representations as at present, when a prisoner becomes eligible for release on licence. This will only apply to life prisoners initially, but an order making power is also inserted to allow the Scottish Ministers to extend this ability in relation to other categories of prisoner.

65. Subsection (b) amends section 17 of the 2003 Act to provide that the Scottish Ministers can set out, in guidance, how both written and oral representations should be made (currently this power to issue guidance only relates to written representations). Subsection (c) inserts subsection 10A into section 17 of the 2003 Act. This allows the Scottish Ministers, when setting a time limit for representations to be made, to set different time limits for written and oral representations.

Section 25 – Temporary release: victim’s right to make representations

66. This section adds a new section to the 2003 Act to allow victims, who are registered on VNS and who have expressed the wish to do so, to make written representations about the licence conditions that may be imposed when a prisoner first becomes eligible for temporary release from prison.
National Confidential Forum

Section 26 – 4ZA – National Confidential Forum

67. Section 26 establishes the National Confidential Forum (“the Forum”; “NCF”) as part of the Mental Welfare Commission for Scotland (“the Commission”).

68. The legislation under which the Commission currently operates (Part 2 and Schedule 1 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (“the 2003 Act”) as amended by the Public Services Reform (Scotland) Act 2010) is amended accordingly. Sections 4ZA, 4ZB, 4ZC, 4ZD and schedule 1A, comprising Parts 1-7, are inserted into the 2003 Act.

69. Section 26 inserts section 4ZA into the 2003 Act to require the Commission to establish and maintain a committee of the Commission to be known as the National Confidential Forum.

Section 26 – 4ZB – General functions of NCF

70. Section 26 sets out the general functions of the Forum in a new section 4ZB of the 2003 Act (referred to as the “NCF functions”). The principal function of the Forum is to give people who were placed in institutional care as children the opportunity to describe, in confidence, their experiences of that care, including any abuse experienced during the time spent in care. The descriptions of being in care which people will recount to the members of the Forum are referred to as “testimony”.

71. The Forum is to acknowledge the experiences of people placed in institutional care as children by enabling them to give testimony at hearings of the Forum or in other ways, for example, in writing or by video or phone link.

72. A further function of the Forum is to identify patterns and trends in relation to institutional child care provision, including issues concerning abuse, based on the information provided to it by participants and, subsequently, to make recommendations for the improvement of institutional child care provision in the future.

73. The Forum is also empowered to produce reports on its work and any recommendations arising from the information it receives from people placed in institutional care as children. These reports will be available to the public but the identity of participants in the Forum, other persons and institutions will not be disclosed.

74. The final function of the Forum is to provide people who are considering taking part, and those who do take part, in hearings of the Forum information about sources of assistance and advice.

Section 26 – 4ZC – Carrying out NCF functions

75. Section 26 inserts section 4ZC into the 2003 Act to require, in section 4ZC(1), the Commission to delegate the functions, set out above, to the Forum. This requires the NCF functions to be delegated to a distinct entity within the Commission, enabling a significant
degree of operational independence for the Forum within the accountability structure of the Commission.

76. Section 4ZC(2) provides that the person appointed to chair the Forum (the “NCF Head”) is to account to the Commission for the work of the Forum in discharging its functions effectively.

77. Section 4ZC(3) makes explicit that, despite the delegation of functions and the accountability of the Head of NCF, the Commission will retain responsibility for ensuring that the Forum carries out its functions.

Section 26 – 4ZD – Further modifications in relation to NCF

78. Section 26 inserts section 4ZD into the 2003 Act.

79. Section 4ZD(1)(a) sets out which functions and duties currently undertaken by the Commission will not apply to the Forum. In particular, the duty to monitor Part 1 of the 2003 Act, to bring to the attention of the Scottish Ministers matters concerning the operation of that legislation and to advise on such matters, do not apply to the Forum. The functions of the Commission relating to the publishing of information (including statistical information), particularly about investigations and inquiries, are also expressly disapplied by section 4ZD(1)(a).

80. Section 4ZD(1)(c) bars the Commission from publishing anything in its annual report that could identify or lead to the identification of a person in institutional care as a child, a person who experienced or committed abuse or an establishment providing institutional care.

81. Section 4ZD(1)(d) inserts section 20(1A) into the 2003 Act to offer protection to the Forum, its members and staff, and participants from an action for defamation.

82. The effect of this protection is that the Forum, and its members and staff, will not be able to be sued for defamation as a result of statements they make, in good faith, while carrying out the work of the Forum. This is akin to the protection provided to Commissioners and staff of the Commission.

83. The protection offered to participants in the Forum from an action for defamation is in relation to any statement they make to the Forum and is, therefore, a higher level of protection than that offered to the Forum, its members and staff. This level of protection is to ensure that people who come forward to participate in the Forum can be assured in advance that what they say in information provided to the Forum cannot be used by anyone to found an action of defamation.

84. Section 4ZD(2) amends the Public Records (Scotland) Act 2011 to insert a new subsection (8) into section 1 of that Act to require the Commission to prepare a records management plan in relation to the NCF functions. This is to be separate from the Commission’s records management plan to further safeguard the confidentiality of testimony and other information given to the Forum by people placed in institutional care as children.
Section 27 – NCF: constitution and operation

85. Section 27(1) extends the maximum membership of the Commission from 8 to 9 members to enable the appointment of an additional Commissioner, selected specifically for their skills, experience and knowledge as considered by the Scottish Ministers to be relevant to the work and functions of the Forum.

Section 27 – Schedule 1A

86. Schedule 1A is introduced by section 4ZA(2) and is inserted into the 2003 Act by section 27(2).

Schedule 1A – Part 1 – Members of the National Confidential Forum

87. Part 1 sets out the membership of the Forum, the appointment of its members and staff and the powers and procedure of the Forum.

Membership

88. Paragraph 1(1) provides that the Forum is to consist of the NCF Head and no fewer than two other members, all of whom will be appointed by the Scottish Ministers.

89. Paragraph 1(2) provides that the Scottish Ministers must make these appointments having regard to the recommendation of the selection panel (mentioned in paragraph 2(2)). Each member of the Forum is to be appointed for such period as the Scottish Ministers think fit (paragraph 1(3)).

90. Paragraph 1(4) provides that members of the Forum may resign by providing written notice to the Scottish Ministers, and that the Scottish Ministers must then inform the Commission of any such resignation (paragraph 1(5)).

Membership selection panel

91. Paragraph 2(1) provides that members of the Forum are to be selected by a membership selection panel, the composition of which is set out in that paragraph. The Scottish Ministers are able to determine, in addition to the members of the selection panel set out in paragraph 2(1), that others be included in that selection panel.

92. Paragraphs 2(2), (3) and (4) provide that a membership selection panel is to determine the selection process and can recommend for appointment those who, in the panel’s view, have the skills, knowledge and experience to carry out the work of the Forum (excluding members of the Commission).

National Confidential Forum staff

93. Paragraph 3 provides that the appointment of staff to the Forum requires the recommendation of the Forum Head and that such staff are only to carry out the functions of the Forum.
Powers and procedure of the National Confidential Forum

94. Paragraph 4(1) empowers the Forum to do anything which is necessary or expedient in order for it to carry out its functions.

95. Paragraph 4(2) specifically empowers the Head of the Forum to determine the procedure of the Forum, having regard to the views of the other members of the Forum. This reflects the leadership role held by the NCF Head.

96. Paragraph 4(3) sets out the requirement that the Forum should have regard to the need to avoid any unnecessary cost to public funds, to participants and others in undertaking its work and carrying out its functions.

97. Paragraph 4(4) provides that proceedings of the Forum will not be invalidated because of a vacancy in the membership or a defect in the appointment of a member.

98. Paragraph 4(5) specifically excludes members of the Scottish Government or others authorised by the Scottish Government from taking part in the meetings of the Forum.

Application of schedule 1 to the National Confidential Forum


Schedule 1A – Part 2 – Delegation of functions

100. Part 2 sets out arrangements for the delegation of the NCF functions.

Delegation by the National Confidential Forum

101. Paragraph 6 requires the Forum to delegate its functions to the NCF Head, other members of the Forum or staff, the extent of which is to be determined by the NCF Head.

102. Paragraph 6 also enables the delegation of functions by the Forum to the NCF Head, other members of the Forum or staff, the extent of which is to be determined by the Forum.

103. Paragraph 6 makes explicit that such delegation does not affect the Forum’s responsibility, or the accountability of the NCF Head, for the functions of the Forum.

Schedule 1A – Part 3 – Eligibility to participate in the National Confidential Forum

104. Part 3 sets out who will be eligible to participate in the Forum.

105. Paragraph 7(1) provides that the Forum may hear testimony from people who have made an application to participate in a hearing of the Forum and whose application has been accepted.

106. Paragraph 7(2) provides that any person aged 18 or over, who was placed in an establishment providing institutional care as a child, for any length of time and who is no longer in that care, may apply to participate in the Forum.
107. Paragraph 7(3) provides that the term “institutional care”, for the purposes of the Forum, means a care or health service which provided residential accommodation to children in Scotland.

108. Paragraph 7(3) allows the Scottish Ministers to prescribe by order the specific types of care and health services which meet the conditions set out in paragraph 7(4), not including services provided at premises used mainly or wholly as a private dwelling. This excludes the supervision of children at home, foster care and kinship care from the scope of the Forum.

Schedule 1A – Part 4 – Conduct of Hearings

109. Part 4 sets out how the hearings of the Forum will be conducted.

110. Paragraph 8(2) requires the Forum to make arrangements for participants to give testimony, either at a hearing of the Forum or by other means and in writing or orally.

111. Paragraph 8(3) requires that at least two members of the Forum be present at a hearing and that hearings be held in private.

112. Paragraph 8(4) explains that a Forum hearing is defined as being ‘private’ provided no one other than the person giving testimony, anyone accompanying that person and members of the Forum and Forum staff are present.

113. Paragraph 8(5) enables the Forum to determine its own procedures for hearing testimony, otherwise than is provided for in paragraph 8. This is subject to the duty to avoid any unnecessary cost to public funds, to participants and others in undertaking its work and carrying out its functions.

Recording of testimony

114. Paragraph 9 provides that the Forum may decide how it will record testimony and any other information it receives from persons who take part in hearings. In practice, this may include audio recording or recording in writing and could be undertaken with the participant face-to-face or remotely.

115. Paragraph 9(2) sets out a requirement that the Forum take steps, as soon as reasonably practicable, to organise the information it receives so as to preserve confidentiality, in particular the anonymity of the person giving the testimony and any other individuals or institutions mentioned in testimony.

Payment of expenses

116. Paragraph 10 authorises the Forum to require the Commission to pay reasonable expenses to participants, and those who accompany participants, to Forum hearings. This will comprise travel and subsistence associated with participation in the Forum.
Schedule 1A – Part 5 – Reporting

117. Part 5 sets out arrangements by which the Forum may prepare reports and is required to produce an Annual Report.

118. Paragraph 11 empowers the Forum to prepare reports based on the information provided to it at hearings and in other ways. A report produced by the Forum must not include information which could lead to the identification of people who were placed in institutional care as children, anyone alleged to have committed abuse or institutions where abuse is alleged to have taken place. Reports of the Forum must also not include any other information that is subject to a confidentiality restriction set out in paragraph 13 (below).

119. Paragraph 12 requires the Forum to prepare a report each year on progress made in discharging the functions of the NCF (covering the 12 month period up to the end of March) and to submit that report to the Scottish Ministers. Annual Reports of the Forum are subject to the same requirements of confidentiality which apply to the other reports produced by the Forum.

120. Paragraph 12(2) provides that the Forum must consult the Commission before preparing its Annual Report and paragraph 12(4) requires the Forum to send a copy of its Annual Report to the Commission.

121. Paragraph 12(5) provides that the Scottish Ministers must lay before the Scottish Parliament a copy of each Annual Report of the Forum.

Schedule 1A – Part 6 - Confidentiality

Prohibition on disclosure

122. Part 6 sets out arrangements to ensure the confidentiality, as far as possible, of information obtained by the Forum in the course of carrying out its functions.

123. Paragraphs 13(1) and (2) make express provision that certain persons listed are not to disclose information provided to them in connection with the work of the Forum and which is not otherwise in the public domain.

124. Paragraph 13(3) does not prevent the disclosure of information between the persons listed in paragraph 13(1) where this is necessary to carry out the work of the Forum, including the preparation of a report in accordance with paragraph 11 (as set out above).

125. Paragraph 13(4) sets out the circumstances in which a member of the Forum must disclose information to the police. Information must be disclosed to the police 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.

126. Paragraph 13(5) enables a member of the Forum to disclose information to the police where an allegation is made by a person who has given testimony that an offence involving the abuse of a child has been committed. Disclosure is made to the police in these circumstances
These documents relate to the Victims and Witnesses (Scotland) Bill (SP Bill 23) as introduced in the Scottish Parliament on 6 February 2013

where it is, in the opinion of the member of the Forum acting in good faith, in the public interest to do so.

127. Paragraph 13(6) provides that a court may order the disclosure of information held by the Forum for the purposes of legal proceedings, whether civil or criminal (including for the purposes of the investigation of any offence or suspected offence), if it is satisfied that such disclosure is necessary in the interests of justice.

Schedule 1A – Part 7

128. Paragraph 14 sets out definition of terms used in schedule 1A.

General

Section 28 – Interpretation

129. Section 28 provides for the interpretation of various terms used in the Bill.

Section 29 – Ancillary provision

130. This section provides the Scottish Ministers with the power to make, by order, such supplementary, incidental, consequential, transitional, transitory or saving provision as they consider appropriate. It provides that an order under this section may modify this, or any other, enactment.

Section 30 – Commencement

131. This section provides for the commencement of the provisions in the Bill.
INTRODUCTION

1. This document relates to the Victims and Witnesses (Scotland) Bill introduced in the Scottish Parliament on 6 February 2013. It has been prepared by Kenny MacAskill MSP, who is the member in charge of the Bill, to satisfy Rule 9.3.2 of the Parliament’s Standing Orders. It does not form part of the Bill and has not been endorsed by the Parliament.

2. The Policy Memorandum which is published separately explains in detail the background to the Bill and its policy intentions. The purpose of this Financial Memorandum is to set out the costs associated with the measures introduced by the Bill, and as such it should be read in conjunction with the Bill and the other accompanying documents.

3. The Bill deals with two broad topics:
   - reforms to the justice system relating to victims and witnesses, the costs of which are dealt with in Part A; and
   - the establishment of a National Confidential Forum (NCF) for adults placed in institutional forms of care as children, dealt with in Part B.

4. For many of the potential costs described in the Financial Memorandum, particularly those relating to the victims and witnesses reforms, there is a significant margin of uncertainty. Where this is the case, a range of figures has been given, identifying the lowest and highest likely costs to be incurred as a result of the proposal in question.

5. In relation to the victims and witnesses reforms, set up costs are expected to arise in 2014/15, with recurring costs also beginning that year. However, full recurring costs are not likely to arise until 2015/16, as there will be a phased implementation of the Bill throughout 2014/15. In relation to the NCF, some set up and recurring costs will arise in 2013/14. Full recurring costs are expected to arise from 2014/15 onward.

6. A table providing an overall summary of the financial impact of the Bill is included on page 52.
PART A – VICTIMS AND WITNESSES REFORMS

Overview

7. The Bill will have financial implications for a number of bodies. These will primarily affect the Scottish Court Service (SCS), the Crown Office and Procurator Fiscal Service (COPFS), the Scottish Prison Service (SPS), and the Parole Board for Scotland (PBS).

8. There will also be some moderate financial implications for the Scottish Government, the Scottish Police Authority (SPA), the Scottish Children’s Reporter Administration (SCRA) and the Legal Aid Fund, which is administered by the Scottish Legal Aid Board (SLAB). The Scottish Government has consulted with the relevant organisations on the likely financial impact.

9. The measures which will have the greatest financial implications are:
   - reforms relating to vulnerable witnesses and the use of special measures;
   - the introduction of the victim surcharge and restitution orders;
   - the extension of the Victim Notification Scheme (VNS) and ability to make representations about temporary release; and
   - the introduction of an ability to make oral representations when a prisoner is eligible for parole.

10. While there will be some limited capital costs, most of the potential financial effects will arise from additional administrative work. The Bill contains various other measures, but these are likely to have no or marginal costs.

11. The total costs of this part of the Bill, by organisation and by measure, are set out in tables 1 and 2 respectively, followed by details of how the measures will be funded. A brief outline of the various measures in the Bill is given, followed by a detailed breakdown of costs on each organisation.

12. For the purposes of this Financial Memorandum all figures given presume a commencement of provisions in financial year 2014/15. The estimates of costs contained in this memorandum are compiled from information provided by those bodies affected. The figures and projections provided are the best current estimates available for the costs and income that will be generated as a result of the provisions of this Bill. All costs have been rounded to the nearest £100.
These documents relate to the Victims and Witnesses (Scotland) Bill (SP Bill 23) as introduced in the Scottish Parliament on 6 February 2013

Table 1 - Cost by organisation*

<table>
<thead>
<tr>
<th>Body</th>
<th>Non-recurring costs (£)</th>
<th>Recurring costs – Min (£ per year)</th>
<th>Recurring costs – Max (£ per year)</th>
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<tbody>
<tr>
<td>COPFS</td>
<td>-</td>
<td>300,000</td>
<td>324,500</td>
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<tr>
<td>SCS</td>
<td>92,800</td>
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<td>SPS</td>
<td>31,000</td>
<td>112,000</td>
<td>146,300</td>
</tr>
<tr>
<td>PBS</td>
<td>-</td>
<td>23,400</td>
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<tr>
<td>SLAB (Legal Aid Fund)</td>
<td>-</td>
<td>6,000</td>
<td>26,700</td>
</tr>
<tr>
<td>SCRA</td>
<td>-</td>
<td>1,100</td>
<td>1,100</td>
</tr>
<tr>
<td>SCOTTISH ADMINISTRATION</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>TOTAL (COPFS, SCS and SPS)</td>
<td>123,800</td>
<td>781,000</td>
<td>973,300</td>
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<tr>
<td>TOTAL</td>
<td>123,800</td>
<td>811,500</td>
<td>1,088,300</td>
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* Costs on the SG and SPA are marginal and have not been included in this table.

Table 2 - Cost by proposal

<table>
<thead>
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<th>Proposal</th>
<th>Non-recurring costs (£)</th>
<th>Recurring costs – Min (£ per year)</th>
<th>Recurring costs – Max (£ per year)</th>
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<tr>
<td>Reforms relating to vulnerable witnesses and special measures</td>
<td>70,800</td>
<td>536,600</td>
<td>690,800</td>
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<tr>
<td>Introduction of victim surcharge and restitution orders</td>
<td>22,000</td>
<td>115,000</td>
<td>115,000</td>
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<td>Extension of Victim Notification Scheme and ability to make representations about temporary release</td>
<td>31,000</td>
<td>136,500</td>
<td>195,300</td>
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<tr>
<td>Ability to make oral representations to Parole Board</td>
<td>-</td>
<td>23,400</td>
<td>87,200</td>
</tr>
<tr>
<td>TOTAL</td>
<td>123,800</td>
<td>811,500</td>
<td>1,088,300</td>
</tr>
</tbody>
</table>
These documents relate to the Victims and Witnesses (Scotland) Bill (SP Bill 23) as introduced in the Scottish Parliament on 6 February 2013

FUNDING

13. The measures in the Bill will result in costs on COPFS, SCS, SPS, PBS, the Legal Aid Fund, and SCRA (with marginal costs on some other bodies). Funding of these costs has been discussed with the relevant bodies.

14. COPFS has recently reviewed the procedures it uses to apply for special measures for vulnerable witnesses and considers that these can be simplified, resulting in significantly lower costs. It is anticipated that the additional expenditure resulting from the Bill (of around £300k per year) will be offset by savings made through this streamlining process, and that there will be no overall increase in funding required.

15. Costs on SCS for financial year 2014/15 will be met from within existing Scottish Government budgets. Funds are available to cover the capital costs identified (around £93k), and approximately half of the recurring yearly costs (of between £369k and £503k per year). This is considered sufficient for 2014/15, as there will be a phased implementation of the Bill throughout that year and so full recurring costs will not be incurred until the following year at the earliest. To address costs in 2015/16 onwards, any rise in the overall running costs of SCS will be reviewed as part of the overall planning for the Justice budget.

16. Costs on the Parole Board and on SPS for 2014/15 will be met from within existing budgets. As with SCS, any rise in overall costs will be reviewed as part of the overall planning for the Justice budget for 2015/16 onwards.

17. The costs on the Legal Aid Fund, which the Scottish Government is under a statutory obligation to meet, are reasonably minor and are not expected to have any significant impact on overall expenditure.

18. Finally, costs on SCRA are relatively small, and will be met from within existing organisational budgets.

OUTLINE OF MEASURES

Measures with cost implications

19. Those measures which will have definite financial implications are outlined below.

Vulnerable witnesses and special measures

20. The Bill extends the definition of vulnerable witness and the entitlement to certain special measures to assist such witnesses give evidence. Costs will arise from changes to court procedures and facilities available, and will fall primarily on SCS and COPFS.

Victim surcharge and restitution orders

21. A victim surcharge will be imposed on certain offenders, and the proceeds used to support victims. Costs will arise primarily from the collection of the surcharge, which will fall
These documents relate to the Victims and Witnesses (Scotland) Bill (SP Bill 23) as introduced in the Scottish Parliament on 6 February 2013

on SCS, and in relation to administration of the fund (details of which will be set out in subordinate legislation).

22. The courts will be able to impose restitution orders in cases where the offender has assaulted a police officer, and the funds raised will contribute to the support services which assist in their recovery. Costs will arise primarily from the collection of restitution orders, which will affect SCS, and from the administration of the fund, which will be carried out by the Scottish Government.

Extension to Victim Notification Scheme and written representations about temporary release

23. The VNS, which notifies certain victims when the relevant offender is released from prison (and supplies some other information) is being extended to encompass more victims (part of this extension is an indirect cost, which is set out in more detail in the relevant sections of this memorandum). Costs will primarily fall on SPS and COPFS. There may also be some minor costs to the Scottish Government.

24. SPS advises victims registered on the VNS when an offender is first eligible for temporary release. Changes are being made to allow victims to make written representations about the offender’s release. Minor costs will fall on SPS.

Oral representations to the Parole Board for Scotland

25. Oral representations to PBS are being introduced to assist those victims who would prefer to make their views known orally rather than by submitting written representations. The cost of accepting and dealing with such oral representations will fall on PBS. There may also be some marginal costs to the Scottish Government.

Measures with no or marginal costs

26. The measures in the Bill which are expected to have no or marginal cost implications are summarised below.

General Principles

27. The Bill sets out high level overarching principles which outline the general aims of the Bill, and imposes a duty on a number of organisations within the justice system to have regard to these principles when carrying out their functions, in so far as they relate to victims and witnesses. This duty is not expected to require any additional resources; while the principles will inform how bodies carry out relevant functions, it is not anticipated that significant changes will be required.

Standards of service

28. A number of organisations within the justice system will be required to develop and set out clear standards of service for victims and witnesses, and to set out an effective complaints procedure. It is unlikely that this will require a significant amount of work, and the cost implications are expected to be marginal (mostly relating to costs associated with revising guidance leaflets, web based information etc.).
Compensation orders

29. A compensation order may currently be imposed either instead of or in addition to any other punishment to be imposed on the convicted person. The Bill will require the court to consider making a compensation order in every case where such an order could be imposed. This is not expected to have any significant cost implications.

Access to case specific information

30. Victims and witnesses will be given the right to certain information about their case on request, from SCS, COPFS and the police. These organisations already provide much of this information, and so the costs are not expected to be significant. However, this is difficult to estimate with any certainty, as it is unclear whether requests for information will increase as a result of the Bill (and if so, by how much).

Duty to have regard to guidance on Joint Investigative Interviews

31. Existing guidance on Joint Investigative Interviews (JIIs) will be put on a statutory basis to ensure that those carrying out such interviews (social workers and the police) have regard to it. As the guidance already exists and is in use, no costs are expected.

Removal of presumption that child witnesses aged under 12 will give evidence away from court building

32. The Bill makes a minor amendment to existing legislation to ensure that there is no presumption that a child must give evidence away from the court building. No costs are expected.

Right for victims of sexual violence to choose gender of interviewer

33. The Bill gives victims of sexual violence the right to choose the gender of their interviewer. This will affect the police (who will need to ensure that interviewers of both genders are available), but no costs are expected.

Victim statements - increased flexibility in timing

34. The Bill allows slightly more flexibility in relation to the timing of submitting victim statements. This may have some administrative impact on SCS, but no costs are expected.

Victim statements - extension of eligibility

35. The Bill will ensure that victim statements can be made on behalf of those under the age of 14. No costs are expected.

COSTS ON THE SCOTTISH ADMINISTRATION

36. Costs on the Scottish Administration will fall on the Scottish Government, COPFS, SCS and SPS. These are set out separately below. Total non-recurring costs on the Scottish Administration will be around £123,800, and total recurring costs will be between £781,000 and £973,300 per year.
SCOTTISH GOVERNMENT

37. A number of the measures in the Bill will have an effect on the Scottish Government, but these are all expected to involve no or marginal costs.

Measures with no or marginal costs

Victim Notification Scheme

38. The extension of the VNS will have a minor effect on the Scottish Government, in that any changes will need to be reflected in information leaflets produced. However, this will be achieved during the usual re-printing cycle, and so there will be no additional cost.

Oral representations to the Parole Board

39. The Parole Unit within the Scottish Government issues a letter to victims when a prisoner is due to be considered for parole or release on non-parole licence. While some minor changes may be required to reflect the introduction of oral representations, it is anticipated that costs will be marginal and can be absorbed within current resources.

Victim surcharge

40. Revenue raised by the victim surcharge will be collected by SCS and passed to the Scottish Government. The Scottish Government will then transfer the funds to the body which administers the victim surcharge fund (to be determined in secondary legislation). There will also be some work required in monitoring the fund, and considering regular reports from the body which administers it. The minor additional work required will be met from within existing resources.

Restitution orders

41. As with the victim surcharge, revenue raised by restitution orders will be collected by SCS and passed to the Scottish Government. However, in the case of restitution orders, the fund created will be administered by the Scottish Government, which will distribute money for purposes to be set out in subordinate legislation. The number of recipients is expected to be very small, however, and it is anticipated that the administration of the fund can be met from within existing resources.

General principles

42. The general principles will apply to, among others, SPS and COPFS. As SPS is an executive agency and COPFS is a Ministerial department of the Scottish Government, the duty to have regard to the principles must be placed upon the Scottish Ministers and the Lord Advocate respectively. However, the cost implications are dealt with below in relation to SPS and COPFS separately.

Standards of service

43. As with the general principles, the duty to set out standards of service is intended to apply to SPS and COPFS, but must be applied to the Scottish Ministers and the Lord Advocate respectively. Again, the cost implications are described below in relation to SPS and COPFS.
CROWN OFFICE AND PROCURATOR FISCAL SERVICE

44. Costs to COPFS will arise from the package of measures around vulnerable witnesses and special measures, and from the extension to the VNS. COPFS will also be affected by a number of other proposals, which are expected to have no or minimal cost.

45. It is estimated that the total recurring costs to COPFS will be between £300,000 and £324,500 per year.

Measures with cost implications

Vulnerable witnesses and special measures - overview

46. The changes in the Bill will result in increased numbers of witnesses automatically entitled to the use of special measures, and potential increases in the numbers applying for the use of such measures. This will increase costs in relation to the processing of applications and notices which must be submitted to the court, and the actual use of special measures. In addition, the Bill will introduce the ability for either party to object to an application or notice for special measures, which will require additional court time.

Vulnerable witnesses and special measures – costs relating to notices/applications

47. At present, any child witness under 16 is automatically entitled to the use of certain standard special measures when giving evidence. Other witnesses may also benefit from special measures, although this is not an automatic entitlement. The Bill seeks to extend the right to automatic entitlement to special measures to certain categories of victims and witnesses. These are:

- 16 and 17 year olds (through the extension of the definition of child witness)
- victims of a sexual offence
- victims of domestic abuse
- victims of stalking
- victims of human trafficking

48. As this is likely to increase significantly the number of witnesses who will benefit from the use of special measures, COPFS has assessed whether it is possible to streamline the current application process. This would seek to remove the requirement to fill out a detailed notice in the situation where a victim was automatically entitled to the use of a special measure in any event. This would ensure that all victims and witnesses were notified at the earliest opportunity that they were entitled to the use of a special measure, providing reassurance about the court process at any early stage.

49. This revised process will ensure that victims receive a timely and individual assessment to identify specific protection needs and to see if they would benefit from the special measures, as specified in the EU Directive establishing minimum standards on the rights, support and
These documents relate to the Victims and Witnesses (Scotland) Bill (SP Bill 23) as introduced in the Scottish Parliament on 6 February 2013

protection of victims of crime. It is intended that the additional expenditure anticipated under the Bill will be offset by savings made through streamlining current processes.

50. The following financial estimates have been based on this new process. It should also be stressed that it has not been possible to develop any definitive costs, and what has been prepared for this memorandum is an estimate of costs based on what COPFS consider to be reasonable assumptions.

Number of additional notices

51. In order to provide an estimate of the cost of increased use of special measures, it was necessary to establish how many additional notices there would be in any one year. It is likely that there will be a degree of duplication within these figures – for example, a child witness may also be a victim of a sexual offence.

52. There may also be an additional number of applications for special measures from those not automatically classed as vulnerable, or for measures which are not automatically available to those who are (as the Bill will require individual assessments of all witnesses to ascertain if they require special measures). However, there is no data on which to base an estimate of any increase, and so this has not been included. Furthermore, the likely overestimate in relation to additional numbers of notices is likely to more than cover any potential costs from an increase in applications.

53. In relation to Child Witness Notices, COPFS confirms that the average number of 16 and 17 year olds cited over a three year period are as set out in table 3.

Table 3 -witnesses aged 16/17

<table>
<thead>
<tr>
<th>Type of Case</th>
<th>Number of 16 and 17 year old witnesses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Summary</td>
<td>5,233</td>
</tr>
<tr>
<td>Sheriff and Jury</td>
<td>689</td>
</tr>
<tr>
<td>High Court</td>
<td>149</td>
</tr>
<tr>
<td>TOTAL</td>
<td>6071</td>
</tr>
</tbody>
</table>

54. In relation to victims of sexual offences, figures on the number of people proceeded against for crimes of indecency are available from Criminal Proceeding in Scotland 2011-12 (supplemented by additional analysis for earlier years). These figures record a person each time there is a proceeding where the main charge is a crime of indecency. The annual average number over the 3 years 2009-10 to 2011-12 is 970. Based on current available experience and data, it has been assumed that one vulnerable witness is associated with each of those people proceeded

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against, and that 34% of accused plead guilty at the earliest opportunity\(^3\), therefore removing the need for any vulnerable witness notice. The figures obtained are set out in table 4.

**Table 4 - vulnerable witnesses in cases involving sexual offences**

<table>
<thead>
<tr>
<th>Number of people proceeded against in court for crimes of indecency (3-year average)</th>
<th>Number of vulnerable witnesses (based on assumptions in paragraph 54)</th>
</tr>
</thead>
<tbody>
<tr>
<td>970</td>
<td>640</td>
</tr>
</tbody>
</table>

55. In relation to victims of domestic offences, figures on the number of domestic abuse incidents are available from *Domestic Abuse Recorded by the Police in Scotland, 2010-11 and 2011-12*\(^4\). The annual average number of incidents reported over the 3 years 2009-10 to 2011-12 is 23,273. It has been assumed that proceedings are commenced in 75% of the number of reported incidences, based on estimates from COPFS. As above, it has also been assumed that 34% of accused plead guilty at the earliest opportunity. These figures are set out in table 5.

**Table 5 - vulnerable witnesses in cases involving domestic abuse**

<table>
<thead>
<tr>
<th>Number of incidents reported to Procurator Fiscal (3-year average)</th>
<th>Number of charges prosecuted</th>
<th>Number of cases for trial/number of vulnerable witnesses</th>
</tr>
</thead>
<tbody>
<tr>
<td>23,273</td>
<td>17,455</td>
<td>11,520</td>
</tr>
</tbody>
</table>

56. For stalking cases, information from the COPFS system shows how many stalking charges have been prosecuted in a year. In addition, COPFS estimate that there are currently around 10 human trafficking charges prosecuted per year. For both stalking and human trafficking cases, it has been assumed that each case has only one charge. It has also been assumed that 34% of cases accused guilty at the earliest opportunity. The figures obtained are set out in table 6.

**Table 6 - vulnerable witnesses in cases involving stalking or human trafficking**

<table>
<thead>
<tr>
<th>Number of Charges/Cases</th>
<th>Number of cases for trial/Number of vulnerable witnesses</th>
</tr>
</thead>
<tbody>
<tr>
<td>313</td>
<td>207</td>
</tr>
</tbody>
</table>

---

\(^3\) This figure of 34% is taken from the 2011/12 Summary Justice Report (http://www.scotland.gov.uk/Resource/0039/00394941.pdf). While only applying to cases under summary proceedings, no data is currently available on which to base an estimate for solemn proceedings. For the purposes of the financial memorandum, therefore, this figure has been used for all cases.

\(^4\) http://www.scotland.gov.uk/Publications/2012/10/9283
On the basis of the figures above, the estimate of the number of additional vulnerable witnesses is 18,438. As will be noted, with the exception of child witnesses, it has not been possible to distinguish between cases prosecuted at summary and solemn level.

Cost of individual notices

On the basis of a streamlined procedure, as described in paragraphs 48 to 49, the following costs have been estimated for each type of vulnerable witness notice. This varies between straightforward cases (where vulnerability is easily identified and the victim does not require any COPFS assistance) and less straightforward cases (where the victim has a particular vulnerability or wishes the use of a special measure which is not automatically available).

The estimated cost for a standard notice (where there is an automatic entitlement to a special measure) is £4.57.

The estimated cost for a non-standard application is £40.23.

Total cost of application process

Based on the figures above, it is estimated that there will be 18,438 additional notices/applications per year. It has been assumed that the vast majority of these will be standard applications, following the straightforward application process. This figure has been estimated at 90% of cases.

That gives the following figures:

- Cost of standard notices (18,438 x 90% x £4.57) - £75,800 per year
- Cost of non-standard applications (18,438 x 10% x £40.23) - £74,200 per year

So, the total additional cost of the application process will be £150,000 per year.

Vulnerable witnesses and special measures - costs relating to use of special measures

As the use of special measures increases, there will be increased use of supporters, which will have a cost implication for COPFS (the cost of other special measures primarily affects SCS). The majority of supporters will be from the Witness Service, but some may be personally requested by the witness. The expenses of these supporters are met by COPFS. In estimating the cost of additional supporters, it has been assumed that the percentage of applications for personal supporters out of the total number of current applications for special measures will be the same under the new provisions (3.6%). It has been estimated that these supporters are paid an average amount of £15 each.

The cost of additional supporters is therefore likely to be approximately £10,000 per year (18,438 additional notices x 3.6% x £15).

Vulnerable witnesses and special measures – costs relating to challenges

There is no estimate given for the cost of challenges to notifications/application for special measures. COPFS consider that the cost of preparing and carrying out debates in relation...
to the challenge will be absorbed by other case preparation costs. In addition, COPFS anticipate
that, as the vast majority of these notifications relate to a witness’s automatic right to special
measures, there should not be a large number of challenges.

**Vulnerable witnesses and special measures – other costs (referrals to Victim Information and
Advice)**

67. As the definition of child witness will now include 16 and 17 year olds, this will increase
the number of referrals to COPFS’s Victim Information and Advice (VIA) service. This number
relates to the total number of 16 and 17 year olds who are cited by COPFS in a year and does not
take account of victims in cases where the accused pleads guilty at the earliest opportunity. VIA
will still have an involvement with the witnesses in these cases.

68. The numbers involved are:

- 16 & 17 year olds (Summary) = 5,233
- 16 & 17 year olds (Sheriff and Jury) = 689
- 16 & 17 year olds (High Court) = 149

69. An individual cost has been identified for each type of referral, as follows:

- Summary: £18.27
- Sheriff and Jury: £21.77
- High Court: £32.65

70. This means that the total cost of additional referrals is:

\[
(5233 \times £18.27) + (689 \times £21.77) + (149 \times £32.65) = £115,500 \text{ per year}
\]

**Victim Notification Scheme**

71. The VNS is to be extended to include all offences where the accused is sentenced to over
12 months imprisonment. Although the scheme is operated by the SPS, there will be additional
costs to COPFS in the initial administration, in terms of notifying victims that they may apply for
the scheme. As set out in more detail at paragraph 112, part of this cost is not directly related to
the provisions in the Bill. However, as the constituent parts of this proposal cannot easily be
disaggregated, the total cost is used here.

72. The total estimated cost of one notification is £16.33.

73. SPS estimate that an additional 3,000 victims per year will be entitled to register for the
scheme. At most, therefore (if all newly eligible victims opted in to the VNS) the additional cost
to COPFS would be **£49,000 per year**. There are no accurate figures available for the current
opt-in rate, but SPS consider that this is likely to be slightly lower than 50%. Assuming an opt in
rate of between 50% and 100% (to account for a likely increase in the awareness of the VNS in
light of the passage of the Bill), costs to COPFS will therefore be between **£24,500 and £49,000
per year**.
These documents relate to the Victims and Witnesses (Scotland) Bill (SP Bill 23) as introduced in the Scottish Parliament on 6 February 2013

COPFS – total costs

74. Taking all of the above into consideration, the total estimated financial impact of the Bill on COPFS is set out in Table 7.

Table 7 - total costs on COPFS

<table>
<thead>
<tr>
<th>Proposal</th>
<th>Cost per year (£)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Vulnerable witnesses and special measures – costs relating to applications/notices</td>
<td>150,000</td>
</tr>
<tr>
<td>Vulnerable witnesses and special measures – costs relating to use of special measures (supporters)</td>
<td>10,000</td>
</tr>
<tr>
<td>Vulnerable witnesses and special measures – other costs (referrals to VIA)</td>
<td>115,500</td>
</tr>
<tr>
<td>Victim Notification Scheme</td>
<td>24,500 – 49,000</td>
</tr>
<tr>
<td><strong>Total Cost to COPFS</strong></td>
<td><strong>300,000 – 324,500</strong></td>
</tr>
</tbody>
</table>

Measures with no or marginal costs

General principles

75. While COPFS will be required to have regard to the general principles when carrying out its functions (in so far as these relate to victims and witnesses), this is not expected to have any financial impact.

Standards of service

76. The obligation on certain justice organisations to publish standards of service for victims and witnesses will have minimal cost implications for COPFS, which already has similar standards and an established complaints procedure.

Access to case specific information

77. As with the police, COPFS currently deals with requests for case specific information, and is often the initial point of contact for victims and witnesses. While COPFS anticipates that there will be an initial increase in requests for information due to increased awareness of the reforms in the Bill and the EU Directive, it considers that this can be dealt with within current resources.

SCOTTISH COURT SERVICE

78. Costs on SCS will arise primarily from the proposals around vulnerable witnesses and special measures, and the introduction of the victim surcharge and restitution orders.

79. Total non-recurring costs are expected to be £92,800, with recurring costs of between £369,000 and £502,500 per annum.
Measures with cost implications

Vulnerable witnesses and special measures - overview

80. The changes in the Bill will result in increased numbers of witnesses automatically entitled to the use of special measures, and potential increases in the numbers applying for the use of such measures. This will increase costs in relation to the processing of applications and notices which must be submitted to the court, and the actual use of special measures. In addition, the Bill will introduce the ability for either party to object to an application or notice for special measures, which will require additional court time.

Vulnerable witnesses and special measures - costs relating to notices/applications

81. The Bill will increase the number of witnesses automatically entitled to use special measures, by including 16 to 17 year olds and victims of domestic abuse, sexual offences, stalking and human trafficking. The estimates provided by COPFS, which are replicated in the list below, have been used for the purposes of calculating costs on SCS.

- 16 and 17 year olds – 6,071 per annum
- domestic abuse – 11,520
- sexual offences - 640
- stalking and human trafficking - 207

82. At present, while witnesses falling into these categories are not automatically deemed to be vulnerable and so entitled to use special measures, they may be able to do so on application to the court. In addition, there will be some overlap between the categories described above. However, the numbers involved are considered to be fairly low, and so have not been taken into account.

83. Therefore, as in the COPFS estimates, it is assumed that the changes to special measures will result in an additional 18,438 notices/applications. It is expected that the vast majority of these would be lodged in the sheriff court.

84. SCS estimates that each notice will cost £11.32 to process in the sheriff court (it would cost around £14.45 in the High Court, but such notices are expected to constitute a very small percentage of the total). On this basis, it is estimated that the total cost of processing 18,438 additional notices would be around £208,700 per year.

85. There are also likely to be some additional applications for non-standard measures due to the wider definition of vulnerability (primarily to include individuals who, following an individual assessment, are considered to be at significant risk of harm as a result of giving evidence) but there is insufficient information available upon which to base any reasonable estimate, and any impact is expected to be small.

Vulnerable witnesses and special measures - Costs relating to the use of special measures

86. Any additional costs relating to the use of special measures depend crucially on the extent to which automatic entitlement is taken up, what sort of special measures are used, and whether
use of special measures which must be applied for (as opposed to being automatically available) also increases. All of these factors are unknown at present. In addition, it is not known whether the increased availability of both standard and special measures will have an impact (and if so, to what extent) on the trend of cases proceeding to evidence, which is currently around 10%. Costs are therefore difficult to predict with any accuracy. However, some estimates are provided below.

87. The automatic entitlement mentioned above will only apply to three special measures: use of a screen (to prevent the witness seeing the accused within the courtroom); the use of a live television link from within or outwith the court building; and the use of a supporter (to accompany the witness when giving evidence). Of these, an increase in the use of screens or live television links would have a cost implication for SCS.

88. The potential increase in demand for live television links within court buildings will likely require the purchase of additional equipment for the two largest courts, in Edinburgh and Glasgow. This will enable relevant cases to be allocated to additional courtrooms, which are currently not suitably equipped. Costs are estimated at £60,000, on the basis of providing a new witness room and additional courtroom equipment in both Edinburgh and Glasgow (costing £30,000 each).

89. The demand for use of live television links from remote sites (i.e. not from within the court building) is likely to increase as a result of the wider definition of "vulnerability". There is currently a dedicated site in each sheriffdom and these are supplemented by ad hoc sites across the SCS estate. On the basis of available information this is expected to be sufficient to meet any increased demand resulting from the Bill. SCS estimates that it will require one additional member of staff, costing £24,000 p.a., to provide IT support for any additional demand.

90. To cope with additional demands for screen equipment, SCS considers that it will be necessary to provide one additional set of screen equipment for courts which deal with higher volumes of business; and two each for Glasgow and Edinburgh. A total of 19 sets will be required at £570 each, costing around £10,800.

91. It is unclear whether or not the use of other special measures (which will not be available automatically to the groups mentioned above) may increase as a result of the Bill. However, the special measure considered most likely to be used more frequently, and with the largest cost implication, is evidence by commissioner (a way of giving evidence in advance, outwith the courtroom). Table 8 reflects the potential impact on staff and judicial costs at hearings, presuming the sheriff or judge acts as the commissioner (at approximately £212 per hour).

Table 8 – potential cost of increase in use of evidence by commissioner

<table>
<thead>
<tr>
<th>Increased take up – hearings per annum</th>
<th>Hearing – one hour duration (£)</th>
<th>Hearing – two hour duration (£)*</th>
<th>Hearing – four hour duration (£)*</th>
</tr>
</thead>
<tbody>
<tr>
<td>25</td>
<td>5,300 p.a.*</td>
<td>10,600 p.a.</td>
<td>21,200 p.a.</td>
</tr>
<tr>
<td>50</td>
<td>10,600 p.a.</td>
<td>21,200 p.a.</td>
<td>42,400 p.a.</td>
</tr>
<tr>
<td>100</td>
<td>21,200 p.a.</td>
<td>42,400 p.a.</td>
<td>84,800 p.a.</td>
</tr>
</tbody>
</table>

* where the commissioner is a high court judge this start point figure would be £7,000 p.a.
92. The total non-recurring cost relating to vulnerable witnesses using special measures is therefore £70,800, with recurring costs of between £29,300 and £108,800 per year (this includes the cost of one member of staff referred to in paragraph 89 (£24,000) and the minimum and maximum costs from table 8).

Vulnerable witnesses and special measures - costs relating to challenges to use of special measures

93. Finally, the new provisions will afford parties an opportunity to challenge a notice or application for special measures (standard or otherwise). The ability to challenge was previously fairly limited. In such instances the matter should be heard at a forthcoming diet e.g. an intermediate diet or a specific hearing should be fixed for this purpose.

94. It is difficult to estimate the likely number of challenges, but it is considered that this may be between 2.5% and 5% of all notices or applications for special measures.

95. Currently, around 7,000 applications and notices are lodged annually. As above, it is estimated that the automatic entitlement of certain groups to special measures will result in an additional 18,438 notices per year, giving a total of 25,438 notices/applications. However, the number of notices/applications requesting special measures will likely be considerably lower than this, as not all of the 18,438 newly eligible witnesses will wish to use them. This is not the case in relation to the processing costs mentioned above, as a notice has to be dealt with by the court even where the witness in question does not want to use special measures.

96. The additional cost of a single hearing to determine a challenge is estimated to be £55, based on this taking 15 minutes of court time. Table 9 sets out the potential cost to SCS of dealing with challenges on 2.5% and 5% of applications/notices, for a range of between 25% and 100% of newly eligible witnesses (i.e. of the 18,438) actually choosing to use special measures.

<table>
<thead>
<tr>
<th>Uptake of special measures by newly eligible witnesses (%)</th>
<th>Total number of applications/notices requesting special measures*</th>
<th>Cost of challenges to 2.5% of cases (£55 per challenge) (£)</th>
<th>Cost of challenges to 5% of cases (£55 per challenge) (£)</th>
</tr>
</thead>
<tbody>
<tr>
<td>25</td>
<td>11,610</td>
<td>16,000</td>
<td>31,900</td>
</tr>
<tr>
<td>50</td>
<td>16,219</td>
<td>22,300</td>
<td>44,600</td>
</tr>
<tr>
<td>100</td>
<td>25,438</td>
<td>35,000</td>
<td>70,000</td>
</tr>
</tbody>
</table>

* Comprising the percentage of the 18,438 newly eligible witnesses in column 1, plus the current 7000.

97. The total cost of challenges is therefore between £16,000 and £70,000 per year.
Victim surcharge and restitution orders

98. The victim surcharge will be imposed on certain offenders by the court, and revenue will be collected by SCS (as court fines are currently). Similarly, the court will be able to impose a restitution order on those convicted of assaulting a police officer or police staff, which again will be collected by SCS. Once collected, these funds will be passed to the Scottish Government.

99. SCS has estimated the IT costs involved in setting up the victim surcharge and restitution orders at approximately £22,000. The amount is provided as an estimate at this stage and will require to be revised once more detail about both funds is known (this is to be set out in subordinate legislation). Consideration will also need to be given to the management information data required, which may result in additional costs.

100. The court costs for handling the victim surcharge are calculated on the basis that it will take an extra minute per case in court and administrative time to process. It is not anticipated that restitution orders will require additional court time, as these can be used as an alternative to a fine. The total estimated cost is £115,000 per annum.

101. The total non-recurring cost of the victim surcharge and restitution orders is therefore estimated to be £22,000, with recurring annual costs of £115,000.

Scottish Court Service – total costs

102. The likely total costs on SCS are set out in table 10.

Table 10 – Total costs on SCS

<table>
<thead>
<tr>
<th>Proposal</th>
<th>Recurring costs per annum (£)</th>
<th>Non-recurring costs (in year 2014/15)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Min</td>
<td>Max</td>
</tr>
<tr>
<td>Special measures – processing notices</td>
<td>208,700</td>
<td>208,700</td>
</tr>
<tr>
<td>Special measures – use of special measures</td>
<td>29,300</td>
<td>108,800</td>
</tr>
<tr>
<td>Special measures – challenges</td>
<td>16,000</td>
<td>70,000</td>
</tr>
<tr>
<td>Victim surcharge and restitution orders</td>
<td>115,000</td>
<td>115,000</td>
</tr>
<tr>
<td>TOTAL</td>
<td>369,000</td>
<td>502,500</td>
</tr>
</tbody>
</table>
Measures with no or marginal costs

General principles

103. The cost of observing the general principles for SCS will be minimal.

Standards of service

104. There will be minimal costs associated with revising guidance and leaflets for victims and witnesses. These are not likely to be significant and will be absorbed by SCS.

Access to case specific information

105. As with the police and COPFS, SCS already deal with enquiries from victims and witnesses about cases affecting them. If the number of enquiries were to rise as a result of the Bill, this would increase the costs involved. However, it is not currently possible to quantify these potential costs, as it is not known what the level of enquiries will be, the level of staff required to deal with these, or how many requests are currently being made for this information. Costs will be considered as part of wider work with agencies to better facilitate access to case specific information for the victims of crime.

Victim statements – increased flexibility in timing of submission

106. SCS consider that this proposal will be cost neutral. There may be cases where an additional hearing will be required if the statement is lodged and issue is taken when sentence is about to be passed but such cases are likely to be minimal.

Court to consider compensation orders

107. The policy intention is to simply formalise that the court should give consideration to awarding compensation. This will not take up any notable amount of court time and as such there are no cost implications for SCS.

Removal of presumption that child witnesses under 12 will give evidence away from court

108. This is a very minor amendment to existing legislation, and is not expected to have an effect on many cases. No cost implications are anticipated.

Victim statements – extend eligibility

109. This is another minor amendment to existing legislation, to ensure that victim statements can be made on behalf of those under the age of 14. No costs implications are anticipated.

SCOTTISH PRISON SERVICE

110. Costs on SPS will result from the extension to the VNS. Non-recurring costs are estimated to be around £31,000, and recurring costs are estimated to be between around £112,000 and £146,300 per annum.
Measures with cost implications

Extension of Victim Notification Scheme and written representations about temporary release

111. The Scottish Government intends to extend the existing VNS, which enables victims of certain crimes to be notified of the release of offenders (and given various other information) who are sentenced to 18 months or more in prison. This threshold will be lowered from 18 to 12 months, and applicability further widened to include victims of all crimes, not just those specified at present. This will result in an increase in the number of victims who are eligible to use the VNS, with an additional administrative cost on SPS depending on how many newly eligible victims utilise the scheme.

112. However, although the extension of the VNS to encompass victims of all crimes will be provided for in the Bill, the lowering of the threshold from 18 to 12 months will be carried out through existing order-making powers in the Criminal Justice (Scotland) Act 2003. While the Financial Memorandum is focussed on those costs arising directly from the Bill, this is a single proposal with two elements to it, neither of which is intended to stand alone. In addition, while the cost implications can be calculated for the proposal as a whole, it is difficult to disaggregate the constituent parts. For that reason, the cost estimate below encompasses both parts of this proposal.

113. The Bill will also allow victims to make written representations when a prisoner is first eligible for temporary release. Again, this will have an administrative cost on SPS, and this has been incorporated into the cost estimates below.

114. SPS estimates that the extension to VNS will result in an additional 3,000 eligible victims per year. The potential additional costs to SPS are shown in tables 11 and 12. Table 12 assumes that 100% of the newly eligible victims register for the VNS, while table 13 assumes that 50% register (the current uptake rate is estimated at slightly less than 50%). These cost estimates also incorporate the increase in costs expected from the ability to make representations about temporary release.

<table>
<thead>
<tr>
<th>Table 11 – 100% of victims register (an additional 3,000 per year)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Set up</strong> (IT development costs, furniture etc.)</td>
</tr>
<tr>
<td>Set up (IT development costs, furniture etc.)</td>
</tr>
<tr>
<td>Staffing (1 legal services manager and 2 legal services officers)</td>
</tr>
<tr>
<td>Administration (courier services for letters, stationery etc.)</td>
</tr>
<tr>
<td>TOTAL</td>
</tr>
</tbody>
</table>

Table 12 – 50% of victims register (an additional 1,500 per year)

<table>
<thead>
<tr>
<th></th>
<th>Year 1 costs (£)</th>
<th>Year 2 costs (£)</th>
<th>Year 3 costs (£)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Set up</strong></td>
<td>30,600</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>(IT development costs, furniture etc.)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Staffing</strong></td>
<td>75,000</td>
<td>78,700</td>
<td>82,600</td>
</tr>
<tr>
<td>(50% of 1 legal services manager and 2 legal services officers)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Administration</strong></td>
<td>29,400</td>
<td>29,400</td>
<td>29,400</td>
</tr>
<tr>
<td>(courier services for letters, stationery etc.)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>135,000</td>
<td>108,100</td>
<td>112,000</td>
</tr>
</tbody>
</table>

**Measures with no or marginal costs**

**General principles**

115. The cost of observing the general principles for SPS will be minimal.

**Standards of service**

116. There may be some costs associated with revising guidance for victims and witnesses. These are expected to be marginal.

**COSTS ON LOCAL AUTHORITIES**

117. The establishment of a duty to have regard to guidance on Joint Investigative Interviews (JIIs) will apply to social workers. However, as this guidance already exists and is used by those carrying out such interviews, no financial impact is expected.

**COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES**

118. The Bill will have cost implications on PBS, the legal aid fund (administered by SLAB), SCRA, and SPA. Details of these costs are set out below.

**PAROLE BOARD FOR SCOTLAND (PBS)**

119. PBS will incur costs primarily from the introduction of the ability to make oral representations. Recurring costs of between £23,400 and £87,200 per year are expected.
Measures with cost implications

Oral representations to the Parole Board for Scotland

120. Oral representations to PBS are being introduced to assist those victims who would prefer to make their views known orally rather than by submitting written representations. The cost of meeting with victims to receive these oral representations, and of then producing a written record of these to be presented to the tribunal will fall on PBS. The ability to make oral representations will only be available in connection with offenders given life sentences in the first instance (with the option to extend this to other categories by subordinate legislation).

121. Costs have been calculated based on the number of life sentence prisoners (approximately 220) referred to the Board each year. This number obviously fluctuates over time, but is considered to be the best available basis for estimating costs.

122. The uptake of the new ability to make oral representations is difficult to estimate, and so a range has been calculated to show the costs of 25%, 50% and 100% of eligible victims choosing to make such representations.

123. Potential costs are set out in table 13.

Table 13 - costs on PBS

<table>
<thead>
<tr>
<th>PBS COSTS</th>
<th>100% take up – 220 cases £</th>
<th>50% take up – 110 cases £</th>
<th>25% take up – 55 cases £</th>
</tr>
</thead>
<tbody>
<tr>
<td>PB members costs @ £255 (including fees and travel)</td>
<td>56,100</td>
<td>28,100</td>
<td>14,000</td>
</tr>
<tr>
<td>Late cancellation fee for PB member (assuming this occurs in 10% of cases) @ £97.50</td>
<td>2,100</td>
<td>1,100</td>
<td>500</td>
</tr>
<tr>
<td>Training PB members based on 10 members @ a daily fee of £195</td>
<td>2,000</td>
<td>2,000</td>
<td>2,000</td>
</tr>
<tr>
<td>Overnight accommodation based on 25% of cases @ £100 per night</td>
<td>5,500</td>
<td>2,800</td>
<td>1,400</td>
</tr>
<tr>
<td>Victim + supporter travel and expenses @ £10</td>
<td>2,200</td>
<td>1,100</td>
<td>600</td>
</tr>
<tr>
<td>Room hire @ £25</td>
<td>5,500</td>
<td>2,800</td>
<td>1,400</td>
</tr>
<tr>
<td>PBS administration @ £62</td>
<td>13,600</td>
<td>6,800</td>
<td>3,400</td>
</tr>
<tr>
<td>Administrative cancellation costs (assuming 10% of cases) @ £9</td>
<td>200</td>
<td>100</td>
<td>100</td>
</tr>
<tr>
<td>TOTALS</td>
<td>87,200</td>
<td>44,800</td>
<td>23,400</td>
</tr>
</tbody>
</table>
Measures with no or marginal costs

General principles
124. The cost of observing the general principles for PBS is expected to be minimal.

Standards of service
125. PBS does not anticipate any cost implications arising from the duty to set out standards of service.

LEGAL AID FUND
126. The changes being made in relation to vulnerable witnesses and special measures will have a cost implication on the Legal Aid Fund (which is administered by SLAB), estimated at between £6,000 and £26,700 per year.

Measures with cost implications

Vulnerable witnesses and special measures – introduction of ability to challenge
127. Costs on the Legal Aid Fund will arise from the introduction of an ability for either party in a case to challenge an application or notice for special measures (as such a challenge will require the involvement of a defence solicitor).

128. It is difficult to calculate an accurate estimate of costs on the Legal Aid Fund, as there is uncertainty over the total number of applications or notices per year; the percentage of these which are likely to be challenged; and the number of cases where the defence will be funded by legal aid. Crucially, it is also unclear how many cases involving challenges to special measures will be conducted under summary and solemn proceedings. The former should involve no additional costs, as these would be covered by the core fixed payment to the solicitor in question. However, under solemn proceedings, there would be additional costs.

129. For solemn proceedings, SLAB estimates that a single challenge would cost £205.20 (comprised of a £152 standard fee plus an estimated £19 court hearing fee for a 15 minute hearing, plus VAT). In addition, SLAB estimates that 15% of cases under solemn proceedings involve counsel, which would cost an additional £378 per challenge (resulting in cases utilising counsel costing £583.20 in total). These figures can be consolidated to give an average cost per case in solemn proceedings of £261.90 (which covers an additional £378 counsel fees in 15% of cases; i.e. £205.20 + £56.70).

130. Based on data from the past 3 years\(^6\), solemn proceedings are used in just over 7% of cases held in the sheriff or high court. It is possible that the proportion of solemn cases for the subset of cases involving special measures may differ from this. However, there is currently no data on which to base an alternative proportion (and, in any case, it is considered unlikely that this would be significantly different from the average across all cases). For the current purposes, therefore, this average figure has been used, rounded up to 8%.

\(^6\) [http://www.scotland.gov.uk/Publications/2012/11/5336/7](http://www.scotland.gov.uk/Publications/2012/11/5336/7)
131. The total number of applications/notices for special measures per year is estimated to be between 11,610 and 25,438 (as explained in the SCS section in paragraphs 95 to 96). Using the percentage above, it is therefore likely that between 929 and 2,035 of these will relate to solemn proceedings.

132. As in the SCS estimates, costs have been calculated for 2.5% and 5% of relevant special measures applications/notices being challenged.

Table 14 – Potential costs to Legal Aid Fund

<table>
<thead>
<tr>
<th></th>
<th>Minimum cost (£) (929 applications/notices relating to solemn proceedings)</th>
<th>Maximum cost (£) (2,035 applications/notices relating to solemn proceedings)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.5% of cases challenged</td>
<td>£6,000 (23 x 261.90)</td>
<td>£13,400 (51 x 261.90)</td>
</tr>
<tr>
<td>5% of cases challenged</td>
<td>£12,000 (46 x 261.90)</td>
<td>£26,700 (102 x 261.90)</td>
</tr>
</tbody>
</table>

SCOTTISH CHILDREN’S REPORTER ADMINISTRATION (SCRA)

133. SCRA will incur some minor costs from the change in the definition of child witness to include 16 and 17 year olds (which is part of the package of changes being made around special measures and vulnerable witnesses).

Measures with no or minimal cost implications

Special measures – change to definition of child witness

134. The potential increase in costs for SCRA is a result of 16 and 17 year olds being included in the definition of child witness, and so being automatically entitled to special measures. This may affect cases which are referred from the children’s hearing system to the sheriff court in which SCRA calls such individuals as witnesses. Costs would result from completing the necessary paperwork, and from communicating with the individual witnesses to obtain their views about what special measures are required.

135. While there is very limited data available, an estimate of the minor costs involved is given below.
These documents relate to the Victims and Witnesses (Scotland) Bill (SP Bill 23) as introduced in the Scottish Parliament on 6 February 2013

136. In 2011-12 there were 3,795 proofs concluded. In 376 of these evidence was led by the Reporter. An anecdotal survey of SCRA’s Senior Practitioners (who have specific responsibilities in relation to court work) suggests that calling a 16 to 17 year old as a witness in a proof is very rare and may only occur in a maximum of 5% of cases where evidence is led (please note that this is a very rough maximum estimate). That would give a theoretical potential maximum of around nineteen 16 to 17 year old witnesses in a year.

137. SCRA estimates that the time to cite a child witness would average out at around 3 hours of additional work (though this can vary considerably on a case-by-case basis). Based on an average Reporter cost of £20 per hour, SCRA estimate a cost of £60 per application.

138. It is therefore estimated that the maximum possible cost of the provision is around £1,100 per year (5% of 376 at £60, rounded to nearest £100).

SCOTTISH POLICE AUTHORITY

139. The SPA will be affected by a number of measures in the Bill, set out below. However, these are all expected to have no or marginal costs.

Measures with no or marginal costs

General principles

140. While the police will be required to have regard to the general principles when carrying out their functions (in so far as these relate to victims and witnesses), this is not expected to have any financial impact.

Standards of service

141. The costs of developing and making available clear standards of service for victims and witnesses are expected to be marginal, and the police already have a comprehensive complaints process.

Access to case specific information

142. The police already deal with enquiries from victims and witnesses about cases affecting them. If the number of enquiries were to rise significantly as a result of the Bill, this could increase the costs involved (for example, if handling these took up a larger proportion of staff time, or there was a need to establish dedicated contact points). However, there is no available data on which to predict the likelihood or volume of such a rise in enquiries, nor of the current cost of responding to these, and so no meaningful estimate can be given at present. Costs will be considered as part of wider work with agencies, including the police, to better facilitate access to case specific information for victims of crime.

Vulnerable witnesses and special measures

143. Changes to the availability of special measures for vulnerable witnesses will primarily affect SCS and COPFS. However, it is possible that there could be some minor indirect costs on the police resulting from these changes. For example, the changes are likely to result in an
increased use of screens in court (to allow the witness to give evidence without seeing the accused). If so, this could potentially result in an increase in the number of identity parades required in order to allow witnesses to identify the accused, since that cannot be done from behind a screen.

144. Given the uncertainties around this, it is very difficult to anticipate the extent to which additional parades could be required, if at all. However, this is not expected to require significant additional resource.

Right for victims of sexual violence to choose gender of interviewer

145. The police will be required to ensure that interviewers of both genders are available in cases involving sexual violence. However, it is expected that this can be achieved without any additional costs.

Duty to have regard to guidance on Joint Investigative Interviews

146. The duty to have regard to guidance on JIIs will apply to the police. However, as this guidance already exists and is used by those carrying out such interviews, no additional costs are expected.

INDIVIDUALS AND BUSINESSES

147. There may be some cost to individuals calling vulnerable witnesses in civil cases, as a result of the change in the definition of child witness to include 16 and 17 year olds. However, the Scottish Government does not expect there to be many civil cases involving this age group. There are a large number of family cases in the courts and many of these relate to issues such as child contact and residence. However, these cases relate to children under the age of 16 and that is not being changed by this Bill. As a result, any additional costs on individuals are expected to be minimal.

ADDITIONAL INCOME

148. The introduction of the victim surcharge and restitution orders will generate additional income from offenders, which will be used for the benefit of victims.

Victim surcharge

149. The Bill provides that a victim surcharge will be payable by such offenders as are identified by the Scottish Ministers by order, and that further detail on the amount of the surcharge will also be set out by subordinate legislation. As a result, it is impossible at this stage to give an accurate estimate of the likely income from the surcharge. However, although no decisions have been taken as yet, the Scottish Government has developed a model which may be used.

150. Under this model, the victim surcharge would initially be imposed on all offenders who are subject to court fines (with the potential to expand this at a later date). The amount of the surcharge would be linked to the amount of the fine, by way of a scale set out in secondary
These documents relate to the Victims and Witnesses (Scotland) Bill (SP Bill 23) as introduced in the Scottish Parliament on 6 February 2013

legislation. The levels on this scale would be set by reference to the standard scale of fines, as shown in table 15.

_Table 15 – possible model for setting surcharge amount_

<table>
<thead>
<tr>
<th>Court fine between (£)</th>
<th>Surcharge (£)</th>
</tr>
</thead>
<tbody>
<tr>
<td>0.01 - 200</td>
<td>20</td>
</tr>
<tr>
<td>200.01 - 500</td>
<td>30</td>
</tr>
<tr>
<td>500.01 - 1000</td>
<td>40</td>
</tr>
<tr>
<td>1000.01 - 2500</td>
<td>50</td>
</tr>
<tr>
<td>2500.01 - 5000</td>
<td>100</td>
</tr>
<tr>
<td>5000.01 - 10,000</td>
<td>200</td>
</tr>
<tr>
<td>Over 10,000</td>
<td>10% of fine</td>
</tr>
</tbody>
</table>

151. For illustrative purposes only, this model is used in table 16 to set out the potential income which may be generated by the victim surcharge. Calculations are based on data from SCS on the number and value of fines imposed over the last 3 years (2009/10 – 2011/12).

_Table 16 – Potential income from victim surcharge_

<table>
<thead>
<tr>
<th>Fines between (£):</th>
<th>Average number of fines imposed p.a.</th>
<th>Level of victim surcharge (£)</th>
<th>Income - 100% collection rate (£)</th>
<th>Income – 80% collection rate (£)</th>
<th>Income – 60% collection rate (£)</th>
</tr>
</thead>
<tbody>
<tr>
<td>0 – 200</td>
<td>38,149</td>
<td>20</td>
<td>763,000</td>
<td>610,400</td>
<td>457,800</td>
</tr>
<tr>
<td>200.01 – 500</td>
<td>23,438</td>
<td>30</td>
<td>703,100</td>
<td>562,500</td>
<td>421,900</td>
</tr>
<tr>
<td>500.01 – 1,000</td>
<td>3,885</td>
<td>40</td>
<td>155,400</td>
<td>124,300</td>
<td>93,200</td>
</tr>
<tr>
<td>1000.01 – 2,500</td>
<td>535</td>
<td>50</td>
<td>26,800</td>
<td>21,400</td>
<td>16,000</td>
</tr>
<tr>
<td>2,500.01 – 5,000</td>
<td>107</td>
<td>100</td>
<td>10,700</td>
<td>8,600</td>
<td>6,400</td>
</tr>
<tr>
<td>5,000.01 – 10,000</td>
<td>54</td>
<td>200</td>
<td>10,800</td>
<td>8,600</td>
<td>6,500</td>
</tr>
<tr>
<td>Over 10,000</td>
<td>89 (total value £4,854,610)</td>
<td>10% of fine</td>
<td>485,500</td>
<td>388,400</td>
<td>291,300</td>
</tr>
<tr>
<td>Total per annum (£)</td>
<td>-</td>
<td>-</td>
<td>2,155,300</td>
<td>1,724,200</td>
<td>1,293,100</td>
</tr>
</tbody>
</table>
152. It is acknowledged that once a fine or, in future, a surcharge is imposed by the court, there will in some cases be a time delay before full payment is received, either because of agreed phased payment arrangements or following enforcement action against defaulters. Information from SCS suggests that a reasonable estimated collection rate, based on previous years, is likely to be around 66% after one year, and around 90% after 3 years.

153. The cost of collecting the victim surcharge will fall on SCS, as set out earlier. However, there will also be some costs involved in administering the fund, which the Scottish Government intends to delegate to a third party. These costs would be met from the victim surcharge income, but are expected to be minimal.

**Restitution orders**

154. Unlike the victim surcharge, the court will decide whether or not to impose a restitution order in relevant cases, and will determine the amount. It is therefore difficult to estimate potential income. The current charge for assaulting the police resulted in the imposition of fines totalling £336,096 over the period 1 January 2010 - 28 February 2012, which is an average of approximately £155,000 per year. The new equivalent charge in the Police and Fire Reform (Scotland) Act 2012 may increase the potential income as it is worded to include a wider range of potential victims, although any difference is likely to be small.

155. However, given that this figure is subject to so many variables, such as the rate of commission of the crime in question, and sentencers’ approach, there is no guarantee that it will remain stable and even less that it will be similar to that imposed through restitution orders. Furthermore, while the Bill’s provisions prioritise a restitution order over a fine, the continued use of fines (which will still be an option for the court) could lower the potential income.

**PART B – NATIONAL CONFIDENTIAL FORUM**

156. This part of the Financial Memorandum summarises the cost implications of the National Confidential Forum (NCF) discharging the following functions:

- To receive and listen, in private and in confidence, to the experiences of adults who were placed in institutional care as children, including experiences of abuse;
- To contribute to the prevention of the abuse of children placed in institutional care in the future by making proposals to inform policy and practice, based on experiences recounted in hearings of the NCF;
- 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 signpost services to participants and their families which can offer support, advocacy, advice and information.

157. The analysis and estimates contained in this memorandum draw on a variety of sources including the Scottish Government consultation on the NCF; the costs associated with the precursor to the NCF, the Time to be Heard Pilot Forum⁷; and the experiences of other

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⁷ Time to be Heard [http://www.scotland.gov.uk/Publications/2011/03/07122331/0](http://www.scotland.gov.uk/Publications/2011/03/07122331/0)
These documents relate to the Victims and Witnesses (Scotland) Bill (SP Bill 23) as introduced in the Scottish Parliament on 6 February 2013

jurisdictions. It should be read in conjunction with the Policy Memorandum, which sets out more fully the policy proposals which underpin the Bill and the range of non-financial benefits associated with the creation of the NCF.

158. One of the key policy areas in the Bill is the establishment of the NCF. The NCF will give people who were placed in institutional care as children the opportunity to recount their experiences of that care, in a confidential and non-judgemental setting, to an independent panel. These experiences will include, but not necessarily be confined to, abuse and neglect. The work of the NCF will both contribute to an improvement in the health and wellbeing of the people who participate in the NCF and inform the future development of law, policy and service provision to children. The creation of the NCF is central to the National Strategy for Adult Survivors of Childhood Abuse (the Scottish Government’s SurvivorScotland Strategy)\(^8\) which seeks to improve the health and wellbeing of all survivors of abuse in childhood.

159. The specific financial impact of the Bill provisions relating to the NCF is relatively narrow. There are, however, a range of costs associated with establishing and operating the NCF, including support for participants; staffing; and infrastructure costs.

**SUMMARY OF COSTS ON THE SCOTTISH ADMINISTRATION**

160. Table 17 summarises the projected Scottish Government investment for the setting up and operating of the NCF. Costs have been estimated on the basis of the Time to Be Heard Pilot Forum and through a consideration of the operational costs incurred by existing public bodies.

**Table 17 - Projected costs**

<table>
<thead>
<tr>
<th>National Confidential Forum – Projected Costs</th>
<th>Start-up costs (2013-14) £’000</th>
<th>Annual Running Costs from 2014 - 15 £’000</th>
</tr>
</thead>
<tbody>
<tr>
<td>Head of Forum, members and staff * - including counselling support</td>
<td>80</td>
<td>320</td>
</tr>
<tr>
<td>Recruitment costs</td>
<td>15</td>
<td></td>
</tr>
<tr>
<td>Operating costs**</td>
<td>20</td>
<td>55</td>
</tr>
<tr>
<td>Professional advice/project management</td>
<td>70</td>
<td>70</td>
</tr>
<tr>
<td>Website</td>
<td>25</td>
<td>10</td>
</tr>
<tr>
<td>IT/Telephones/ audio &amp; video conferencing</td>
<td>50</td>
<td>12</td>
</tr>
<tr>
<td>Advertising</td>
<td></td>
<td>30</td>
</tr>
<tr>
<td>Annual report</td>
<td></td>
<td>5</td>
</tr>
<tr>
<td>Participant costs</td>
<td></td>
<td>288</td>
</tr>
<tr>
<td>Professional support for participants</td>
<td></td>
<td>60</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>260</strong></td>
<td><strong>850</strong></td>
</tr>
</tbody>
</table>

* includes employer contributions  
** includes travel & subsistence; premises; rates; utilities; postage; printing.

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161. Table 18 below summarises the year-on-year costs to the Scottish Government and any others.

Table 18 - Costs over time

<table>
<thead>
<tr>
<th></th>
<th>2012/13</th>
<th>2013/14</th>
<th>2014 – 15+</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Costs to the SG</strong></td>
<td>£300,000</td>
<td>£560,000</td>
<td>£850,000</td>
</tr>
<tr>
<td><strong>Costs to local authorities, NHS Boards, third sector organisations or for relevant individuals</strong></td>
<td>£0</td>
<td>£0</td>
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</tr>
</tbody>
</table>

**BACKGROUND**

**The Bill**

162. The Bill contains provision relating to the establishment and operation of the NCF. In particular, the Bill sets out the arrangements by which the NCF is to be hosted by an existing public body, specifically the Mental Welfare Commission (MWC), including the mechanisms to safeguard the respective operational autonomy of the NCF and the MWC.

**Statistics**

163. In order to estimate future demand for participation in the NCF, the Scottish Government funded the Centre for Excellence for Looked After Children in Scotland (CELCIS) to undertake a scoping project to look at patterns of abuse and neglect in care in Scotland between 1930 and 2005. Despite a lack of consistent, robust data over that period, the Report produced by CELCIS as a result of the scoping project concludes that 480,000 people were in care as children between 1930 and 2005 (including war time evacuees) and, of these, 320,000 are likely to be alive today. This spans residential, foster care and community placements. While it is not possible to robustly disaggregate these figures, it is clear that the majority of children placed in care in Scotland over the period of the scoping project were not placed in institutional forms of care (the proposed scope of the NCF).

164. The experience of the Time to be Heard Pilot Forum has also informed estimates of expected demand to participate in the NCF. The total number of those who participated in the Pilot Forum (98) represented less than 1 per cent of the children who were in the care of Quarriers between 1878 and the mid 1980s.

165. These figures would appear to suggest that the total number of people seeking to participate in the NCF will be similar to that in respect of the Commission in Ireland. The total number of people who came forward to participate in both the Confidential and Investigation

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10 Quarriers history: [http://www.quarriers.org.uk/who-we-are/history/](http://www.quarriers.org.uk/who-we-are/history/)
Committees in Ireland totalled 2,390. It should, however, be noted that the budget for the NCF is significantly less than that of the Irish Commission (which totalled 136 million Euros) principally because the NCF will not have investigatory or inquiry powers nor will it be empowered to offer financial compensation to survivors of abuse.\(^\text{11}\)

166. There are many factors which could support or inhibit the participation in the NCF of those placed in institutional care as children. It is not possible to predict with certainty exact numbers. However, based on the findings of the scoping project and the experiences of the Time to be Heard Pilot Forum and the Irish Commission, it is expected that up to 2,000 people will wish to take part in the NCF.

167. The Time to be Heard Pilot Forum incurred expenditure totalling £300,000 for 98 participants (not including the preparatory work done by the Scottish Government). The per capita cost of the Pilot was £3,000, based on the holding of 8 hearings per week. The NCF is expected to hold 10 hearings per week, with the total budget reflecting the costs associated with that increased frequency of hearings as compared with the Pilot Forum.

168. On the basis that 2,000 people will wish to take part in the NCF, and the capacity of the NCF to hold 10 hearings a week, it is likely that expenditure associated with the delivery of the main function of the NCF (acknowledgement hearings) will be spread across several financial years, encompassing two spending review periods.

COSTS ON THE SCOTTISH ADMINISTRATION

169. In 2012/13, funding of £300,000 has been made available for the consultation and development of legislation to establish the NCF on a statutory footing. In 2013/14, funding will be available for the legislative process and further engagement with stakeholders of £300,000. These costs do not arise directly from the Bill but rather are costs associated with developing the legislative framework for the NCF, in consultation with stakeholders.

170. In 2013/14, there will be start-up costs associated with the establishment of the NCF of £260,000 (as outlined in Table 17). Annual recurring costs associated with the discharge by the NCF of its functions (of £850,000) will likely be incurred from 2014-15 onwards.

171. These costs will be met from the baseline budget provided for in the Scottish Spending Review 2011 to support the establishment and running of the NCF, with funding for future years to be prioritised at the next Scottish Spending Review.

Short-term, non-recurring costs

172. The start-up costs (as outlined in Table 17) are those associated with the establishment of the NCF and are estimated at £260,000 in 2013/14. These costs will fall on the Scottish Government. The NCF will be hosted by an existing public body, maximising the benefits of being part of an established body, while being supported to deliver distinct functions with a high level of operational independence.

\(^{11}\) http://www.childabusecommission.com/rpt/
173. The start-up costs associated with the establishment of the NCF include the following budget heads:

- Recruitment costs;
- Legal costs;
- Media advice;
- Minor furnishings;
- Website;
- IT/Telephones;
- Audio/Video Conferencing;
- Advertising;
- Postage; and
- Stationery and Printing.

174. The estimates of start-up costs are based on the experience of establishing the Time to be Heard Pilot Forum which, while operating for a more limited period and with a more restricted scope, had similar start-up costs to those envisaged for the NCF. For example, the NCF will require to recruit staff; advertise its role and function; and have the necessary equipment and premises to organise, hold and record acknowledgement hearings.

Annual, recurring costs

175. The annual recurring costs associated with the operational management of the NCF are estimated at £850,000, as set out in table 18. These estimates are partly based on the experience of the Pilot Forum, with an increase to reflect the significantly higher number of acknowledgement hearings which will be held and the increased need for flexibility in organising those hearings to enable participation of a diverse group. There are also increased costs to reflect the expected higher level of staff support required to ensure the effective operation of the NCF.

176. The operational costs associated with the discharge by the NCF of its functions, include the cost of premises (likely to be within the MWC) as well as costs associated with holding acknowledgement hearings in flexible ways to encourage participation. These costs will also include access to a protected area of the MWC’s existing IT system and a dedicated website for the NCF.

177. The annual recurring costs associated with the discharge by the NCF include the following budget heads:

- Employment/appointment of the NCF Head; at least two further members of the NCF; a Project Manager; and administrative support.
- Counselling support for staff;
- Travel and subsistence for the Chair, members and staff;
These documents relate to the Victims and Witnesses (Scotland) Bill (SP Bill 23) as introduced in the Scottish Parliament on 6 February 2013

- Legal costs;
- Media advice;
- Project management;
- Furnished premises;
- Rates;
- Utilities;
- Website;
- IT/Telephones;
- Audio/video conferencing;
- Advertising;
- Postage;
- Stationery and printing;
- Annual Report;
- Participants’ travel and subsistence; and
- Professional support for participants.

Assistance for participants

178. The budget for the NCF includes provision for the travel and subsistence costs incurred by participants in attending hearings of the NCF. This is set at a maximum limit of £300 per person, based on the Time To Be Heard Pilot Forum which incurred average costs of £300 per participant and the expectation that the NCF will hold 10 hearings a week for 48 weeks per annum. These participant costs will also include accommodation, where appropriate and in agreement with the NCF. The budget also makes provision for the costs associated with participants bringing another person to support them at NCF hearings. This is also set at a maximum limit of £300 per person.

COSTS ON LOCAL AUTHORITIES

179. There are no cost implications for local authorities associated with the establishment and running of the NCF.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

180. There are no cost implications for others parties associated with the establishment and running of the NCF, including NHS Boards, third sector organisations and relevant individuals. Specifically, any additional costs falling to the MWC as a result of hosting the NCF will be funded by the Scottish Government.
Other support for participants

181. In 2010, the Scottish Government provided funding for the creation of a new service, In Care Survivors Service Scotland (ICSSS), recognising the importance of a service specifically for adult survivors abused in care as children. This voluntary sector organisation provides dedicated services for adults who were abused in care as children, recognising their specific needs. The Scottish Government committed £750,000 of funding (until October 2011) and has recently committed a further £637,500 to ICSSS until 2015.

182. The costs associated with funding ICSSS do not arise directly from the Bill. The support provided to participants in the NCF by ICSSS will, however, provide added value to the range of supports funded under the budget made available to establish and run the NCF.

VICTIMS AND WITNESSES (SCOTLAND) BILL – SUMMARY OF ALL COSTS

183. Table 19 summarises all costs arising from the Bill as a whole.

Table 19 – Summary of all costs

<table>
<thead>
<tr>
<th>Body</th>
<th>Non-recurring costs (£)</th>
<th>Recurring costs – Min (£ per year)</th>
<th>Recurring costs - Max (£ per year)</th>
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<td>SCOTTISH ADMINISTRATION TOTAL (COPFS, SCS, SPS and Scottish Government)</td>
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<td>TOTAL</td>
<td>383,800</td>
<td>1,661,500</td>
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SCOTTISH GOVERNMENT STATEMENT ON LEGISLATIVE COMPETENCE

184. On 6 February 2013, the Cabinet Secretary for Justice (Kenny MacAskill MSP) made the following statement:

“In my view, the provisions of the Victims and Witnesses (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE

185. On 6 February 2013, the Presiding Officer (Rt Hon Tricia Marwick MSP) made the following statement:

“In my view, the provisions of the Victims and Witnesses (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”
This document relates to the Victims and Witnesses (Scotland) Bill (SP Bill 23) as introduced in the Scottish Parliament on 6 February 2013

VICTIMS AND WITNESSES (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Victims and Witnesses (Scotland) Bill (the Bill) introduced in the Scottish Parliament on 6 February 2013. It has been prepared by the Scottish Government to satisfy Rule 9.3.3 of the Parliament’s Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 23–EN.

OVERVIEW OF THE BILL

2. 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 (NCF, the Forum) for adults placed in institutional forms of care as children.

3. The proposed reforms relating to victims and witnesses aim to put victims’ interests at the heart of ongoing improvements to the justice system and to ensure that witnesses are able to fulfil their public duty effectively. Key proposals include:
   - giving victims and witnesses a right to certain information about their case;
   - creating a duty on organisations within the 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 certain special measures when giving evidence;
   - requiring the court to consider compensation to victims in relevant cases;
   - introducing a victim surcharge so that offenders contribute to the cost of supporting victims; and
   - introducing restitution orders, allowing the court to require that offenders who assault police officers pay to support the specialist non-NHS services which assist in the recovery of such individuals.

4. The establishment of the NCF creates a unique 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. The NCF will help improve the health and wellbeing of people placed in care as children, by offering acknowledgement of their experiences, including experiences of abuse and neglect.
This document relates to the Victims and Witnesses (Scotland) Bill Bill (SP Bill 23) as introduced in the Scottish Parliament on 6 February 2013

5. The key proposals in the Bill which relate to the NCF are as follows:

- The functions of the NCF are set out in a clear and distinct way, the main function being to offer adults placed in institutional care as children the opportunity of acknowledgement of their experiences, including experiences of abuse;
- The scope of the NCF is defined to enable all adults placed in institutional care as children the opportunity to participate in hearings of the Forum;
- Information held by the NCF is protected by a general duty of confidentiality. In particular, the testimony of persons who participate in the NCF is protected from disclosure and those persons will be protected from the threat of action of defamation as a result of the testimony they give. Members of the NCF who will conduct hearings, receive testimony and offer acknowledgement, and its staff, will also be protected from the threat of action of defamation in discharging, in good faith, the functions of the Forum;
- The arrangements by which the NCF is to be hosted by an existing public body, specifically the Mental Welfare Commission (MWC), are set out, including the mechanisms to safeguard the respective operational autonomy of the Forum and Commission.

POLICY OBJECTIVES – VICTIMS AND WITNESSES REFORMS

Overview

6. Overall crime levels in Scotland have fallen over recent years and, in 2011/12, recorded crimes were at their lowest level for 37 years\(^1\). However, as well as tackling crime, the Scottish Government recognises that the justice system needs to do more to support victims and witnesses of crime.

7. The overarching policy objective of this part of the Bill is, therefore, to improve the support available to victims and witnesses throughout the justice system, putting victims’ interests at the heart of ongoing improvements to that system and ensuring that witnesses are able to fulfil their public duty effectively. Background information on the planned reforms and detailed policy objectives for each individual proposal are set out below.

Background

Victims Policy

8. The Scottish Strategy for Victims\(^2\) 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\(^3\) set out the level of service that victims and witnesses should expect in their dealings with the criminal justice and children’s hearing systems.

\(^1\) [http://www.scotland.gov.uk/Publications/2012/06/1698/0](http://www.scotland.gov.uk/Publications/2012/06/1698/0)
Since 2005, a number of improvements have been made in relation to the support of victims of crime. These include:

- extending the coverage of the Victim Notification Scheme (VNS) to custodial sentences of 18 months or more (from four years or more);
- introducing a national victim statement scheme in solemn cases from 2009;
- organisational developments, including the launch by the Crown Office and Procurator Fiscal Service (COPFS) of a document setting out how victims and witnesses will be treated (‘Our Commitments to Victims and Witnesses’) and amendment of the police Standard Prosecution Report to improve identification of witness vulnerability; and
- the joint protocol between the Association of Chief Police Officers in Scotland (ACPOS) and COPFS to challenge domestic abuse.

In late 2012, an EU Directive establishing minimum standards on the rights, support and protection of victims of crime (2012/29/EU) (the Directive) was finalised. The Directive is a measure on the ‘Budapest Roadmap’ for improving victim rights. 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 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;
- vulnerable victims are identified – such as children, victims of rape, or those with disabilities – and are properly protected; and
- victims are protected during the police investigation and court proceedings.

While Scotland already complies with much of the Directive, some changes (both legislative and non-legislative) to the justice system will be required. This has been the subject of
consideration and discussion between the Scottish Government and justice partner organisations (particularly bodies such as the Scottish Court Service (SCS) and COPFS).

Witnesses Policy

13. Much of the work on witnesses in recent years has focused on implementing the Vulnerable Witnesses (Scotland) Act 2004\(^9\) (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.

14. Other developments include:
   - The Criminal Justice and Licensing (Scotland) Act 2010\(^10\) - provisions to allow witnesses to see their statements again before giving evidence; introducing a statutory scheme of witness anonymity orders; and raising the age of automatic entitlement to standard special measures to up to age 18 in human trafficking cases;
   - The Children’s Hearings (Scotland) Act 2011\(^11\) - provisions to widen application of restrictions on evidence or questioning about character and sexual behaviour in hearings in front of a sheriff, and allow use of prior statements;
   - Work to update guidance on the joint investigative interviewing of child witnesses (published in December 2011) and the roll out of visual recording equipment;
   - The Getting People to Court project (which is part of the wider Making Justice Work programme) which focuses on the factors that affect witness attendance at court.

Other reforms

15. These improvements have been complemented by other reforms which have made the justice system more responsive to the needs of victims and witnesses. Examples include:
   - High Court Reform – ensured that more cases are settled at an earlier stage and that those cases which do go to trial are better prepared, so reducing anxiety for, and inconvenience to, victims and witnesses
   - Summary Justice Reform - introduced a range of measures designed to make procedures quicker, simpler, fair and effective. A series of evaluations - including one on victims’, witnesses’ and public perception of the differences made by Summary Justice Reform - was published between November 2011 and March 2012.

Making Justice Work

16. The Making Justice Work\(^12\) (MJW) programme was set up in 2010 by the Scottish Government, with the vision that:

‘The Scottish justice system will be fair and accessible, cost-effective and efficient, and make proportionate use of resources. Disputes and prosecutions will be resolved quickly and secure just outcomes.’

17. MJW is one of five justice change programmes which have been designed to improve how the justice system deals with the challenge of improving outcomes laid down in the National Performance Framework\textsuperscript{13} and expanded upon in the Strategy for Justice\textsuperscript{14}. The creation of the MJW programme was also influenced by a number of significant changes to the justice system which are likely to be made over the next few years. In particular, the Scottish Government has broadly accepted the findings of a number of recent reports reviewing various aspects of the justice system, which will change how business is done in the courts. The most significant of these are Lord Gill’s review of the civil courts\textsuperscript{15}; Lord Carloway’s report into criminal law and practice\textsuperscript{16}; and Sheriff Principal Bowen’s review of sheriff and jury procedure\textsuperscript{17}.

18. The MJW programme was set up with organisations across the justice system. The main organisations involved, who are all represented on the programme board, are:

- Scottish Court Service
- Scottish Legal Aid Board
- Crown Office and Procurator Fiscal Service
- Scottish Tribunals Service
- Judicial advisers
- Association of Chief Police Officers in Scotland

19. The Scottish Government is working together with these justice partners on five major projects which form the MJW:

- **Project 1 – Delivering efficient and effective court structures**
  This project aims to create a cost effective, proportionate court structure in which cases and appeals are heard by the right court in both civil and criminal cases, reserving the use of the highest courts for the most serious and complex cases. This includes SCS work on the future structure of the court estate and the implementation of Lord Gill’s Scottish Civil Courts Review.

- **Project 2 – Improving procedures and case management**
  This projects aims 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 court time. This includes projects such as the

\textsuperscript{12} http://www.scotland.gov.uk/Topics/Justice/legal/mjw
\textsuperscript{13} http://www.scotland.gov.uk/About/Performance/scotPerforms
\textsuperscript{14} http://www.scotland.gov.uk/Publications/2012/09/5924
\textsuperscript{15} http://www.scotcourts.gov.uk/about-the-scottish-court-service/the-scottish-civil-courts-review
\textsuperscript{16} http://www.scotland.gov.uk/About/Review/CarlowayReview
\textsuperscript{17} http://www.scotland.gov.uk/Publications/2010/06/10093251/0
Summary Justice System Model, Getting People to Court, and Video Conferencing, as well as the Victims and Witnesses (Scotland) Bill.

- **Project 3 – Enabling access to justice**
  This project is looking at the funding of litigation, alternative dispute resolution, co-ordination and strategic planning of advice, information and representation, and strengthening the legal capability of the public. It will also be looking at how ICT can support this work, particularly public access to information and support.

- **Project 4 – Co-ordinating IT and management information**
  This project aims to provide the strategic platform for the development of IT, data management and management information to ensure all justice organisations have access to the data and information that they need, with efficient administrative processes supported by appropriate technology.

- **Project 5 – Establishing a Scottish Tribunals Service**
  This project aims to establish an efficient and effective Scottish Tribunals Service (STS) by merging the administration of devolved tribunals and through the devolution of reserved tribunals to Scotland. STS was set up in December 2010 and now administers 7 tribunals. The Scottish Government has consulted on legislation to bring together judicial leadership of the tribunals under the Lord President.

20. Working together in this way brings together a number of different bodies, and requires the discipline of programme and project planning to ensure that change is co-ordinated and benefits delivered.

21. Improving the experience of victims and witnesses is a key objective in the MJW programme (forming part of project 2), and the Bill is just one part of that ongoing work. Other initiatives include the Getting People to Work project being carried out by ACPOS, which is focussed on improving attendance of witnesses in court; and the Summary Justice Reform Model project, led by COPFS, which seeks to reduce the number of cases which need to repeat stages or proceed to trial. As part of the latter project, a scheme to send text messages to witnesses to remind them to attend court has been established, and is in the process of being rolled out across Scotland.

22. In addition to these specific projects, more general improvements to procedures and the overall efficiency of the courts system have the potential to improve the experiences of all court users, including victims and witnesses. For example, work on reducing the number of cases which are cancelled or re-scheduled will make it more likely that cases will go ahead when planned, reducing stress and inconvenience and reducing the likelihood of repeated witness citations. The Scottish Government also hopes that earlier availability of CCTV and forensic evidence will lead to an increase in the number of early guilty pleas, reducing the need for some people to give evidence.

23. In order to deliver the MJW vision and track progress on the justice outcomes, MJW has defined eight ‘justice system benefits’. These have been developed in partnership with justice organisations and external stakeholders. Four of these eight benefits are focussed on the end users
of the justice system, including victims and witnesses\textsuperscript{18}. The effectiveness of the proposals in the Bill will be measured as part of that work.

24. Work is underway on measuring these benefits, using existing measures and developing new measures where those currently in use are not adequate. Justice organisations are currently working together to develop a set of common user measures to allow us to develop comprehensive, consistent measurement of users experience of justice.

Evidence base and key principles identified

25. There is a lot of evidence available from a range of studies, surveys and discussions about what makes a difference to victims and witnesses and their experience of the justice system. These include:

- Reports of the HM Inspectorate of Constabulary for Scotland / Inspectorate of Prosecution in Scotland (HMICS/IPS) joint thematic inspection into services for victims (Phase \textsuperscript{19} published in October 2010 and Phase \textsuperscript{20} in November 2011)
- The annual Scottish Crime and Justice Survey
- The Audit Scotland report into Scotland’s justice system\textsuperscript{21} (published in September 2011)
- Sheriff Principal Bowen’s independent review of Sheriff and Jury procedure (published June 2010)
- The evaluation report into Victims, Witnesses and Public Perceptions of Summary Justice Reform \textsuperscript{22}
- Holding focus groups, meeting and consultation on witness issues in 2010-11, and a Victim’s Summit in January 2011.

26. Through consideration of the material described above and extensive engagement with stakeholders, the Scottish Government has identified a number of key principles which appear vital to improving the experience of victims and witnesses. These are as follows:

- victims and witnesses should know what is going on in cases which affect them;
- victims and witnesses should know what to expect in relation to proceedings, including that hearings will go ahead when scheduled;
- victims and witnesses should have access to appropriately tailored support before, during and after proceedings;
- victims and witnesses should feel confident in coming forward and that their personal safety will be protected;

\textsuperscript{18} These 4 benefits are: affordable access; improved user experience; fair and equitable justice; and increased public confidence in the justice system.
\textsuperscript{19} \url{http://www.hmics.org/publications/victims-criminal-justice-system-i}
\textsuperscript{20} \url{http://www.hmics.org/publications/victims-criminal-justice-system-ii}
\textsuperscript{21} \url{http://www.audit-scotland.gov.uk/docs/central/2011/nr_110906_justice_overview.pdf}
\textsuperscript{22} \url{http://www.scotland.gov.uk/Publications/2012/02/4610}
• victims and witnesses should be able to contribute effectively to cases which affect them; and
• offenders should pay for the injury, loss or distress they have caused.

Need for further reform

27. While significant progress has been and continues to be made in improving the experience of victims and witnesses within the justice system in recent years, the Scottish Government considers that the proposals in the Bill, which are based on the key principles outlined above, are both necessary and timely.

28. This is principally a result of extensive and continuing engagement with stakeholders, which has highlighted areas for improvement; the ongoing MJW programme, which will improve the efficiency and effectiveness of the justice system generally; and the recently finalised Directive.

29. The reforms in the Bill will ensure that offenders pay towards the cost of supporting victims; that victims and witnesses have better access to information about cases from organisations which have clear standards of service; that the needs of vulnerable witnesses are taken into account when they are giving evidence; and that, where necessary, provision is made in primary legislation to reflect the recent Directive.

30. The Bill focuses primarily on criminal proceedings, where there is inevitably a greater need to protect victims and witnesses. This also reflects the EU Directive, which relates exclusively to criminal proceedings. Some reforms will be made in relation to civil proceedings, but these are relatively limited.

Proposals

31. Each of the individual proposals relating to victims and witnesses is set out below, with an explanation of the policy objective and any alternative approaches considered.

Statement of general principles

Policy objectives

32. In developing the reforms in the Bill, the Scottish Government has been guided by a number of principles, set out in paragraph 26, which describe how victims and witnesses should be treated within the justice system.

33. The Scottish Government considers that these principles reflect the general aims of the Bill, and that organisations throughout the justice system should have regard to similar principles when exercising their functions, in so far as these relate to victims and witnesses.

Proposed approach

34. A number of general principles, broadly reflecting those above, will be set out in the Bill. These principles will be:
that a victim or witness should be able to obtain information about what is happening in the investigation or proceedings;

- 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 and proceedings; and

- 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.

35. The principle that offenders should pay for the injury, loss or distress they have caused, will not be covered by the statement of general principles. While the other principles describe outcomes which justice organisations can work towards, this is not something which such organisations can appropriately influence.

36. In addition to setting out a number of general principles in the Bill, a duty will be placed on certain justice organisations to have regard to these principles when carrying out their statutory functions, in so far as those relate to victims and witnesses. This will guide these organisations when dealing with victims and witnesses and will also inform any non-legislative improvements being made in this area.

Alternative approaches considered

37. There were two alternative approaches considered: doing nothing or imposing a stronger duty on justice organisations to act consistently with the principles set out.

38. It was considered that the first approach, while not having a negative impact on the treatment of victims and witnesses, would result in a potential lack of clarity on what the overarching aims of the Bill are, particularly given that the individual reforms are fairly wide ranging, with some making fairly technical changes to existing legislation. In addition, maintaining the status quo would miss an opportunity to emphasise the principles which all justice organisations should be working towards in relation to their treatment of victims and witnesses.

39. The second approach was considered to impose an impractical and inflexible burden on justice organisations. The principles are intended to be both high level and aspirational, and it was considered that a strict duty to act consistently with them would raise issues around the interpretation of what are deliberately general principles, and potentially result in conflicts with other duties held by the organisations in question.

Access to case specific information

Policy objectives

40. The policy objective is to ensure that victims and witnesses can access practical and up to date information about the progress and outcome of their case. Information from surveys and stakeholder engagement has shown that a lack of such information can cause significant uncertainty and distress. In addition, Article 6 of the Directive requires that certain information be made
This document relates to the Victims and Witnesses (Scotland) Bill Bill (SP Bill 23) as introduced in the Scottish Parliament on 6 February 2013

available to victims of crime and, while much of this is currently available, there is no right for individuals to access this as a matter of course. That information is as follows:

- 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 the trial;
- the nature of the 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; and
- notification that a person in custody has been released or has escaped and any measures taken for their protection.

Proposed approach

41. A duty will be placed on COPFS, SCS and the police to provide certain information to victims and witnesses about their case, on request. COPFS, SCS and the police have been selected as they hold most of the practical information about cases which victims and witnesses are likely to find useful.

42. The information to be provided will initially be that described in the Directive, with the exception of the notifications relating to persons in custody, as this will be covered by an extension to the existing VNS (see paragraph 49). The Bill will retain sufficient flexibility to allow the information in question to be modified if this appears necessary and appropriate in the future, and to extend the list of organisations affected.

43. In the longer term, the Scottish Government intends to look at building on this right to information. In particular, it intends to carry out a feasibility study during 2013, in collaboration with justice partner organisations, on creating an online information hub which could gather information from various organisations within the criminal justice system and allow direct access to the data at appropriate times by individual victims and witnesses. The hub could provide the information described above from a single point, in addition to more generic information about the justice system. One example of how this type of system can work is the ‘Track My Crime’ system set up by Avon and Somerset Constabulary. 23

Alternative approaches considered

44. An alternative approach considered was to introduce more extensive provisions to make justice organisations share their information proactively with other justice organisations in the interests of easy accessibility for victims and witnesses by creating the right for a victim or witness to be able to obtain all the information they required from the first organisation they contacted. However, this raised a number of practical issues, particularly around the sharing of potentially sensitive data and ensuring appropriate access. It was concluded that a feasibility study into pooling information to create a single point of contact for victims and witnesses should be carried out in the first instance, to identify any such issues and consider how these could be overcome.

23 https://asp.trackmycrime.police.uk/Account/Index?ReturnUrl=%2F
Ability to make representations when offenders are first eligible for temporary release

Policy objectives

45. The VNS\textsuperscript{24} gives victims who are registered, the right to be informed, if they so wish, when a prisoner is eligible to be considered for temporary 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.

46. The Scottish Government considers that the ability of victims to make representations about the release of prisoners should not be limited in this way. The policy objective is therefore to extend the current ability to make formal written representations to include eligibility for temporary release as well as release on licence.

Proposed approach

47. 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 them.

Alternative approaches considered

48. No alternative approaches were considered in relation to this proposal.

Extension of Victim Notification Scheme

Policy objectives

49. In certain criminal cases, victims have a right (under the Criminal Justice (Scotland) Act 2003) to receive information about the release of an offender and some other relevant details, through the VNS. However, 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 where their sentence is 18 months or longer.

50. As mentioned at paragraph 40, the Directive requires that victims be able to access information about the release or escape of prisoners. While that is the purpose of the VNS, the Scottish Government considers that it should be extended slightly to better reflect the Directive. In particular, the Directive does not specify any threshold on the length of sentence before victims should have the right to be informed (though it does suggest that cases involving minor offences should be excluded), and it states that this right should apply to all crimes.

Proposed approach

51. The Bill will remove the list of prescribed offences in relation to the VNS, so that victims of all offences will potentially be eligible.

\textsuperscript{24} \url{http://www.sps.gov.uk/VictimNotificationScheme/victim-notification-scheme.aspx}
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52. The Scottish Government also intends to lower the sentence threshold, so that victims of offenders sentenced to 12 months or more (rather than 18 months or more) are eligible. It is considered that sentences of less than 12 months indicate a fairly minor offence, and that the VNS should not be extended to cover these. This latter change will be made through existing order-making powers, rather than in the Bill.

Alternative approaches considered

53. No alternative approaches were considered, as removing the list of prescribed offences was considered the only way to achieve the policy objective.

54. In relation to the proposed lowering of the sentence threshold (which is an integral part of this proposal, despite not requiring provision in the Bill), consideration was given to how workable it would be to completely remove the lower sentence length restrictions, so allowing victims of even minor offences to make use of the VNS. However, doing so would create significant practical difficulties. In particular, it would be impossible to notify victims that they could register on VNS and tell them about an offender’s release in many cases. This was particularly evident in cases where there was a very short custodial sentence or the offender was released early due to time spent on remand prior to sentencing.

Duty on justice organisations to set out standards of service

Policy objectives

55. National Standards for Victims of Crime were published in 2005. These set out the level of service that victims (and victims when giving evidence as witnesses) should expect in their dealings with the criminal justice and children’s hearing systems. The standards did not include commitments and expectations to be delivered by each of the criminal justice and children’s hearings agencies. There are currently no specific service standards for witnesses.

56. A recurring theme in consultations undertaken during the 2010-11 victim and witness policy reviews was that there is a need for clear standards of service to be set out for both victims and witnesses. In addition, the Directive has at its heart an underlying minimum set of standards that victims should expect to receive. For these reasons, the objective is to create a duty on criminal justice agencies to set clear standards of service for victims and witnesses and to also set out, or make specific reference to, their complaints procedure.

Proposed approach

57. The Bill will require organisations involved in supporting victims and witnesses in the justice system to develop and set out clear standards of service for victims and witnesses, while having regard to the overarching principles set out in the Bill (see paragraph 34), and set out an effective route for complaints so that victims and witnesses are able to air any concerns about the services being provided. The organisations on which this duty will be placed are as follows:

- The Police Service of Scotland
- COPFS
- SCS
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- SPS
- The Parole Board for Scotland (PBS)

58. As 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 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 COPFS and SPS will be expected to set out distinct standards of service and a complaints procedure.

Alternative approaches considered

59. The alternative approach considered was to set out a list of generic standards in the Bill. The Scottish Government concluded that one uniform set of generic standards would be unlikely to achieve the policy objective. Such a list would not be significantly different to what is already in place for victims on a non-statutory basis, and would not give a detailed and organisation-specific indication of what victims and witnesses can expect (which is important as different organisations inevitably provide very different services).

Improving support for vulnerable witnesses

Policy objectives

60. In relation to witnesses, the focus in recent years has been on implementing the 2004 Act which has provided a much greater focus on the needs of witnesses (including those who are victims) when giving evidence. This includes 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.

61. 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 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.

Proposed approach

62. The Bill contains a number of reforms to improve the identification and the support available to enable vulnerable witnesses to give their best evidence. These are as follows:

Definition of child witness

63. At present, the definition of ‘child witness’ in relation to special measures only includes those up to age 16 (unless they are witnesses in a human trafficking case, 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, with the effect that all those under the age of 18 will be automatically entitled to special measures to assist them in giving evidence. In addition, it will enable the Scottish Government to
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comply with the Directive which defines ‘child witness’ for the purpose of criminal proceedings as any person below 18 years of age.

64. To maintain equality across the justice system, the Bill will also make this change to the definition of ‘child witness’ in relation to civil proceedings.

**Definition of vulnerable witness**

65. Currently only ‘child witnesses’ are automatically classed as vulnerable (and so entitled to use certain special measures when giving evidence). There are two additional categories of witnesses who fall within the definition of ‘vulnerable person’: those where there is a significant risk that the quality of their evidence will be diminished by reason of either mental disorder (within the meaning of s328 of the Mental Health (Care & Treatment) (Scotland) Act 2003), or fear or distress in connection with giving evidence at the trial.

66. These two categories allow any witness to be regarded as vulnerable under certain conditions. No further detail was set out at the time in order to avoid creating a hierarchy of vulnerability - i.e. suggesting that some types of witness are inherently more vulnerable than others.

67. However, since these changes were made, there have been several developments to improve support for victims of sexual offences and domestic abuse including the setting up of the National Sexual Crimes Unit and the creation of Domestic Abuse courts in Glasgow and Edinburgh. There was also support amongst statutory and voluntary organisations during the consultation around witness support and policy in Scotland in 2010-11 to create a presumption that certain types of victim, including victims of sexual offences and domestic abuse, are likely to be vulnerable. Similar suggestions have been made in relation to victims of human trafficking and victims of stalking.

68. The Scottish Government accepts that vulnerability cannot be identified solely by virtue of what offences witnesses may have been the victim of, and that not all victims of the offences mentioned above will be vulnerable. However, the nature of these crimes is such that the Scottish Government considers it is appropriate to create a presumption in criminal proceedings that the relevant victims are vulnerable and should be entitled to the use of certain special measures when giving evidence, so long as the views of such individuals are taken into account before a final decision is made in each case.

69. Provisions in the Bill will therefore amend the definition of vulnerable witness in criminal proceedings to include victims of sexual offences, domestic abuse, human trafficking, and stalking, during the case to which that particular offence relates. As with child witnesses currently, there will be a presumption that such individuals are vulnerable, and they will be entitled to use certain special measures when giving evidence. The Bill will be sufficiently flexible to allow this list of victims who are presumed to be vulnerable to be updated in future if appropriate.

70. The Bill will also allow any witness to be considered vulnerable following an individual assessment which takes account of their personal characteristics, type or nature of the crime and the circumstances of the crime. The party citing the witness (which will be COPFS in most cases) will be obliged to carry out individual assessments of each of their intended witnesses to ascertain
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whether that witness is vulnerable and, if they are, to submit an application specifying which special measure would be appropriate to assist them. The court will then determine if they are indeed vulnerable and if the special measures sought are the most appropriate.

71. Vulnerable witnesses for the prosecution will be identified at an early stage in proceedings by a member of COPFS staff on the basis of the information provided by the police and also on their own observations. All of these witnesses will be sent information on the support available to them and they will also be referred to Victim Information and Advice (VIA). Witnesses can discuss with VIA staff how they have been personally affected by the crime and whether they would benefit from the use of special measures. In some cases it may be appropriate to personally meet with the witness to ensure that they are fully assessed and offered the necessary support for giving evidence.

72. A different approach is being taken in relation to civil proceedings. As indicated in paragraph 64, children under the age of 18 will, in future, be treated as vulnerable witnesses. The court must then make an order under section 12 of the 2004 Act authorising the use of special measures or laying down that the child must give evidence without the benefit of special measures. The Scottish Government considers that this provides an appropriate balance in civil cases between the protection of witnesses and the interests of justice.

73. The Bill will also make provision so that other categories of witnesses in civil cases prescribed by order made by the Scottish Ministers should be regarded as vulnerable witnesses. The Scottish Ministers could prescribe categories of witness in civil cases by reference to classes of people (e.g. victims of domestic abuse) or by reference to witnesses involved in certain types of actions (e.g. applications for forced marriage protection orders or applications for civil protection orders against domestic abuse).

74. The provisions of the 2004 Act will remain in place in relation to a person other than a child witness who is to give evidence in or for the purpose of civil proceedings. Under section 12(6) of the 2004 Act, the court may, on receiving an application by the party citing or intending to cite the witness and, if satisfied that the witness is a vulnerable witness, make an order authorising the use of special measures. Again, the Scottish Government considers that these provisions strike an appropriate balance in civil cases between the protection of vulnerable witnesses and the interests of justice.

Special measures

75. There are a number of standard special measures (SSMs) and special measures (SMs) defined in the 2004 Act in relation to criminal proceedings. The Bill will amend some of these and add a closed court as a SM. Table 1 sets out the current position and what the position will be with the Bill provisions in force.
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Table 1

<table>
<thead>
<tr>
<th>Current position</th>
<th>Position after Bill provisions in 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>
</tr>
<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>
<td></td>
</tr>
</tbody>
</table>

**Applications for SMs**

Witnesses who do not fall within the description above are considered to be vulnerable witnesses:

- 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 & Treatment) (Scotland) Act 2003, or fear or distress in connection with giving evidence at the trial.

The party citing a vulnerable witness can 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

Use of all SMs is at the discretion of the court.

**Applications for SMs**

Witnesses who do not fall within the description above will be considered to be a vulnerable witness:

- 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 & Treatment) (Scotland) Act 2003, or fear or distress in connection with giving evidence at the trial.
- 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 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.

76. It should be noted that the accused, if classed as vulnerable, will also be entitled to apply to use SMs (but not a screen or a closed court) to assist them to give their evidence.
Notification and application process

77. The Bill makes a number of minor amendments to the notification and application processes for special measures, primarily to take account of the additional groups of witnesses who will be entitled to use SSMs. The existing process for notifying the court that a witness is a child witness, and so will be entitled to the use of SSMs, will be adapted for use in cases involving child witnesses and the other categories automatically deemed vulnerable (victims of sexual offences, domestic abuse, stalking and human trafficking).

78. For witnesses automatically classed as vulnerable, the party citing the witness will submit a Vulnerable Witness Notice (VWN) to the court, setting out that the witness falls within the relevant categories and requesting a particular SSM. If the VWN also requests a SM, it will be for the court to decide, taking account of the views of the witness, whether to authorise the SM.

79. For witnesses who are not automatically classed as vulnerable, the party citing the witness will be able to make a Vulnerable Witness Application (VWA) seeking permission from the court for the use of a SM. It will be for the court to decide whether the witness falls within the definition of ‘vulnerable witness’ and, if so, whether to authorise the giving of evidence by means of the SM requested. The court must take the views of the witness into account when considering whether SMs should be used.

Objections to special measures and review arrangements

80. The Scottish Government considers that both parties to a case should be informed at an early stage of any request for the use of special measures, and should be able to object if they consider that such a request is inappropriate in the circumstances (which there is limited opportunity to do currently). The Bill will ensure that parties are so notified, and introduce a right to object within a set time period, which will involve setting out what special measures are felt to be inappropriate and the rationale for this position. If an objection is made, the court will hear representations from both parties before deciding whether the measures specified in the VWN or VWA are appropriate.

81. At present, the arrangements for taking the evidence of a vulnerable witness can be reviewed during the case on the application of the party citing the witness, or by the court itself. While both parties can then be heard on the matter, the non-citing party cannot apply for a review. Given that the ability to object to a request for special measures prior to the commencement of proceedings is being extended equally to all parties, the Scottish Government considers that all parties should also be able to request such a review. The Bill will therefore allow a review to be carried out by the court on the application of any party to the proceedings, not just on the application of the party citing the witness.

82. The Scottish Government is only making these changes in relation to criminal proceedings. In relation to civil proceedings, it considers that existing provision in Part 2 of the 2004 Act (which covers the circumstances in which the court can refuse special measures in civil proceedings) remains appropriate.

Closed court as a special measure

83. As a general rule, all trials in Scotland are held in public. However, there are some situations in which the public can be excluded, and the court’s common law power to regulate its
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own proceedings includes the ability to exclude the public from proceedings where this is necessary for the administration of justice. There is also specific guidance relating to the exclusion of the public in child witness cases (Lord Justice General’s Memorandum on Child Witnesses). In addition, section 50(3) and section 92(3) of the Criminal Procedure (Scotland) Act 1995 (the 1995 Act) allow the court to direct that the courtroom is cleared of all persons not directly involved in the proceedings in cases involving certain types of offences.

84. The Directive requires that a closed court, in addition to various other measures, be available as a possible option for supporting vulnerable witnesses in giving evidence, where appropriate. The Scottish Government considers that the availability of closed courts will require to be widened slightly in order to reflect the Directive.

85. In addition, the Scottish Government considers that the decision on whether or not a closed court is to be used should be made as early as is practicable, in order to avoid causing the witness undue stress.

86. To address both of these points, the Bill will designate closed courts as an additional special measure which can be applied for by parties citing a vulnerable witness. This will reflect the requirements of the Directive by ensuring that a closed court is an available option, where appropriate, for all vulnerable witnesses, and will ensure that witnesses are informed in good time of any such application.

87. The Scottish Government recognises the balance that must be struck between ensuring that trials are generally held in public, and protecting the interests of vulnerable witnesses. In practice, the Scottish Government expects that a closed court will only be appropriate in exceptional circumstances, given the range of other special measures which are available, but this will be a matter for the court to determine.

Prospective measures to meet communication support needs

88. There are no SMs at present which offer support specifically to those with communication needs. The Scottish Government considers that such measures could be of use to some vulnerable witnesses. For example, intermediaries may be useful in ensuring that witnesses with communication support needs can understand questions put to them and can communicate their answers effectively, and witness profiling would allow an assessment of the individual’s potential to be a credible and competent witness to be presented to the court before any trial. However, the Scottish Government considers that further examination of these and other possible measures is required before determining whether they should be introduced, and that the ability to pilot potential measures on a limited basis would be a crucial part of such an assessment.

89. The Bill will therefore enable the Scottish Ministers to specify additional temporary special measures and to restrict these to certain locations and time periods. This will allow pilots of potential new special measures to be carried out and their effectiveness assessed before making a decision on whether they should be extended more widely (which can be achieved under order making powers in the 1995 Act).
Alternative approaches considered

90. No alternative approaches were considered in relation to the definition of child witness, the inclusion of the additional discretionary category of vulnerable witness or including a closed court as a SM as these changes are required in order to comply with the Directive. There was no alternative approach considered on the provision of SMs to assist witnesses with communication support needs as pilot schemes were considered necessary in order to make sure any new SMs were appropriate and viable before extending across Scotland.

91. An alternative approach considered in relation to adding categories of adult witness who will be classed as automatically vulnerable was to do nothing, as the Directive does not require any category of adult witness to be considered automatically vulnerable. However, as set out above, the Scottish Government considered that, given the particular nature of the crimes in question, introducing a presumption of vulnerability for victims of sexual abuse, domestic abuse, human trafficking and stalking is the correct approach (and is one which was widely supported during the public consultation exercise on the proposals in the Bill).

92. Another approach considered was to include a wider list of victims for which there should be a strong presumption that specific protection measures should be made available. However, it was concluded that this approach was not necessary given that the Bill will enable any witness who is considered vulnerable following an individual assessment of need, to apply for special measures.

93. An alternative approach to amending the notification process was to remove it for those presumed vulnerable and therefore automatically entitled to use SSMs. However, SCS need to be aware of which SSMs or SMs have been requested in order to provide them and the court and other parties to the proceedings also need to be notified of any request to use them. This was therefore not considered to be a practicable option.

94. As there is no express provision in the Directive requiring the accused to be given a right to challenge the use of SMs in court an alternative approach of doing nothing in relation to a right to object was considered. However, the requirement in the Directive to make SMs available to victims is stated to be without prejudice to the rights of the accused. The Scottish Government believes that the best way of ensuring the spirit of this requirement is met is for there to be a right for all parties to object to the use of SSMs or SMs requested and for any objection to be considered by the court.

Removal of presumption that child witnesses aged under 12 will give evidence away from court building

Policy objectives

95. Part 1 of the 2004 Act amended section 271(b) of the 1995 Act to include a presumption that child witnesses under the age of 12 should give evidence away from the court building in trials concerning specific offences. These include murder, culpable homicide, and abduction. Section 271(b) gives effect to this presumption by preventing the court making an order which would require the child witness to be present in the court or any part of the court building for the purposes of giving evidence unless satisfied that:

- the child has expressed a wish to be so present for the purposes of giving evidence and that it is appropriate for a child witness to be present; or
in any other case that the taking of the evidence of a child without the child being present would give rise to a significant risk of prejudice to the fairness of the trial or otherwise to the interests of justice and that risk significantly outweighs any risk of prejudice to the interests of the child.

96. Feedback from some justice partners suggests that the current presumption is applied too rigidly by the courts and little regard may be given to the needs and wishes of the child. For example, decisions of the courts in line with section 271(b) can result in decisions where a child is required to give evidence from a remote site, separately from their mother or father who may be giving evidence in the court. This can cause additional stress for witnesses and their family.

Proposed approach

97. The Bill proposes a minor amendment to section 271(b) to place greater weight on the wishes of the witnesses in consideration of whether an order should be made requiring a child witnesses to be present in the court room. This is achieved by creating a presumption that a child witness will give evidence in the court-room where they have expressed a wish to do so.

Alternative approaches considered

98. No other approaches were considered to meet the policy objective.

Duty to have regard to guidance on Joint Investigative Interviews

Policy objectives

99. 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.

100. Revised Guidance on Joint Investigative Interviewing of Child Witnesses in Scotland was published on 19 December 2011, but currently has no statutory basis. It promotes best practice for police and social workers undertaking JIIs with children and makes clear that such interviews should only be undertaken by practitioners who are both trained and competent. The guidance emphasises that every decision made about interviewing a child must be made on the basis that the paramount consideration is the best interests of the child. It also makes clear that these interviews should be visually recorded unless there is a good reason why this is not appropriate (e.g. recording was a feature of the alleged crime).

101. While the existing guidance is being used, the Scottish Government considers that to ensure its effectiveness and to reflect requirements in the Directive, it should be placed on a statutory footing, with a requirement on the police and social workers to have regard to it when conducting a JII with a child witness.

25 http://www.scotland.gov.uk/Publications/2011/12/16102728/0
Proposed approach

102. A requirement will be placed on the police and social workers to have regard to guidance issued by the Scottish Ministers when conducting JIIs with child witnesses (under the age of 18). The existing guidance will then be re-issued in due course.

Alternative approaches considered

103. The alternative approach considered was doing nothing. While police and social workers conducting JIIs with child witnesses have received training in relation to the revised guidance and currently follow that guidance, the Scottish Government concluded that this was not an acceptable approach if the Directive is to be complied with.

Sexual offences - right for victim to choose gender of interviewer

Policy objectives

104. When victims have been identified as being vulnerable to further victimisation or intimidation, appropriate measures should be taken to prevent such harm. Vulnerable victims can find the interview process highly distressing, particularly where the crime is of a very personal nature. To help minimise distress, the Directive requires that all interviews with victims of sexual violence, gender-based violence or violence in close relationships, unless conducted by a public prosecutor or judge, are conducted by a person of the same sex, if the victim so wishes and if the court proceedings will not be prejudiced.

Proposed approach

105. The Bill introduces a right for victims to choose the gender of any person who has reason to interview them. Although it is perhaps more likely that a victim would choose to be interviewed by a person of the same sex, the Bill proposed a wider approach that allows the victim to choose without any limitation.

106. The right would apply in relation to any interview by the police or in any other part of subsequent criminal proceedings. To reflect the requirements of the Directive, the right would not apply where the victims has reasons to be interviewed by a sheriff or judge or by the Procurator Fiscal.

107. In line with the proposals for changes to special measures (set out in paragraphs 65-69) the right would apply to victims of sexual offences; domestic abuse; human trafficking; and stalking. An order making power would allow the list of offences or circumstances in which the right should apply to be modified.

108. The Bill also proposes that the police, or any other persons intending to interview a victim, should be required to explain to the victim, before any interview takes place, that they have a right to choose the gender of the person(s) who will interview them. Any failure to provide such an explanation in advance of an interview being conducted would not affect the validity of the interview and would not affect any subsequent proceedings.
In order to avoid potentially putting criminal investigations at risk, the Bill will contain an exception for cases in which complying with a request for a particular gender of interviewer would be likely to prejudice an investigation.

Alternative approaches considered

These provisions are required to ensure compliance with Article 23 of the Directive. No alternative approaches were considered.

Ability to make oral representations to the parole board

Policy objectives

The VNS allows those registered on it to receive specific information and make written representations to PBS when the prisoner who committed an offence against them is being considered for release and/or when licence conditions are being set. PBS considers those representations along with other information when reaching a decision on release or licence conditions. If a licence condition is made relating to the victim’s representations, they are informed of the decision.

The PBS is primarily concerned with the assessment of risk to the public if a prisoner is released. The policy intention is that victims should feel more involved in the criminal justice process and that they should have the option of making representations in person rather than in writing if they feel that this would better allow them to convey their views.

Proposed approach

The Bill will allow certain victims who are registered on the VNS to make oral representation to a PBS member if they wish. The PBS member who meets with the victim will not be a member of the tribunal considering the case but will convey any concerns to the tribunal members. This will only apply to life sentence prisoners in the first instance with an option to extend it to other categories of prisoner in future. Victims will still have the option of making written representations, as at present.

Alternative approaches considered

Consideration was given to doing nothing and continuing with written representations being the only option. However, this does not achieve the policy intention of giving victims more flexibility in making representations or of involving them further in the criminal justice process.

Victim statements – increased flexibility in timing of submission

Policy objectives

Victim statements allow victims and close relatives to tell the court about the physical, emotional and financial impact of a crime on them. A victim statement is written and is given to the court if the accused pleads guilty or is found guilty. The judge or sheriff should consider the statement and what weight should be attached to it. Section 14 of the 2003 Act sets out the

http://www.scottishparoleboard.gov.uk/page/victims_and_families
This document relates to the Victims and Witnesses (Scotland) Bill Bill (SP Bill 23) as introduced in the Scottish Parliament on 6 February 2013

arrangements for the submission of victim statement. A prosecutor must lay any victim statement before the court:

- in solemn proceedings, when moving for sentence as respect an offence; and
- in summary proceedings, when a plea of guilty is tendered in respect of, or the accused is convicted of, an offence.

116. On occasion the victim impact statement may not be available for the court at the relevant time. This can be for various reasons, including the timing of the plea, especially if it is a very early plea of guilty.

Proposed approach

117. The Bill would allow a victim impact statement to be submitted to the court at any time after the prosecutor moves for sentence (or the accused pleads guilty or is found guilty), but before sentence is passed. This is to ensure that, if the statement is not available at the time of the guilty plea, this does not prejudicially affect the victim in the case.

Alternative approaches considered

118. There are no alternative approaches that would achieve the policy objective.

Victim statements – extend eligibility to carers of those under 14, and change to definition of carer

Policy objectives

119. Under current legislation children under 14 years are entitled to have a victim statement made on their behalf by their carer if they are the direct victim of the crime. However, in cases where the victim has died, children under 14 (for example, the son, daughter or sibling of the victim) are not eligible to make a statement or have one made on their behalf by a carer. Relatives aged 14 years and over can make a statement in these cases. A similar anomaly arose in the VNS and this was rectified by section 36 of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007.

Proposed approach

120. The Bill seeks to introduce consistency between the VNS and the victim statement arrangements so that a child under 14 years, who is not the direct victim of the crime, can have a victim statement made on their behalf by a carer. The Scottish Government also proposes to amend the definition of carer in relation to the victim statement scheme so that the carer who makes the statement on behalf of a child under 14 years does not have to have been the carer at the time of the offence or alleged offence.

Alternative approaches considered

121. No alternative approaches were considered to meet the policy objectives.
Require court to consider compensation

Policy objectives

122. Compensation orders (i.e. a payment from the offender to the victim) may be imposed by the court in respect of personal injury, loss or damage caused directly or indirectly to the victim or any alarm or distress caused directly to the victim.

123. The Directive requires that victims of crime should be entitled to a decision on compensation from the offender within a reasonable time. It seeks to encourage member states to promote measures to ensure offenders provide compensation. Currently the court has the option to grant a compensation order but is under no obligation to consider doing so. The Scottish Government is committed to strengthening the link between offenders and compensation for their victims and the policy objective is to ensure that courts consider direct compensation orders in appropriate cases.

Proposed approach

124. The Bill makes a minor amendment to existing legislation which will place a duty on the courts to consider a compensation order in relevant cases. This means that consideration will have to be given to making a compensation order in every situation where there is a victim who is eligible to receive a compensation payment under such an order, for example a person who has been caused personal injury, loss, damage, alarm or distress as a result of an offender’s criminal acts.

Alternative approaches considered

125. No alternative approaches were considered. Doing nothing would be contrary to the Scottish Government’s commitment to ensuring that appropriate consideration is given to providing compensation for victims of crime and the Directive requirement to promote the use of direct compensation. The proposed approach still allows the court the latitude not to impose a compensation order if it is not considered appropriate.

Introduction of victim surcharge

Policy objectives

126. While the court can already make direct compensation orders to victims, this is not always appropriate; for example in cases where there is no identifiable victim. The Scottish Government considers that, regardless of whether or not the court imposes a direct compensation order, offenders should be made more accountable for the harm or damage caused by their actions and should contribute to supporting the needs of victims of crime generally.

127. The policy objective is therefore to create a fund to help meet the immediate needs of victims of crime and to maintain this through contributions from offenders.
Proposed approach

128. The Bill will require the court to impose a victim surcharge on offenders in certain circumstances, to be set out in secondary legislation. In the first instance, the Scottish Government intends to impose the surcharge in cases resulting in a court fine.

129. The money raised will be put into a central victims’ fund, to be administered by a third party, to be used in providing immediate and practical support to victims of crime. The Scottish Government will have the ability to set out how the victims’ fund is to be operated and to extend the surcharge to apply to other types of sentence, for example if application to fines proves to be successful.

130. Disbursements from the fund will be made to provide assistance and support to victims with immediate unmet needs, for example:

- basic life essentials;
- removal costs (for personal safety);
- funeral costs;
- cleaning (for example, following a violent incident in a victim’s home).

131. While no decisions have been taken yet about how the amount of the surcharge will be calculated, the Scottish Government has developed a model which may be used. Under this model, the amount of the surcharge would be linked to the amount of the court fine, by way of a scale set out in secondary legislation. The levels on this scale would be set by reference to the standard scale of fines, as shown in table 2.

Table 2 - possible surcharge model

<table>
<thead>
<tr>
<th>Court fine between (£)</th>
<th>Surcharge (£)</th>
</tr>
</thead>
<tbody>
<tr>
<td>0.01 - 200</td>
<td>20</td>
</tr>
<tr>
<td>200.01 - 500</td>
<td>30</td>
</tr>
<tr>
<td>500.01 - 1000</td>
<td>40</td>
</tr>
<tr>
<td>1000.01 - 2500</td>
<td>50</td>
</tr>
<tr>
<td>2500.01 - 5000</td>
<td>100</td>
</tr>
<tr>
<td>5000.01 - 10,000</td>
<td>200</td>
</tr>
<tr>
<td>Over 10,000</td>
<td>10% of fine</td>
</tr>
</tbody>
</table>

132. For illustrative purposes only, this model is used in table 3 below to set out the potential income which may be generated by the victim surcharge. Calculations are based on data from SCS on the number and value of fines imposed over the last 3 years (2009/10 – 2011/12).
This document relates to the Victims and Witnesses (Scotland) Bill Bill (SP Bill 23) as introduced in the Scottish Parliament on 6 February 2013

Table 3 - potential income from victim surcharge

<table>
<thead>
<tr>
<th>Fines between (£):</th>
<th>Average number of fines imposed p.a.</th>
<th>Level of victim surcharge (£)</th>
<th>Income - 100% collection rate (£)*</th>
<th>Income – 80% collection rate (£)</th>
<th>Income - 60% collection rate (£)</th>
</tr>
</thead>
<tbody>
<tr>
<td>0 – 200</td>
<td>38,149</td>
<td>20</td>
<td>763,000</td>
<td>610,400</td>
<td>457,800</td>
</tr>
<tr>
<td>200.01 – 500</td>
<td>23,438</td>
<td>30</td>
<td>703,100</td>
<td>562,500</td>
<td>421,900</td>
</tr>
<tr>
<td>500.01 – 1,000</td>
<td>3,885</td>
<td>40</td>
<td>155,400</td>
<td>124,300</td>
<td>93,200</td>
</tr>
<tr>
<td>1000.01 – 2,500</td>
<td>535</td>
<td>50</td>
<td>26,800</td>
<td>21,400</td>
<td>16,000</td>
</tr>
<tr>
<td>2,500.01 – 5,000</td>
<td>107</td>
<td>100</td>
<td>10,700</td>
<td>8,600</td>
<td>6,400</td>
</tr>
<tr>
<td>5,000.01 – 10,000</td>
<td>54</td>
<td>200</td>
<td>10,900</td>
<td>8,700</td>
<td>6,500</td>
</tr>
<tr>
<td>Over 10,000</td>
<td>89 (total value £4,854,610)</td>
<td>10% of fine</td>
<td>485,500</td>
<td>388,400</td>
<td>291,300</td>
</tr>
<tr>
<td>Total per annum (£)</td>
<td>-</td>
<td>-</td>
<td>2,155,400</td>
<td>1,724,300</td>
<td>1,293,100</td>
</tr>
</tbody>
</table>

* All income estimates rounded to nearest £100

133. It is acknowledged that once a fine or, in future, a surcharge is imposed by the court, there will in some cases be a time delay before full payment is received, either because of agreed phased payment arrangements or following enforcement action against defaulters. Information from SCS suggests that a reasonable estimated collection rate, based on previous years, is likely to be around 66% after one year, and around 90% after 3 years.

134. Some other jurisdictions have some form of victim surcharge in place including Northern Ireland and England and Wales. In Northern Ireland the offender levy was introduced in the Justice Act (NI) 2011. In England and Wales the victim surcharge was introduced by the Domestic Violence, Crime and Victims Act 2004.

Alternative approaches considered

135. In Northern Ireland, the offender levy applies to fines and to custodial sentences and offenders have to pay between £5 and £50. This is pooled in the Victims of Crime Fund which is used to support projects for victims and witnesses in the justice process, as well as for local initiatives taken forward by groups working with victims in the community.

136. In England and Wales, following the consultation Getting it right for victims and witnesses, the Ministry of Justice has decided to increase the amounts of surcharge payable, to include juveniles and to extend the categories of sentences that the surcharge will apply to. The surcharge

rate varies from £10 to £120 depending on the charge. The fund will be used to provide services for victims of crime.

137. The Scottish Government considered adopting a similar approach for the use of the funds. However, after speaking to those who provide support and assistance to victims of crime, it considers that responding to the immediate needs in the aftermath of a crime would best serve victims.

**Introduction of restitution orders**

**Policy objectives**

138. In comparison with other forms of employment, police officers and police staff are at disproportionate risk of being assaulted while carrying out their job. This is reflected in the arrangements that exist to support police officers and staff who are assaulted and who require particular care and support services in the wake of these incidents. These support services – offered through the Police Benevolent Fund and the Police Treatment Centres, for example - are largely paid for by police officers themselves. The Scottish Government wishes to ensure that, even where there is not a direct compensation order, persons who assault police officers and police staff are punished in such a way that they contribute to the care and support their actions make necessary.

**Proposed approach**

139. A restitution order is a new financial penalty whereby those who are convicted of the statutory offence of assaulting a police officer or member of police staff (section 90(1) of the Police & Fire Reform (Scotland) Act 2012) may be required to contribute to the cost of providing services which care for, treat or rehabilitate police officers. A financial penalty would be imposed on individuals convicted of such an offence. It would be collected, just as fines are, by SCS, and the receipts credited to a fund. The fund would be administered by the Scottish Government, and would pay out such monies as it receives to purposes approved by the Scottish Parliament. These purposes would support or promote the physical and/or mental health and well-being of police officers and staff.

140. Restitution orders would not replace compensation orders for criminal injuries to individual police officers or staff; nor would they preclude such officers or staff from seeking compensation through the civil courts. They would replace a victim surcharge in the circumstances of a conviction under section 90(1) of the 2012 Act.

**Alternative approaches considered**

141. An alternative approach would be not to introduce restitution orders, but instead to provide that monies from the victim surcharge could be used to fund services supporting or promoting the physical and/or mental health and well-being of police officers and staff. However, this would not meet the policy objective to make a clear link between the criminal offence and a suitable punishment which would be used to ameliorate or mitigate the effects of that crime. The opportunity to make this link is provided by the fact that there are existing services providing targeted support for precisely the group protected by the criminal offence.
142. Moreover, the victim surcharge would likely not raise as much support for these care services as the restitution order is likely to do, as the upper limit is as high as any potential fine, rather than a relatively small portion of it. In any event the victim surcharge is intended to focus on meeting the very immediate needs of victims of crime, rather than assist with the long-term provision of services to a group of people who are especially likely to fall victim to a particular crime and who are paying for those services from their own pockets.

143. Another potential approach would be to hypothecate fines for section 90(1) of the 2012 Act to the purposes to which restitution orders will be applied. This is not possible, however, as Regulation 2(2)(b) of the Scotland Act (Designation of Receipts) Order 2009 classes fines among the designated receipts which, under section 64(6) of the Scotland Act, must be paid to HM Treasury. Restitution orders are therefore a new penalty which will co-exist with fines, and which may be imposed instead of, or alongside, a fine. However, since restitution orders have the function of supporting victims, as indicated above, a victim surcharge would not apply in respect of a fine where a restitution order was a possible penalty.

CONSULTATION

144. Informal consultation with stakeholder organisations (such as Victim Support Scotland, Children 1st and Rape Crisis Scotland) took place in relation to victims and witness policy during 2010-11. This included looking at whether the 2004 Act had achieved what was intended or whether other improvements were needed, and revisiting the Scottish Strategy for Victims which was published in 2001. Focus groups, meetings and regional consultation events on witness issues along with the Victims’ Summit held in January 2011 and a stakeholder meeting group held in October 2011, helped identify the key areas which needed to be addressed.

145. This information formed the basis of many of the measures included in the public consultation ‘Making Justice Work for Victims and Witnesses’, which closed in July 2012. This asked for views on most of the proposals to be included in the Bill, in addition to some which do not require primary legislation, and 76 responses were received.

146. An analysis of the consultation responses is available online (at http://www.scotland.gov.uk/Publications/2013/01/8185) and the proposals in the paper were supported by the majority of respondents. Negative views were, as expected, mostly focussed on the need to take into account data protection and privacy issues with any information-sharing proposals, and the need to consider logistical, administrative and resource issues in relation to all of the planned reforms.

147. Consultation has also taken place with key stakeholder groups, justice partners and individual victims during the policy development process, including the following organisations:

- SCS
- COPFS
- SPS
- PBS
- ACPOS
148. Again, there is general support for the proposals. The Scottish Government will continue to work with victim support organisations in particular throughout the Bill process.
POLICY OBJECTIVES – NATIONAL CONFIDENTIAL FORUM

Overview

149. The principal policy objective of this part of the Bill is to offer adults placed in institutional care as children acknowledgement of their experiences, including abuse and neglect, through the creation of the National Confidential Forum (NCF). The value of such recognition, in terms of improved health and wellbeing, was evident in the experience of the Pilot Forum, ‘Time to be Heard’ on which the NCF is firmly based.

Background

The SurvivorScotland Strategy

150. SurvivorScotland, the National Strategy for Adult Survivors of Childhood Abuse, was launched in September 2005. The Strategy encompasses all adult survivors of childhood abuse, including people abused in care as children. The implementation of the Strategy has different elements, including the provision of funding for services for adult survivors of childhood abuse; training for professionals; and measures to increase public awareness of childhood abuse.

151. In 2004, the then First Minister offered an apology on behalf of the people of Scotland to those who were subject to abuse and neglect as children in residential care. Following this, in 2005, a review of the systems of laws, rules and regulations that governed residential schools and children’s homes between 1950 and 1995 was commissioned by the Scottish Government. The conclusions and recommendations contained in that Review note the need for former residents to ‘have their experiences as a child in a residential establishment heard and recorded-as a means of acknowledging and believing what they need to tell’. Most of the recommendations of the Review have been implemented, with the remainder to be completed in 2013.

152. There have been a number of inquiries into the abuse of children in specific institutions over the last 20 years, including an independent inquiry for Edinburgh City Council into the sexual abuse of children in two children’s homes and an independent inquiry for Fife Council concerning physical and sexual abuse committed in children’s homes. More recently, there was an independent inquiry into abuse at Kerelaw residential school in Ayrshire.

153. In 2010, the Scottish Government provided funding for a new service, In Care Survivors Service Scotland (ICSSS) recognising the very specific needs of people abused in care settings. The Scottish Government committed £750,000 to ICSSS (until October 2011) and has recently committed a further £637,500 until 2015. This voluntary sector service enables dedicated support

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28 [www.survivorscotland.org.uk](http://www.survivorscotland.org.uk)
31 [Historical Abuse Systemic Review, page 155](http://www.scotland.gov.uk/Publications/2007/11/20104729/0)
33 [Fife Council Independent Enquiry Established By the Chief Executive Following the Conviction of David Logan Murphy For The Sexual Abuse of Children](http://www.scotland.gov.uk/Publications/2007/11/20104729/0)
34 [http://www.scotland.gov.uk/Publications/2009/05/08090356/0](http://www.scotland.gov.uk/Publications/2009/05/08090356/0)
to be provided to adults who were abused in care as children. Support is offered, principally, through a national confidential telephone support line and the provision of information, advocacy and confidential counselling to survivors and their families. As such, it provides an important service which complements the role of the NCF and will support the participation of people in hearings of the NCF, at all stages of that process.

154. During the lifespan of the Time to be Heard Pilot Forum in 2010, the Scottish Government recognised the need for support to be available to participants before, during and after they shared their experiences. The services of ICSSS were highlighted to every person who applied to participate in the Pilot Forum. ICSSS offered a specific service to people considering participation and the ICSSS helpline was open until 11 pm on the days on which hearings were held.

Experiences in other jurisdictions

155. In developing the policy underpinning the establishment of the NCF, the experiences of other jurisdictions in responding to adults placed in care as children were considered. This spanned developments in Canada, Australia, New Zealand, Wales and Ireland.

156. From 2001 to 2010, a Confidential Committee operated as part of the Commission to Inquire into Child Abuse in Ireland. The approach of the Committee was sympathetic and informal, designed to support survivors be able to describe their experiences. This model, in particular, helped inform the development of what became the Time to be Heard Pilot Forum.

157. The UK Government has no dedicated policy in respect of adult survivors of abuse. Following recent allegations of historic abuse, the Prime Minister has announced two inquiries. The first inquiry will look into the conduct and remit of the Waterhouse inquiry which was held between 1996 and 2000, to investigate alleged abuse in North Wales in the 1970s and 1980s. The second inquiry will look into the police handling of the original complaints and any new allegations.

158. Legislation in the Northern Ireland Assembly to establish an inquiry into historical institutional childhood abuse was passed on 11 December 2012. The Northern Ireland Inquiry will include an Acknowledgement Forum in which survivors of abuse will be supported to recount their childhood experiences of institutional care. Tom Shaw, the chair of Time to be Heard, is a member of the panel of the Acknowledgement Forum.

The ‘Time to be Heard’ Pilot Forum

159. In 2009, the Scottish Ministers announced that a Pilot Forum, known as Time to be Heard, (‘TTBH’) would be established. The purpose of TTBH was 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, in particular abusive experiences, to an independent and non-judgemental panel.

35 http://www.childabusecommission.ie/
160. The scope of TTBH was limited to one institution. Quarriers was selected because it 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 1500 children living in the Village at any one time. In total over 30,000 children had been cared for by Quarriers since its inception in the late 19th century to the closure of mainstream residential child care provision in the 1980s. Focussing on one institution which operated with large numbers over a long period has yielded rich information to inform the scope of the NCF.

161. People seeking to participate in TTBH were not asked to identify themselves as survivors nor to indicate that they had experienced abuse in care, to ensure the broadest possible representation of former residents 37.

162. The experience of TTBH was evaluated using a number of different methods including: questionnaires returned by participants; in-depth interviews of participants; and daily debrief sheets compiled by the Chair and Commissioners. Feedback was also obtained from ICSSS, including anonymised information about the use of its helpline. The experiences of other support agencies were noted in interviews with Kingdom Abuse Survivors Project, Breaking the Silence, Open Secret, Health in Mind and the Moira Anderson Foundation.

163. Feedback from participants, through the questionnaire, was very positive. While a quarter of respondents said that they had found it very difficult or quite difficult to decide to take part in TTBH, none indicated that they regretted doing so. Over 85 per cent considered that they were able to say all or most of what they wanted to say and all said that they felt listened to with respect and sensitivity. Over 87 per cent considered that the overall experience had been almost all or mainly positive. The findings of the in-depth interviews (conducted independently of the Scottish Government) confirmed that the outcomes for participants in TTBH were very positive 38. Feedback from participants directly to the Chair and Commissioners was again very positive, both about the experience of TTBH and the effect of participation on their self-respect, self-confidence and progress towards closure. Many said that they felt acknowledged, affirmed and could begin to move on from painful past experiences.

164. An independent report of the experience of TTBH was published in 2011 39 and states 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.’ 40

165. The TTBH Report contains 15 recommendations, 6 of which are concerned with the establishment and operation of a NCF. The Scottish Government has accepted all six recommendations in taking forward the policy to establish a national forum, including, that

37 See paragraphs 3.4.2 and 4.1.1 of the TTBH Report http://www.scotland.gov.uk/Publications/2011/03/07122331/14
38 http://www.survivorsescotland.org.uk/confidential-forum/time-to-be-heard/process-review/; see also para, 3.5 http://www.scotland.gov.uk/Publications/2011/03/07122331/0
39 http://www.scotland.gov.uk/Publications/2011/03/07122331/0
40 At page 104.
legislation should be introduced to underpin a national forum, thereby enabling it to function with a status and protections not able to be afforded to TTBH.

The Human Rights Framework and InterAction

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)\(^{41}\). The SHRC Framework was published in February 2010\(^{12}\) to which the Scottish Government provided an interim response (in June 2010) on the specific recommendations for the TTBH Pilot Forum and a further response (in February 2011) following the completion of the TTBH hearings and just before the launch of the TTBH Report, on all of the recommendations\(^{43}\).

167. The SHRC Framework outlines what the SHRC regards as a ‘comprehensive approach to ensuring effective access to justice, remedies and reparation for childhood abuse’. The confidential committee model adopted for TTBH focused on acknowledgement rather than accountability. As such, the SHRC Framework addresses wider issues than those addressed by the TTBH Pilot Forum. 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’.

Other developments

Restorative justice

168. A restorative justice pilot project ran alongside TTBH, highlighting that this approach can offer a form of accountability and may be helpful to some survivors\(^{44}\). SACRO, which managed the pilot, intends to build on learning from the initial project to look at ways in which restorative justice opportunities may be offered to a wider group of survivors.

Limitation on civil actions

169. The Scottish Government has acknowledged the concern expressed by some stakeholders regarding the practical application of a ‘time-bar’ in respect of civil proceedings brought by survivors of historic abuse. The three year limitation period, beyond which civil actions for personal injury are not generally permitted, is not absolute. The law already permits the courts to exercise discretion and allow claims to proceed where they deem it equitable to do so. However, the Scottish Government has recognised that even with this flexibility, there is a perception that the current limitation regime is unduly restrictive in respect of survivors of historic abuse.

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\(^{41}\) A human rights framework for the design and implementation of the proposed ‘Acknowledgement and Accountability Forum’ and other remedies for historic child abuse in Scotland, SHRC, February 2010.


This document relates to the Victims and Witnesses (Scotland) Bill Bill (SP Bill 23) as introduced in the Scottish Parliament on 6 February 2013


PROPOSALS - NATIONAL CONFIDENTIAL FORUM

171. In 2011, the Scottish Government announced its intention to establish a national acknowledgement forum, building on the positive experience of TTBH.

172. On 23 July 2012, the Scottish Government launched a consultation on the proposal to establish a ‘forum giving adult survivors abused in residential care as children the opportunity to describe their experiences to people who understand about such abuse in residential care.’ The consultation document set out ten questions, including questions as to the scope of the forum and protections and support for participants. Consultation events were held across the country and one to one sessions with individual survivors of abuse arranged to ensure a depth and range of participation.

173. The Scottish Government has considered fully the views expressed by stakeholders in written consultation responses and at consultation events and one to one sessions. In particular, the views of survivors of abuse in care have been given careful consideration in shaping the functions and scope of the NCF as set out in the Bill.

174. The main findings of the consultation are set out as follows, with the full Consultation Report being available on the Scottish Government website:

- Almost all respondents agreed with the purpose proposed for it as an acknowledgement forum. No respondent disagreed with this purpose. This general view was reinforced at each of the consultation events, with widespread agreement of the focus on, and need for, acknowledgment.

- Respondents 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.

- Four fifths of respondents agreed that the NCF should operate independently of Government. The option preferred by respondents is for the NCF to be established as a separate unit within an existing public body.

- A very high proportion 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

45 [http://www.scotland.gov.uk/Publications/2012/12/5980](http://www.scotland.gov.uk/Publications/2012/12/5980)
46 [http://www.scotland.gov.uk/Publications/2012/12/8644/downloads](http://www.scotland.gov.uk/Publications/2012/12/8644/downloads)
47 [http://www.scotland.gov.uk/Publications/2013/01/8196/downloads](http://www.scotland.gov.uk/Publications/2013/01/8196/downloads)
48 92% of respondents agreed (47 out of 51, with 2 respondents not providing a response and 2 not expressing a preference).
49 80% of respondents agreed (41 out of 51, with 3 respondents not agreeing, 3 not expressing a preference and 4 not providing a response.)
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.

- A very high proportion of respondents agreed that the types of residential care listed in the consultation document should be included within the scope of the NCF. Just less than a fifth of respondents proposed that the scope of the Forum encompass all categories of care. A further fifth of respondents made a specific reference to foster care being included within the scope of the Forum, with half of those proposing that foster care be considered.

- The Scottish Government has considered in depth the matter of the scope of eligibility to participate in the NCF and proposes that the principal criterion 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 in the Forum. 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. As such, the scope of the NCF will be considerably wider than that of the Time to be Heard Pilot Forum.

- Almost three quarters of 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.

- Over half of respondents agreed that people engaged with the NCF should be protected from any form of legal action as a result of either participating in hearings or working for the Forum.

- 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 in the Forum. The Scottish Government will be working closely with stakeholders to ensure that the support requirements of participants in the Forum are known and that steps are taken to meet those requirements and that any barriers to participation in the Forum are identified and tackled.

175. Following the Scottish Government’s consultation on the NCF, and drawing on the experience of TTBH, the Bill contains a number of provisions, as set out below. In general terms, the Bill provides a framework within which the NCF will operate, thereby explicitly addressing the recommendation in the TTBH Report that ‘appropriate legislation should be introduced to give the necessary protection for the effective operation of a national confidential forum’.

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50 88% of respondents agreed (45 out of 51, with 1 respondent disagreeing and 5 not providing a response).
51 64% of respondents agreed (43 out of 51, with 1 disagreeing and 7 not providing a response).
52 71% of respondents agreed (36 out of 51, with 5 disagreeing; 3 having no preference; and 7 not providing a response).
53 57% of respondents agreed (29 out of 51, with 6 disagreeing; 7 having no preference; and 9 not providing a response).
Functions

176. The functions of the NCF are set out clearly on the face of the Bill. These functions are new and distinct and are as follows:

- to receive and listen, in private and in confidence, to the experiences of adults who were placed in institutional care as children, including experiences of abuse, and to offer acknowledgement of those experiences;
- to contribute to the prevention of the abuse of children placed in institutional care in the future by making proposals to inform policy and practice, based on experiences recounted in hearings of the NCF;
- 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 signpost services to participants and their families which can offer support, advocacy, advice and information.

Eligibility to participate

177. The Bill sets out the principal criterion for participating in the NCF; namely the experience of having been placed in institutional care as a child.

178. The scope of ‘institutional’ care is significantly wider than the scope of TTBH (which was open to residents of only one institution) and the traditional scope of ‘residential child care’, to encompass all forms of institutional care into which children can be placed, including long stay hospitals and secure units. 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.

179. The Scottish Government recognises the importance of responding, in an appropriate and informed way, to the distinct experiences of people placed in institutional forms of care as children. There are specific facets of institutional care, particularly care provided on an historical basis, which distinguish it from other forms of care and which can have particular implications for residents throughout their lives. In particular, the recounting of childhood experiences of institutional care where there has been abuse can be traumatic with implications not only for the person recounting their own experience but for other former residents, former and current employees of the institution in question and the institution itself. This may deter people from disclosing abuse experienced in the context of institutional care.

180. The Bill provides that the NCF will be open to all persons placed in institutional care as children, whether they were placed there directly by the state or under a private arrangement. The Scottish Government considers it important that the experiences of all persons placed in institutional forms of care are heard, spanning many decades during which the law, policy and practice relating to the placement of children in care, and the state’s responsibility to those children, have changed significantly.
181. The experiences which the NCF will hear will be all experiences of being in institutional care as a child, including abuse. The scope of the NCF is purposely not restricted solely to hearing about experiences of abuse because this would not give a balanced view of life in care. A fifth of participants in TTBH identified their experience of Quarrriers as positive. In any event, not all people who have experienced abuse in care necessarily identify themselves as having done so. They do not necessarily consider themselves to be either ‘victims’ or ‘survivors’ and, therefore, may be deterred from considering participation in the NCF. As the Scottish Government’s response to the SHRC Framework clearly states:

‘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 nation-wide programme of confidential hearings.’

182. The Bill provides that the NCF will be open to any person over 18 years of age who has had an experience of being in institutional care as a child. There is no time restriction either in relation to the length of time spent in care or the start and end date of that period of time in care (with the exception that it is not current).

Confidentiality

183. The Bill makes provision to safeguard the confidentiality of information held by the NCF, including testimony given by participants in hearings of the Forum and information held by the Forum in discharging its functions.

184. 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. The Bill also includes provision for the protection of participants, members and staff of the NCF from action for defamation, including an absolute level of privilege for participants in the Forum. These provisions enable 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. This was not possible during TTBH. These provisions 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. The rights of both participants in the NCF and persons against whom allegations of abuse are made have been weighed to strike a fair and proportionate balance.

185. The Bill makes provision for confidentiality to be breached in specific circumstances, including where a participant makes an allegation that a crime has been perpetrated or is likely to be perpetrated. Efforts will be made by the NCF to support participants to report such allegations directly to the police themselves.

54 http://www.survivorScotland.org.uk/time-to-be-heard/scottish-human-rights-commission/
Conduct of hearings

186. The Bill makes provision to ensure that hearings of the NCF will involve at least two members; that they will be held in private; and that participants will be entitled to be accompanied by a companion of their choice.

Hosting by the Mental Welfare Commission

187. The Bill makes provision for the hosting of the NCF by the Mental Welfare Commission (MWC). 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.

188. The NCF will be set up as a mandatory committee of the MWC. The members of this committee will be responsible for the effective operational discharge of the functions of the NCF.

Reports

189. The Bill makes provision for the production of an Annual Report by the NCF, setting out progress in discharging its functions. The Bill will 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.

Alternative approaches considered

190. In developing the policy underpinning the development of the NCF, different approaches have been considered informed by the specific context of Scotland and learning from other jurisdictions. Approaches considered have included: not establishing a NCF at all; establishing a non-statutory forum; and establishing a forum with wider functions than that proposed for the NCF.

Not establishing a National Confidential Forum

191. The Scottish Government has made a commitment to establish a confidential acknowledgement forum on a national footing, based on the positive impact of TTBH. The vast majority of responses to the recent consultation on the NCF were in agreement that a Forum with the role and function proposed be established to provide acknowledgement to people placed in institutional care as children. The experience of TTBH demonstrates the significant benefits of acknowledgement provided in a supportive, confidential and non-judgemental setting, both to individual participants and their families in terms of improved health and wellbeing and in contributing to the prevention of abuse in the future.

192. The option of not establishing the NCF would likely only be acceptable to stakeholders if the benefits and outcomes of a confidential, acknowledgement forum could be achieved in other ways.
193. Existing opportunities for people placed in care as children to give testimony are limited to court action, which is adversarial and presents a risk of retraumatisation without the guarantee of acknowledgement. People may also access support services and share their experiences in that way. However, this option does not offer the opportunity of non-judgemental acknowledgement by an informed and well-respected panel, who will use the experiences shared with it to contribute to the prevention of future harm to children and to inform the public record of life in care for children in Scotland.

194. It is considered that the NCF adds much to existing remedies, services and responses to persons placed in care as children, including those who have experienced abuse. It does not duplicate any current provision and is, in fact, unique in providing the opportunity of non-judgemental acknowledgement and belief.

A non-statutory forum

195. It is possible that the NCF could be established on a non-statutory footing, in the same way as TTBH.

196. The absence of legislative provision to underpin the work of TTBH was highlighted for particular attention in the TTBH Report. The Report sets out the implications of the Pilot Forum not having had a legislative underpinning and that this ‘necessitated changes in the conduct of the Forum’s business and especially in the way in which it recorded what participants said’. In particular, the Report states that as ‘TTBH did not have statutory protection for confidentiality, the Chair and Commissioners developed practices to mitigate any risks that information provided in confidence might require to be disclosed’. Another consequence of the non-statutory basis of TTBH identified in the Report was the ‘implications for the possible personal liability of the Chair and Commissioners, employment and contractual issues and the ownership of the records held by TTBH…as a result of the Forum not having a separate legal personality’. The TTBH Report concludes that ‘despite these difficulties, the Pilot Forum proceeded effectively. Nevertheless, it is essential that any future forum be established on a statutory basis, thus providing necessary protections for both the participants and staff of the forum.’.

197. The NCF needs to be able to offer assurances of confidentiality to individual participants in discharging its role and functions. It is essential that prospective participants are not deterred from taking part in hearings by the fear that their testimony might be made public or that they might be sued because of the content of that testimony. It is imperative that participants feel secure that the NCF offers a confidential and non-judgemental process for them to describe their experiences, without adverse consequence. The Head and members of the NCF, and its staff, also require a safe environment within which to work, where they are not at risk of being sued for pursuing legitimate activities. While the likelihood of legal action against participants, members and staff of the NCF may be considered low, the very prospect of it will have a deterrent effect on participation and a consequent effect on the overall effectiveness of the Forum. The advantage of primary legislation to underpin the establishment and operation of the NCF is that safeguards and protections can be put in place to ensure that, as far as possible, information held by the Forum is confidential.

55 At paragraph 3.7.2 http://www.scotland.gov.uk/Publications/2011/03/07122331/0.
198. It is, therefore, considered fundamental that there be a legal framework within which the NCF will be established and operate, thereby explicitly addressing the recommendation in the TTBH Report that ‘appropriate legislation should be introduced to give the necessary protection for the effective operation of a national confidential forum’.

A Forum with wider powers

199. There are some stakeholders who consider that the 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. A small minority of respondents to the consultation on the NCF indicated this position.

200. The Chair and Commissioners of TTBH did not consider this approach to be advisable and indicated this to the 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 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.’

201. The Scottish Government’s response to the SHRC Framework echoes this position, recognising the importance that participants in TTBH attached to the confidential nature of the process and the supportive approach taken in what were non-legal, informal proceedings. In this response, the Scottish Government highlighted that:

‘introducing an investigatory requirement would undoubtedly change the nature of the process in significant ways. First, the institutions would need to be given the opportunity to present their account and to be parties to the process. Second, the survivors’ accounts would have to be open to challenge, either by the institutions (drawing on an adversarial model) or by the Chair and Commissioners. Third, 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.’

202. The Scottish Government recognises that the NCF is part of a suite of responses to people placed in care as children, including survivors of abuse. That is why the Scottish Government has agreed to take part in the ‘InterAction’ process, managed by the SHRC and the Centre for

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56 Recommendation 2—see page 110 [http://www.scotland.gov.uk/Publications/2011/03/07122331/0](http://www.scotland.gov.uk/Publications/2011/03/07122331/0)

57 1 March 2011, Proceedings of the Public Petitions Committee, paragraphs 3457-8.
Excellence for Looked After Children in Scotland, to develop an Action Plan for taking forward the recommendations in the SHRC Framework.

CONSULTATION

203. In 2008, the Scottish Government launched a discussion paper entitled ‘Developing an Acknowledgement and Accountability Forum for Adult Survivors of Childhood Abuse’58. The aim of the Forum was proposed as:—

‘to acknowledge the pain experienced by survivors and to give some of them the opportunity to recount those experiences in order to secure public recognition and to assist, where possible, with their own individual recovery [and to ensure] that survivors receive practical help to assist them to recover as far as they are able.’ 59

204. All respondents to the consultation, almost half of whom were survivors, agreed that a forum for adult survivors who were abused in care as children should be established. There was, however a clear difference of view among respondents as to whether such a forum should include acceptance of accountability as one of its aims; whether it was the appropriate vehicle for obtaining an apology; and whether financial compensation should be part of the forum’s responsibilities.

205. Many of the respondents felt that it would be a good idea to test out such a forum so that public awareness could be raised, teething problems could be ironed out and improvements and adjustments made before rolling it out on a national basis60.

206. A consultation on the NCF was launched on 23 July and closed on 12 October 2012. The NCF Reference Group and Survivor Stakeholder Group contributed to both the design of the consultation and to the responses. The consultation was circulated to approximately 517 contacts and was posted on the Scottish Government Consultation website. An advert was taken out in ‘Third Force News’ to proactively highlight the consultation process to the voluntary and community sectors.

207. Four consultation events were held in different parts of Scotland during August and September 2012 to give people the opportunity engage in a less formal and more direct way. A total of 54 attendees provided comments which were then summarised by those who facilitated the events.

208. The opportunity of individual and smaller group sessions were also offered to survivors of abuse experienced in care and to support organisations. This approach was designed to offer survivors the chance to take part in the consultation in a safe, supportive and private atmosphere. In total, seven survivors asked to meet on a one to one basis. Of the five survivors who felt able to participate (two decided to withdraw), four were female and one male. All had been placed in various residential care settings where abuse took place. Sessions with individual survivors were held in Dundee, Glasgow, Oban, Dunoon and Greenock.

58 http://www.scotland.gov.uk/Publications/2008/10/10114037/0
59 Consultation on Acknowledgement and Accountability, page 2.
60 http://www.scotland.gov.uk/Publications/2009/06/02154100/0
Responses to the consultation demonstrate the general support which exists for the creation of the NCF and the positive value placed on acknowledgement in contributing to the health and wellbeing of people placed in institutional care as children⁶¹.

A high proportion (almost 90%) of respondents to the consultation agreed with the proposed scope of the NCF, namely that it be open to persons placed in residential care by the state as children. This included almost all individual survivors who responded to the consultation. A number of respondents questioned whether the focus of the NCF should be limited to persons placed in care by the state, as many persons have been, particularly historically, placed in institutional care under private arrangements. This has been taken into account and is reflected in the provisions in the Bill on the scope of eligibility to participate in the NCF.

A minority of respondents (nine) to the consultation proposed that the scope of the NCF be extended beyond that proposed to encompass all categories of care. Two of these responses came from individual survivors. A further minority of respondents (ten) made a specific reference to foster care being included within the scope of the Forum. None of these responses came from individual survivors. Half of the respondents who mentioned foster care specifically simply indicated that it be considered in defining the scope of the Forum, with one respondent suggesting that foster care ‘may have to be considered’ and another suggesting that there may be a ‘second phase’ which encompasses foster care. Where a rationale was given for proposing that foster care be considered for inclusion within the scope of the NCF, this was based on the view that there is abuse within foster care and, as such, people placed in foster care and who have experienced abuse should be able to participate in the Forum.

Many respondents to the consultation highlighted the need for support for participants before, during and after their participation in the NCF, including counselling and advocacy services. This correlates to responses to the consultation which identified the particular barriers which may prevent people participating in the Forum and measures which could be put in place to dismantle, or minimise, such barriers. It is intended that operational arrangements will be put in place, similar to those set up under TTBH, to ensure that there is appropriate support for participants at all stages of their engagement with the NCF.

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

Equal Opportunities

An Equality Impact Assessment (EQIA) has been carried out and the results will be published on the Scottish Government website at http://www.scotland.gov.uk/Publications/Recent.

In relation to the victims and witnesses reforms, the Scottish Government considers that the Bill does not discriminate on the basis of age, maternity and pregnancy, marriage and civil

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⁶¹ http://www.scotland.gov.uk/Publications/2012/12/8644/downloads
http://www.scotland.gov.uk/Publications/2013/01/8196/downloads
partnership, gender reassignment, race, disability, religion and belief, sex or sexual orientation. Indeed, the reforms are intended to ensure that the particular needs of individuals are met (e.g. the introduction of an individual assessment of vulnerability for witnesses, which takes account of their personal characteristics, type or nature of the crime and the circumstances of the crime), including those originating from protected characteristics.

215. In relation to the establishment of the NCF, it is also considered that the Bill’s provisions are not discriminatory on the basis of the protected characteristics listed above. The EQIA does not identify any group that will be adversely affected by the establishment of the Forum. In fact, based on TTBH, it is very likely that the NCF will have a significant and positive impact on the lives and outcomes of a group of people who can be, as a result of their experiences of care, disadvantaged in terms of mental and physical wellbeing, educational attainment, income levels, employment opportunities and family life. In addition, it is considered that the NCF will have a particular benefit for older people some of whom may never have shared their experiences of care.

Human Rights

216. It is not considered that the victims and witnesses reforms in the Bill raise any issues relating to the European Convention on Human Rights (ECHR). There is no effect on the rights of the accused or the presumption of innocence and it is considered that the Bill does not interfere with the Article 6 rights (right to a fair trial) of persons accused of criminal conduct.

217. The provisions in the Bill concerning the NCF do not give rise to any issues of concern in relation to the ECHR. It is not considered that the Forum engages Article 6 of the ECHR (right to a fair trial). The Forum will have a positive effect on participants’ realisation of their Article 8 right (to protection of private and family life) in giving them the opportunity to describe their experiences in a confidential, non-judgmental setting with acknowledgement and support. The Bill provisions which prohibit the disclosure of information received by the NCF in the discharge of its functions and which restrict the right to raise an action of defamation, are proportionate measures which appropriately balance competing rights in pursuit of a legitimate aim.

Island communities

218. The Bill has no differential impact upon island or rural communities

Local government

219. The Bill has no direct impact on local authorities in discharging their duties under health and social care legislation.

220. An outcome of participation in the National Confidential Forum may be an increase in the number of persons seeking help from services, but this may well be offset by a more appropriate use of health and social care services, leading to improved outcomes and the prevention of crisis.
Sustainable Development and Environmental Issues

221. The Bill has no negative impact on sustainable development and will have a strong positive effect on the health and wellbeing of the people of Scotland, assisting not only adults who were in institutional care as children, but also bringing benefits to their families and wider communities.

222. The potential environmental impact of the Bill has been considered. A pre-screening report confirmed that the Bill has minimal or no impact on the environment and consequently that a full Strategic Environmental Assessment does not need to be undertaken. It is therefore exempt for the purposes of section 7 of the Environmental Assessment (Scotland) Act 2005.
PURPOSE

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament’s Standing Orders, in relation to the Victims and Witnesses (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

2. The contents of this Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

Outline of Bill provisions

3. 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 (NCF) for adults placed in institutional forms of care as children.

4. The proposed reforms relating to victims and witnesses will improve the support available for such individuals. Key proposals include:

- giving victims and witnesses a right to certain information about their case;
- creating a duty on organisations within the 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 certain special measures when giving evidence;
- requiring the court to consider compensation to victims in relevant cases;
- introducing a victim surcharge so that offenders contribute to the cost of supporting victims; and
- introducing restitution orders, allowing the court to require that offenders who assault police officers pay to support the specialist non-NHS services which assist in the recovery of such individuals.
5. The establishment of the National Confidential Forum (NCF) will provide an opportunity for adults who were placed in institutional care as children to recount their experiences of being in care in a confidential, non-judgemental and supportive setting.

6. The key proposals in the Bill which relate to the NCF are as follows:

- The functions of the NCF are set out in a clear and distinct way, the main function being to offer adults placed in institutional care as children the opportunity of acknowledgement of their experiences, in particular those of abuse.
- The scope of the NCF is defined to enable all adults placed in institutional care as children the opportunity to participate in hearings.
- The testimony of persons who participate in the NCF is protected from disclosure and those persons will be protected from the threat of defamation as a result of testimony they give. Members of the NCF who will conduct hearings, receive testimony and offer acknowledgement, and its staff, will also be protected from the threat of action for defamation where they have acted in good faith in discharging the functions of the Forum.
- The arrangements by which the NCF is to be hosted by an existing public body, specifically the Mental Welfare Commission, are set out, including the mechanisms to safeguard the respective operational autonomy of the Forum and Commission.

Rationale for subordinate legislation

7. In deciding whether provision should be set out in subordinate legislation rather than on the face of the Bill, the Scottish Government has considered:

- the need to strike the right balance between the importance of the issue and providing sufficient flexibility to respond to changing circumstances without the need for primary legislation;
- the need to anticipate the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by the Parliament;
- the need to make proper use of valuable Parliamentary time; and
- the need to allow detailed administrative arrangements to be kept up to date within the basic structures set out in the Bill.

8. The relevant provisions are described in detail below. For each provision, the memorandum sets out:

- the person upon whom the power to make subordinate legislation is conferred and the form in which the power is to be exercised;
- why it is considered appropriate to delegate the power to subordinate legislation and the purpose of each such provision; and
This document relates to the Victims and Witnesses (Scotland) Bill (SP Bill 23) as introduced in the Scottish Parliament on 6 February 2013

- the parliamentary procedure to which the exercise of the power to make subordinate legislation is to be subject, if any.

Delegated powers

Section 1(4) – General principles

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Affirmative procedure

9. Section 1 provides that certain persons (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) must have regard to four general principles when carrying out any statutory functions they have in relation to victims and witnesses.

10. Section 1(4) gives the Scottish Ministers the power to modify the list of persons on which this duty is placed (set out at section 1(2)).

Reason for taking power

11. There is no immediate intention to modify the list of persons covered by the obligation to take account of the four general principles. However, it is possible that this list will require to be amended in the future, for example to extend the duty to another organisation dealing with victims and witnesses if appropriate, or to modify the list to reflect any changes to the organisations currently listed. It is considered appropriate to provide for the flexibility to make such relatively limited changes by subordinate legislation, rather than requiring further primary legislation.

Reason for choice of procedure

12. As this power can be used to alter primary legislation, and to add or remove the duty to have regard to the principles set out in section 1, it is considered appropriate that it be subject to the affirmative procedure.

Section 2(4) – Standards of Service

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Affirmative procedure

13. Section 2 creates a duty on certain persons to set and publish standards of service relating to the carrying out of functions in relation to victims and witnesses. It also requires those persons to set out the procedure for making and resolving complaints.
14. Section 2(4) gives the Scottish Ministers an Order making power to modify the list of persons to whom the duty applies (as set out in section 2(2)).

Reason for taking power

15. There is no immediate intention to use the power to modify the list of persons covered by the obligation to set out standards of service. However, as with the duty to have regard to the general principles, it may be necessary or desirable to amend this list in the future - for example, to include a body which has been given new functions in relation to victims and witnesses. It is considered appropriate to provide for the flexibility to make such relatively limited changes by subordinate legislation, rather than requiring further primary legislation.

Reason for choice of procedure

16. The Scottish Government considers the affirmative procedure is appropriate to allow the Scottish Parliament to give a high level of scrutiny to the detail of any changes to primary legislation.

Section 2(6) - Standards of service

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Negative procedure

17. Section 2(5) specifies that “victim”, for the purposes of that section, includes a prescribed relative of a victim. Section 2(6) allows the Scottish Ministers to prescribe by order those to be regarded as a relative of the victim under that subsection.

Reason for taking power

18. Rather than set out a definitive list of those to be regarded as relatives on the face of the Bill, it is considered appropriate to provide such detail in subordinate legislation. This will allow the Scottish Ministers the flexibility to modify the definition of “relative”, which has a fairly narrow application in relation to section 2, without amending primary legislation.

Reason for choice of procedure

19. This power has a narrow focus on the definition of “relative” in section 2, with a fairly limited effect. It is therefore considered that the negative procedure is appropriate.
Section 3(7) – Disclosure of information about criminal proceedings

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Affirmative procedure

20. Section 3 provides that certain persons (the chief constable of the Police Service of Scotland, a prosecutor, and the Scottish Court Service) must provide certain information to victims and witnesses. Subsection (7) gives the Scottish Ministers an order making power to modify who this duty applies to and to modify the information which must be disclosed.

Reason for taking power

21. The information to be provided to victims and witnesses, as set out in subsection (6), covers a variety of facts about the criminal investigation or proceedings (and this list reflects the requirement of the recent EU Directive 2012/29/EU). However, while this list is currently considered appropriate, it is possible that it may be desirable to modify it in the future - for example, to expand the list to encompass other information which victims and witnesses may find useful. It is considered appropriate to allow the flexibility to make any such changes by subordinate legislation, rather than requiring further primary legislation.

Reason for choice of procedure

22. Similarly, the persons to whom the duty applies may require to be modified in the future. This could be a result of a change in who holds some of the information currently specified or, more probably, to include persons who hold any new information which is specified by order.

Section 4(4) – Interviews with children: guidance

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Negative procedure

24. Section 4 provides that police officers and social workers must have regard to any guidance issued by the Scottish Ministers under subsection (2) when carrying out a joint investigative interview with a child witness in the course of criminal proceedings or a matter which may lead to criminal proceedings. Section 4(4) gives the Scottish Ministers an order making power which enables them to modify the list of persons to whom this duty applies, as set out in section 4(3).
This document relates to the Victims and Witnesses (Scotland) Bill (SP Bill 23) as introduced in the Scottish Parliament on 6 February 2013

Reason for taking power

25. The power to issue guidance (under subsection (2)) and modify the list of those who must have regard to it (under subsection (4)) will provide flexibility to allow the guidance to be updated as necessary (e.g. to reflect developments in interviewing techniques, updated research etc.) and the list of interviewers to be updated as required (e.g. to reflect any future change to current job titles or to the category of persons who undertake joint investigative interviews with child witnesses) without requiring primary legislation.

Reason for choice of procedure

26. The power to issue guidance is very narrow, applying only to joint interviews carried out with children. Furthermore, the guidance to be issued under this section already exists in non-statutory form, and will be modified only in consultation with the public bodies who were involved in drafting the original guidance (issued December 2011). It is therefore considered that there is no need for the guidance to be laid in Parliament.

27. The duty to have regard to the guidance is limited – there are no sanctions for a breach of the duty and no obligation to inform the Scottish Ministers in the event that the guidance has not been followed. Accordingly, the order making power to modify the list of persons who must have regard to the guidance is subject to negative procedure as the high level of parliamentary scrutiny offered by the affirmative procedure is not considered necessary when imposing such a modest obligation.

Section 5(7) – Certain sexual offences: victim’s right to specify gender of interviewer

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Negative procedure

28. Article 23 of EU Directive 2012/29/EU requires that all interviews with victims of sexual violence, gender-based violence or violence in close relationships should be conducted by a person of the same sex as the victim, if the victim so wishes, provided that the criminal proceedings will not be prejudiced. Section 5 provides for such a right for victims, and broadens this slightly to allow the victim to specify the gender of the person conducting an interview, which may be the same gender as the victim.

29. Section 5(7) gives the Scottish Ministers an order making power to modify the list of types of offences that this section should apply to. Section 5(8) allows the Scottish Ministers to modify the description of persons carrying out an interview (which currently only includes police officers).

Reason for taking power

30. The power under section 5(7) will allow a wider range of victims to have this entitlement if this is considered appropriate in the future, without requiring further primary legislation. Section 5(8) also allows the Scottish Ministers to modify the description of persons carrying out interviewing.


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an interview. While interviews will ordinarily be carried out by police officers, other interview formats may be developed involving officers of other agencies.

Reason for choice of procedure

31. The Scottish Government considers that any changes under this section are likely to be intended to assist the operational delivery of the requirements of the Directive, and the powers in subsections (7) and (8) are fairly narrow in scope. It is therefore considered appropriate that the negative procedure is used.

Section 6(b) – Vulnerable witnesses: main definitions

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Affirmative procedure

32. Section 6(a) replaces the main definitions of vulnerable witnesses contained in section 271(1) of the Criminal Procedure (Scotland) Act 1995 (the 1995 Act). Section 6(a) inserts subsection (1)(c) which provides that victims of alleged sexual offences, human trafficking, domestic abuse, or stalking, who are giving evidence in proceedings which relate to that particular offence, are to be regarded as vulnerable. Section 6(b) inserts subsection (1AA) which gives the Scottish Ministers an order making power to modify the inserted subsection (1)(c).

Reason for taking power

33. There is no immediate intention to use the power to prescribe additional categories of witnesses who fall under the inserted subsection (1)(c). However, this power will provide the flexibility to allow the Scottish Ministers to do so, if it is found to be necessary in the future, without enacting primary legislation.

Reason for choice of procedure

34. The power is subject to the affirmative procedure. The Scottish Government considers this is appropriate to allow the Scottish Parliament to give a high level of scrutiny to the detail of any changes to primary legislation.

Section 8(b) – Child and deemed vulnerable witnesses: standard special measures

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Affirmative procedure

35. Section 271H(1) of the 1995 Act specifies a range of special measures that may be used to assist vulnerable witnesses to give their evidence to the court. Section 8(a) amends the definition of standard special measures so that a supporter can be used as a stand-alone standard special measure and removes the restriction that a live television link can only be used in another part of the court building. Section 8(b) inserts new section 271A(15) into the 1995 Act, giving the Scottish Ministers an order making power so that they can add new standard special
measures, amend or delete existing standard special measures and also modify the detail of how these standard special measures are to operate.

Reason for taking power
36. There is no immediate intention to use the power described above, which is designed to allow the range of standard special measures to be kept up to date with developments such as new or improved technology or the identification of other appropriate support measures for vulnerable witnesses. However, this power will provide the flexibility to allow the Scottish Ministers to do so, if it is found to be necessary in the future, without enacting primary legislation.

Reason for choice of procedure
37. The power is subject to the affirmative procedure. The Scottish Government considers this is appropriate to allow the Scottish Parliament to give a high level of scrutiny to the detail of any changes to primary legislation.

Section 15 – Temporary additional special measures

Power conferred on: The Scottish Ministers
Power exercisable by: order made by Scottish statutory instrument
Parliamentary procedure: Affirmative procedure

38. Section 271H(1) of the 1995 Act specifies a range of special measures that may be used to assist vulnerable witnesses to give their evidence to the court. Section 15 inserts new section 271HA into the 1995 Act to allow the Scottish Ministers to create additional special measures by order for a temporary period. The order must specify where the temporary special measure should take place, the procedures to be used and for how long it should operate.

Reason for taking power
39. The current list of special measures for vulnerable witnesses may be modified in the future, for example to offer better support to those with communication support needs. However, before introducing any new categories of special measures across Scotland, the Scottish Government considers it important to assess whether a particular special measure works and if there is a real benefit to vulnerable witnesses in using it. The ability to pilot potential measures on a limited basis, as this order making power allows, is considered a crucial part of that assessment. This power is likely to be used in conducting such pilots, particularly in relation to the testing of potential new measures relating to communication support needs.

Reason for choice of procedure
40. The power is subject to the affirmative procedure. The Scottish Government considers this is appropriate to allow the Scottish Parliament to give a high level of scrutiny to any proposals to pilot new special measures, which could have a relatively significant impact on the courts.
Section 17(b) – Power to prescribe further special measures

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Affirmative procedure

41. Section 271H(1) of the 1995 Act specifies a range of special measures that may be used to assist vulnerable witnesses to give their evidence to the court. Section 17(b) inserts section 271H(1A) into the 1995 Act. This section gives the Scottish Ministers an order making power so that they can add new special measures, amend or delete existing special measures and also modify the detail of how these special measures are to operate.

Reason for taking power

42. There is no immediate intention to use the powers described above, which are designed to allow the range of special measures to be kept up to date with developments such as new or improved technology or the identification of other appropriate support measures for vulnerable witnesses. However, it is anticipated that, should the testing of additional special measures through a pilot scheme initiated by the Scottish Ministers (see detail of order making power under section 15) prove successful, then the Scottish Ministers may wish to roll it out across Scotland by exercising their power to add another category of special measure and detail how it should operate.

Reason for choice of procedure

43. The power is subject to the affirmative procedure. The Scottish Government considers this is appropriate to allow the Scottish Parliament to give a high level of scrutiny to the detail which may result in changes to primary legislation.

Section 18 – Vulnerable witnesses: civil proceedings

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Affirmative procedure

44. Section 18 amends the definition of a “child witness” in civil proceedings in section 11 of the Vulnerable Witnesses (Scotland) Act 2004 to include anyone under the age of 18 (currently this definition only includes those under 16). It also inserts an order making power to allow the Scottish Ministers to extend the definition of vulnerable witness to include specified types of witnesses, and witnesses in specified types of actions.

Reason for taking power

45. This power has been taken so that the definition of vulnerable witness, and consequently the potential use of special measures, can be extended to certain types of actions and certain types of witnesses. The areas where this power might be used are to specify classes of people (e.g. victims of domestic abuse) or certain types of action (e.g. applications for forced marriage protection orders or applications for civil protection orders to protect against domestic abuse) where those involved are to be regarded as vulnerable.
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Reason for choice of procedure

46. Using this power would extend the definition of vulnerable witness in civil proceedings. This is a significant matter, and the Scottish Government therefore considers that the use of the power should be subject to the affirmative procedure.

Section 21 (new section 253A of the 1995 Act) – Restitution order where conviction of police assault etc.

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Negative procedure

47. Section 21 establishes that, in addition to existing disposals, it shall also be competent to sentence a person convicted of an offence under section 90(1) of the Police and Fire Reform (Scotland) Act 2012 (the “2012 Act”) (which concerns assault on police officers and staff) to pay a sum called a “restitution order”. This shall be credited to a Fund for disbursement for the purpose of securing the provision of support services for such persons as have been assaulted in circumstances to which section 90(1) of the 2012 Act applies.

48. It does so by inserting new sections into the Criminal Procedure (Scotland) Act 1995 (the “1995 Act”).

49. The new section 253A to be inserted into the 1995 Act establishes that persons convicted of an offence under section 90(1) of the 2012 Act shall be liable to a restitution order.

50. This section aligns the maximum amount of such restitution orders to the prescribed sum (as defined in section 225(8) of the 1995 Act) and confers on the Scottish Ministers the power to change the maximum amount by regulations.

Reason for taking power

51. As with any monetary penalty, or any upper limit set upon such a monetary penalty, the severity of any restitution order, and thus its appropriateness and effectiveness as a penalty, will be affected by the changing value of money.

52. For this reason, section 225(4) of the 1995 Act gives the Scottish Ministers a power to vary, by order, the values of the levels of the standard scale for fines and of the prescribed sum.

53. Sentencers’ views of the appropriateness of a restitution order are also likely to be affected by changes in the conditions under which other sanctions, such as fines, may be applied – for example a change made by an order under section 225(4) of the 1995 Act, described above.

54. Giving the Scottish Ministers the power to set the upper limit applicable to the amount of restitution orders, in a similar way to that in which they set the upper limit for fines, is considered to be the best way to build in flexibility to deal with changes in the value of money, and of comparable financial penalties.
Reason for choice of procedure

55. The rate of change in the value of money has historically varied considerably and cannot be forecast for the lifetime of the proposed legislation. There may arise periods in which the value of financial penalties has to be amended frequently. In these circumstances the negative procedure provides the greatest speed and flexibility; and mirrors (for the same reasons) the procedure to be used in changing the limits for fines.

Section 21 (new section 253B of the 1995 Act) - The Restitution Fund

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Affirmative procedure

56. The new section 253B to be inserted into the 1995 Act provides that the Scottish Ministers shall establish a Restitution Fund which shall receive monies realised in respect of restitution orders, and disburse them to appropriate beneficiaries.

57. Subsection (5) allows the Scottish Ministers to delegate, by order, their functions of establishing and maintaining the Restitution Fund.

58. Subsection (6) grants the Scottish Ministers powers to manage the Restitution Fund, by making orders connected with its operation, administration, records and reports, and as to how payments are to be made.

59. The new section sets out in primary legislation the purpose of payments out of the Restitution Fund. This purpose is to secure the provision of support services for persons who have been assaulted as mentioned in section 90(1) of the 2012 Act. The new section also grants the Scottish Ministers powers to specify in subordinate legislation the persons or classes of person who shall receive support from the Restitution Fund as a means of achieving that purpose.

Reasons for taking power

60. The purposes of the Restitution Fund are to be clearly set out in primary legislation. However, the range of circumstances in which the Fund will operate cannot be foreseen. Some may be beyond the Scottish Ministers’ control, while others may be driven by wider operational concerns of the Scottish Ministers for, for example, efficient and cost-effective administration, whose requirements may change over time. Applicable regulatory regimes may also change over time.

61. It is appropriate that the operation and administration of the Restitution Fund should be able to respond to changes in these circumstances as efficiently as possible. This argues against setting out detailed arrangements in primary legislation.
62. Similarly, such changes in circumstances may make it appropriate or efficient to delegate the Scottish Ministers’ functions of establishing and maintaining the Restitution Fund to a third party (though this is not the Scottish Government’s intention at present).

63. The organisations which provide support services for persons assaulted in terms of section 90(1) of the 2012 Act are also likely to change over time. Organisations will cease to operate, and new organisations will arise. Even where the organisation remains essentially the same, the legal person in which they are embodied may change.

64. Finally, the need to be able to continue to meet the purpose of the Restitution Fund, whatever organisations or persons may exist providing services which meet that purpose, makes setting out recipients of monies from the Restitution Fund in primary legislation impractical.

Choice of procedure

65. Both changes in the circumstances in which the Restitution Fund operates, and in the persons or classes of person who offer the support services which are the purposes of the provision, may occur quickly and without prior warning to the Scottish Ministers.

66. In these circumstances the Scottish Ministers must be able to react quickly to ensure that the purpose of the Restitution Fund is still met. At the same time, these powers are fairly extensive. The joint requirements of speed and flexibility on the one hand, and of proper scrutiny on the other, are best met by the affirmative procedure.

Section 22 (new section 253F of the 1995 Act) – Victim Surcharge

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Affirmative procedure

67. Section 22 inserts sections 253F to 253J into the 1995 Act which establish the victim surcharge and the Victim Surcharge Fund. Under new section 253F(1)(a), the Scottish Ministers will have a regulation making power to set out offences, or classes of offences, to which the victim surcharge is not to apply. Under new section 253F(1)(c), the Scottish Ministers will have a regulation making power to set out sentences in relation to which the court must impose a victim surcharge. Under new section 253F(2), the Scottish Ministers will have the power to prescribe circumstances where the victim surcharge does not apply and to set the amount of the victim surcharge the court will be obliged to impose. This includes the ability to set different amounts for different descriptions of offender and for different circumstances. This power can also be used to make provision for determining the amount of the surcharge to be paid when the offender in question is convicted of two or more offences in the same proceedings. Reason for taking power

68. Although the broad purpose and operation of the victim surcharge will be set out on the face of the Bill, it is considered appropriate to set out exactly which offenders this will apply to (by reference to particular offences or sentences, as appropriate), and the amount of the
surcharge, in subordinate legislation. This will allow increased flexibility to respond to changing circumstances, and allow the exact model used to be varied in light of experience.

69. For example, the Scottish Government intends to impose the surcharge on those sentenced to a court fine in the first instance and to set out a tiered scale of surcharge amounts, linked to the amount of the fine. However, this model is likely to require some refinement in the future, and it may be desirable to widen the applicability of the surcharge to other types of offender or, if appropriate, to set out offences to which it does not apply. The powers in new section 253F will enable such changes to be made without requiring primary legislation.

Reason for choice of procedure

70. The power is subject to affirmative procedure. The Scottish Government consider that it is appropriate for the Scottish Parliament to give a high level of scrutiny when considering changes to the amount of victim surcharge that may be imposed and to the classes of offenders who will be affected.

Section 22 (new section 253G of the 1995 Act) – The Victim Surcharge Fund

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Affirmative procedure

71. Section 22 inserts section 253G into the 1995 Act, which deals with the establishment and purpose of the Victim Surcharge Fund. Subsection (5) allows the Scottish Ministers to delegate their functions of establishing and maintaining the Victim Surcharge Fund to a third party. Subsection (6) gives the Scottish Ministers power to set out various administrative and operational details relating to the operation of the Fund, and to prescribe the persons or classes of person who will be able to receive support from the fund.

Reason for taking power

72. As with similar provision in relation to restitution orders, it is considered appropriate that various operational and administrative details be set out in subordinate legislation. This will allow the operation of the Fund to be varied as necessary, in response to changing circumstances. For example, once the Fund is operational, it may be desirable to refine certain aspects of its operation, or to specify more exactly the persons to whom payments can be made. The order making powers in this section will give the Scottish Ministers the flexibility to make such changes as required, without further primary legislation.

Reason for choice of procedure

73. Given the amount of detail which can be set out using the powers in this section, and their impact on the operation of the Victim Surcharge Fund, the affirmative procedure is considered appropriate.
Section 24 – Oral representations to the Parole Board for Scotland

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Negative procedure

74. Section 24 amends section 17 of the Criminal Justice (Scotland) Act 2003 to give victims the right to make oral representations to the Parole Board for Scotland in relation to the release of prisoners serving a life sentence. New subsection (13) gives the Scottish Ministers the power to modify the type of convicted person to which this right relates.

Reason for taking power

75. While there is no immediate intention to extend the right to make oral representations in relation to other categories of prisoner, this may be considered in due course. As any such extension of this right to other categories may be carried out in an incremental manner, in order to assess the impact and benefits, it is considered appropriate that such provision be made in subordinate legislation.

Reason for choice of procedure

76. The power will only be used to extend the existing right to make representations to the Parole Board by varying the class of prisoners it will apply to. Given the narrow scope of the power, the negative resolution procedure is considered appropriate.

Section 27, paragraph 7 of new schedule 1A – Eligibility to participate in the National Confidential Forum

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Affirmative procedure

77. Section 27(2) inserts schedule 1A into the Mental Health (Care and Treatment) (Scotland) Act 2003 (“the 2003 Act”). Schedule 1A makes further provision in relation to the NCF and is inserted into the 2003 Act because the Forum is to operate as part of the Mental Welfare Commission, provision in respect of which is set out in the 2003 Act.

78. Paragraph 7 of schedule 1A makes provision for eligibility to participate in the NCF. Any person aged 18 years or over and who was placed in institutional care as a child for any length of time, and who is no longer in care, may apply to participate in the Forum. The term “institutional care”, for the purposes of participating in the Forum, means a care or health service which provided residential accommodation to children in Scotland.

79. Paragraph 7(3) of Schedule 1A gives the Scottish Ministers power to prescribe the particular types of care or health service which are to be included within the scope of “institutional care”. The types of services prescribed must be services which were provided to children in Scotland; provided by a body corporate or unincorporated; included a residential
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accommodation component; and which were not provided at premises used wholly or mainly as a private dwelling.

**Reason for taking power**

80. The landscape of residential care and health services provided to children in Scotland is dynamic and complex, both services provided historically and those provided currently. Persons applying to participate in the NCF will seek to share experiences of services provided over a significant period of time, spanning up to nine decades. The scope of “institutional care” needs to be sufficiently broad and flexible to encompass the range of institutions into which children were placed over this significant period.

81. It is appropriate for the Scottish Ministers to prescribe the services which will fall within the scope of “institutional care” in order to enable flexibility in specifying the particular types of services to be included within the scope of the NCF, including any additions or changes to the types of services prescribed to be made efficiently. There is not in existence a comprehensive list of every type of care and health service into which children were placed in Scotland and which were in operation during the time period participants in the Forum will seek to share experiences. Prescription of those services by the Scottish Ministers through the exercise of an order making power will enable a comprehensive and relevant list of services to be specified in a transparent and clear way and will allow sufficient flexibility for changes to that list to be made in recognition of the scale and dynamic nature of service provision over the period in question.

**Reason for choice of procedure**

82. This power gives the Scottish Ministers the ability to prescribe the particular types of care and health services which will be included within the scope of the National Confidential Forum. The Scottish Government considers that this is a matter in respect of which it is appropriate for the Scottish Parliament to have a high level of scrutiny to enable it to consider whether the types of services so prescribed are relevant and appropriate.

**Section 29(1) – Ancillary provision**

- **Power conferred on:** The Scottish Ministers
- **Power exercisable by:** Order made by Scottish statutory instrument
- **Parliamentary procedure:** Affirmative or Negative procedure, depending on the circumstances

83. Section 29(1) provides the Scottish Ministers with the power to make, by order, such supplementary, incidental, consequential, transitional, transitory or saving provision as they consider appropriate in connection with the Bill.

**Reason for taking power**

84. As with any new body of law, this Bill may give rise to a need for a range of ancillary provisions. This power is considered necessary in order to ensure that any unexpected issues can be dealt with effectively, and that the purpose of the Bill is not inadvertently obstructed.

85. The power to make supplemental or incidental provision is considered necessary in order to ensure that the policy intentions of the Bill are achieved. For example, it is possible that when
the policy is implemented that there are unforeseen issues, and this power would allow such changes to be made without the need for further primary legislation.

86. Consequential provision may be required in order to make necessary changes to related legislation - a number of consequential amendments are identified in the Bill as introduced (see, for example, section 7), but this power will allow the Scottish Ministers to make further changes should there be an unforeseen interaction with existing legislation.

87. The ability to make transitional or transitory provision may be required during implementation of the Bill to ensure that any changes to existing procedure do not present any issues. Finally, savings provisions will allow the operation of provisions in repealed or amended legislation to be preserved in certain circumstances, if necessary.

88. Without such a power it may be necessary to return to the Parliament, through subsequent primary legislation, to deal with a matter that is clearly within the scope and policy intentions of the original Bill. That would not be an effective use of either Parliament or Government resources.

Reason for choice of procedure

89. Where an order under this section is clearly limited in scope and effect, such as transitional or transitory provisions intended to address temporary issues, the negative procedure is considered appropriate. Such provisions would not have a lasting effect, and would be intended to resolve operational difficulties. However, where an order under this section adds to, replaces, or omits any part of the text of any Act (including this Act), the affirmative procedure will be used. As such amendment to primary legislation has the potential to have a significant impact on the effect of the Bill, this level of parliamentary scrutiny is considered appropriate.

Section 30(2) – Commencement

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: None

90. Section 30(2) gives the Scottish Ministers power to bring into force provisions in the Bill by order. No commencement date is specified in the Bill.

Reason for taking power

91. Exact commencement dates for the substantive provisions of the Bill have not yet been determined. This power allows the Scottish Ministers flexibility to control the commencement of the various provisions as they consider appropriate.

Reason for choice of procedure

92. As is common with commencement orders the power is subject to the default laying requirement under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.
Justice Committee

7th Report, 2013 (Session 4)

Stage 1 Report on the Victims and Witnesses (Scotland) Bill

Published by the Scottish Parliament on 3 June 2013
Justice Committee

7th Report, 2013 (Session 4)

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Justice Committee

Remit and membership

Remit:

To consider and report on:

a) the administration of criminal and civil justice, community safety and other matters falling within the responsibility of the Cabinet Secretary for Justice; and

b) the functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.

Membership:

Roderick Campbell
John Finnie
Christine Grahame (Convener)
Colin Keir
Jenny Marra (Deputy Convener)
Alison McInnes
David McLetchie
Graeme Pearson
Sandra White

Committee Clerking Team:

Irene Fleming
Joanne Clinton
Ned Sharratt
Christine Lambourne
Justice Committee

7th Report, 2013 (Session 4)

Stage 1 Report on the Victims and Witnesses (Scotland) Bill

The Committee reports to the Parliament as follows—

SUMMARY OF RECOMMENDATIONS

1. The Committee has sympathy for the Faculty of Advocates’ view (as set out in paragraph 41) and is concerned at any suggestion that the presumption of innocence of the accused may be compromised by the Bill’s use of the term ‘victim’ when referring to cases where guilt has not yet been proven or admitted. There is also the point that the word ‘complainer’ is used in the Criminal Procedure (Scotland) Act 1995 and, as some of the provisions in this Bill are to be incorporated into that Act, issues of clarity and consistency need to be addressed. However, the Committee acknowledges that the word ‘complainer’ may not strike the right tone for a Bill aimed at improving support for victims. We would therefore welcome the Cabinet Secretary’s views on this matter and would refer him to our recommendation on the definition of victim.

2. The Committee recommends that the Scottish Government gives full consideration to including a definition of ‘victim’ on the face of the Bill. This would assist in providing some clarity for individuals, in what may be extremely traumatic circumstances, as to what rights they have under the Bill. We also believe that a clear definition would in some way alleviate concerns raised that use of the term ‘victim’ in the Bill to refer to cases prior to and during a trial may give rise to an assumption that the accused is guilty. The Committee suggests that, as a starting point, the Scottish Government considers those definitions included in the Victims of Crime Assistance Act 2009 of Queensland, Australia, (as suggested by the Law Society of Scotland) and in the EU Directive on establishing minimum standards on the rights, support and protection of victims of crime.

3. The Committee has concerns regarding the level of confusion amongst organisations within the criminal justice system surrounding the meaning of section 1(3)(d) which would allow victims and witnesses, as far as would be appropriate to do so, to participate effectively in investigations and proceedings. We also consider that the lack of clarity on this provision could raise the expectations of victims that they will have a more active role to play in criminal proceedings than can realistically be met, or that, in the attempts to
comply with this principle, access to justice for the accused may be compromised. We therefore urge the Scottish Government to consider either clarifying the meaning of section 1(3)(d) in guidance or removing the provision from the Bill.

4. The Committee asks the Scottish Government to consider placing the actual standards of service to be complied with by prescribed organisations and individuals, along with details of a reporting mechanism on how the standards are working in practice, within guidance for approval by the Parliament in order to improve the experiences of victims and witnesses.

5. The Committee supports the proposal to create an online hub to give victims access to information about their individual case, but cautions against this tool completely replacing human interaction and support for victims, which we believe is vital.

6. On balance, the Committee does not believe that a compelling case has been made in support of the introduction of case companions or for the establishment of a Victim’s Commissioner at this time. However, we acknowledge that some victims and witnesses asked for continuity in the support provided across the system.

7. The Committee believes that it is vital that communication with victims and witnesses is improved and therefore supports the duty in the Bill to disclose to them case-specific information. We believe that criminal justice bodies must also take better care to ensure that the written information they provide to victims and witnesses is in plain English.

8. The Committee notes concerns regarding the capacity of organisations to comply with the duty to provide information and calls on the Scottish Government to ensure that the necessary finances, training and support is available to those criminal justice bodies to ensure that expectations of victims and witnesses can be met. We also urge the Scottish Government to provide further guidance in relation to those circumstances in which it would be ‘inappropriate’ for an organisation to disclose case-specific information to victims under section 3 of the Bill.

9. The Committee notes the view of some witnesses that a right to request a review of decisions not to prosecute, as provided for under the EU Directive, could assist in ensuring that decisions are transparent and accountable. We therefore await with interest the conclusions from research commissioned by the Crown Agent on whether to introduce a system of formal review.

10. The Committee welcomes the Cabinet Secretary’s indication that he would be happy to engage with the Crown Office and Procurator Fiscal Service to ensure that the appropriate level of information is given to families of road death victims wherever possible and we would welcome an update on these discussions. Nevertheless, we believe that a statutory requirement may give a greater level of certainty to victims that they would be entitled to receive the information they request at the end of criminal proceedings.
11. The Committee notes the concerns raised regarding the practical difficulties for the police in complying with the requirement to allow victims to specify the gender of their interviewer and urges the Scottish Government to work in helping the police to improve its capacity to meet the rights under the Bill. The Committee suggests that consideration be given to specifying that, in those circumstances where it is not possible to comply with a request, a full explanation is provided to the individual concerned and is included in the report to the Procurator Fiscal.

12. The Committee welcomes the Cabinet Secretary's commitment to look into the suggestion that the right under section 5 be extended so that a victim can also specify the gender of their forensic examiner and looks forward to receiving details of his conclusions on this matter.

13. The Committee welcomes the Cabinet Secretary for Justice's commitment to consider fully the provisions in the Bill relating to access for vulnerable witnesses to special measures and the right to object to such measures and, in doing so, we would urge him to make every effort to strike the appropriate balance between the rights of victims and the accused. More generally, the Committee seeks clarification as to where responsibility lies in relation to establishing the vulnerability of victims and witnesses and confirmation that those organisations involved in identifying vulnerability will be examining their procedures in light of these provisions in the Bill.

14. The Committee asks the Scottish Government to make every effort to ensure that removal of the presumption that child witnesses under the age of 12 will give evidence away from the court building does not lead to the unintended consequence of children giving evidence in court against their will.

15. The Committee has concerns regarding the apparent lack of regard given to victim statements by the courts given that, in writing them, victims are likely to have spent some time and experienced distress reliving the crime, in the belief that their statement will have some impact. The Committee asks the Cabinet Secretary to respond to these concerns.

16. The Committee recognises how distressing it would be for victims of some offences to receive money from their offender. We therefore welcome the Cabinet Secretary's assurances that appropriate guidance will be prepared to ensure that victims' views on whether or not the appropriateness of a compensation order being imposed are taken into account.

17. The Committee accepts that police officers and staff are at disproportionate risk of being assaulted while at work; however, we believe that introducing restitution orders only for police officers and staff and not for other occupations could prove divisive. We also appreciate that extending restitution orders may increase administration costs. On balance, we would ask the Scottish Government to give further consideration to the merits of this proposal.

18. The Committee welcomes the Scottish Government's commitment to consult those bodies affected by section 22 of the Bill in relation to the victim
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surcharge, before laying draft regulations before the Parliament. The Committee would welcome sight of these regulations as soon as possible to assist its scrutiny of the Bill.

19. The process of assessing whether a life prisoner should be released is likely to be an extremely traumatic experience for a victim and it is therefore essential that they are not given false expectations as to the level of influence that their representations can have on the Parole Board of Scotland’s decision. The Committee therefore believes that guidance is required to ensure that victims are fully aware of the Parole Board’s role in assessing the risk of the offender if they are released on licence. This guidance should include, for the benefit of the victim, those factors that they may comment on and should also make clear that the victim’s views are shared with the offender.

20. The Committee supports the general principles of the Bill. We consider that the Bill provides much-needed support and protection for victims and witnesses and we hope that it will help improve their experiences of the criminal justice system in the future. However, we believe that improvements are required to certain provisions in the Bill, in particular to ensure that the rights of both the accused and those of victims and witnesses are balanced appropriately. Our recommendations on these issues are set out in the main body of this report.

BACKGROUND

Parliamentary scrutiny

21. 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 Parliament designated the Justice Committee as lead committee in consideration of the Bill at Stage 1, and the Health and Sport Committee as secondary committee. The Justice Committee examined sections 1 to 25 of the Bill relating to victims and witnesses, as these sections fall clearly within the remit of this Committee. The Health and Sport Committee focused on sections 26 and 27 on the establishment of a National Confidential Forum (NCF). The Health and Sport Committee has the main interest in these provisions as the key focus of the NCF is to “improve the health and wellbeing of survivors of abuse in childhood”, it is to be hosted by the Mental Welfare Commission, and is within the Minister for Public Health’s portfolio.

22. The Health and Sport Committee’s conclusions on the Bill have informed the Justice Committee’s recommendation to the Parliament on the general principles of the Bill. However, this report does not reproduce any of the detailed findings of the Health and Sport Committee in relation to the proposals to create the NCF as, these

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1 Victims and Witnesses (Scotland) Bill, as introduced (SP Bill 23, Session 4 (2013)). Available at: http://www.scottish.parliament.uk/S4_Bills/Victims%20and%20Witnesses%20(Scotland)%20Bill/b23s4-introd.pdf

2 Victims and Witnesses (Scotland) Bill. Policy Memorandum (SP Bill 23-PM), Session 4 (2013), paragraph 4. Available at: http://www.scottish.parliament.uk/S4_Bills/Victims%20and%20Witnesses%20(Scotland)%20Bill/b23s4-introd-pm.pdf
provisions, unusually, have no bearing on the rest of the Bill. The Health and Sport Committee has therefore published a separate report on sections 26 and 27 of the Bill.\(^3\)

23. The Justice Committee’s call for written evidence on the Bill issued on 19 February received 33 written submissions. The Committee took evidence on the Bill over four meetings between 16 April and 14 May, hearing from a range of criminal justice bodies, victims’ groups, legal and human rights experts and children’s organisations, as well as the Cabinet Secretary for Justice.

24. In addition to taking formal evidence on the Bill, the Committee was keen to hear from victims of crime about their individual experiences of the criminal justice system. The Committee therefore arranged an informal round-table discussion with victims from across Scotland, who were nominated to participate by Victim Support Scotland and individual MSPs, which took place on 26 March. This was held in private to allow individuals to share their personal accounts in a relatively informal setting, out of the glare of the media. The Committee appreciates how difficult it was for those who participated to speak about their experiences as victims within the criminal justice system and wishes to thank those individuals for giving Members a valuable insight into what is actually happening in practice. Key themes\(^4\) arising from this discussion have been reflected by the Committee during its formal scrutiny of the Bill and in this report.

25. The Finance Committee also issued a call for written evidence on the financial memorandum on the Bill, receiving eight responses, which did not raise any substantive issues. The Finance Committee therefore decided not to undertake any further scrutiny of the financial memorandum or to report to the Justice Committee or Health and Sport Committee on the costs associated with the Bill.


**Background to the Bill**

*Policy: victims*

27. In recent years, there have been a number of policy developments aimed at improving support for victims as they move through the criminal justice system, against the backdrop of a growing public perception that the balance of rights is tipping in favour of the accused.

28. In 2001, the Scottish Government published its Scottish Strategy for Victims\(^6\), setting out an action plan based on the core principles that victims should receive

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\(^4\) Note of information discussion with victims and witnesses, 26 March 2013. Available at: http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/Summary_of_informal_discussion_VW_Bill.pdf


generic and case-specific information, appropriate support and have their voices heard. This Strategy was followed in 2005 by publication of National Standards for Victims of Crime, which outlined the minimum standards of service that victims of crime should receive from all criminal justice agencies and the children’s hearing system.

29. A number of developments since publication of the national standards in 2005 are highlighted in the policy memorandum on the Bill, including—

- extending coverage of the Victim Notification Scheme (VNS) to custodial sentences of 18 months or more (from four years of more);
- introducing a national victim statement scheme in solemn cases from 2009;
- the launch of Our Commitment to Victims and Witnesses by the Crown Office and Procurator Fiscal Service (COPFS) and amendments to the police Standard Prosecution Report to improve identification of witness vulnerability; and
- agreement of a joint protocol between the Association of Chief Police Officers in Scotland and COPFS to challenge domestic abuse.

Policy: witnesses

30. Recent policy on witnesses has concentrated on introducing a variety of measures aimed at enabling vulnerable witnesses to give their best evidence. The Vulnerable Witnesses (Scotland) Act 2004 makes provision for improved identification of the vulnerability of witnesses, and for the use of special measures, such as a screen or CCTV links.

31. The policy memorandum on the Bill also sets out other developments in recent years, such as—

- measures in the Criminal Justice and Licensing (Scotland) Act 2010 allowing witnesses to see their statements again before giving evidence, introducing a statutory scheme of witness anonymity orders, and raising the age of automatic entitlement to standard special measures up to the age of 18 in human trafficking cases;
- provisions in the Children’s Hearings (Scotland) Act 2011 to widen application of restrictions on evidence or questioning about character and sexual behaviour in hearings in front of a sheriff, and allow use of prior statements;

8 Policy Memorandum, paragraph 9.
9 In certain criminal cases, victims have a right (under the Criminal Justice (Scotland) Act 2003) to receive information about the release of an offender and some other relevant details.
10 This scheme allows victims (or relatives of victims) of serious crimes to make a written statement that tells the court how the crime affected them.
11 Policy Memorandum, paragraph 9.
Justice Committee, 7th Report, 2013 (Session 4)

- updating guidance on joint investigative interviewing of child witnesses in 2011 and rolling out visual recording equipment; and
- introducing the ‘Getting people to court’ project, as part of the Scottish Government’s Making Justice Work (MJW) programme, to improve witness attendance at court.¹²

Other reforms
32. The policy memorandum also suggests that other reforms, such as high court reform, aimed at allowing cases to be settled at an earlier stage, and summary justice reform, which introduced measures to make procedures “quicker, simpler, fair and effective”, have made the justice system “more responsive to the needs of victims and witnesses”.¹³

33. In 2010, the Scottish Government created the Making Justice Work (MJW) Programme, with the aim that “the Scottish justice system will be fair and accessible, cost-effective and efficient, and make proportionate use of resources”, and that “disputes and prosecutions will be resolved quickly and secure just outcomes”.¹⁴ MJW is composed of five projects aimed at (1) delivering efficient and effective court structures; (2) improving procedures and case management; (3) enabling access to justice; (4) co-ordinating IT and management information, and (5) establishing a Scottish Tribunals Service.¹⁵

The need for further reform
34. The Scottish Government, in the policy memorandum, recognises that, despite significant progress in improving the experience of victims and witnesses within the justice system in recent years,¹⁶ the justice system needs to do more to support victims and witnesses of crime.¹⁷

35. In May 2012, the Scottish Government launched a consultation on Making Justice Work for Victims and Witnesses¹⁸, outlining its proposals for improving services for victims and witnesses, which received 77 responses. Key themes emerging from responses have shaped the proposals contained in the Victims and Witnesses (Scotland) Bill, including—

- 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;

¹² Policy Memorandum, paragraph 14.
¹³ Policy Memorandum, paragraph 15.
¹⁴ Policy Memorandum, paragraph 16.
¹⁵ Policy Memorandum, paragraph 19.
¹⁶ Policy Memorandum, paragraph 27.
¹⁷ Policy Memorandum, paragraph 6.
• the need to ensure that all relevant agencies have access to adequate training, support and resources;

• the 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; and

• the need to ensure that offenders’ rights are recognised and that a balance between reparation and rehabilitation is managed effectively.  

36. In October 2012, Directive 2012/29/EU of the European Parliament and of the Council, establishing minimum standards on the rights, support and protection of victims of crime was finalised. Its objectives 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 from any public authority. The Directive relates exclusively to criminal proceedings and 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 receive information on their rights and their case in a way they understand;

• victim support exists;

• victims can participate in proceedings if they wish to and are helped to attend the trial;

• vulnerable victims are identified and properly protected; and

• victims are protected during the police investigation and court proceedings.  

37. In the policy memorandum on the Bill, the Scottish Government explains that, while Scotland already complies with much of this Directive, some legislative and non-legislative changes to the justice system will be required.

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21 Policy Memorandum, paragraph 10.

22 Policy Memorandum, paragraph 11.
Overview of the Bill

Key proposals
38. One of the two main purposes of the Victims and Witnesses (Scotland) Bill is to reform the justice system to improve the experience of victims and witnesses. The Bill aims to put victims’ interests at the heart of on-going improvements to the justice system and to ensure that witnesses are able to fulfil their public duty effectively. The Bill also implements a number of measures in EU Directive 2012/29/EU.

39. Key proposals in the Bill relating to victims and witnesses include—

- giving victims and witnesses a right to certain information about their case;
- creating a duty on organisations within the 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 certain special measures when giving evidence;
- requiring the court to consider compensation to victims in relevant cases;
- introducing a victim surcharge so that offenders contribute to the cost of supporting victims; and
- introducing restitution orders, allowing the court to require that offenders who assault police officers pay to support the specialist non-NHS services which assist in their recovery.

Definition of victim
40. There is no clear definition of ‘victim’ in the Bill. It further does not make any distinction between individuals who are victims of alleged crimes and those crimes that have been proven by the courts. The EU Directive on establishing minimum standards on the rights, support and protection of victims of crime, which is implemented in part by this Bill, does however contain the following definition of ‘victim’:

“A person should be considered a victim regardless of whether an offender is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between them. It is possible that family members of victims are also harmed as a result of the crime. In particular, family members of a person whose death has been directly caused by a criminal offence could be harmed as a result of the crime. Such family members, who are indirect victims of the crime, should therefore also benefit from protection under the Directive.”

41. The Committee heard concerns from some witnesses regarding use of the word ‘victim’ in the Bill to refer, not just to individuals involved in cases where guilt of an

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23 The second purpose is to establish a National Confidential Forum (NCF), which was considered by the Health and Sport Committee.
24 SPICe briefing 13/21, page 4.
offender has been proven, but also to cases before and during the court process. The Faculty of Advocates argued that this approach may give rise to an implicit assumption that the victim’s allegations are true, thereby undermining the presumption of innocence of the accused. The Faculty suggested using the word ‘complainer’ when referring to cases prior to and during a trial and limiting the term ‘victim’ to cases in which guilt has been proved.26

42. The Cabinet Secretary told the Committee that he was not in favour of using the term ‘complainer’ in the Bill. He argued that it was “in the best interests” of those going through the criminal justice system that the language used was understandable and that “for the victim to be told they are not the victim but the complainer might cause some consternation”.27

43. The Committee has sympathy for the Faculty of Advocates’ view (as set out in paragraph 41) and is concerned at any suggestion that the presumption of innocence of the accused may be compromised by the Bill’s use of the term ‘victim’ when referring to cases where guilt has not yet been proven or admitted. There is also the point that the word ‘complainer’ is used in the Criminal Procedure (Scotland) Act 1995 and, as some of the provisions in this Bill are to be incorporated into that Act, issues of clarity and consistency need to be addressed. However, the Committee acknowledges that the word ‘complainer’ may not strike the right tone for a Bill aimed at improving support for victims. We would therefore welcome the Cabinet Secretary’s views on this matter and would refer him to our recommendation on the definition of victim (at paragraph 27 of this report).

44. The Committee heard from some witnesses that a definition of victim should be included on the face of the Bill. For example, the Law Society of Scotland argued for a clear, unambiguous definition of victim to provide clarity to individuals, including victims’ families, as to whether they do or do not have rights under the Bill.28 The Law Society suggested using the definition of ‘victim’ contained in the Victims of Crime Assistance Act 2009 of Queensland, Australia, which specifies that—

“(1) A victim is a person who has suffered harm—

(a) because a crime is committed against the person; or

(b) because the person is a family member or dependant of a person who has died or suffered harm because a crime is committed against that person;

(c) as a direct result of intervening to help a person who has died or suffered harm because a crime is committed against that person.

26 Faculty of Advocates. Written submission, 11 April 2013.
28 Law Society of Scotland. Written submission, 18 April 2013.
(2) A person who commits a crime against a person as mentioned in subsection 1(a) is not a victim of the crime under subsection (1)(b) or (c)."\textsuperscript{29}

45. Victim Support Scotland supported the Law Society’s view that a definition of ‘victim’ including both victims and their family members should be included in the Bill to “ensure that all victims of crime have routine access to the rights and supports to which they are entitled”.\textsuperscript{30}

46. The Cabinet Secretary for Justice said that he was happy to reflect on the suggestion that a definition of ‘victim’ should be added to the Bill.\textsuperscript{31}

47. The Committee recommends that the Scottish Government gives full consideration to including a definition of ‘victim’ on the face of the Bill. This would assist in providing some clarity for individuals, in what may be extremely traumatic circumstances, as to what rights they have under the Bill. We also believe that a clear definition would in some way alleviate concerns raised that use of the term ‘victim’ in the Bill to refer to cases prior to and during a trial may give rise to an assumption that the accused is guilty. The Committee suggests that, as a starting point, the Scottish Government considers those definitions included in the Victims of Crime Assistance Act 2009 of Queensland, Australia, (as suggested by the Law Society of Scotland) and in the EU Directive on establishing minimum standards on the rights, support and protection of victims of crime.

48. The main body of this report sets out the Committee’s detailed scrutiny of the general principles of the Bill. In doing so, the Committee, for consistency, follows the Bill’s approach in using the term ‘victim’ to refer to individuals in cases before, during and after a criminal trial.

PROVISIONS IN THE BILL

Statement of general principles

49. Section 1 of the Bill sets out a list of general principles which the Lord Advocate, Scottish Ministers, Chief Constable, Scottish Court Service, and Parole Board of Scotland, must have regard to in carrying out their functions relating to “a person who appears to be a victim or witness in relation to a criminal investigation or proceedings”. The list of general principles is as follows—

- that a victim or witness should be able to obtain information about what is happening in the investigation or proceedings;
- 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 and proceedings; and

\textsuperscript{29} Law Society of Scotland. Supplementary written submission, 29 April 2013.
\textsuperscript{30} Victim Support Scotland. Written submission, 9 April 2013.
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.\textsuperscript{32}

50. Although the Crown Office and Procurator Fiscal Service (COPFS) and the Scottish Prison Service (SPS) are not named in the list of bodies to which these duties apply, they will be expected to follow the general principles set out in the Bill. However, as COPFS is a Ministerial Department, the actual duty will be placed on the Lord Advocate in relation to his functions of investigating and prosecuting crime. Similarly, as the SPS is an Executive Agency, the duty will be placed on the Scottish Ministers in respect of their functions relating to prisons and young offenders’ institutions and to detainees within them.\textsuperscript{33}

51. While there was broad support for the statement of general principles set out in the Bill, some concerns were raised regarding the meaning behind the general principle in section 1(3)(d): “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”. For example, Murdo Macleod QC of the Faculty of Advocates said that he could “only imagine that it means that people can effectively participate in terms of giving evidence”, but “beyond that, I have no idea what the provision means”.\textsuperscript{34} Superintendent Grahame Clarke of Police Scotland said that he thought it was perhaps “a statement of empowerment for victims”, but concluded that “the fact that there is confusion may be worthy of reflection, especially if not everyone understands what it is intended to mean”.\textsuperscript{35} David McKenna of Victim Support Scotland went further to argue that the provision was so unclear that it should be “struck from the Bill”.\textsuperscript{36}

52. The Cabinet Secretary told the Committee that this principle is a “high-level provision” which relates to the EU Directive.\textsuperscript{37}

53. The Committee has concerns regarding the level of confusion amongst organisations within the criminal justice system surrounding the meaning of section 1(3)(d) which would allow victims and witnesses, as far as would be appropriate to do so, to participate effectively in investigations and proceedings. We also consider that the lack of clarity on this provision could raise the expectations of victims that they will have a more active role to play in criminal proceedings than can realistically be met, or that, in the attempts to comply with this principle, access to justice for the accused may be compromised. We therefore urge the Scottish Government to consider either clarifying the meaning of section 1(3)(d) in guidance or removing the provision from the Bill.

Duty on justice organisations to set out standards of service

54. The prescribed bodies and individuals listed in section 1 (and above) are also required, under section 2 of the Bill, to set and publish standards in relation to a

\[\text{\textsuperscript{32} Victims and Witnesses (Scotland) Bill, section 1.}\]
\[\text{\textsuperscript{33} SPICe Briefing 13/21, page 7.}\]
\[\text{\textsuperscript{34} Scottish Parliament Justice Committee, Official Report, 23 April 2013, Col 2653.}\]
\[\text{\textsuperscript{35} Scottish Parliament Justice Committee, Official Report, 16 April 2013, Col 2597.}\]
\[\text{\textsuperscript{36} Scottish Parliament Justice Committee, Official Report, 16 April 2013, Col 2596.}\]
\[\text{\textsuperscript{37} Scottish Parliament Justice Committee, Official Report, 14 May 2013, Col 2756.}\]
criminal investigation or criminal proceedings. Furthermore, they must each set out a procedure for making and resolving complaints about the way in which they carry out their functions in respect of victims and witnesses.\(^{38}\)

55. The Bill does not set out the actual standards of service to be applied; it allows the prescribed organisations to develop their own standards. While there was no apparent desire amongst witnesses for the actual standards to be added to the Bill\(^{39}\), a number of witnesses highlighted the need to set them out in regulations\(^{40}\), and to include a reporting requirement to the Parliament to ensure evaluation, monitoring and accountability\(^{41}\). Scottish Women’s Aid went further in suggesting that the standards should include a duty to consult victims of crime and support organisations to inform regular reporting to the Parliament on how the standards are being complied with in practice.\(^{42}\)

56. The Committee asks the Scottish Government to consider placing the actual standards of service to be complied with by prescribed organisations and individuals, along with details of a reporting mechanism on how the standards are working in practice, within guidance for approval by the Parliament in order to improve the experiences of victims and witnesses.

**Disclosure of information about criminal proceedings**

57. Article 6 of the EU Directive on establishing minimum standards on the rights, support and protection of victims of crime requires that certain information be made available to victims.

58. The Scottish Government indicates in the policy memorandum on the Bill that, although much of this information is already available, there is no right for individuals to access this as a matter of course. Section 3 of the Bill therefore places a duty on the Chief Constable, the Scottish Court Service, and prosecutors to provide the following information to victims and witnesses about their case—

- a decision not to proceed with a criminal investigation and any reasons for it;
- a decision to end a criminal investigation and any reasons for it;
- a decision not to institute criminal proceedings against a person and any reasons for it;
- the place in which a trial is to be held;
- the date on which and time at which a trial is to be held;

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\(^{38}\) Victims and Witnesses (Scotland) Bill, section 2.

\(^{39}\) David McKenna of Victim Support Scotland and Superintendent Grahame Clarke of Police Scotland told the Committee that it was not necessary for standards to be included in the Bill.

\(^{40}\) Louise Johnson of Scottish Women’s Aid, David McKenna of Victim Support Scotland and Action Scotland Against Stalking stated that it would be helpful if standards were included in Regulations.

\(^{41}\) David McKenna of Victim Support Scotland, Louise Johnson of Scottish Women’s Aid and Scotland’s Commissioner for Children and Young People said they were in favour of monitoring and reporting arrangements in relation to standards of service.

the nature of charges libelled against a person;
the stage that criminal proceedings have reached; and
the final disposal in criminal proceedings and any reasons for it.\footnote{Victims and Witnesses (Scotland) Bill, section 3.}

59. While there was general support amongst witnesses for placing duties on certain organisations to provide case-specific information to victims and witnesses, a number of concerns arose in evidence regarding this section of the Bill. Firstly, some respondents, such as the Faculty of Advocates, argued that this duty must be based around “the flow of information, rather than on allowing complainers and others to become active participants”, as “to do otherwise would be to threaten the independence of the prosecution service”.\footnote{Faculty of Advocates. Written submission, 11 April 2013.} The Scottish Human Rights Commission also warned against this duty being interpreted to the detriment of the accused in impairing their right to a fair trial and fair hearing.\footnote{Scottish Human Rights Commission. Written submission, page 7.}

60. Others had concerns regarding the prescribed organisations’ ability to deliver on this duty. For example, David Ross of the Scottish Police Federation, said that his personal view was that, while the police service “absolutely want to disclose the relevant information”, it was “probably not prepared for delivering that”.\footnote{Scottish Parliament Justice Committee, \textit{Official Report}, 30 April 2013, Col 2709.} He suggested that issues with the IT systems currently in operation would in particular need to be addressed if the requirements to provide information as set out in the Bill were to be carried out properly.\footnote{Scottish Parliament Justice Committee, \textit{Official Report}, 30 April 2013, Col 2709.} Peter Lockhart of the Law Society of Scotland said he suspected that “there will be funding issues” more generally which would need to be “considered carefully”.\footnote{Scottish Parliament Justice Committee, \textit{Official Report}, 23 April 2013, Col 2656.} He further commented that “it would be unfortunate if victims and witnesses had expectations that could not be fulfilled due to current financial constraints” and that was a danger.\footnote{Scottish Parliament Justice Committee, \textit{Official Report}, 23 April 2013, Col 2656.}

61. A number of other witnesses suggested that further information was required in relation to the circumstances in which section 3(4) of the Bill would apply. Section 3(4) specifies that the prescribed organisations need not comply with a request to disclose the information where they consider that it would be “inappropriate” to do so. The Law Society of Scotland argued that clear guidance was required to clarify what was meant by the term “inappropriate”, including details of those factors that must be taken into account when deciding whether or not to comply with the request.\footnote{Law Society of Scotland. Written submission, 18 April 2013.} Scotland’s Commissioner for Children and Young People agreed that an explanation of when and why disclosure would be inappropriate was required.\footnote{Scotland’s Commissioner for Children and Young People. Written submission, 23 April 2013.}

62. More generally, victims and witnesses told the Committee that communication from criminal justice bodies must be improved. Indeed, David Ross of the Scottish Police Federation agreed that “all partners in the criminal justice system would accept that we have been poor at keeping victims and witnesses informed as to the
progress of cases in which they are involved‖. Victims also said that correspondence was often complex and difficult to understand, particularly when they may already be confused and distressed in the aftermath of the crime.

63. As the flow of information from criminal justice organisations was not as effective or co-ordinated as it should be, victims and their families often found themselves having to explain very traumatic events to several different organisations on a number of separate occasions. In fact, David McKenna of Victim Support Scotland confirmed that victims probably had to tell their story around 16 times. He went on to say that “there is a widespread sense that the justice system does not provide recognition of the individual’s experience and does not demonstrate respect or treat the individual with dignity”. Mr McKenna and Peter Morris stressed the need for all individuals who work in the criminal justice system dealing with victims and witnesses to be properly trained to show sensitivity and respect in communications with them.

64. A lack of compassion and human touch was a concern raised in relation to the Scottish Government’s intention, as set out in the policy memorandum, to carry out a feasibility study on creating an online hub to gather data from various organisations within the criminal justice system and allow direct access to this information for victims and witnesses. There was however general support for the proposal as a way of obtaining information quickly and efficiently. The Committee supports the proposal to create an online hub to give victims access to information about their individual case, but cautions against this tool completely replacing human interaction and support for victims, which we believe is vital.

65. Some witnesses supported the idea of having a single point of contact or ‘case companion’ to help individuals navigate their way through the criminal justice system. Diane Greenaway, a former precognition officer, said that she “could not stress enough the need for dedicated and informed support persons (case companions) who have essential experience of criminal justice processes”. However, others, such as Chief Superintendent Craig Suttie of the Association of Scottish Police Superintendents told the Committee that he was “not so comfortable with case companions, given issues about how they would be serviced and how they would get information”. There was also a mix of views from witnesses in relation to the creation of a Victim’s Commissioner. Some suggested that a Victim’s Commissioner could have a role in monitoring and reporting on whether the

54 Note of informal discussion with victims and witnesses, 26 March 2013.
59 Note of informal discussion with victims and witnesses, 26 March 2013.
60 Crown Office and Procurator Fiscal Service and Faculty of Advocates.
61 Peter Morris. Written submission, 21 February 2013.
62 Diane Greenaway. Written submission, 16 April 2013.
measures in the Bill are being met\textsuperscript{64}, while others argued that creating another layer in the system would only compound difficulties for support organisations in engaging with relevant criminal justice bodies.\textsuperscript{65} On balance, the Committee does not believe that a compelling case has been made in support of the introduction of case companions or for the establishment of a Victim’s Commissioner at this time. However, we acknowledge that some victims and witnesses asked for continuity in the support provided across the system.

66. The Committee believes that it is vital that communication with victims and witnesses is improved and therefore supports the duty in the Bill to disclose to them case-specific information. We believe that criminal justice bodies must also take better care to ensure that the written information they provide to victims and witnesses is in plain English.

67. The Committee notes concerns regarding the capacity of organisations to comply with the duty to provide information and calls on the Scottish Government to ensure that the necessary finances, training and support is available to those criminal justice bodies to ensure that expectations of victims and witnesses can be met. We also urge the Scottish Government to provide further guidance in relation to those circumstances in which it would be ‘inappropriate’ for an organisation to disclose case-specific information to victims under section 3 of the Bill.

Right to review a decision not to prosecute

68. Article 11 of the EU Directive on establishing minimum standards on the rights, support and protection of victims of crime specifies that “member states shall ensure that victims, in accordance with their role in the relevant criminal justice system, have the right to a review of a decision not to prosecute”.\textsuperscript{66} This right applies to decisions taken by prosecutors and the police, but excludes decisions taken by the courts or decisions of a prosecutor which result in an out-of-court settlement.

69. The Bill does not contain a specific right to review a decision not to prosecute. Victim Support Scotland\textsuperscript{67} and Scottish Women’s Aid\textsuperscript{68} argued that this right should be included in the Bill. In addition, Sandy Brindley of Rape Crisis Scotland explained that an explicit right to request a review of decisions not to prosecute could be “very helpful” in providing “a certain level of accountability for those decisions”.\textsuperscript{69}

70. David Harvie of the Crown Office and Procurator Fiscal Service (COPFS) told the Committee that COPFS’ view was that the current arrangements available to victims and witnesses to challenge decisions already comply with the Directive.\textsuperscript{70} However, he said that the Crown Agent had commissioned further research “to

\textsuperscript{64} Note of informal discussion with victims and witnesses, 26 March 2013.
\textsuperscript{66} Directive 2012/29/EU, Article 11.
\textsuperscript{67} Victim Support Scotland. Written submission, 9 April 2013.
\textsuperscript{68} Scottish Women’s Aid. Written submission, 8 April 2013.
establish whether further improvements can be made and whether a system of formal review would enhance the current position”.

71. The Committee notes the view of some witnesses that a right to request a review of decisions not to prosecute, as provided for under the EU Directive, could assist in ensuring that decisions are transparent and accountable. We therefore await with interest the conclusions from research commissioned by the Crown Agent on whether to introduce a system of formal review.

Fatal road accidents
72. During an evidence session on fatal road collisions, the Committee heard from some witnesses that the families of road death victims should, on request, have a statutory right to receive investigation documents at the conclusion of criminal proceedings (or at the end of relevant investigations where there are no criminal proceedings). Witnesses from COPFS told the Committee that current guidance to staff provides that this information should already be released to families in such circumstances and that family members should be made aware of this. However, the Scottish Campaign Against Irresponsible Drivers argued that this did not always happen in practice. COPFS indicated that it would seek to learn lessons from any past failures and would investigate the merits of providing the families of all road death victims with a short document setting out what material may be requested and how to submit such a request.

73. The Committee welcomes the Cabinet Secretary’s indication that he would be happy to engage with the Crown Office and Procurator Fiscal Service to ensure that the appropriate level of information is given to families of road death victims wherever possible and we would welcome an update on these discussions. Nevertheless, we believe that a statutory requirement may give a greater level of certainty to victims that they would be entitled to receive the information they request at the end of criminal proceedings.

Interviews

Interviews with children: guidance
74. 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. Revised Guidance on Joint Investigative Interviewing of Child Witnesses in Scotland published on 19 December 2011 aims to promote best practice for police and social workers undertaking JIIs with children and makes clear that such interviews should only be undertaken by trained and competent practitioners. Currently, this guidance has no statutory basis. The Scottish Government states in the policy memorandum that, although the guidance is being used, it should be placed on a statutory basis to ensure its effectiveness and to better reflect requirements in the EU Directive, such as allowing interviews to be audio-visually recorded and that such recorded
interviews may be used in evidence. Section 4 of the Bill therefore places a requirement on the police and social workers to have regard to the guidance.

75. The Committee considers that the proposal to put this guidance on a statutory footing is a positive move.

Certain sexual offences: victim’s right to specify the gender of interviewer

76. In compliance with the EU Directive, section 5 of the Bill introduces a right for victims of sexual offences, domestic abuse, human trafficking, and stalking, to choose the gender of any person who has reason to interview them. It also places a requirement on the police or any other person within criminal proceedings who is to interview a victim of these crimes to explain that they have a right to choose the gender of the person who will interview them. The Bill contains an exception for cases in which complying with a request for a particular gender of interviewer would be likely to prejudice an investigation.

77. Scottish Women’s Aid welcomed this right being placed in the Bill and argued that it should be extended to cover forensic examinations. Rape Crisis Scotland explained that “one of the most common complaints we hear from survivors is about how distressing it can be to be examined by a male doctor immediately following an experience of sexual violence”.

78. However, a number of witnesses representing the police highlighted that there may be practical difficulties in ensuring that this right to specify the gender of interviewer can be met. David Ross of the Scottish Police Federation said he was not confident that there would be enough appropriately trained police officers to carry out interviews in all areas of the country. Superintendent Craig Suttie of the Association of Scottish Police Superintendents agreed with this position, but suggested that it may be less of an issue since the introduction of a single police force.

79. David Ross accepted in principle Rape Crisis’ proposal to extend the right of victims of sexual offences to specify the gender of their forensic examiner, but argued that it could compound existing difficulties, as victims of sexual offences already frequently have to wait a significant length of time for the examination to take place irrespective of the gender of the examiner.

80. The Cabinet Secretary for Justice told the Committee that “there is a consciousness that it is not just desirable but, quite often, necessary for a victim to be able to specify the gender of an interviewer”. He did however accept that “there may be instances when that is not possible, but I think they will be few and far

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77 The EU Directive also specifies that a special representative must be appointed for child victims during interviews where the holders of parental responsibility are precluded from representing the child victim as a result of a conflict of interest, or where the child victim is unaccompanied or separated from the family. It further requires that, where a child victim is entitled to a lawyer, that they also receive legal advice and representation.

78 Victims and Witnesses (Scotland) Bill, section 5.


80 Rape Crisis Scotland. Written submission, 5 April 2013.


between”.\(^\text{85}\) He also stated that he was happy to look into the suggestion that victims should also be able to specify the gender of their forensic examiner.\(^\text{86}\)

81. The Committee notes the concerns raised regarding the practical difficulties for the police in complying with the requirement to allow victims to specify the gender of their interviewer and urges the Scottish Government to work in helping the police to improve its capacity to meet the rights under the Bill. The Committee suggests that consideration be given to specifying that, in those circumstances where it is not possible to comply with a request, a full explanation is provided to the individual concerned and is included in the report to the Procurator Fiscal.

82. The Committee welcomes the Cabinet Secretary's commitment to look into the suggestion that the right under section 5 be extended so that a victim can also specify the gender of their forensic examiner and looks forward to receiving details of his conclusions on this matter.

### Vulnerable witnesses

#### Special measures

83. The Vulnerable Witnesses (Scotland) Act 2004 sets out special measures available to vulnerable witnesses and the procedures to be followed in criminal proceedings to enable the use of these measures. It defines a ‘vulnerable witness’ as being either a (a) child (a person who is under the age of 16 at the time of the complaint or indictment is served on the accused), or (b) an adult witness, the quality of whose evidence may be diminished either as a result of a mental disorder or due to fear or distress associated with giving evidence.\(^\text{87}\)

84. Special measures under the 2004 Act include:

- taking evidence by a commissioner;
- use of a live television link;
- use of a screen;
- use of a supporter;
- giving evidence in chief in the form of a prior statement; and
- such other measures as the Scottish Ministers may, by order made by statutory instrument, prescribe.\(^\text{88}\)

85. The Bill contains a number of measures aimed at “ensuring that vulnerability is identified and to widen access to special measures for vulnerable witnesses so that

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\(^{87}\) Vulnerable Witnesses (Scotland) Act 2004, section 1.

\(^{88}\) SPICe briefing, pages 11-12.
they can give their best evidence, while, at the same time, ensuring that the justice process is fair to the accused\textsuperscript{89}, including:

- amending the definition of a ‘child witness’ so that all those under the age of 18 will \textbf{automatically} be entitled to use special measures, known as ‘standard special measures\textsuperscript{90}’ to assist them in giving evidence.\textsuperscript{91}

- amending the current definition of vulnerable witness in criminal proceedings to include victims of sexual offences, domestic abuse, human trafficking, and stalking. These victims will also be \textbf{automatically} entitled to use standard special measures when giving evidence.\textsuperscript{92}

- allowing any witness to be considered vulnerable following an individual assessment, which takes account of their personal characteristics, type or nature and circumstances of the crime. The party citing the witness (which in most cases will be the Crown Office and Procurator Fiscal Service) will be obliged to carry out individual assessments of each of their intended witnesses to establish whether that witness is vulnerable and, if they are, to submit an application, specifying which special measures would be appropriate to assist them. The court will then determine if they are indeed vulnerable and if the special measures sought are appropriate. ‘Special measures’ comprise a live television link; a screen; a supporter; giving evidence in the form of a prior statement, taking evidence by commissioner, and a closed court.\textsuperscript{93}

- allowing objections to the use of both automatic standard special measures and special measures to be lodged by either party if they consider that such a request is inappropriate in the circumstances. The policy memorandum states that there is currently limited opportunity to do this.\textsuperscript{94}

- adding a closed court to the list of special measures as a possible option for vulnerable witnesses. The policy memorandum makes clear that this option, along with the use of a screen, will not be available to any accused persons that are identified as vulnerable.\textsuperscript{95}

86. Murdo Macleod QC of the Faculty of Advocates told the Committee that it is expected that around 18,000 additional witnesses will be deemed vulnerable under the proposals in the Bill.\textsuperscript{96}

87. There was broad support amongst witnesses for these provisions and a recognition that improved access to special measures would allow more vulnerable

\textsuperscript{89} Policy Memorandum, paragraph 61.
\textsuperscript{90} Standard special measures consist of the use of a live television link, a screen, and the use of a support. The party citing a vulnerable witness who is automatically entitled to standard special measures may also apply to the court that they give evidence (a) in the form of a prior written statement; (b) to a Commissioner, or (c) in closed court.
\textsuperscript{91} Policy Memorandum, paragraph 63.
\textsuperscript{92} Policy Memorandum, paragraph 69.
\textsuperscript{93} Policy Memorandum, paragraph 70.
\textsuperscript{94} Policy Memorandum, paragraphs 80-82.
\textsuperscript{95} Policy Memorandum, paragraph 76.
witnesses to give their best evidence. A number of witnesses further argued that improved access to special measures should similarly be provided in civil cases.

88. Sandy Brindley of Rape Crisis Scotland suggested that the ability to give greater certainty to victims that they will automatically be entitled to access special measures was very welcome. However, the Committee also heard that the introduction of a right for parties to object to the use of automatic standard special measures removed this certainty for some victims. For example, Victim Support Scotland stated in its written evidence that this provision was, of all of the Bill’s provisions, its “greatest concern” and called for its removal from the Bill. It went on to state that “this provision will have extremely negative consequences for witnesses; most notably it will increase witnesses’ anxieties around attending court and giving evidence, as well as slowing down the trial process and negatively impacting on the quality of evidence provided by witnesses”.

89. COPFS suggested that the automatic entitlement to standard special measures should not be open to challenge and argued that this appeared to undermine the purpose of creating two categories of special measures – standard and non-standard. It went on to state that “it should not be possible to argue that a victim of a sexual offence is not vulnerable – in the same way that it is not currently possible to argue that a 15 year old is not a child witness”.

90. Murdo Macleod QC of the Faculty of Advocates told the Committee that the automatic entitlement to standard special measures may raise the expectations of vulnerable witnesses, when in fact objections to that entitlement may come at any stage of the process. He further argued that “the Government has perhaps got itself into a bit of a pickle ... because, if the measures are mandatory, why should there be a right to object?” He went on to confirm that his solution would be to remove the automatic entitlement to standard special measures. The Law Society of Scotland welcomed “very much” the right to challenge applications for special measures.

91. There was particular concern that the Bill would allow objections to child witnesses accessing automatic standard special measures and some witnesses therefore called for child witnesses to be exempt from objections under section 9 of the Bill. Scotland’s Commissioner for Children and Young People, for example, questioned how an objection could be raised on the basis of age “because someone is either a child or an adult – it is quite simple”.

92. The Cabinet Secretary for Justice confirmed that the right to object to special measures was introduced as a result of the EU Directive, but noted that the issues

97 Victim Support Scotland, Scottish Women’s Aid and Rape Crisis Scotland.
98 Scottish Women’s Aid and Action Scotland Against Stalking.
100 Victim Support Scotland. Written submission, 9 April 2013.
raised in evidence regarding special measures had caused the Scottish Government some concern. He agreed to discuss the matter further with the Crown Office and Procurator Fiscal Service and Victim Support Scotland.\textsuperscript{107}

93. The Committee welcomes the Cabinet Secretary for Justice’s commitment to consider fully the provisions in the Bill relating to access for vulnerable witnesses to special measures and the right to object to such measures and, in doing so, we would urge him to make every effort to strike the appropriate balance between the rights of victims and the accused. More generally, the Committee seeks clarification as to where responsibility lies in relation to establishing the vulnerability of victims and witnesses and confirmation that those organisations involved in identifying vulnerability will be examining their procedures in light of these provisions in the Bill.

\textit{Removal of presumption that child witnesses under the age of 12 will give evidence away from the court building}

94. The Vulnerable Witnesses (Scotland) Act 2004 included a presumption that child witnesses under the age of 12 should give evidence away from the court building in trials concerning specific offences, including murder, culpable homicide, and abduction.\textsuperscript{108} The court is therefore currently unable to make an order to allow the child witness to be present in court or be within the court building unless the child has expressed a wish to be present, or where the risk of prejudice to the fairness of the trial and to the interests of justice outweigh the risks to the interests of the child.

95. The Scottish Government states in the policy memorandum on the Bill that the current presumption is being applied too rigidly by the courts and so, in some cases children have been required to give evidence remotely, separately from their parents who are giving evidence in court, causing additional stress to both the child and parents.\textsuperscript{109} Section 10 of the Bill therefore seeks to place greater weight on the wishes of the child and creates a presumption that a child witness will give evidence in the court room where they have expressed a wish to do so.

96. Some witnesses, including Children 1\textsuperscript{st}, argued that current legislation adequately protects children and expressed concern that the proposals may have the unintended consequence of other people deciding that the child should be in court.\textsuperscript{110}

97. However, the Cabinet Secretary for Justice suggested that the provisions in the Bill were “based on the best evidence” and would in fact “place greater weight on the child’s views”.\textsuperscript{111}

98. The Committee asks the Scottish Government to make every effort to ensure that removal of the presumption that child witnesses under the age of 12 will give evidence away from the court building does not lead to the unintended consequence of children giving evidence in court against their will.

\textsuperscript{108} Vulnerable Witnesses (Scotland) Act 2004, section 1.
\textsuperscript{109} Policy Memorandum, paragraph 96.
Victim statements

99. Victim statements were introduced in 2009 to allow victims of serious crimes (and in some cases their relatives) to provide a written account of the emotional, physical or financial impact of the crime. A prosecutor must lay any victim statement before the court when moving for sentence in solemn proceedings or, in summary proceedings, when a guilty plea is tendered.\(^{112}\) The policy memorandum suggests that, on occasion, the victim statement has not been available at the required time due, for example, to a very early guilty plea.\(^ {113}\) Section 19 of the Bill would allow a victim statement to be submitted to the court at any time after the prosecutor moves for sentence (or the accused pleads guilty or is found guilty), but before sentence is passed. This approach aims to ensure that the victim is not prejudicially affected if their statement is not available at the time of a guilty plea.\(^ {114}\)

100. Currently, children under 14 are entitled to have a victim statement made on their behalf by a carer if they are the direct victim of the crime. This entitlement does not extend to situations where the child under 14 is a son, daughter or sibling of a victim who has died, however, relatives aged 14 and over can make a statement in these cases. The Bill seeks to resolve this anomaly so that a child under 14, who is not a direct victim of the crime, can have a victim statement made on their behalf by a carer.\(^ {115}\)

101. During an informal round-table discussion with victims, the Committee heard that victim statements were not always read out in court and that, in some cases, there was doubt that they were considered at all by the court before sentencing.\(^ {116}\)

102. The Committee has concerns regarding the apparent lack of regard given to victim statements by the courts given that, in writing them, victims are likely to have spent some time and experienced distress reliving the crime, in the belief that their statement will have some impact. The Committee asks the Cabinet Secretary to respond to these concerns.

Sentencing

Duty to consider making compensation orders

103. Under Section 249 of the Criminal Procedure (Scotland) Act 1995, compensation orders may be imposed by the court in respect of personal injury, loss or damage caused directly or indirectly to the victim or any alarm or distress caused directly to the victim.\(^ {117}\) For the purposes of the 1995 Act a ‘victim’ is defined as a person against whom or a person against whose property the acts constituting the offence was directed. It is not competent for the court to make a compensation order—

- where the court makes an order discharging the person absolutely (because the court considers it to be inexpedient to inflict punishment);

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\(^{112}\) SPICe briefing 13/21, page 16.
\(^{113}\) Policy Memorandum, paragraph 119.
\(^{114}\) Policy Memorandum, paragraph 120.
\(^{115}\) Policy Memorandum, paragraph 120.
\(^{116}\) Note of informal discussion with victims and witnesses, 26 March 2013.
\(^{117}\) Criminal Procedure (Scotland) Act 1995, section 249.
• where the court imposes a community payback order;
• at the same time as it defers sentence.\textsuperscript{118}

104. The EU Directive requires that victims of crime should be entitled to a decision on receiving compensation from the offender within a reasonable time and seeks to encourage member states to promote measures to ensure offenders provide compensation.\textsuperscript{119} Currently there is no obligation on the court to consider imposing a compensation order.\textsuperscript{120} Section 20 of the Bill places a duty on the courts to consider making a compensation order “in any case where it would be competent for the court” to do so.

105. Some witnesses supported the proposal to require courts to consider imposing a compensation order. South Lanarkshire Council, for example, argued in its written submission that this would “reinforce the link between an offence being committed and a victim being acknowledged and compensated”.\textsuperscript{121} The Scottish Human Rights Commission highlighted that “compensation is one of the principal forms of reparation and often an essential part of a victim’s remedy”.\textsuperscript{122}

106. Others expressed concern about the appropriateness of applying compensation orders in sexual offence and domestic abuse cases where victims would not wish to receive money from, or have any form of contact with, those individuals who have been convicted. Scottish Women’s Aid\textsuperscript{123} and Rape Crisis Scotland\textsuperscript{124} therefore emphasised the need for victims’ views to be taken into account on whether they wish a compensation order to be considered before any decision is made by the court.

107. The Cabinet Secretary for Justice confirmed that “if someone did not want a compensation order because it might rub salt in the wound, it should not be granted” and said that the Scottish Government would “ensure that appropriate guidance is given and action taken” on this matter.\textsuperscript{125}

108. The Committee recognises how distressing it would be for victims of some offences to receive money from their offender. We therefore welcome the Cabinet Secretary’s assurances that appropriate guidance will be prepared to ensure that victims’ views on whether or not the appropriateness of a compensation order being imposed are taken into account.

Restitution Orders
109. Section 21 of the Bill seeks to introduce restitution orders for those who are convicted of the statutory offence of assaulting a police officer or member of police staff, as set out in the Police and Fire Reform (Scotland) Act 2012. The policy

\textsuperscript{118} Criminal Procedure (Scotland) Act 1995, section 249.
\textsuperscript{119} Policy Memorandum, paragraph 123.
\textsuperscript{120} Policy Memorandum, paragraph 123.
\textsuperscript{121} South Lanarkshire Council. Written submission, 9 April 2013.
\textsuperscript{122} Scottish Human Rights Commission. Written submission, 8 April 2013.
\textsuperscript{123} Scottish Parliament Justice Committee, Official Report, 16 April 2013, Cols 2621-2622.
\textsuperscript{124} Rape Crisis Scotland. Written submission, 5 April 2013.
\textsuperscript{125} Scottish Parliament Justice Committee, Official Report, 14 May 2013, Col 2778.
memorandum on the Bill explains that, in comparison to other forms of employment, police officers and police staff are at disproportionate risk of being assaulted while carrying out their job and that this is reflected in current arrangements to support those police officers and staff who are assaulted and need particular care after these incidents. This support is provided through the Police Benevolent Fund and Police Treatment Centres and is largely paid for by police officers themselves.

110. The Scottish Court Service would be responsible for the collection of the restitution order (as with fines), and funds raised would be placed in a fund initially administered by the Scottish Government to be used to support or promote the physical and/or mental health and wellbeing of police officers and staff. The policy memorandum explains that restitution orders 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. Restitution orders would however replace the victim surcharge.

111. An offender convicted of an offence of assaulting a police officer or member of police staff under the 2012 Act could have a sentence imposed which included three financial penalties: a restitution order, a compensation order, and a fine. Where a person does not have sufficient means to pay all three penalties, the Bill provides that the court should move to impose a compensation order, then a restitution order, and finally a fine. In such cases, any payment made is applied first to any compensation order, until it is fully paid, then to any restitution order, until that has been fully paid, and then to any fine.

112. There were concerns regarding the ability to collect the payments where a restitution order has been imposed, with Professor Alan Miller of the Scottish Human Rights Commission suggesting this would be like “getting blood out of a stone”.

113. Peter Lockhart of the Law Society of Scotland questioned whether ‘the man on the street’ would understand the difference between a compensation order, restitution order and a victim surcharge and therefore whether the link between the crime and the payment imposed would be as clear as was intended.

114. Murdo Macleod QC questioned why restitution orders would only apply to police officers and suggested that they should be extended to also cover other occupations at risk. South Lanarkshire Council took a similar view, suggesting that the scope of restitution orders should be expanded to include “any worker undertaking duties in the course of public service as defined by the Emergency Workers (Scotland) Act.

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126 Policy Memorandum, paragraph 138.
127 Policy Memorandum, paragraph 138.
128 Policy Memorandum, paragraph 139.
129 The Bill provides for the introduction of a victim surcharge in sentences where a fine is imposed. Funds raised through the surcharge will go to a central Victim Surcharge Fund to provide practical assistance and support to victims with “immediate unmet needs”, such as funeral or cleaning costs.
130 SPICe briefing 13/21, page 18.
131 SPICe briefing 13/21, page 18.
2005”.\textsuperscript{136} David Ross of the Scottish Police Federation confirmed that there was no resistance from the police to extending the provision beyond the police service.\textsuperscript{137}

115. Witnesses were asked whether they thought there could be a conflict of interest in respect of restitution orders, given that police officers may be prosecution witnesses in a court case where the outcome may result in a restitution order. Superintendent Grahame Clarke responded that “unless such orders operate in a manner that establishes a firewall between the court proceedings and how the restitution is made, they may leave police officers open to the accusation of a conflict of interest”.\textsuperscript{138} Others, such as Murdo Macleod QC\textsuperscript{139} and Chief Superintendent David O’Connor\textsuperscript{140}, said they had faith that police officers would give evidence truthfully without being influenced by the prospect of a restitution order being imposed. On balance, the Committee is persuaded that a conflict of interest is unlikely to arise.

116. The Cabinet Secretary for Justice told the Committee that the Scottish Government had not ruled out the suggestion that restitution orders be extended to include others in the emergency services. However, he did not want to “create a system in which the administrative costs and burden of running it outweigh any benefit”.\textsuperscript{141}

117. The Committee accepts that police officers and staff are at disproportionate risk of being assaulted while at work; however, we believe that introducing restitution orders only for police officers and staff and not for other occupations could prove divisive. We also appreciate that extending restitution orders may increase administration costs. On balance, we would ask the Scottish Government to give further consideration to the merits of this proposal.

Victim surcharge

118. The policy memorandum states that “the Scottish Government considers that, regardless of whether or not the court imposes a direct compensation order, offenders should be made more accountable for the harm or damage caused by their actions and should contribute to supporting the needs of victims of crime generally”.\textsuperscript{142} Section 22 of the Bill requires the court to impose a victim surcharge on offenders in certain circumstances, to be set out in secondary legislation. Scottish Ministers also intend to set out the amount of the victim surcharge by regulations. In the first instance, the surcharge will only be imposed in cases resulting in a court fine, but the Scottish Government will be able to extend the surcharge to apply to other types of sentence if application to fines proves to be successful.\textsuperscript{143}

\textsuperscript{136} South Lanarkshire Council. Written submission, 9 April 2013.
\textsuperscript{142} Policy Memorandum, paragraph 126.
\textsuperscript{143} Policy Memorandum, paragraphs 128-129.
119. The funds raised through the surcharge will go to a central Victim Surcharge Fund to provide practical assistance and support to victims with “immediate unmet needs”, for example:

- basic life essentials;
- removal costs (for personal safety);
- funeral costs;
- cleaning (for example, following a violent incident in a victim’s home).  

120. The policy memorandum states that, while no decisions have yet been taken in respect of how the amount of surcharge will be calculated, the Scottish Government has developed a model which may be used. Under this model, the amount of surcharge would be linked to the amount of the court fine, by way of a scale set out in secondary legislation. It goes on to state that, based on previous years, a reasonable estimated collection rate is likely to be around 66 per cent after one year, and around 90 per cent after three years.

121. A victim surcharge scheme operates in England and Wales, and in Northern Ireland, and the funds gathered are used to support projects and services for victims and witnesses. The Scottish Government states in the policy memorandum that it did consider adopting a similar approach, but decided that responding to the immediate needs in the aftermath of a crime would “best serve victims”.

122. In its report on the delegated powers memorandum on the Bill, the Subordinate Legislation Committee drew the Justice Committee’s attention to the powers in section 22 of the Bill, which it considered to be wide, as they enable the Scottish Ministers to prescribe in regulations any amount of victim surcharge to be ordered by the court, and in relation to any sentences prescribed. The Scottish Government acknowledged the points made by the Subordinate Legislation Committee and undertook to consult those bodies affected by the proposed regulations under section 22, before laying draft regulations in the Parliament.

123. While some witnesses were in favour of a victim surcharge, others had concerns surrounding its impact on the rights of the offender and potential difficulties in its collection. David McKenna of Victim Support Scotland supported introduction of the victim surcharge. He told the Committee he believes that it should be applied more widely so that everyone convicted of an offence in Scotland should be required to contribute to the fund to help victims.

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144 Policy Memorandum, paragraph 130.
145 Policy Memorandum, paragraph 131.
146 Policy Memorandum, paragraph 133.
147 Policy Memorandum, paragraph 136.
124. However, Murdo Macleod QC said he was concerned that the requirement under the Bill to impose a victim surcharge and setting payment at a prescribed amount was "regressive and potentially unfair". He argued that current arrangements, whereby the judge or sheriff has discretion on whether or not to impose a fine and is statutorily obliged to take into account the means of the offender before setting the payment amount, were more acceptable.

125. As with restitution orders, others highlighted practical difficulties in collecting the surcharge. For example, Sacro suggested that, "given the number of offenders currently imprisoned for non-payment of fines, this proposal has the potential to increase the prison population unnecessarily". However, Cliff Binning of the Scottish Court Service said that recovery of fines had improved in recent years and therefore he was confident in the SCS’ capacity to recover financial penalties. David McKenna suggested that international experience shows that, “when a penalty is introduced that involves returning something to the victim, recovery increases”.

126. There was also some concern that imposing the victim surcharge in those cases resulting in a court fine may disproportionately affect motorists in road traffic offences where there is not always a victim, and therefore this could be seen as generating income rather than imposing a punishment. Diane Greenaway suggested in written evidence that the victim surcharge should therefore be re-examined to place more emphasis on serious crime, and less on road traffic offences.

127. The Cabinet Secretary for Justice confirmed that he was content that the court service would “do an outstanding job in collecting the surcharge, as it seeks to do in collecting fines”.

128. The Committee welcomes the Scottish Government’s commitment to consult those bodies affected by section 22 of the Bill in relation to the victim surcharge, before laying draft regulations before the Parliament. The Committee would welcome sight of these regulations as soon as possible to assist its scrutiny of the Bill.

Release of offender: victim’s rights

Victim’s right to receive information about the release of an offender

129. Under the Criminal Justice (Scotland) Act 2003, victims have a right, in certain criminal cases, to apply to join the Victim Notification Scheme (VNS) to receive information about the release of an offender. As introduced, this scheme applied to victims of offenders with custodial sentences of four years or more and who have committed a particular offence set out in the Victim Notification (Prescribed Offences) (Scotland) Order 2004. The scheme was extended in 2008 to include victims of offenders with sentences of 18 months or more and who committed an offence listed

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153 Sacro. Written submission, 8 April 2013.
156 Diane Greenaway. Written submission, 16 April 2013.
158 SPICe briefing 13/21, page 9.
in the 2004 Order. The scheme is in two parts and victims can apply to join either or both parts.

130. 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 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.\(^{159}\)

131. Part 2 of the scheme entitles victims to be informed if the offender is being considered either for parole or temporary release on Home Detention Curfew.\(^{160}\) The victim is given the opportunity to send written comments to the Parole Board when it is considering whether to grant an offender’s release on parole and to the Scottish Prison Service when it is considering a prisoner’s release on Home Detention Curfew. The Parole Board will inform the victim of its recommendations and, if the prisoner is released on licence, of any conditions attached to that licence which relate to the victim or their family. Similarly, the Scottish Prison Service will send a letter to the victim advising them of the date of the offender’s release.\(^{161}\)

132. The EU Directive requires that victims should be able to access information about the release and escape of prisoners and, while it does not specify a length of sentence at which a victim may receive this information, it does suggest that cases involving minor offences should be excluded.\(^{162}\) The Scottish Government considers that the VNS should be extended to better reflect the Directive.\(^{163}\) Section 23 of the Bill therefore seeks to amend the 2003 Act to make changes to the VNS, including to the list of prescribed offences set out in the 2004 Order.\(^{164}\)

133. Section 24 of the Bill will also allow certain victims who are registered on the Victim Notification Scheme to make oral representations to a member of the Parole Board for Scotland when a prisoner becomes eligible for release on licence and/or when licence conditions are being set, if they so wish.\(^{165}\) This will only apply to life sentence prisoners in the first instance, with an option to extend it to other categories of prisoner in the future. Written representations will continue to be offered. The Scottish Government states in the policy memorandum that the policy intention is that “victims should feel more involved in the criminal justice process and that they should

\(^{159}\) SPICe briefing 13/21, page 9.
\(^{160}\) SPICe briefing 13/21, page 9.
\(^{161}\) SPICe briefing 13/21, page 9.
\(^{162}\) Policy Memorandum, paragraph 50.
\(^{163}\) Policy Memorandum, paragraph 50.
\(^{164}\) Policy Memorandum, paragraph 51.
\(^{165}\) Policy Memorandum, paragraph 113.
have the option of making representations in person rather than in writing if they feel that this would better allow them to convey their views.”

134. Section 25 of the Bill gives victims the right to make written representations to the Scottish Prison Service when prisoners are first eligible for temporary release, and to raise concerns about any conditions that are to be placed on the offender during temporary release.

135. 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 (instead of 18 months or more) will be eligible to participate in the VNS.

136. Main concerns raised in relation to extending victim’s rights regarding the release of an offender surrounded the proposal to allow victims to make oral representations before life prisoners are released on licence. Professor Alan Miller of the Scottish Human Rights Commission told the Committee that the prisoner should have the right to respond to any concerns raised by the victim to ensure that the Parole Board “is looking at the case independently”. Murdo Macleod QC agreed that “there is scope for an accused to be unfairly prejudiced by information being passed over to the Parole Board or another organisation without their having the opportunity to respond to or perhaps challenge that information”.

137. The Parole Board confirmed to the Committee that the prisoner was already able to challenge the detail of written representations made by victims and that this will continue under the measures proposed in the Bill. John Watt, Chair of the Parole Board explained that, “if a prisoner thinks that the information provided [by the victim] is inaccurate in some way, it is only fair that they can bring information before the tribunal to challenge that”. Graham Ackerman of the Criminal Law and Licensing Division at the Scottish Government clarified that the proposal is “not a massive departure from what happens at the moment”. The victim’s oral representations to a Parole Board member would be written into an agreed statement which would be made available to the prisoner and could be challenged at the tribunal.

138. The Parole Board itself had some concerns about this proposal. It confirmed that the main consideration of the Parole Board is to assess whether an offender is likely to be a risk to the community if they are released on licence. It therefore argued that “careful consideration will need to be given to ensure that this Bill does not raise false expectations on behalf of the victim that their representations will influence the Board’s decision on whether or not to release the offender if their only reasons for objecting to release relate to the offence and its subsequent impact on the victim”.

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166 Policy Memorandum, paragraph 112.
167 Policy Memorandum, paragraph 52.
173 Parole Board for Scotland. Written submission, 8 April 2013.
174 Parole Board for Scotland. Written submission, 8 April 2013.
139. The process of assessing whether a life prisoner should be released is likely to be an extremely traumatic experience for a victim and it is therefore essential that they are not given false expectations as to the level of influence that their representations can have on the Parole Board of Scotland’s decision. The Committee therefore believes that guidance is required to ensure that victims are fully aware of the Parole Board’s role in assessing the risk of the offender if they are released on licence. This guidance should include, for the benefit of the victim, those factors that they may comment on and should also make clear that the victim’s views are shared with the offender.

Policy and Financial Memorandums

140. The lead committee is required under Rule 9.6.3 of Standing Orders to report on the policy memorandum which accompanies the Bill. We consider that the memorandum provides adequate detail on the policy intention behind the provisions in the Bill and explains why alternative approaches considered were not favoured. The Committee was also content with the details of the Making Justice Work for Victims and Witnesses consultation conducted by the Scottish Government prior to introduction of the Bill.

141. The same rule also requires the lead committee to report on the financial memorandum. The Committee notes that the Finance Committee was satisfied that no substantive issues were raised in the written submissions it received in response to its call for evidence, and did not opt to undertake any further scrutiny or report to this Committee. We are therefore content with the level of detail provided in the financial memorandum.

GENERAL PRINCIPLES

142. Under Rule 9.6.1 of Standing Orders, the lead committee is required to report to the Parliament on the general principles of the Bill. In doing so, the Justice Committee has taken into consideration the recommendation of the Health and Sport Committee that the Bill, as it affects sections 26 and 27 on establishment of a National Confidential Forum, should proceed to Stage 2 consideration.

143. The Committee supports the general principles of the Bill. We consider that the Bill provides much-needed support and protection for victims and witnesses and we hope that it will help improve their experiences of the criminal justice system in the future. However, we believe that improvements are required to certain provisions in the Bill, in particular to ensure that the rights of both the accused and those of victims and witnesses are balanced appropriately. Our recommendations on these issues are set out in the main body of this report.

OTHER ISSUES ARISING DURING EVIDENCE

144. The report set out above focuses specifically on the provisions in the Bill aimed at supporting and protecting victims and witnesses. The Committee however considers that one particular concern raised by witnesses relating to current practice is also worth noting.
145. This concern relates to the lack of legal representation for victims in dealing with defence applications to access medical and other sensitive records and to introduce evidence relating to sexual history or character. Currently, the Crown has the right to oppose any application of this nature; however, the Faculty of Advocates told the Committee that this may give rise to a conflict of interest “between the prosecution position, representing the public interest, and the very personal position of the victim”. The Faculty argued that there should be a “presumption of entitlement” for victims to have independent representation at hearings where applications of the nature described above are made, and highlighted that legal representation at these hearings are “commonplace in other jurisdictions”.

146. Rape Crisis Scotland had particular concerns at the lack of legal representation when defence applications are being made to introduce evidence in sexual offence cases relating to the victim’s sexual history or to access medical information. It argued that the Crown, in considering whether or not to oppose any such defence applications, is not acting directly on behalf of the victim and so there may be situations where the Crown does not oppose an application that a victim would have wished to be challenged. Rape Crisis went on to state that “we believe that for complainers of sexual offences to have any real prospect of protecting their private and family life, as set out in Article 8 of the European Convention on Human Rights, they must have access to independent legal representation, funded by Legal Aid, for matters relating to sexual history and character evidence and access to medical records”.

147. Graham Ackerman of the Criminal Law and Licensing Division at the Scottish Government told the Committee that the Scottish Government was open to receiving further detail from the Faculty of Advocates and Rape Crisis Scotland on this proposal.

148. The Committee does not consider that it has heard sufficient evidence to fully support the views of the Faculty of Advocates and Rape Crisis Scotland on legal representation for victims during defence applications to access and admit sensitive information regarding a victim. However, we do consider this issue to be worthy of further consideration and we therefore ask the Scottish Government to examine this proposal further with the two organisations and others and to report back to the Committee in due course.

149. The Committee also wishes to highlight a number of other issues raised during evidence which do not directly relate to the Bill, but which we believe need to be addressed in order to better support victims and witnesses. The first is the need to ensure segregation of victims and the accused in court buildings, as many witnesses told us that this did not always happen in practice and that it was often intimidating and distressing. We would also like to clarify why child witnesses do not appear to be allowed access to prior statements that they have made before giving evidence,

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175 Faculty of Advocates. Written submission, 11 April 2013.
176 Faculty of Advocates. Written submission, 11 April 2013.
177 Rape Crisis Scotland. Written submission, 5 April 2013.
178 Rape Crisis Scotland. Written submission, 5 April 2013.
180 Note of information discussion with victims and witnesses, 26 March 2013.
whereas adults are able to benefit from this.\(^{181}\) We were also concerned to hear that the police do not conduct a formal assessment of the vulnerability of a victim or witness and therefore, that any initial information regarding significant risk to them or to the quality of their evidence is not necessarily being provided to the procurator fiscal.\(^{182}\) We consider that this may have serious consequences when considering whether to release the accused on bail. Finally, victims who may be at significant risk of harm are not always informed that the accused has been granted bail or told of any bail conditions attached that may affect them, such as conditions not to approach the victim or to enter a certain area.\(^{183}\) We would therefore welcome the Scottish Government’s views on these matters in due course.

\(^{182}\) Police Scotland. Supplementary written submission, 13 May 2013.
ANNEXE A: REPORTS FROM OTHER COMMITTEES

Health and Sport Committee consideration
The Health and Sport Committee’s report to the Justice Committee on the Victims and Witnesses (Scotland) Bill is available at:
http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/63829.aspx

Finance Committee consideration
The Finance Committee’s call for written evidence on the Financial Memorandum to the Victims and Witnesses (Scotland) Bill prompted eight responses, the majority of which made no substantive comments. The Finance Committee therefore agreed not to undertake any further scrutiny of the Financial Memorandum and did not produce a report to the Justice Committee (or to the Health and Sport Committee on the costs associated with the National Confidential Forum). The responses received are available at:

Subordinate Legislation Committee consideration
The Subordinate Legislation Committee’s report to the Justice Committee on the Victims and Witnesses (Scotland) Bill is available at:
http://scottish.parliament.uk/S4_SubordinateLegislationCommittee/Reports/sur-13-20w.pdf
ANNEXE B: EXTRACTS FROM THE MINUTES

5th Meeting, 2013 (Session 4) Tuesday 19 February 2013

Victims and Witnesses (Scotland) Bill (in private): The Committee considered its approach to the scrutiny of the Bill at Stage 1 and agreed: (a) to focus its scrutiny on the victims and witnesses provisions in the Bill; (b) the proposed timetable for scrutiny of the Bill; (c) to issue a call for written evidence; (d) not to appoint an adviser; and (e) to explore further at a future meeting suggested witnesses and proposals for potential fact-finding visits.

8th Meeting, 2013 (Session 4) Tuesday 12 March 2013

Victims and Witnesses (Scotland) Bill (in private): The Committee considered its approach to the scrutiny of the Bill at Stage 1 and agreed (a) potential witnesses; and (b) to undertake fact-finding visits.

9th Meeting, 2013 (Session 4) Tuesday 19 March 2013

Victims and Witnesses (Scotland) Bill - witness expenses: The Committee agreed to delegate to the Convener responsibility for arranging for the SPCB to pay, under Rule 12.4.3, any expenses of witnesses on the Bill.

11th Meeting, 2013 (Session 4) Tuesday 16 April 2013

Victims and Witnesses (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—
- David McKenna, Chief Executive, Victim Support Scotland;
- Cliff Binning, Executive Director Field Services, Scottish Court Service;
- David Harvie, Director of Serious Casework, Crown Office and Procurator Fiscal Service;
- Superintendent Grahame Clarke, Safer Communities, Police Scotland;
- Sandy Brindley, National Co-ordinator, Rape Crisis Scotland;
- Louise Johnson, National Worker - Legal Issues, Scottish Women's Aid;
- Peter Morris, petitioner and campaigner.

12th Meeting, 2013 (Session 4) Tuesday 23 April 2013

Victims and Witnesses (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—
- Peter Lockhart, Criminal Law Committee, Law Society of Scotland;
- Murdo Macleod QC, Faculty of Advocates;
- Professor Alan Miller, Chair, Scottish Human Rights Commission;
- Colin McConnell, Chief Executive, Scottish Prison Service;
- John Watt, Chairman, and Heather Baillie, Vice Chair, Parole Board for Scotland.

Roderick Campbell indicated that he is a member of the Faculty of Advocates.
13th Meeting, 2013 (Session 4) Tuesday 30 April 2013

Victims and Witnesses (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—
- Alison Todd, Children and Families Service Director, and Kate Higgins, Policy Manager, Children 1st;
- Tam Baillie, Commissioner, Scotland's Commissioner for Children and Young People;
- Chief Superintendent David O'Connor, President, and Chief Superintendent Craig Suttie, Association of Scottish Police Superintendents;
- David Ross, Vice Chairman, Scottish Police Federation.

15th Meeting, 2013 (Session 4) Tuesday 14 May 2013

Victims and Witnesses (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—
- Kenny MacAskill, Cabinet Secretary for Justice;
- Graham Ackerman, Criminal Law and Licensing Division, Scottish Government.

Roderick Campbell indicated that he is a member of the Faculty of Advocates.

17th Meeting, 2013 (Session 4) Tuesday 28 May 2013

Victims and Witnesses (Scotland) Bill (in private): The Committee considered a draft Stage 1 report. Various changes were agreed to and the Committee agreed its report to the Parliament.
ANNEXE C: INDEX OF ORAL EVIDENCE

11th Meeting, 2013 (Session 4) Tuesday 16 April 2013

David McKenna, Chief Executive, Victim Support Scotland
Cliff Binning, Executive Director Field Services, Scottish Court Service
David Harvie, Director of Serious Casework, Crown Office and Procurator Fiscal Service
Superintendent Grahame Clarke, Safer Communities, Police Scotland
Sandy Brindley, National Co-ordinator, Rape Crisis Scotland
Louise Johnson, National Worker - Legal Issues, Scottish Women's Aid
Peter Morris, petitioner and campaigner

12th Meeting, 2013 (Session 4) Tuesday 23 April 2013

Peter Lockhart, Criminal Law Committee, Law Society of Scotland
Murdo Macleod QC, Faculty of Advocates
Professor Alan Miller, Chair, Scottish Human Rights Commission
Colin McConnell, Chief Executive, Scottish Prison Service
John Watt, Chairman, and Heather Baillie, Vice Chair, Parole Board for Scotland

13th Meeting, 2013 (Session 4) Tuesday 30 April 2013

Alison Todd, Children and Families Service Director, and Kate Higgins, Policy Manager, Children 1st
Tam Baillie, Commissioner, Scotland's Commissioner for Children and Young People
Chief Superintendent David O'Connor, President, and Chief Superintendent Craig Suttie, Association of Scottish Police Superintendents
David Ross, Vice Chairman, Scottish Police Federation

14th Meeting, 2013 (Session 4) Tuesday 14 May 2013

Kenny MacAskill, Cabinet Secretary for Justice
Graham Ackerman, Criminal Law and Licensing Division, Scottish Government
ANNEXE D: INDEX OF WRITTEN EVIDENCE

Evidence received in alphabetical order

Action Scotland Against Stalking (305KB pdf)
ASSIST (132KB pdf)
Barnardo's Scotland (122KB pdf)
Brake (road safety charity) (89KB pdf)
Children 1st (96KB pdf)
Crown Office and Procurator Fiscal Service (86KB pdf)
Crown Office and Procurator Fiscal Service (supplementary submission) (141KB pdf)
Equality and Human Rights Commission (160KB pdf)
Faculty of Advocates (131KB pdf)
Former Boys and Girls Abused in Quarriers Homes (84KB pdf)
Geddes, Angela (87KB pdf)
Greenaway, Diane (129KB pdf)
HM Inspectorate of Constabulary for Scotland (247KB pdf)
Information Commissioner's Office (138KB pdf)
Johnstone, Caroline (136KB pdf)
Law Society of Scotland (190KB pdf)
Law Society of Scotland (supplementary submission) (164KB pdf)
Morris, Peter (121KB pdf)
NSPCC Scotland (141KB pdf)
Parole Board for Scotland (144KB pdf)
Rape Crisis Scotland (85KB pdf)
Richardson, Helen (62KB pdf)
Royal College of Speech and Language Therapists (273KB pdf)
Sacro (7KB pdf)
Scotland's Commissioner for Children and Young People (188KB pdf)
Scottish Campaign against Irresponsible Drivers (96KB pdf)
Scottish Children's Reporter Administration (152KB pdf)
Scottish Court Service (102KB pdf)
Scottish Human Rights Commission (201KB pdf)
Scottish Prison Service (176KB pdf)
Scottish Women's Aid (228KB pdf)
South Lanarkshire Council (123KB pdf)
Stewart, Katrina (97KB pdf)
Stuart, Marilyn (71KB pdf)
Victim Support Scotland (225KB pdf)

Other written evidence

Police Scotland (69KB pdf)

Written submissions are also published (in the order received) on the Committee’s webpage at:
http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/62082.aspx
Justice Committee

Victims and Witnesses (Scotland) Bill

Written submission from Brake (road safety charity)

About Brake

Brake is an independent charity working across the UK to make roads safer, prevent road death and injury, and care for victims. Brake carries out research into road users’ attitudes and behaviour in relation to road safety, engages schools and communities to spread road safety education, disseminates international research, guidance and case studies to fleet and road safety professionals through its Fleet Safety Forum and Road Safety Forum, and supports communities campaigning for road safety. It is also a UK-wide, government-funded provider of specialist support for people bereaved and seriously injured in road crashes, running a national helpline and providing packs that are handed to bereaved families by police following every road death.

A duty to set clear standards of service for victims and witnesses

1. Brake agrees that creating a duty on relevant public bodies to publish minimum standards of service for victims and witnesses is essential as it should help to improve information and standards of service for victims and witnesses, and enable public bodies to be better held to account in this respect. However, we recommend a strengthening of the wording of this duty, as set out below. We also recommend the government ideally goes one step further by enshrining in law the right of victims to support and information. (See below for further explanation on this point.)

2. These minimum standards should be clearly set out in a single document that victims can use to understand their entitlements in terms of support and information. Given the acute distress many victims will be experiencing, it is crucial this document is clear, accessible, empathetic and reassuring, following the same principles that Brake uses to produce its support literature for road crash victims. It must also be easily accessible for victims, and their relatives, carers and professionals working with them, for it to be a meaningful and useful document in improving the treatment of victims. These standards should be based around the general principles set out in the Bill (1.3).

3. Brake broadly agrees with the general principles outlined in section 1.3 of the Bill which the criminal justice system must have regard to when relating to victims or witnesses, and when publishing minimum standards of services. However, Brake recommends the Bill be strengthened by stipulating that these principles should form the basis of public bodies’ minimum standards, not only that they pay them regard.

4. Brake would also recommend strengthening the wording of principle (c), so it instead states ‘that a victim or witness should have access to high quality

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1 See Brake’s service standards: [http://www.brake.org.uk/services-for-victims/supportstandards.htm](http://www.brake.org.uk/services-for-victims/supportstandards.htm)
comprehensive specialist support, proactively offered and appropriate to their needs, during and after the investigation and proceedings.

5. Brake also recommends an additional and important principle is added: that victims should be treated with dignity, respect and empathy.

Rights about your case

6. Victim access to information about their case is vital for bereaved and seriously injured road crash victims and their families. Brake supports the proposed duty placed on COPFS, SCS and the police to provide certain information to victims and witnesses about their case. It supports plans to investigate the feasibility of creating an online information hub to allow victims and witnesses direct access to information about their case.

7. However, it is vital that bereaved or seriously injured victims of road crashes also have access to speak to appropriate persons to get further questions answered or seek explanation of the information available to them, and to seek emotional support and other help alongside accessing this information. For example, it is likely that in some cases only very limited information is available to a bereaved or injured victim at a particular time, and this lack of information may be distressing and confusing. They may need and benefit from someone explaining why limited information is available, and the likelihood of further information becoming available in future. This sort of support is best delivered by someone with specialist experience of supporting victims in these particular situations, and who can potentially liaise with local professionals to establish the situation; this is a role that Brake’s helpline commonly performs (see further detail below). It should also be noted that some victims will not have access to the internet in a suitably private place, or will not have the skills to access an online portal, so this should not be the sole means for families to access information about their case. It is also important that relevant information, alongside appropriate support and explanation, is proactively offered to victims, rather than them being expected to hunt it out, given that they are likely to be suffering acute distress.

Further comments

8. Brake generally supports the proposals in the Victims and Witnesses (Scotland) Bill, which are a positive step towards better services and information for road crash victims. However, Brake also urges the Scottish government to work towards enshrining road crash victims’ right to support in law. This was a recommendation made by then Victims’ Commissioner Louise Casey in 2011 in relation to ensuring bereaved victims of culpable road death and homicide could access appropriate support and information, given that many of these victims (in England and Wales) do not receive the support they need despite the existence of a victims’ code.

9. Road deaths and serious injuries cause horrendous suffering every day. These needless casualties are sudden, violent, man-made and often result from

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2 Review into the needs of families bereaved through homicide, Victims Commissioner, July 2011
criminal behaviour. The bereaved and injured victims often experience long-term and acute emotional suffering and other serious implications such as debt, health problems and social isolation\textsuperscript{34}. These families desperately need support, guidance and information, but often they are unable to access a clear pathway of support as there is no comprehensive and integrated government-funded support service automatically offered following a serious crash.

10. Brake supports bereaved and seriously injured crash victims in Scotland through packs, funded by government, and a helpline, which receives no funding from the Scottish Government. Although these services provide a lifeline to many, they are not nearly as comprehensive or well-funded as those afforded to other victims bereaved or injured through criminal acts. Brake’s packs remain the only government-funded support automatically provided to bereaved road crash victims (as written into police protocols).

11. Given the general principle in the bill that it should be ensured victims can access appropriate support, Brake recommends the Scottish Government works alongside support providers such as Brake, to ensure comprehensive, specialist support for bereaved and seriously injured road crash victims in Scotland is readily available and properly resourced. As recommended above, it should also place a duty on public bodies to ensure victims are able to access high quality, comprehensive, specialist support, proactively offered and appropriate to their needs, during and after the investigation and proceedings.

12. In particular, Brake recommends the Scottish Government should ensure the availability of the Brake helpline to all bereaved and seriously injured road crash victims by funding the further development and expansion of this service. This would mean Brake could work with police in Scotland towards the helpline being proactively offered to all families bereaved and very seriously injured in road crashes, at the same time as providing Brake’s packs in bereavement cases, promptly following the death or serious injury. This would mean all these families can easily access a wide range of specialist, professionally-delivered services, including over-the-phone emotional support, further explanation of practical procedures, including CJS processes, advocacy services, such as through the helpline liaising with officials on the victim’s behalf to obtain information and overcome problems, and referrals and signposting on to locally-available face-to-face support and medical help and counselling.

13. As well as providing direct support, Brake’s helpline often helps callers by also identifying and referring onto other locally available services where these are in place, such as counselling, or early-intervention face-to-face emotional support. At present, the availability of suitable face-to-face emotional support provided by professionals experienced in supporting traumatically bereaved people (such as through hospital bereavement services) that the helpline can refer to is patchy. Brake would therefore also recommend that the Scottish Government review where increased funding might be needed to further develop locally available (more

\textsuperscript{3} “Psychological suffering by the victims [of road crashes] and their relatives is often extreme and long-lasting.” Impact of road death and injury, FEVR (the European Federation of Road Traffic Victims), 1995

\textsuperscript{4} Brake also bears witness to these support needs through its handling of helpline calls.
generalist) services like these, and how these can be developed alongside highly specialist support like that provided through Brake’s helpline.

14. Brake recommends these services are available to all bereaved and very seriously injured victims of road crashes, not just victims whose cases result in a criminal prosecution. All bereaved road death victims and most of those very seriously injured come into contact with the criminal justice system since all fatal and most very serious injury crashes are followed by police investigation and the deployment of a police family liaison officer. In a large proportion of cases a criminal prosecution will follow, but many more road crashes may have involved criminal behaviour, yet this will never be recorded as a crime, nor will a criminal prosecution take place, due to the person who committed the crime being killed or very seriously injured themselves. In other cases, where no crime has occurred, it remains the case that the family will suffer terribly, as a result of man-made, preventable circumstances, and a failure by government. In all these cases the families need advice, information support and advocacy to navigate their sudden bereavement, and all bereaved victims will need advice to navigate through the criminal justice system.

Ellen Booth
Senior Campaigns Officer
18 March 2013
Justice Committee

Victims and Witnesses (Scotland) Bill

Written submission from the Scottish Children’s Reporter Administration

Background

The Children's Hearings System is Scotland’s distinct system of child protection and youth justice. Among its fundamental principles are:

- whether concerns relate to their welfare or behaviour, the needs of children or young people in trouble should be met through a single holistic and integrated system
- a preventative approach, involving early identification and diagnosis of problems, is essential
- the welfare of the child remains at the centre of all decision making and the child’s best interests are paramount throughout
- the child’s engagement and participation is crucial to good decision making

Scottish Children’s Reporter Administration (SCRA) operates the Reporter service which sits at the heart of the system. SCRA employs Children’s Reporters who are located throughout Scotland, working in close partnership with panel members and other professionals such as social work, education, the police, the health service, the legal profession and the courts system.

SCRA’s vision is that vulnerable children and young people in Scotland are safe, protected and offered positive futures. We will seek to achieve this by adhering to the following key values:

- The voice of the child must be heard.
- Our hopes and dreams for the children of Scotland are what unite us.
- Children and young people’s experiences and opinions guide us.
- We are approachable and open.
- We bring the best of the past with us into the future to meet new challenges.

Response

SCRA welcomes the opportunity to respond to the Justice Committee’s call for evidence on the Victims and Witnesses (Scotland) Bill. We are fully supportive of the drive to improve the experience of both victims and witnesses in whatever context.

Vulnerable witnesses

We agree with the proposal to extend the definition of a child witness to 17. SCRA’s Practice Instruction makes clear that Reporters should not to call child witnesses to give evidence unless it is absolutely necessary (SCRA’s policy statement on child witnesses is attached as an appendix to this submission). Therefore, while this provision may result in a small number of additional vulnerable witness applications in children’s hearings court proceedings; we expect the overall financial impact on SCRA to be minimal. The potential costs are accurately reflected in the Financial Memorandum.
The Bill makes a number of additional provisions in relation to vulnerable witnesses. Specifically it provides that:

- Adult witnesses whose quality of evidence is at significant risk of being diminished either as a result of a mental disorder, or due to fear or distress in connection to giving evidence, are treated as vulnerable
- Victims of alleged sexual offences, human trafficking, domestic abuse or stalking who are giving evidence in proceedings which relate to that particular offence are to be “deemed” as vulnerable witnesses
- Witnesses who are considered by the court to be at significant risk of harm by reason of them giving evidence are treated as vulnerable
- There is an automatic entitlement to special measures for “deemed” vulnerable witnesses

We note that the application of these provisions is restricted to victims giving evidence in the criminal justice system. All children’s hearings court proceedings are civil proceedings and thus not covered by the above provisions. However, victims of crime and other potentially vulnerable witnesses will also give evidence in children’s hearings proofs (and possibly other court proceedings such as appeals). For example, grounds may relate to a sexual offence committed against the child, or concerns that the child may be exposed to someone who has carried out domestic abuse. In these kinds of cases, it would not be unusual for an adult victim to be called to give evidence in order to allow the grounds to be established. It is important therefore that the protections being introduced for witnesses in criminal proceedings are available when appropriate in children’s hearings court proceedings as well.

We have raised this matter with the Scottish Government and further discussions are planned to explore whether any of these improvements could be extended to the children’s hearings system. Our clear view is that it is possible to apply these provisions distinctly to the hearings system without them automatically applying across the rest of the civil justice system.

On a related topic, the Criminal Justice and Licensing (Scotland) Act 2010 contains provisions (in sections 54 and 85) which:

- allow the Crown to provide a witness who is likely to be cited to give evidence copy of their statement, or access to it.
- allow the court to grant permission to a witness to refer to his statement during the giving of evidence provided certain conditions are met.

These provisions however are specifically disapplied from children’s hearings court proceedings. We are unclear as to why this decision was taken – had there been no specific mention of children’s hearings proceedings, there would have been a strong argument that if the Crown can do this in a trial, then reporters can adopt a similar approach. However, this argument cannot be made when the sections have been expressly stated as not applying to our offence proofs. We believe that witnesses in our proceedings should not be disadvantaged compared to witnesses in criminal trials. We hope that this Bill could offer an opportunity to include similar provisions for the children’s hearings system where the proof relates to an offence ground for referral.
Victim information

We note that the EU draft directive only applies to criminal proceedings. However, there is still a need to consider what information should be made available to victims of offences by children who are dealt with in the Hearings System or via other interventions – and how to strike the appropriate balance between the rights of children and of victims. Section 53 of the Criminal Justice (Scotland) Act 2003 enables the Principal Reporter to provide such information, subject to certain reservations that balance the rights and interests of the child with the victim’s right to information. More detail on SCRA’s Victim Information Service is available on our website (www.scra.gov.uk).

The principles of the Children’s Hearings System are very different from those of the criminal justice system and it would not be appropriate therefore to simply transpose provisions designed for one system across onto the other. We consider that the current legislative provision in this area allows the appropriate balance to be struck and remain committed to building on the existing law and practice to improve the experience of victims of offences committed by children.

Conclusion

We welcome the Scottish Government’s proposals to improve the experiences of victims and witnesses but consider that there is a need to extend the vulnerable witness provisions to ensure that individuals giving evidence in children’s hearings proof and appeal proceedings can be granted the same degree of protection as those in the criminal justice system. We see no reason why this should be outwith the scope of the Bill and would be happy to give oral evidence to bring further detail or clarity to the points raised above if the Committee would find that helpful.

SCRA
April 2013

Appendix A

Scottish Children's Reporter Administration Policy on Child Witnesses

1. The Reporter will not ask any child to give evidence in person in court where there is other evidence available that will satisfy a court as to the fact or facts in issue.

2. The Reporter will not ask any child to give evidence in person in court where to do so would cause the child significant emotional harm or distress.

3. SCRA and Reporters have the same responsibility for the welfare and wellbeing of all children who are asked to be witnesses in the Reporter’s court process, whether or not they are children who are referred to the Reporter.

4. SCRA is committed to ensuring that a child witness is supported before, during and after the court process.

5. Reporters will identify and deliver individual measures of support for child witnesses to facilitate their ability to get to court and give evidence in proceedings.
6. Preparation of child witnesses for court is an essential part of the Reporter’s role in any court case.

7. Reporters will not compound any distress to a child witness by any action or inaction in court proceedings.

8. Reporters will not take any action or be involved in any activity that contaminates or could be reasonably perceived to contaminate a child’s evidence.

9. Reporters will act with integrity in any court proceedings and will not compromise the proceedings by any action in respect of a child witness that causes unfairness or prejudice to any party involved.

10. Reporters will provide information about the court process, including written information in the form of leaflets, to child witnesses and their carer or carers.

11. Reporters will identify a person, be that carer or other, who can support the child during the court process to whatever extent permitted by the court in each individual case.

12. Reporters will offer all child witnesses an opportunity to visit the court room or court that the child will be asked to give their evidence in.

13. Reporters will not attempt to prevent or inhibit a child from access to therapeutic services required for that child, before a proof is, or may be, underway.

14. Reporters will not interview a child witness about traumatic events unless interview is unavoidable if the related court proceedings are to continue.

15. SCRA will actively promote the sharing of information to parties, where appropriate and competent, where this will prevent further unnecessary interview of the child.

16. Reporters will work with agencies and professionals involved with a child witness, for the benefit of that child’s welfare.

17. Reporters will establish and maintain clear communication lines with others involved in and directly affected by the court process.

18. Reporters will attempt to avoid delay in proceedings that involve a child witness.

19. Reporters will make themselves available to a child witness and their carer after the court proceedings have been concluded, should the child wish to clarify any issue about their experience as a witness.

20. Reporters will afford every child witness and their carer an opportunity to comment on the support provided by SCRA and the Reporter.
Justice Committee

Victims and Witnesses (Scotland) Bill

Written submission from the Royal College of Speech and Language Therapists

1. This response was discussed and approved informally at the March 2013 meeting of the Communicating Justice Coalition.

2. RCSLT would welcome the opportunity to give oral evidence on the Bill to the Committee.

3. People with Speech, Language and Communication Needs are disproportionately represented among victims and witnesses

Evidence indicates that people with speech, language and communication support needs (SLCN) are

- more likely to be victims of crime. ¹
- at greater risk of harm ² than other people.

This is because communication support needs are variously associated with:

- Difficulty reporting things that have happened.
- Difficulty understanding things that have happened.
- Difficulty recognising harmful behaviour.
- Lack of access to information about rights and support.
- Social isolation.
- Difficulty making needs and wishes known.

4. Section 1: General Principles

Effective communication between services and individual victims and witnesses (i.e. ability to understand and / or express oneself to the best of one’s ability) is the foundation of (or in the case of (c) inferred) in the following principles:

(a) that a victim or witness should be able to obtain information about what is happening in the investigation or proceedings,
(c) that a victim or witness should have access to appropriate support during and after the investigation and proceedings,
(d) 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.

Persons and services required to have regard to these principles should therefore be required, by law, to apply inclusive communication standards. To not do so rigorously will discriminate against those with SLCN.

5. **The proposal to create a duty on relevant justice organisations to set clear standards of service for victims and witnesses (as in Section 2 of Bill)**

RCSLT welcome this proposal.

For reasons above we would wish relevant justice organisations to be required to set and publish evidence based standards related to inclusive communication practice.

To secure quality and consistency of inclusive communication practice across Scotland and the justice system **RCSLT would recommend a national inclusive communication standard is set and promoted.**

A national inclusive communication standard would also save money and time for relevant justice organisations.

RCSLT would be keen to contribute to development of an inclusive communication standard at national and specific agency levels.

6. **The proposal to give victims and witnesses a right to certain information about their case (as in Section 3 of Bill)**

RCSLT welcome this proposal.

For reasons above RCSLT highlight the information provided to victims and witnesses should apply best evidence based inclusive communication standards.

7. **Section 4: Interviews with children: guidance**

RCSLT welcome the proposal to issue guidance on interviewing child witnesses and victims.

Guidance should include direction to effectively assess the child’s speech, language and communication capacity as early as possible in any investigation or proceedings.

RCSLT would be keen to contribute to development of guidance should it be established.

8. **Proposal to do with giving vulnerable witnesses a right to access certain special measures when giving evidence**

a) **Section 6 - Vulnerable witness: main definitions**

The Bill defines vulnerability with reference to the definition of “mental disorder” in Mental Health (Care and Treatment) (Scotland) Act 2003. In that Act "mental disorder" means any mental illness; personality disorder; or learning disability, however caused or manifested.

This definition of vulnerability excludes many people who have SLCN.
The consultation document preceding the Bill recognised people with communication support needs as vulnerable. RCSLT are disappointed that the proposed Bill does not.

The Bill proposes (Section (6) (e)) that in determining vulnerability the court ("take account of any views expressed by the witness").

RCSLT ask in the strongest terms for the definition of vulnerability to be extended to people with speech, language and communication needs given the impediment such difficulties present in respect of, for example, being “...able to participate effectively in the investigation and proceedings and express views on vulnerability.

RCSLT suggest the definition of disability set out in the Equality Act 2010 may be helpful in defining vulnerability more broadly.

b) Section 10: Child witness

To ensure equal access to the opportunity to express the wish to be present in court or not children with SLCN require communication support.

Setting and implementing a national inclusive communication standard would help to secure equality in this respect.

c) Section 12: Other vulnerable witnesses: assessment and applications

The Bill proposes matters to consider in determining vulnerability (beyond being a child or deemed vulnerable group).

The Bill proposes (section 12: (3) (a)) that an assessment must determine whether a person is likely to be a vulnerable witness. The explanatory notes indicate vulnerability may arise by virtue of physical disability or impairment.

As above, RCSLT ask that determination of vulnerability (in the 1995 Act) is extended to include those with speech, language and communication needs and not just those with physical disability or impairment.

The Bill also proposes (Section (12) (4c)) that in determining vulnerability those assessing vulnerability of cited witnesses “take account of any views expressed by the person”.

RCSLT ask in the strongest terms for the definition of vulnerability to be extended to people with speech, language and communication needs given the impediment such difficulties present in respect of, for example, being able to express views on vulnerability.

9. Release of offenders – victim’s rights

- Section 23 - Victim’s right to receive information about release of offender.
• Section 24 – Life prisoners: victim’s right to make oral representation before release on licence
• Section 25 – Temporary release: victim’s right to make (written) representations about conditions

All of the above sections of the Bill require the victim to understand information provided to them and to express themselves.

To ensure victims with SLCN enjoy equal rights relevant agencies should be required, by law, to apply inclusive communication standards.

That is:
• Information provision should match the speech, language and communication comprehension needs of victims (including, for example, non literate victims)
• Victim’s should be given the opportunity to make representation on release – including temporary release – in whatever way they are best able to express themselves.

To not allow this flexibility would discriminate against those victims and witnesses with SLCN.

10. **Human rights implications arising from the provisions in the Bill**

People with speech, language and communication needs are more likely than non-communication disabled people to be victims of crime.

A victim and witnesses ability to understand and express themselves effectively is central to enjoyment of equal rights and access to fair justice under the Bill – as described throughout this submission.

RCSLT appeal in the strongest terms that the Bill reflects the interests of people with speech, language and communication needs as they have:
• proven heightened chance of becoming a victim of crime; and
• increased vulnerability during investigations and proceedings.

Kim Hartley
RCSLT Scotland Office
1 April 2013
Justice Committee

Victims and Witnesses (Scotland) Bill

Written submission from Marilyn Stuart

On Friday 6 May 2011 my husband was knocked down by a car. The car driver lost control of her car. My husband was standing at the boot of his car preparing to take our son’s dogs out of the boot to take them for a walk at the beach. My husband died four days later in hospital, 9 May. My husband, our family or myself had never had any previous experience with police or courts, but I’m afraid my family and I very quickly came to the conclusion from our meetings and phone conversations with the police that the human rights being protected was that of the accused and only the accused.

Our first meeting with the procurator fiscal was a terrible experience. She was very matter of fact and said that there may not be enough evidence to take the case to trial.

We left her office that day not knowing who to turn to. A friend recommended I call Lewis Macdonald, which I did. Lewis was very helpful and said as he was going to the procurator fiscal office the next week, with my consent he would talk to the procurator fiscal about the case. Within 14 Days of my conversation with Lewis I received a letter from Edinburgh to say the driver was to be charged with death by careless driving. I believe without help from Lewis Macdonald there was a strong possibility the driver may not have been charged.

The months before the trial were very difficult and I felt that we as a family were very much on our own. By the time the case went to trial it was being dealt with by the fourth procurator fiscal. How unfair, unlike the accused who had the same QC since day one. The week before the trial date, one and a half years after my husband’s death, the procurator fiscal decided to move the trial to Peterhead from Aberdeen. This caused major problems for my family, but like the change of procurator fiscal, no one was interested in our feelings or concerns. I had strong family and friend support, but I felt we had no professional on our side.

The trial was a horrendous experience, and again I had strong family and friend’s support, a lovely girl from Victim Support, but unlike the accused who had her QC keeping her informed and very much looking after her. We the victim’s family were again excluded and on our own.

My family and I are an ordinary family. After the avoidable tragic loss of my husband I feel very strongly that victims like us must in the future be given more help and guidance.

1. The proposal to create a duty on relevant justice organisations to set clear standards of service for victims or witnesses

I feel something like this is desperately needed. And should be available at the earliest possible date. The procurator fiscal offer victim support, people from Victim
Support only become available when accused is charged. They are kind people but very much just go-betweens who can’t give any advice.

2. **The proposal to give victims and witnesses a right to certain information about their case**

We as a family were very much excluded. I know that the accused, through her QC, had access to details of my husband’s pathology report, but we as a family did not until after the trial.

3. **Any human rights implications arising from the victims and witnesses provisions in the Bill**

What I could see was the only human rights that was taken into account was that of the accused. So any improvement on this would be welcome, as I feel at the moment everyone, especially the police, were so worried about the accused human rights.

I feel strongly that victims need more help. And if needed I may be able to give oral evidence.

Marilyn Stuart  
25 March 2013
Justice Committee

Victims and Witnesses (Scotland) Bill

Written Submission from the Scottish Campaign against Irresponsible Drivers

SCID (Scottish Campaign against Irresponsible Drivers) welcomes the opportunity to present comments to the Justice Committee, on the Victims and Witnesses (Scotland) Bill.

SCID1, was formed in 1985 by Wendy Moss as a result of a fatal road crash in which her only son was killed. Since that time SCID has helped and advised hundreds of Scottish families who have lost a loved one as a result of a road crash.

The Justice Committee seek comments on:

1. The proposal to create a duty on relevant justice organisations to set clear standards of service for victims and witnesses.

Agree that justice organisations must set clear standards of service for victims and witnesses. However, to make justice work for bereaved families and victims injured in UK road crashes, they must be treated fairly, respectfully, equally, with dignity and autonomy. A system must be put in place to ensure that these standards are followed.

There have been many changes within the justice organisations to improve the service to victims and victim families. This has meant that in addition to the investigation and in appropriate cases the prosecution of crime, justice organisations now require to be victim (and witness) focussed. The Government has reacted by proposing legislation in the Victims and Witnesses (Scotland) Bill. To ensure that victims and witnesses are included in this process.

1.1. Clear standards of service should be communicated to victims and witnesses, verbally, by leaflet form and on relevant websites.
1.2. A monitoring system must be put in place to ensure standards are followed.

2. The proposal to give victims and witnesses a right to certain information about their case.

While victims and witnesses require accurate information on the progress of a case, with accurate information on court dates, reasons for delays etc. the length of time before a case comes to trial causes additional grief for bereaved families as during this time they have very little knowledge on the circumstances of their loved ones death. All too often SCID has witnessed in court the difficulty witnesses have in accurately recalling the sequence of events which happened one, two and even three years previously. The needs of victims and witnesses can be diverse; witnesses can be just that and victims can also be witnesses so their needs will differ.

1 www.SCID.org.uk
with regard to the information they require about the case. It has been SCID’s experience that families bereaved by irresponsible drivers require much more than the progress of their case through the Criminal Justice System; at the end of an investigation or criminal proceedings they require knowing how their loved one was killed and have a need to access the information gathered in the course of the investigation. Both the Crown Office Book of Regulations and the ACPOS Road Death Investigation Manual have clear guidelines, but guidelines are just that and open to interpretation by the individual and do not offer a standard of service to victims. The Procurator Fiscal acts in the “public interest” yet many victims and victim families continue to feel excluded and isolated from the process of law. They feel they are no longer part of the public. A feeling which is exacerbated by the fact that there is no dedicated PF to take them through the investigative process. By contrast in criminal/civil cases, accused persons have the right to be represented by a dedicated solicitor who acts in their interest and who will accompany them through the whole legal process and has access to share with the client, all investigative documents.

The Committee is familiar with the research and recommendations in the Dundee Law School report which was commissioned by SCID with support from the Campaign for Freedom of Information Scotland to examine Access in Europe by a bereaved family to information gathered during an investigation into a fatal road collision.2

In the spirit of the 2011 of the DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing minimum standards on the rights, support and protection of victims of crime and the proposals contained in the Victims and Witnesses (Scotland) Bill; the information victims injured and families bereaved by road crashes require to know about their case includes:

2.1 A legal right, at the end of an investigation or criminal proceedings, for families bereaved by road crashes to access all the information gathered by the police and COPFS if they so wish.
2.2 Victims seriously injured and families bereaved by irresponsible drivers have the right to be informed when an offender applies to the court to have his/her driving licence rescinded.3
Section 23 of the Victims and Witnesses (Scotland) Bill should be amended to facilitate this.
2.3 Victims seriously injured and families bereaved by irresponsible drivers have the right to have their voice heard before any decision is made by the court to return a driver’s licence before the period of disqualification has been completed.4
2.4 Victims seriously injured and families bereaved by irresponsible drivers have the right to be informed when an offender has completed community service.
2.5 Victim Notification Scheme should be extended to give victims seriously injured and families bereaved by irresponsible drivers the right to make representation when an offender is eligible for release from custody or when first eligible from...

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2 http://www.dundee.ac.uk/law/smallnews/edocs/scid_report.pdf
temporary release. Agree with the Government’s proposal in the Bill to follow the EU Directive to remove the list of prescribed offences in relation to the VNS, so that victims of all offences will potentially be eligible.

3. **The proposal to give vulnerable witnesses a right to access certain special measures when giving evidence.**

Any victim and or witness could be vulnerable depending on the person and nature of the crime and therefore any victim and or witnesses should be offered special measures.

4. **The proposal to require the court to consider compensation to victims in certain cases.**

In the majority of road traffic cases victims will seek reparation from insurance companies or the Motor Insurance Bureau through a Civil Action. Agree existing legislation to be amended to place a duty on the courts to consider a compensation order with relevant cases clearly defined.

5. **The proposal to introduce a victim surcharge and restitution orders, so that offenders contribute to the cost of supporting victims.**

SCID disagrees with the term “victim surcharge” the preferred terminology is being “offender’s levy” as used in Northern Ireland. “Victims surcharge” conjures up images of victims being directly compensated by offenders. The media has already suggested it is a tax on motorists which panders to the “war on motorists” lobby. This is not surprising given that 60% of all fines come from motor vehicle offences. In the interests of road safety it must be made clear by Government that it is not a tax on motorists but a tax on motorists who have broken the law.

Agree in this economic climate money has to be found to give support to victim organisations However it must be made clear by Government that the money raised is not going to victims per se but is being channelled into Victim Support Scotland to be used with discretion.

Section (3c) of the General principles of the Victims and Witnesses (Scotland) Bill states that a victim or witness should have access to appropriate support during and after the investigation and proceedings. SCID campaigns for post impact care for victims and victim families of road crashes. The response received from the Scottish Government to the Justice Committee, 13th December 2012 makes reference to post-impact care being a health issue and that there is representation on the Strategic Partnership Board to ensure governance of the Road Safety Framework and its commitments. While much good work has been done by the Strategic Partnership Board to publicise and promote road safety, all of which is more than welcome, there has been no discussion or provision for post impact care for victims seriously injured or families suddenly bereaved by road crashes. The emphasis of the group which could loosely be termed as a “health” issue has been on publicity surrounding drink driving and recidivist drink drivers and not on post impact care for victims. Many individuals affected by fatal road crashes experience some or many degrees or post-traumatic stress disorder. These individuals may seek counselling.
Immediate; not joining a long waiting list, help in tackling physical, psychological, emotional and financial issues

As 60% of all court fines come from driving offences it is reasonable to seek assurances from the Government that the much needed provision for the post impact care of victims of road crashes will be put in place.

6. **Any human rights implications arising from the victims and witnesses provisions in the Bill.**

SCID welcomed the amendment to the Road Traffic Act 1988 which created a new offence of *causing serious injury by dangerous driving*; a charge which at long last gives recognition to some victims seriously injured by irresponsible drivers\(^5\). The new charge became effective from 3\(^{rd}\) December 2012 in Scotland. The charge recognises the consequences of dangerous driving yet it discriminates against those victims who suffer grievous bodily harm or severe physical injury by other criminal driving offences. As the law now stands; innocent victims seriously injured in road crashes in Scotland and England & Wales have their right to life less well protected than those seriously injured in Northern Ireland where serious injury is included in all the Causing death offences. SCID has campaigned vigorously to have all victims seriously injured by driving offences to have recognition in law.

Any amendment to the Road Traffic Act is a reserved matter but the continuance to discriminate victims seriously injured within driving offences raises issues of human rights to be addressed from which the Scottish Government cannot shirk. To make justice work, the Scottish Government, must actively pursue the implementation of Article 2 and Article 8 of Human Rights Act 1998 – to give recognition, in law, to victims seriously injured by driving offences.

SCID
2 April 2013

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\(^5\)Legal Aid, Sentencing and Punishment of Offenders Act 2012
http://www.legislation.gov.uk/ukpga/2012/10/section/143/enacted?view=plain
1. Introduction and overview

1.1 Her Majesty’s Inspectorate of Constabulary for Scotland (HMICS) is grateful for the opportunity to provide evidence to the Justice Committee in relation to the Victims and Witnesses (Scotland) Bill Sections 1-25, hereinafter referred to as ‘the Bill’.

1.2 Whilst this submission will highlight a number of issues and challenges, it is important to note that HMICS welcomes the proposals within the Bill particularly those that aim to improve support to victims and witnesses, put the victims’ interests at the centre of improvements to the justice system and ensure that witnesses are able to effectively fulfil their public duty.

2. Previous reports and submissions and concerns

2.1 HMICS undertook joint thematic inspections with the Inspectorate of Prosecution in Scotland (IPS) into services for victims;

- Victims in the Criminal Justice System phase 1 published in October 2010\(^1\)
- Victims in the Criminal Justice System phase 2 published in November 2011\(^2\)

2.2 Both reports investigated how victims are treated within the criminal justice system in Scotland. The first joint report covered cases where no court proceedings were commenced while the 2011 report investigated cases in which court proceedings were commenced at a summary level, either in the Sheriff Court or Justice of the Peace Court. The 2011 report highlighted a number of recommendations and suggestions for the Police Service and Crown Office and Procurator Fiscal Service (COPFS). The Victims and Witnesses Working Group had undertaken responsibility for eight of the sixteen points, and it is anticipated that many of the recommendations will be strengthened by the passing of the Bill.

2.3 The previous joint submissions by HMICS and IPS to the Victims and Witness Unit Consultation\(^3\) made additional comments that were broadly in agreement with the proposals. However, some concerns were highlighted, as noted below:

2.4 Victims of sexual violence having the right to choose the gender of the person who interviews them would be desirable, however this might not always be possible, and it may be difficult to guarantee such a choice in court.

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2.5 Providing victims with an opportunity to make written representations about additional conditions may be included in a licence when an offender first becomes eligible for temporary release is included within the Bill. As stated in the consultation applying consistent standards to such representations is a concern.

2.6 Investigative Anonymity Orders (IAO) are currently used throughout England and Wales. IAOs were introduced by sections 74 – 85 of the Coroners and Justice Act 2009. It is noted that the IAO is not included within the Bill, although it has been outlined in the consultation. Currently, IAOs are used in England and Wales following submission to a Justice of the Peace to prohibit the disclosure of information relating to the identity of an individual who is able to assist a qualifying criminal investigation. Under the IAO, the identity of witnesses will be protected throughout the investigation and thereafter, by a court order. In operations that include cross border work, there could be some witnesses that are protected under the Order and others that are not within the same investigation. While it is acknowledged that section 90 of the Criminal Justice and Licensing (Scotland) Act 2010 introduced Witness Anonymity Orders (WAOs) that can preserve the anonymity of a witness when giving evidence, the IAO can provide anonymity earlier in the process albeit for a smaller selection of crimes.

2.7 There were concerns expressed about the cost of administering the victim surcharge, including the collection of fines. That said, the explanatory notes accompanying the Bill outline the anticipated costs of administering the surcharge. It is stated that the victim surcharge would initially be imposed on all offenders who are subject to court fines, although the collection of the victim surcharge, in the event they are applied when court fines are not, is likely to increase the cost of collection.

3. Victims and Witnesses (Scotland) Bill (Sections 1 to 25)

3.1 HMICS views the main issues and challenges within the Bill as:

- the identification and updating of vulnerable victims and witnesses
- sharing of information provided to victims and witnesses by partners in the Justice System
- the potential for aspects of the Bill to have financial and resource implications for Police Service of Scotland (PSoS) and the Scottish Police Authority (SPA).

3.2 As highlighted in the HMICS/IPS 2010 report it is important to consider victims and witnesses in their own right rather than in the terms of the court process. For the majority of victims of crime where the crime is detected, experiencing a crime does not result in court proceedings as the case is resolved via a caution, a warning letter, a direct measure or results in no proceedings for any other reason. In 2009/10: there were 902,000 recorded crimes and offences, of which over 690,000 (76%)

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5. On the 1st April 2013 the 8 police forces in Scotland became a national service – The Police Service of Scotland.
were cleared up by the police. Therefore, the role the PSoS has in ensuring that victims and witnesses initial contact with the justice system is positive should not be underestimated.

3.3 HMICS welcomes the proposals within the Bill which create a duty on relevant justice organisations to set clear standards of service for victims and witnesses overall. However, sections of the Bill, such as sections 6-9, relate to witnesses who are ‘giving or is to give evidence... in relevant criminal proceedings’. This reiterates findings that currently a victim’s standing and the services they receive relies, to a large extent, on the initiation of court proceedings and the requirement to be a prosecution witness. This creates a narrow focus on the court aspect, rather than ensuring that victim and witnesses are central to the process and receive the information and support they require regardless of proceedings.

3.4 With reference to vulnerable witnesses, the 2011 report highlighted that the police were proficient at identifying and reporting on obvious vulnerability categories, such as disability. Conversely, the identification of more hidden vulnerabilities, such as mental health problems, was more challenging. It is noted that the Bill expands the definitions of vulnerable victims and witnesses and sets standards of service, however the identification of such witnesses remains an area for improvement.

**Responsibility for updating victims or witnesses**

3.5 Clarity about the handover of responsibility for updating victims between police and COPFS was highlighted in the HMICS/IPS 2010 report. HMICS considers that greater clarity is required to identify which agencies have the primary responsibility for meeting the needs of victims and witnesses at each stage of the process to ensure there are no gaps in provision.

3.6 The Bill states that victims and witnesses can request information regarding their case. However, being more proactive and ensuring victims and witnesses are kept fully appraised in relation to their case is not explicitly outlined. HMICS considers this proactive element is critical to ensuring victims and witnesses are at the centre of the justice process and should be included in any standards of service issued by those listed at section 2 subsection 2 of the bill.

**Sharing of information**

3.7 When information is shared with victims and witnesses, consideration should be given to the wider sharing of information within the Justice System. Sharing information more widely, such as that requested within section 3 of the bill, would support continuous improvement. Providing a statutory framework for sharing information would encourage information sharing to agreed protocols.

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Financial and resources implications

3.8 The Police Service of Scotland came into effect on 1st April 2013, previously for the majority of victims and witnesses of crime, the process did not result in court proceedings rather cases were disposed of by the relevant police force. The eight police forces had processes in place to proactively provide information to victims and witnesses throughout investigations and this should continue. However, this process can be time consuming process and was not consistently applied across Scotland.

3.9 The provision of information outlined in the Bill is, over time, likely to have significant financial and resource implications for the PSoS and SPA. While it is acknowledged that information requests are difficult to predict it is anticipated that, as awareness increases among the general public, so too will information requests. HMICS is concerned at the lack of costs outlined and believes this should be revisited once actual figures can be gathered.

3.10 In the majority of cases vulnerable victims and witnesses will be initially identified by the PSoS and subsequently highlighted in their report submitted to the COPFS where this route is deemed appropriate. The increased number of witnesses automatically entitled to special measures and those who can now access special measures is likely to increase substantially. The implications on this increase to the PSoS and the SPA is as yet undefined and difficult to estimate. However, the increased use of screens is likely to result in an increased demand for identity parades which will utilise staff time and resources. A review of the actual cost implications over the coming years would be appropriate.

3.11 With any revision of a process or procedure, there can be unintended consequences or costs that cannot be predicted. HMICS will work with the PSoS and the SPA to identify and assess the impact of the Bill and would welcome the opportunity to present any implications to the Justice Committee in the future if this was considered helpful.

3.12 HMICS would be willing to provide oral evidence to the committee if this was deemed appropriate.

HMICS
April 2013
Justice Committee

Victims and Witnesses (Scotland) Bill

Written submission from the Former Boys and Girls Abused of Quarriers Homes

To-date eight former employees of Quarriers Homes have been convicted in the Scottish Criminal Courts of abusing children placed in their care. These criminal cases relate to the 50s, 60s and 70s. Many former residents made allegations of being abused sexually psychologically and physically.

It is our position and view that the, National Confidential Forum proposed legislation does not have a sufficient terms of reference, mandate or remit to address the issues in line with the recommendations and framework of the Scottish Human Rights Commission 2010 regarding these historical abuse issues affecting Scotland.

There are no effective remedies, redress, reparation, nor effective inquiries nor access to justice remedies in the current NCF process being proposed that meets the majority of the victims-survivors expectations and needs.

We would refer you to our 11th March 2013 written submission and also our oral testimony to the Health and Sport committee on the 26/03/2013 along with other victims-survivors in particular to our comments pertaining to the proposed National Confidential Forum and the proposed legislation.

We would also refer you to our submission dated regarding the recent "Timebar" consultation submitted on the 04/03/2013.

Sadly the Victims and Witness Bill currently falls short in addressing the needs and expectations of the Scottish historical abuse victims-survivors directly affected by these issues.

Other countries such as Ireland, Australia, Canada and including Jersey faced with similar historical abuse issues have addressed such issues by implementing good practice and legislation to the benefit of their victims-survivors.

We would welcome the opportunity to provide oral testimony to the said Justice committee on these important Justice issues affecting historical abuse victims-survivors.

The proposal to create a duty on relevant justice organisations to set clear standards of service for victims and witnesses

We welcome the proposal to create a duty on relevant justice organisations to set clear standards of service for victims and witnesses; we hope that this will assist victims-survivors in assisting them throughout any contact with any justice organisations and that these duties will be clearly set-out and be open and transparent.
Where there are failures to meet the duty what penalties or processes are in place for Clients, We believe there should be a clear complaints process that all victims-survivors can access when organisations fail in there duties.

**The proposal to give victims and witnesses a right to certain information about their case**

We believe this will help victims especially vulnerable victims-survivors understand the justice processes they engage in and we welcome this proposal.

The proposal to give vulnerable witnesses a right to access certain special measures when giving evidence;

Certain special measures for vulnerable witnesses are required especially in child abuse proceedings and where it involves a child giving evidence. It may also be necessary to provide certain measures in some historical abuse proceedings and where adults abused as children may require certain measures due to there vulnerability.

Also where there is witness intimidation prior to Court proceedings certain special measures may have to be considered to enable witnesses to give their evidence.

We recognise that a balance has to be struck to uphold the "Rights of All" including the right to a fair trial by those accused.

**The proposal to require the court to consider compensation to victims in certain cases**

Clearly in cases where there has been a conviction then the courts should be enabled to consider equitable compensation for victims in certain cases including in historical abuse cases.

This should include victims-survivors of historical abuse who may be currently denied access to certain equitable remedies including compensation due in part to current Timebar law.

The Scottish Government, Criminal and Civil Courts could consider various approaches to resolving this issue such as by having an impartial and independent Tribunal to determine the merits of each individual case and adjudicate on cases referred by the courts. Claimants in certain cases could be assisted to access an independent and impartial arbitration process.

Or other mechanisms could be established such as access to redress and a range remedies including victims-survivors funds which include reparation and compensation for the long term injuries and damage inflicted while addressing the issues comprehensively.

Each case has to be decided on its own merits and individual circumstances. It is important not to exclude on the basis of the non-availability of access to the criminal and civil courts process.
The proposal to introduce a victim surcharge and restitution orders, so that offenders contribute to the cost of supporting victims

Given the current difficulties in collecting fines which have been imposed by the courts on criminals especially those criminals with no funds then this may prove difficult to impose.

However those offenders with assets and funds could be targeted and a victim surcharge and restitution orders imposed.

It is an admirable aspiration but in our view is fraught with difficulties as victims awarded such funds may face additional criminal actions by perpetrators seeking revenge or their own form of justice, if such victims who benefit from this process are publicly identified.

Regarding Criminal Injuries Compensation the Home Affairs Select Committee in the UK Parliament in 2002 recognised that victims-survivors prefer the Civil Route to Justice in historical abuse cases. However in Scotland such access to Civil Justice remedies is denied to victims-survivors of historical abuse due to the imposition of current Time-bar law in Scotland and how it is rigidly interpreted by the Scottish Judiciary who have not exercised the discretion available more widely as they have done in similar cases in the English Courts.

Criminal injuries compensation does not hold organisations and institutions or individuals accountable. Nor does it take into account the long term damage inflicted on the health and well being of those abused. It also does not take account of any losses suffered by victims-survivors. Criminal Injuries compensation is generally at the lower end of the scale.

Again an impartial and independent victims panel-tribunal could determine the merits of each individual case and award remedies accordingly while protecting and maintaining the victims anonymity.

Any human rights implications arising from the victims and witnesses provisions in the Bill

There is currently continued denial to Scottish Justice system accessing redress, justice and a range of equitable remedies in line with the SHRC recommendations and framework 2010 for historical abuse victims-survivors directly affected by these issues.

That such a confidential forum should incorporate a range of other options for justice and remedies including establishing a fund for victims-survivors.

As the Commission outlined in the Human Rights Framework to address historic child abuse in 2010, survivors of serious ill-treatment, such as physical or sexual abuse or serious neglect, which may amount to inhuman or degrading treatment or punishment have a right to an effective remedy, including access to justice and
reparation (including as appropriate satisfaction, rehabilitation, restitution, adequate compensation and guarantees of non-repetition).

Depending on the nature of the perpetrator and the gravity of the harm the state also has an obligation to ensure effective official investigations or an alternative form of investigation sufficient at least to identify any state responsibility and systemic failures – that is to identify not only what happened (the “right to the truth”) but why it happened (to ensure guarantees of non-repetition).

We would kindly request that all the parties including the Scottish Government with collective national and International responsibilities to now take this opportunity to address these outstanding historical issues as other countries using best practice and implementing equitable redress and remedies, who were faced with similar issues have done.

The Scottish Government and Scottish Parliament should now implement in full the Scottish Human Rights recommendations and framework, February 2010 regarding these historical abuse issues affecting Scotland, see link.

http://scottishhumanrights.com/application/resources/documents/SHRCHumanRightsFrameworkonAAF.doc

5 April 2013
FBGA of Quarriers Homes
At Children 1st, we listen, we support and we take action to secure a brighter future for Scotland’s vulnerable children. Our work is built on over 125 years experience as the RSSPCC. By working together with, and listening to children, young people, their families and communities, and by influencing public policy and opinion; we help to change the lives of vulnerable children and young people for the better. We work to safeguard children and young people, to support them within their families and to help them to recover from abuse, neglect and violence.

Children 1st has 46 local services and four national services across Scotland, and we work closely with many local authorities as well as working in partnership with other organisations. All our services are child centred. The children, young people and families we support are key partners in all aspects of our work.

In addition to our services, Children 1st chairs Justice for Children. The aim of Justice for Children is to work with professionals, lay people and academics to ensure that children are able to give their best evidence in court. It seeks to create solutions that preserve the essential judicial rights of accused persons, or of defenders or pursuers, while at the same time safeguarding and promoting the interests and welfare of any children involved. Justice for Children is an alliance of individuals and organisations, including advocates, academics, ChildLine in Scotland, the Scottish Child Law Centre, Scottish Women’s Aid and Children 1st.

Children 1st supports the principles of the Victims and Witnesses Bill and welcomes many of the measures it suggests. Generally, the bill will add to the framework of support currently available for child victims and witnesses in the justice system and addresses many of the concerns Children 1st has long campaigned on. However, we do have concerns about some proposed measures in and indeed, some omissions from the bill, as outlined below.

**The proposal to create a duty on relevant justice organisations to set clear standards of service for victims and witnesses**

We support this proposal and welcome Ministers’ intention to publish draft regulations during the passage of this bill so that we might all be reassured by the detail of what will be contained in the standards. Children 1st is concerned that we might still get a set of minimum standards, yet it is our aspiration for this measure to result in public bodies demonstrating how they will achieve best standards of service, to deliver certainty to victims and witnesses about the level of service they should expect and to clarify their expectations on the extent of what can be provided.

The standards appear only to apply to criminal proceedings, yet many children and young people are party to civil proceedings as well, and the children involved in these cases also require a set of service standards. We are aware that civil proceedings are quite different from criminal ones and that there is currently a reform
process underway relating to civil actions. However, we would consider it appropriate for all court proceedings and public bodies engaged in those proceedings and cases to work to the same standards of service for victims and witnesses.

Finally, from our longstanding experience of supporting children and young people throughout court proceedings, we know that the information needs and support required by child victims and witnesses can be quite particular. We would prefer to see the duty to set and publish standards make specific reference to provide for the needs of child victims and witnesses, in a child-centred and child-friendly way.

**The proposal to give victims and witnesses a right to certain information about their case**

Children 1st welcomes these proposals as we know that existing practices currently fall short of meeting victims’ information needs. For example, we are aware of child victims of serious sexual abuse who have been refused updates from VIA because the case is of a highly sensitive nature. These children then face a dead end, and are not told where to go to find out the information they seek. In other recent cases, child victims of sexual crimes are told that they are too old to be eligible to give evidence at a remote site.

We particularly welcome Section 3, disclosure of information about criminal proceedings. If implemented appropriately, these provisions will go a considerable way to addressing longstanding issue for child victims and witnesses about being kept informed throughout proceedings, and of changes to charges, hearing dates and so on. We also know of one recent case where a child who had been sexually abused was assured that the case would go to trial on a certain day, only to turn up at court that day with her family, wait for two hours in the waiting room and receive a text message that the trial would now not be going ahead and that she would be advised of the re-scheduled date in due course. Clearly, regulations and guidance will have to be clear about acceptable methods of contact, as well as timelines and providing sufficient information in child-centred and child-friendly ways.

We also welcome Section 23, the victims’ right to receive information about the release of the offender. This has been an issue in the past for children and young people and we welcome this being remedied.

Currently, our understanding is that despite the law being changed in section 54 of the Criminal Justice and Licensing (Scotland) Act 2010 to allow witnesses access to prior statements, it is Crown Office policy for the provision not to be applied for child victims and witnesses under the age of 16. We therefore, would hope that Section 1 (3) (a) might allow for that policy to be changed by expressly applying section 54 to all child victims and witnesses.

It is important to consider not just what information is shared, but how it is shared with the victim. Children often tell us that they receive very little advice about the trial or special measures. Children 1st recommends that any professional or organisation tasked with providing information to a child victim or witness about different aspects of the justice process should have basic training skills in how to engage with children
and young people, to listen to children, and ensure that the child understands what the information being shared. Indeed, we would contend that the changes proposed through this bill actually add greater currency to the need for a specific child witness support service in Scotland, following established international models which work very well.

**The proposal to give vulnerable witnesses a right to access certain special measures when giving evidence**

All special measures should be available to all child and young person victims and vulnerable witnesses and we welcome in particular the extension of the definition of a child victim, witness and indeed, offender to 18. There should be a requirement to proactively offer each child the full range of standard special measures, including an explanation of how these measures work, a tour of the court house and remote sites, and to check in with the child nearer to the trial date in case the child has changed his or her mind regarding use of special measures. There should be a duty to ensure that children receive the measures that best meet their needs and wishes, rather than the most convenient or readily available special measure (often the screen). The use of special measures should be monitored and evaluated, with views sought from child victims and witnesses as well as court staff, judges, lawyers, and juries, wherever possible. We note currently that the Scottish Government holds no central data about the use of special measures and their effectiveness or otherwise since their introduction in the 2004 Act.

Children 1st welcomes measures aimed at tidying up the application of special measures and extending their availability. However, we wonder why there continues to be a need to notify and apply for special measures which should automatically apply. Moreover, we note from the financial memorandum a limited financial impact from these measures, yet the equipment used for giving evidence by TV link is out of date, technologically slow, often breaks down and is no longer cost-effective. Investment in new technology and new equipment is required if this measure is to be given full and proper effect in future.

We note and welcome provisions which allow for additional special measures to be tested before becoming “standard”. In particular, we note the successful use of intermediaries in a number of recent complex cases of child sexual abuse and also Ministers’ intention to pilot their use more thoroughly. Children 1st has long campaigned for the introduction and use of intermediaries for child victims and witnesses and welcomes this development.

We are concerned that the practical effect of sections 9 and 14 might adversely impact on children and young people’s automatic entitlement to use special measures to give evidence. We are, of course, aware of the need to protect the rights of the accused but believe a balance must be struck. We would welcome the committee clarifying how these sections might work in practice during the passage of the bill and how children and young people will be kept informed and advised of such applications and notifications. Again, the need to do so in a child-centred and child-friendly way suggests the need for a specific child witness support service.
We understand the policy intention behind Section 10 but are concerned that the remedy provided could seriously undermine children and young people’s right to give evidence away from court. We believe that the test provided in section 10 will result in more children being required to attend court in person to give evidence which Children 1st considers to be a retrograde step and undermines the principle of children giving evidence through the use of standard special measures. Indeed, we do not consider it necessary – current law is sufficient, in that it allows children over the age of 12 to decide where and how to give evidence: what is required is better awareness and training of how to present options to children and young people about how and where they give evidence.

But Children 1st would contend that only in very exceptional circumstances, should it ever be considered appropriate for a child under 12 to give evidence in person in court. Indeed, we are concerned that this measure is trying to resolve a problem which requires to be addressed more fully in criminal proceedings, that of children acting as witnesses in adult proceedings, particularly those involving their parents or carers. We know from our services supporting women and children and young people to recover from abuse, particularly domestic abuse, how traumatic this can be and intend to provide more detailed evidence and case studies highlighting our concerns before Stage 2. In short, Children 1st considers section 10 unnecessary and undesirable – what we would prefer to see being addressed is this more fundamental issue of involving children in adult proceedings as witnesses.

Indeed, other reforms, such as the potential removal of corroboration and the introduction and roll-out of joint investigative interviewing (which we welcome wholeheartedly) should by themselves reduce the number of children being required to be witnesses alongside a parent in a court action.

If this section is to proceed, then training of sheriffs and judges around the needs and interests of child victims and witnesses is vital, alongside robust guidance. In addition, we would like to see consideration of additional and/or temporary special measures to support a child giving evidence in person be mandatory practice where section 10 applies.

The proposal to require the court to consider compensation to victims in certain cases

In principle, we are not opposed to the idea of offenders paying a victim’s surcharge, providing, as with England and Wales, it applies to offenders aged 18 and over only and we would welcome the committee seeking clarification that this will be the case. This is an area where regulations will be vital in terms of the detail; for example, clarity is required on what happens if someone doesn’t pay the victim surcharge. We are currently seeking the views of young people who have been victims on this proposal and will provide that information to the committee before Stage 2 of the bill process.

We are, however, concerned at the proposal for restitution orders and in particular, how the measure proposes only to provide for police officers. Children 1st wonders if there is scope to extend this provision. For example, we have long been concerned at how offenders who have abused children through online images or
pornography are not required to make restitution for what many perceive as a victimless crime. At the same time, we know of the funding and resource pressure on services which support children to recover from child sexual abuse – our own eight services are almost entirely funded through our own fundraised income and yet, the waiting list for these services is always one of the longest. Applying something like a restitution order to offenders of specific online sexual offences – many of whom often have resources available – to go towards funding abuse and trauma recovery services would enable more children and young people who have been sexually abused to receive the right support at the right time to recover.

*Any human rights implications arising from the victims and witnesses provisions in the Bill*

The policy memorandum includes narrative on ECHR compatibility but says nothing about being UNCRC compatible, or even if this has been reviewed by Scottish Government as part of the consultation and drafting processes.

In terms of reporting duties, setting clear standards of service will allow statutory bodies to report on the implementation of the UN Convention on the Rights of the Child, and also the implementation of the standards required by the EU directive.

We note too that in 2012, the Scottish Government committed to undertake child rights impact assessments on appropriate legislation – we would suggest that this bill would have been appropriate for such an assessment to be undertaken.

*Additional evidence for the committee:*

*Victim statements*

Children 1st is concerned that the proposed provisions on victim statements reinforce an anomaly in terms of the definition of children. Nowhere else in legislation are we aware of children being defined as being under 14 and indeed, this provision (which we acknowledge is an existing one) appears to cut across the Age of Legal Capacity Act 1991. We would suggest that the reform required here is to bring the application of victim statements into line with other age-related legislation i.e. for children over the age of 12 to be invited to provide their own victim statement where appropriate.

We are also concerned at the provisions of the new sections created which are wholly un-child-centred and somewhat retrograde. We would prefer to see provisions around victim statements take on more of a GIRFEC approach in that where possible, children and young people should be supported to give their views. Again, support could be provided by a child witness service. Creating statutory provision which allows courts to continue to rely on the views of parents and carers in lieu of those of children and young people themselves appears to cut across the general direction of travel in policy for children.

Moreover, section (11C), which provides for a number of carers of a child to be potentially involved has real potential for conflict for a child who is likely to already be experiencing stress and trauma. A child victim or witness might well have a range of
carers and indeed, could be looked after – this is an unnecessary definition and provision in the bill.

This is a complex area and as such we would draw the Committee’s attention to the commitment made in the Children’s Hearings (Scotland) Act 2011 for advocacy provision to be made available to all children and young people entering the Hearings system. This will be come into force in 2014 and we would recommend that consideration is given to ensuring through the Victims and Witnesses Bill that all child victims and witnesses are given access to this advocacy provision as a matter of course.

Children 1st
5 April 2013
Justice Committee

Victims and Witnesses (Scotland) Bill

Written submission from Rape Crisis Scotland

1. Introduction
Rape Crisis Scotland welcomes the opportunity to comment on the Victim and Witnesses (Scotland) Bill, which in broad terms we support. We consider that the Bill contains a number of positive developments which, if approved, will have a positive impact on the experience of victims and witnesses within the criminal justice system.

2. Special measures

2.1 Rape Crisis Scotland is very supportive of the move to make access to special measures an automatic right for complainers of sexual offences. When the Vulnerable Witnesses (Scotland) Act, which introduced the legal provision for special measures in Scottish courts, was going through Parliament we pressed for complainers of sexual offences to have automatic rather than discretionary entitlement to special measures.

The particular trauma associated with giving evidence in sexual offence trials is well documented. Survivors in contact with rape crisis centres in Scotland frequently describe the experience as akin to being 'raped again' by the system they believed would protect them.

The Youth Evidence and Criminal Justice Act 1999 in England and Wales recognised the particular trauma associated with giving evidence in sexual offence trials by classing complainants in these cases as automatically vulnerable and therefore eligible for special measures.

Giving evidence in a sexual offence trial will always be a traumatic experience. The Scottish criminal justice system does, however, have a responsibility to reduce the additional trauma caused by the system as far as possible. Giving an automatic right to special measures for complainers in sexual offence trials would be a significant start in addressing this.

2.2 Under the current discretionary approach to special measures, adult complainers of sexual offences do not know whether they have any access to special measures until a few weeks before the trial. This significantly increases the uncertainty complainers experience during the often lengthy wait for a trial to proceed.

The prospect of giving evidence of such a potentially distressing and intimate nature can cause considerable trauma to survivors of sexual violence. This trauma is heightened by the criminal justice process itself. It can take up to 18 months for a case to reach court.
One of the major concerns of survivors contacting rape crisis centres who are going through the criminal justice process is the uncertainty around what is happening, and what their rights will be in court.

2.3 A further benefit of moving towards automatic entitlement is that support agencies such as rape crisis centres will be able to be clear with survivors considering reporting their experience to the police what their rights will be. Knowing that, for example, they will have access to a screen and will not need to see the accused in court might make the different between someone feeling able to report or not.

2.4 It is important to note that the provisions in the Bill would create an automatic right – it will still be for complainers to decide whether or not they wish to utilise this right. Some complainers may not wish to use special measures such as screens and this should be respected.

2.5 We note that for the first time the Bill makes clearing the public gallery a special measure. This already happens as a matter of course in sexual offence trials during the complainer’s evidence, and we would be keen to ensure that the process of making this subject to a special measures application does not make this any less certain.

3. Compensation orders

We have some concerns about the appropriateness of applying compensation orders in sexual offence cases. In our experience, what complainers are looking for is access to justice, and the imposition of a sentence which reflects the gravity of the crime committed against them. They are not looking for money from their rapist or abuser. We cannot speak on behalf of every rape or sexual abuse survivor; it may be there may be some survivors who would be open to receiving financial compensation from their attacker. In our experience however many would not. It would be impossible for any judge or sheriff to arrive a sum (particularly where a means tested sum) which would represent for a survivor a fair representation of what they have suffered. Any sum is likely to seem derisory in the face of this.

4. Gender of interviewer

4.1 Rape Crisis Scotland welcomes the acknowledgement in the bill that complainers of sexual offences should have a right to choose the gender of the person interviewing them. This choice should be extended to cover forensic examinations. There is extensive research demonstrating that both female and male survivors of sexual offences prefer female doctors to carry out this examination. In many areas of Scotland, it continues to be the case that survivors have no choice over the sex of who carries out what can be a very intimate and distressing exam, which is often carried out in the hours immediately following a rape or sexual assault. One of the most common complaints we hear from survivors is about how distressing it can be to be examined by a male doctor immediately following an experience of sexual violence.
4.2 If it is acknowledged that complainers of sexual offences have a legitimate preference to be interviewed by a female police officer, it is hard to see why this should not also be extended to cover what is a very personal and intimate examination carried out in extremely difficult circumstances.

4.3 As responsibility for forensic services will be moving to the NHS in the near future, the NHS will be responsible for delivering justice services and should therefore be included in the relevant provisions of the bill.

5. Issues not covered by the Bill

5.1 Right to review of decision not to prosecute

The EU directive provides that victims should have a right to request a review of the decision not to prosecute their case. This provision is not included in the bill as it currently stands. We consider that it is important to amend the bill to include provision of a clear and transparent review process where someone has been informed that their case is not being prosecuted. Victims need to be informed that they have this right, and be clear about what the process and timescales will be. Rape is a crime which can take a lot of courage to report, and it can be devastating for survivors to be informed that the case is not going to court. This is particularly common in sexual offence cases: Crown Office figures suggest only a quarter of reported rapes reach court. Complainers in Scotland should have the right, as laid out in the EU directive, to request a review of this decision.

5.2 Right of victims to participate effectively in criminal justice proceedings

It is difficult to see how this principle as set out in the bill can be meaningful for complainers of sexual offences unless they have access to legal representation. This is particularly the case in areas such as sexual history and character applications and access to medical and other sensitive records. Currently, complainers are informed about applications to introduce evidence relating to their sexual history or character but they do not have a right to actively participate in this process i.e. to challenge any application. While the Crown has the right to oppose any defence application to introduce evidence relating to the complainer’s sexual history or character, they are not acting directly on behalf of the complainer and may not oppose an application which the complainer would have wished to be challenged. Similarly, access to medical and other sensitive records is increasingly an issue which survivors are raising with us as one which causes them significant concern. Although the Crown Office seeks consent from complainers prior to accessing their medical or sensitive records, complainers have no access to legal advice to help inform their response. Consent in these circumstances is not, in our view, either meaningful or freely given, as if complainers do not give their consent there may either be no prosecution or the Crown may seek a warrant to obtain the records irrespective of the views of the complainer. One survivor described her consent in these circumstances as ‘forcible consent’; she did not feel she had any option. In our view this is not consistent with victims having the right to participate.
effectively in criminal proceedings. The prospect of having their personal lives subject to scrutiny in this way acts as a direct deterrent to rape survivors reporting what has happened to them to the police, and where they do report it can add considerably to the trauma and sense of violation experienced within the justice process. We believe that for complainers of sexual offences to have any real prospect of protecting their private and family life, as set out in article 8 of the European Convention on Human Rights, they must have access to independent legal representation, funded by Legal Aid, for matters relating to sexual history and character evidence and access to medical records.

5.3 Right to see a female medical examiner
See point 4 above.

5.4 Judicial directions in sexual offence cases

The Scottish Government has committed (in its election manifesto) to introducing judicial directions in sexual offence cases, to give factual information to jury members on delayed disclosure and apparent lack of physical resistance. Reactions to rape can be counter-intuitive; many survivors freeze and are unable to fight back, meaning that there is frequently little or no significant injury. It is common for survivors not to tell anyone about the assault immediately – it may take hours, days, weeks or even years for someone to feel able to disclose what has happened to them. Many jury members will, however, be completely unaware of this and may have strong views to the contrary: in our experience people can hold strong views on what they would or would not do if they were raped, which can influence their judgement of what others should do. Providing factual information to jury members through the introduction of judicial directions could help address concerns about lack of information or attitudinal issues affecting jury deliberations in rape trials. This bill would seem to be an appropriate place to consider introducing these judicial directions.

Conclusion

Rape Crisis Scotland supports the introduction of the Victim and Witnesses (Scotland) Bill and the principles behind it. There is much in the bill which is worthy of support, and which could make a genuine difference. We consider, however, that it provides a crucial opportunity to look more radically at how we can improve both the experience of the justice system for complainers and their ability to access justice.

Sandy Brindley
National Co-ordinator
5 April 2013
The Parole Board for Scotland is a Tribunal Non-Departmental Public Body (NDPB) which exists under the provisions of the Prisons (Scotland) Act 1989, the Prisoners and Criminal Proceedings (Scotland) Act 1993 (“1993 Act”), the Convention Rights (Compliance) (Scotland) Act 2001, the Criminal Justice (Scotland) Act 2003 and (if commenced) the Custodial Sentences and Weapons (Scotland) Act 2007.

1. The statutory functions and powers of the Board

The Board has powers to:

- direct Scottish Ministers to release determinate sentence prisoners serving four years or more and it may also make directions to Scottish Ministers as to the licence conditions of such prisoners;

- direct Scottish Ministers to release prisoners serving extended sentences where the custodial term is 4 years or more, make directions to Scottish Ministers as to the licence conditions of such prisoners and make directions to Scottish Ministers regarding the licence conditions of extended sentence prisoners where the combined custodial and extension period is 4 years or more;

- direct Scottish Ministers to release life sentence prisoners on life licence once they have served the punishment part of their sentence imposed by the court;

- recommend (in practice direct) Scottish Ministers to revoke the licence of and recall to custody offenders sentenced to 4 years imprisonment or more, life sentence prisoners and extended sentence prisoners in circumstances where such action is considered to be in the public interest.

The Board may direct the Scottish Ministers to re-release any prisoner who has been recalled to custody without a recommendation (direction) of the Board (i.e. recalled by Scottish Ministers without referral to the Board) or any prisoner who has been recalled with such a recommendation (direction). The re-release of life prisoners and certain extended sentence prisoners who are recalled to custody must be considered by a Tribunal of the Board.

The Parole Board (Scotland) Rules 2001 set out the matters which may be taken into account by the Board in dealing with cases referred to it by the Scottish Ministers for consideration for release under the various statutory requirements.

In this submission the Board will focus on the arrangements set out in Section 24 of the Bill which proposes that if the offender is serving a life sentence, the victim should be afforded an opportunity to make oral representations to a member of the Board who is not dealing with the case prior to consideration of release.
2. **Life sentence prisoners**

Life sentence prisoners can only be considered for release after they have completed the "punishment part" of their sentence. This is the period of time set by the judge when the sentence is passed in court, and is announced in court at the same time as the sentence is passed. Life sentence prisoners who are released are subject to a life licence and can be sent back to prison at any time during the rest of their life if they breach any condition of that licence.

Life sentence prisoners are reviewed for possible release on life licence by the Parole Board, sitting as a Life Prisoner Tribunal. This is an oral hearing chaired by a legally qualified member of the Board and two other Board members. The prisoner and, usually, their legal representative will attend along with an Official from the Criminal Justice and Parole Division of the Justice Directorate and a Representative of the Scottish Prison Service. It is for the Board to determine if the prisoner should continue to be confined for the protection of the public. If release on life licence is not directed then the prisoner is required, by law, to have a further review not more than 2 years beyond the current review. The tribunal will set the date of the further review.

3. **Current arrangements for victims**

In some criminal cases, victims have a right to receive information about the release of an offender. They may also have a right to be told when the offender is being considered for release and to make written representations (written comments) about the release of the offender.

The process that allows victims to be told about an offender's release and to make representations is known as the Victim Notification Scheme, or VNS, which has two parts. The first part allows victims to receive information about an offender's release. The second part allows victims to make written representations to the Parole Board in advance of an offender being considered for release. The Board will consider these representations along with other information on the offender's case before reaching a decision.

If parole is granted, the victim may request that certain conditions are added to the offender's licence. For example, that the offender should make no attempt to contact the victim or their family once they are released from prison. If particular additional licence conditions are requested, an explanation is required for each condition requested and evidence provided of why this is necessary. This is because, in accordance with Human Rights legislation the Board can only recommend the inclusion of any condition which is:

- In accordance with the law;
- Has a lawful aim; and
- Would be a proportionate means of achieving that aim.

Every condition requires to be specific (so that the offender knows exactly what he/she and others are required to do/not to do) and enforceable.
4. The Board’s response to the Bill

Many victims think life sentence prisoners should be detained in prison for the rest of their lives and should not be considered for parole. The Board believes that careful consideration will need to be given to making sure that this Bill does not raise false expectations on behalf of the victim that their representations will influence the Board’s decision on whether or not to release the offender if their only reasons for objecting to release relate to the offence and its subsequent impact on the victim.

Prisoners do not usually serve the whole of their sentence in prison. Most are released before the end of their sentence and are then supervised in the community for a time by Social Work Services. Life sentence prisoners may only be detained beyond the expiry of the punishment part of their sentence on the grounds that it is necessary for the protection of the public.

When considering whether to release an offender on parole, the Board takes into account all of the information contained in the reports in the offender’s dossier which is prepared in advance of consideration of the case and is referred to the Board by Scottish Ministers at the relevant point in the sentence. It will take into account information about the offence from the trial judge’s report. The Board is also interested in an offender’s behaviour in prison, their offending history, their family and social background and their plans for release. It will pay particular attention to whether they have taken any steps to address issues or problems which may have contributed to their offending behaviour. This may be demonstrated by the offender taking part in offence focussed work whilst in prison.

If victims are registered under the VNS they can submit representations and these will be considered along with all of the other information contained in the dossier. In particular, if the victim is concerned about contact from the prisoner, licence conditions can be added to address these concerns as long as they comply with the stipulations outlined in paragraph 3 above. The main consideration for the Board will be to assess whether an offender is likely to be a risk to the community if they are released on licence.

The Chairman and Vice Chair have agreed to give oral evidence to the Committee if required.

We hope this information is helpful to the Committee.

Parole Board for Scotland
8 April 2013
Thank you for giving me the opportunity to add to the debate on the Victims and Witnesses Bill, and I am happy to do so orally. I have read nearly all the responses and there are several great ideas to make life better for victims, and I am not going to add to those. This is a real opportunity for Scotland to lead the world in how victims are treated, so that their human rights are also enshrined in legislation, process and practice. The danger with legislation and processes though is that they can de-humanise a situation, reducing it to facts and statistics, that’s full of acronyms and abbreviations and assumptions (without the benefit of paid legal assistance to translate that), and it’s a world that becomes exposed to all because of the way our media deals with such things, including at times, a character assassination that you are never able to defend. I would therefore plead with you that whatever you consider doing in the end, please put the victims first.

Our criminal justice system has always focussed on how society responds to criminals and the impact that has on them and their families while they may be in prison. Most who commit violent crime are known to the police and the justice system, know how to “play the system” and can engage the help of able advocates and lawyers to fight their case, find loopholes, and do what it takes to defend their client. Violent crime may be on the decrease, if statistics can be believed, but there is an increasing lawlessness and disrespect of others and their property that means people are more fearful than before. I applied to be a JP because I believed I could help make a difference to my local community by reducing more crime by “nipping things in the bud” at an earlier stage. I believed that an appropriate sentence early on and adequate support systems in place might halt the “career” of a criminal, or the escalation of crimes. I learned that a JP has very limited opportunity to make such a difference, and it is my view that JP’s should have access to a much wider range of initiatives to go alongside any sentencing, e.g. referrals to relevant bodies and support, referrals to anger management courses or addiction counselling. This may prevent some criminals from continuing and escalating their criminal lifestyles, before any willingness to change was lost. In my work as a JP, in my observations in court and in training, I also saw that those who make the legislation, and those who enforce it, do not always understand the impact of decisions made on paper that have to be lived with in real life. I have had many conversations with police officers who say they despair of the legal system – of the time and effort they put into catching a criminal and seeking for and protecting evidence only for that to be discarded on a technicality, or overlooked. I heard many stories of times when they have personally pleaded with a judge to ensure a known violent criminal isn’t released on bail, for instance, only for that to be ignored. They know what that individual is really like in the real world, not the one displayed on paper, or put
forward by a social worker when too often the individual knows exactly how to “play the system” and say whatever it takes to get a lighter sentence.

I’ve also spoken to many, many victims of crime, and I want to share some of their stories with you, and not just what you might remember from the press stories at the time or because some have sought high profile battles of their own. Many you will not even remember, because time moves on and they are yesterday’s headlines, while they still keep trying to live today. Have you ever lost someone you loved? If so, you will understand the gap that this leaves in your life, the process of grieving, the fact that dreams you shared together will never come true, the fact that they are simply irreplaceable. You may have felt anger that they left you behind to face the world without them, or anger that they did not look after themselves well enough and died as a result. You may have been unable to sleep, or turned to drink or drugs to help you cope, or become deeply depressed as a result. The “normal” death of a loved one in itself is considered to be the most stressful thing any person can live through. The death of a loved one because of a violent crime is a completely different matter, bringing with it fear, hatred, burning anger, pain at carrying around the inability to forgive and you have the shock of the new alien world of our justice system to cope with. That alien world might also include the one place you felt safe; your home, which becomes a crime scene that you eventually have to clean up yourself, and you can’t imagine the horror that brings with it.

Although in shock, your family, friends, (as well as acquaintances and strangers) are contacting you (or someone close to you) for more information – or they are completely ignoring you as they don’t know what to say or do. You are getting phone calls to your ex directory phone number and mobile from people who say they are from the press, who want you to say something about the crime or the person involved. They want a picture, and in your shock you find any picture and give it to them, and then see that picture reproduced time after time after time in the months that lie ahead, and you can’t change it for a better one as that’s the photo that everyone associates with that crime. You are in the full glare of the media, relentless in their pursuit of your story, the “scoop” that forgets there are human beings involved, so they will stand at your door for hours, post things through your letterbox, leave a bunch of flowers “with their sympathy” – and their contact details. This is traumatising in itself; I experienced a tiny glimpse of this myself after my resignation, with constant phone calls and journalists and photographers just turning up on my doorstep, or contacting acquaintances to get my telephone number; one journalist phoned me 15 times on one day, leaving messages each time. I found that extremely stressful, and all I had done was resigned.

After a violent death, your house is filled with police officers and other people whose title and name you cannot remember. You will be assigned some usually highly trained and sensitive police liaison officers initially; nearly all the victims I met spoke very highly of them, but they only remain for a few days and then your case will get handed over to COPFs. This is a critical meeting that takes place not long after the death at a time where you are totally exhausted, where even getting dressed is a major effort and thinking about any decision is done through a fog, where everyone else knows everyone else, or at least why they are there, and where they all have more information than you do (including how your loved one actually died), but usually no-one explains that to you at the meeting. Of course, you can’t
take most of the information in anyway, no-one follows the meeting up in writing, which be such a great help because other people will be asking you what was said or done, or what happens next, and you can’t really remember. Throughout the case, you may get updates as the accused changes his or her plea, or something else changes, but every time you get such a call, you can experience shock again, so don’t really take the information in, and long for a follow up letter to help you explain to your family and friends. More often than not, you get those updates because you’ve checked the court website, or because someone from the press contacts you to ask for your opinion on something they knew before you did.

You find that the justice system isn’t joined up, and that communication is poor when in the 21st century there is no need for that at all. Often, you find out via the press (because you’ve seen them gathering at your door again, or because you’ve got a call to let you know and ask for your opinion) that some sort of court decision has been made. Later, you might get a call from the prosecution side to advise you of this, or you may just get a letter. Equally, you may hear nothing at all because someone was on holidays or forgot. It’s just their job after all; but it’s your new life. At a time when your brain isn’t functioning well anyway, you find you’ve entered a whole new world of information, usually presented in lump format, but it’s not written in simple language that you need at that time. You will get various letters from the prosecution in particular that are full of legal terms that don’t make sense to you, some of which you can’t even find when you search the internet for a definition, or else are jargon, acronyms and abbreviations. What does it mean, you ask yourself? Read this – it’s a real example from a letter “explaining” why a trial has been continued, quoted verbatim:

“As you said this morning the reasons for the continuation are as the papers said. Below is a copy of the official record from court. Says what was said in

In the appeal against sentence the Court having heard submissions in part, found the point at issue.................Continued the appeal to a date to be afterwards fixed before 3 judges and decreed.”

I have mentioned a number of easy fixes in my paper already submitted to you, some of which I know are already being considered by certain departments or have been put forward as recommendations elsewhere, but would ask you to please consider those.

Alongside all of this, you have to try to come to terms with the fact that someone you loved has been badly hurt or murdered by the deliberate actions of someone else. Their bodies have sometimes been mutilated so you can’t see them to say goodbye, but even if that is not the case, you can’t touch their bodies when you go to see them to say goodbye, as the body is evidence. Nor can you be left alone to just say goodbye, like you would in a funeral parlour, because you might tamper with some evidence. When you identify the body, there is usually no-one there to give you any emotional support or explanation as to why you can’t touch them, or why there will be post mortem, or what that might involve – and because of this identification, you become a “witness” which limits the information that can be given to you. You find that things you really wanted – a watch, a ring, a wallet or purse – are not available to you, either because they are currently missing, or because they are also evidence. But don’t worry – two years after they have died, you might get that “evidence” back,
without warning. You might also find that part of their body has been kept for evidence purposes, even though that loved one may have had to go through two autopsies because the accused has the right to demand that – and months or years after the original burial or cremation, you get that body part back. What are you to do with that?

And worst of all, you find you are mainly voiceless, and that you have no rights when the person who did this has many. Apart from an opportunity to give a victim statement, most other information is a one-way flow of what the Crown intends to do, or in court, what the accused solicitor is proposing. How do you draft a victim statement anyway? How can you possibly convey what this loss means to you when you are grieving the loss and in a state that is most akin to Post Traumatic Stress Disorder. You are thankful that you get some support from Victim Support in the initial stages, and many find this very helpful, though limited, but the help is at least coming from someone who has been trained, and knows what your fears might be. Those fears may be totally irrational, but they are real to you, and they kick in from the time bail is granted, (as it is too readily). You fear having to face that person in the street; you don’t know what they look like usually, but they will know what you look like from the press coverage as YOU have no anonymity. Are they behind you on the bus, in the queue for the tills, or beside you in church? Victim Support is a charity and has limited ability to help long term, and the support does drop off after you’re supposed to have “moved on” but you will find that at the appeal or release stage you will get a stark letter from the Crown offering you this service again, when it could instead be proactively be offered to you at that point, because the sentence isn’t the end. Although that person has been sentenced, they may appeal the sentence, they will be considered for parole and they will usually be released – and you dread each stage of that process but are largely forgotten by now as “due process” takes its course. In fact, there IS no end.

On a personal level, you have to work out feelings; in particular anger, guilt and hatred. These may be new emotions to you, and you find a dark side to your personality that you didn’t know existed. You have to struggle with the concept of forgiveness, which may be a big part of the faith you have, but for you is step too far, which makes you feel more guilty. You have to find a way to get back to work, and cope with the initial days of people whispering how sorry they are, but unlike a normal death, this one keeps coming to everyone’s attention again and again. Many will not speak to you at all about it; some will not speak to you again because they don’t know how to deal with it, or because they believe that it would be unlucky to do this, as if it may attract such evil and sorrow to them too, but you don’t know that until many years later. Or perhaps you find that you cannot face life outside again, so you sit trapped in your house because if you go left, you go the direction of the crime, and if you go right, you go past the house of the accused, or of one of their relatives. You ask for help – but because of where you live, the nearest trauma counselling on offer is three different hour long bus journeys away. You often need referred to specialist psychiatric services, which are in high demand, so you may not get the help you need for a year or two years after the crime itself – but in the meantime, your live gets narrowed to that inside your house, and life as you knew it will never be the same again. Or as one victim told me, “life will never be the same. It stopped when she was murdered and now I am just waiting until I can join her.”
I welcome the introduction of the National Confidential Forum. I would also welcome much greater changes for those who have learning difficulties or mental health issues at the time of the crime, who need additional support. And I would ask that you strongly consider the introduction of a Victim Commissioner, not bound or affiliated to any political party, who is independent and can fight on behalf of these victims to ensure their rights are considered. Just before Reammon Gormley was murdered, my son had just been attacked in a taxi rank. He was punched in the throat; had that person had a knife, my son would have been another news story. The next morning, I had been reading the papers and turned to my husband and said, “What is it going to take to make judges and politicians see what this reality is, to really make sure Scotland is a safer better place to live? Is it going to take one of their own children being murdered to make those changes?” Reammon’s story affected me so much because it could have been my son, and indeed I would have been proud to have him as my son, and Scotland cannot afford to lose people like this who would have made a difference to the world. The arguments for crime and punishment, prevention and restorative justice are being made elsewhere – and there are much greater resources being given to that. For the victims of crime, all I ask is that you please do what is right for Scotland and all of its people, and to put victims interests genuinely at the heart of these changes.

Caroline Johnstone
8 April 2013
Justice Committee
Victims and Witnesses (Scotland) Bill
Written submission from the Equality and Human Rights Commission

Introduction

The Equality and Human Rights Commission is the regulatory body for equality and anti-discrimination law in Scotland, England and Wales, working across the nine protected grounds set out in the Equality Act 2010: age, disability, gender, race, religion and belief, pregnancy and maternity, marriage and civil partnership, sexual orientation and gender reassignment. We are also one of Scotland’s two “A status” National Human Rights Institutions (NHRIs). We share our human rights mandate in Scotland with our colleagues in the Scottish Human Rights Commission (SHRC).

We welcome the opportunity to give evidence to the consideration at Stage 1 of the Victims and Witnesses (Scotland) Bill.

Our comments will be framed in part around the findings of our inquiries into disability-related harassment and human trafficking in Scotland, but will not consider the provisions for a National Confidential Forum for survivors of institutional abuse. Our colleagues in the SHRC, who have previously worked on this issue, are better placed to respond to this section of the Bill.

Access to justice is a fundamental equality and human rights issue, enshrined in domestic and international law. All public authorities in Scotland are required under the Public Sector Equality duty provisions (the general duty) of the Equality Act 2010 to have due regard to, among other factors, the need to eliminate discrimination and harassment (S149, (1) (a)).

As well as the legal and regulatory context, the policy context against which the Bill is being considered is one which recognises that equality and human rights are central to transforming public service delivery and to ensuring more responsive and person-centred services in the future. It is encouraging that the Scottish Government’s new Justice Strategy for Scotland clearly demonstrates that ministers are attempting to develop approaches to delivering better justice outcomes in Scotland which reflect the Christie Commission’s emphasis on equality.

Our evidence will draw on some of these factors, and also on evidence gathered and recommendations made in our inquiries into disability-related harassment and human trafficking in Scotland.

1 www.ohchr.org/Documents/Countries/NHRI/Chart_Status_NIs.pdf
Comments on Bill

General Principles
These are welcome, and evidence from our disability harassment inquiry suggests that they can play a role beyond the purely aspirational. Professionals working to the new adult protection regime ushered in by the Adult Support and Protection (Scotland) Act 2007 pointed to the general principles on the face of that legislation as referred to regularly by those working in adult protection to shape thinking on if, when and how to make the most effective intervention where an adult may be at risk of harm.

It is important however that the definitions of “appropriate” at 1, (3) (c) and (d) are not overly restrictive. We recommend that the Government issues further guidance on the interpretation of what is deemed “appropriate” as the term has no legal definition. Needs may not always be immediately apparent – a victim or witness to human trafficking, who could be suffering from post-traumatic stress or have serious concerns for the safety of family members in their country of origin, may need support during an investigation or court proceedings, or to effectively participate, which go beyond immediate basic needs (such as translation and interpretation).

Information
One of the seven key cross-sectorial recommendations in our disability harassment inquiry is that “definitive data is available which spells out the scale, severity and nature of disability harassment and enables better monitoring of the performance of those responsible for dealing with it.”

Information is essential then, not just to ensure that victims and witnesses can participate effectively in the investigation and proceedings, but to provide an end-to-end narrative from initial incident, through arrest, charge, trial, sentencing and rehabilitation, so that criminal justice agencies can build up a much clearer picture of the journey through the criminal justice system for victims, witnesses and perpetrators of different classes of offence. At present, arbitrary organisational and systems boundaries militate against this kind of holistic picture.

Extension of Victim Notification Scheme
The Equality and Human Rights Commission supports lowering the notification threshold from sentences of 18 to 12 months. However, our inquiry into disability-related harassment highlights the effect of “low-level/high-impact” incidents which, while they may in isolation seem inconsequential, can have a profound cumulative effect. In 2007 Fiona Pilkington took her life and that of her disabled daughter Francesca after dozens of “low-level” incidents which agencies failed to identify as fitting a pattern of targeted harassment by local youths. Consideration should therefore be given to creating provisions for notification of release for sentences of less than 12 months where the sentence includes a proven statutory aggravation.

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8 EHRC, Hidden in Plain Sight: Inquiry into disability-related harassment, September 2011, pp. 10-11
Vulnerable Witnesses
The Equality and Human Rights Commission supports the proposals for vulnerable witnesses, in particular the automatic trigger in proceedings for human trafficking offences. However, we would suggest that the provisions at section 6 to amend section 271 of the Criminal Procedure (Scotland) Act 1995 should be amended to encompass significant risk of harm not just to the victim or witness but to their immediate friends and family (s271, (1) (d)).

Equality and Human Rights Commission
March 2013
Sacro agrees that the creation of a duty on relevant justice organisations to set clear standards of service for victims and witnesses would increase their confidence in the criminal justice system. It would also seem appropriate that such a duty should be underpinned by the right of victims and witnesses to receive appropriate information regarding their case.

Vulnerable witnesses should have the right to access certain special measures when giving evidence. However, they should not be required to do so as some may prefer to appear in court, and the ability of victims to remain in control of their experience is important.

The proposal that courts should consider the issue of compensation in certain cases would benefit from the inclusion of restorative approaches, allowing victims to receive direct or indirect apologies from offenders and well as practical reparation.

The introduction of a victim surcharge would, in our opinion, be unmanageable. In particular, given the number of offenders currently imprisoned for non-payment of fines, this proposal has the potential to increase the prison population unnecessarily. However, the option of community reparation as a payment-in-kind could provide many of the positive aspects of this proposal.

Tom Halpin
Chief Executive
8 April 2013
Justice Committee
Victims and Witnesses (Scotland) Bill
Written submission from the Scottish Human Rights Commission

The Scottish Human Rights Commission was established by The Scottish Commission for Human Rights Act 2006, and formed in 2008. The Commission is a public body and is entirely independent in the exercise of its functions. The Commission is the national human rights institution (NHRI) for Scotland with a mandate to promote and protect human rights for everyone in Scotland. The Commission is one of three NHRIs in the UK, along with the Northern Ireland Human Rights Commission and the Equality and Human Rights Commission. In June 2010 the Commission was accredited with “A” status by the International Coordinating Committee of NHRIs and in May 2011 the Commission was elected to chair the European Group of NHRIs.

Introduction

The Scottish Human Rights Commission (the Commission) welcomes the opportunity to submit comments to the Justice Committee on the Victims and Witnesses (Scotland) Bill. As stated in previous submissions\(^1\), the Commission wishes to highlight the importance of human rights for everyone involved in the criminal justice system, in particular victims of crime and witnesses.

The Commission broadly welcomes the Bill as an important step towards implementing the EU Directive\(^2\) and achieving the goals of international human rights standards in this area, but it believes the Bill could go further. The Commission advises that the Justice Committee consider whether the definition of victim included in the Bill fully reflects international human rights standards and is a sufficient basis on which to take steps to ensure the criminal justice system works effectively for all victims of crime in Scotland. The Commission further considers that additional steps could be taken to address the rights of victims of human rights violations, some of whom may also be victims of crime.

The Commission wishes to address the general human rights issues arising from the Bill first (question 6 of the Call for Evidence) and subsequently it will answer questions 2, 3, 4, and 5 put forward by the Committee.

(6) Any human rights implications arising from the victims and witnesses provisions in the Bill

Internationally agreed definitions of victims are broad ranging.

According to the UN Victims Declaration\(^3\), the term “victims” means:

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\(^1\) SHRC response to the Scottish Government consultation on Victims and Witnesses Bill July 2012. Available at www.scottishhumanrights.com
\(^2\) 2012/29/EU
\(^3\) UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN General Assembly Res. A/RES/40/34, 29 November 1985, (hereafter UN Declaration), para 1.
“persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power”.

The Declaration also clarifies that a person may be a victim, irrespective of whether the perpetrator is identified, apprehended or prosecuted, and will extend, where appropriate, to family members of the direct victim. That declaration also includes a separate definition of victims of human rights violations which may not amount to breaches of the criminal law. International human rights law also includes well developed provisions on the right to an effective remedy for victims of violations of human rights.

The Council of Europe Committee of Ministers’ Recommendation on assistance to victims of crime defines victims in similar terms:

“Victim means a natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, caused by acts or omissions that are in violation of the criminal law of a member state. The term victim also includes, where appropriate, the immediate family or dependants of the direct victim.”

The Commission invites the Justice Committee to consider whether the definition of “victim” in the present Bill fully reflects international human rights standards.

From 2008 to 2012 the Commission reviewed research on the realisation of internationally recognised human rights in Scotland. The evidence gathered during this period in relation to ‘Access to Justice’ shows that additional steps are required to ensure effective access to the justice system for victims in different circumstances. This extends to both civil and criminal justice. The Commission believes that the justice system should adapt to individual victims rather than requiring that all victims adapt to the system. The present Bill represents an important opportunity to make the criminal justice system work more effectively for all victims of crime in Scotland.

In addition, the Commission has been working since 2009 to promote effective access to justice and remedies for survivors of historic child abuse. The Commission and the Centre for Excellence in Looked After Children in Scotland (CELCIS) are

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4 Ibid, para. 2.
5 Ibid, para 18.
7 Recommendation Rec(2006)8 of the Committee of Ministers to member states on assistance to crime victims
currently overseeing a series of InterActions to develop an Action Plan on Justice and Remedies in this context. During the InterActions survivors have raised concerns, not only about civil justice and remedies but also, about the current accessibility and effectiveness of the criminal justice system from the moment of reporting criminal abuse to investigation and prosecution. They referred specifically to barriers they have faced in securing investigation of historic crimes and a lack of support during the criminal process.

International human rights law places a number of specific obligations on States to safeguard the rights of victims of crime and witnesses in criminal proceedings. These international standards precede the EU Directive and should be read together with it. Furthermore, both the rights of the victim and the rights of the accused must be respected. Therefore, pursuant to international human rights standards, the Bill should be implemented without prejudice to the rights of the accused. In particular, the Committee should ensure that the right to a fair trial (Article 6 of the European Convention on Human Rights, ECHR) and the right to respect for private, family and home life (Article 8, ECHR) are respected.

As the Council of Europe Committee of Ministers has said, measures to help the victims

“need not necessarily conflict with other objectives of criminal law… such as the reinforcement of social norms and the rehabilitation of offenders, but may in fact assist in their achievement and in an eventual reconciliation between the victim and the offender”.

Similarly, the UN Declaration envisages:

“Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system.”


11 UN Declaration, para. 6(b).
Notwithstanding this principle, the Commission recommends that the Committee give careful consideration to the proposal to give victims the right to make written representations when prisoners are first eligible for temporary release, and enable victims to raise concerns about conditions placed on release. Amongst other questions to consider are: will all victims be able to make representations? Will this extend to relatives, carers, friends? What is the nature of these representations? What weight is given to this type of evidence and its relevance? Similarly, consideration needs to be given to data protection, confidentiality and privacy rights as a consequence of disclosure of sensitive information. Furthermore, will there be adequate means for the prisoner to respond to any such representations by victims?

In relation to oral representations, the Commission notes that any move to amend the current practice to allow representations to be made by victims or relatives to a member of the Parole Board should also allow for proper opportunity for those representations to be challenged by the prisoner in order to avoid the potential for non-compliance with the Convention (i.e. Articles 5 and 6).

(2) The proposal to give victims and witnesses a right to certain information about their case

The UN Declaration provides in para 6:

“The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:

(a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information;”

The Commission considers that victims should be fully informed of their role, scope and timing in the proceedings and outcome of the police investigation and/or prosecution. It is equally important for the proposed scheme to be compatible with human rights in order to consider and protect the victims, witnesses’ and accused’s right to respect for private and family life, in particular Article 8 of the ECHR.

Article 8 (1) of the Convention provides that:

“everyone has the right to respect for their private life, family life, home and correspondence”.

Article 8(2) of the ECHR allows the State to justify interference with these rights where such interference is in accordance with the law, pursues one of the legitimate aims identified in Article 8(2)\(^{12}\), and is necessary in a democratic society. An interference will be considered “necessary in a democratic society” for a legitimate aim if it answers a “pressing social need” and is a proportionate means to address

\(^{12}\) Including ‘the prevention of disorder or crime’ and ‘the protection of the rights and freedoms of others’.
that aim. In consequence, any decision that impacts on Article 8 should be guided by the Convention test.

Article 8 should be considered with Article 6 to guarantee fairness to the accused. It is important that the proposal to give victims and witnesses a right to certain information about their case does not impair the right to a fair trial and a fair hearing. Article 6 contains a series of procedural guarantees in relation to decisions which determine a person's civil rights or obligations, or a criminal charge and "a restrictive interpretation of Article 6 (1) would not correspond to the aim and purpose of that provision".13

The Commission considers that this provision in the Bill should be as clear and specific as possible to ensure its application is limited by the principle of legal certainty and to avoid any risk of arbitrariness.

(3) The proposal to give vulnerable witnesses a right to access certain special measures when giving evidence

The Commission welcomes the proposal as it ensures that vulnerable witnesses in Scotland are entitled to the same support as elsewhere in the UK and EU. Furthermore, the Commission considers that it is important to give further consideration to other areas of Scots law which apply the principles of dignity, respect for private life and the right to presumption of legal capacity as given effect in the Adults with Incapacity Act 2000 and the UN Convention on the Rights of Persons with Disabilities (Article 12).

In addition, it is vital to ensure that the accused's right to challenge witnesses in cross-examination is not unduly or unnecessarily impaired by the proposal.

(4) The proposal to require the court to consider compensation to victims in certain cases

International standards on victims of crime recommend a series of reparations elements, including treatment and rehabilitation for physical and psychological injuries, which go beyond reparation and restitution orders included in the Bill.14

International human rights standards contain specific requirements regarding assistance to, and rehabilitation of, victims.15 The Committee of Ministers' Recommendation on assistance to crime victims recommends that

"States should identify and support measures to alleviate the negative effects of crime and to undertake that victims are assisted in all aspects of their rehabilitation, in the community, at home and in the workplace."

13 Delcourt v Belgium, Application No: 2689/65. See also Golder v United Kingdom, Application No: 4451/70.
14 CoE Recommendation Rec(2006)8; UN Declaration, paras 8-17.
15 See for example: Committee of Ministers’ Recommendation on Intimidation of Witnesses; Yogakarta Principles; CRPD, Art. 16(4); COE Guidelines on the protection of victims of terrorist acts; Convention against Trafficking; CAT and CRC.
The assistance available should include the provision of medical care, material support and psychological health services as well as social care and counselling. This obligation is particularly relevant with respect to children, women in special circumstances and refugees.

A range of victims of crime may also be victims of human rights violations. In this case there is an obligation to comply with the right to an effective remedy as guarantee in Article 13 of the ECHR.

It is important to note that in many cases compensation does not in itself constitute an effective remedy for human rights violations or crimes. International human rights standards on the right to an effective remedy clarify that that right extends to access to justice, investigations and reparations. Reparations should include opportunities for restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Reparations should be proportionate to the harm and guided by the views and wishes of individual victims.

i) Restitution of rights
Restitution of rights means restoring victims to their original situation where this is possible. This may include supporting victims to realise their rights which have been violated and affected by the crime or human rights violation.

ii) Adequate compensation
Compensation is one of the principal forms of reparation and often an essential part of a victim’s remedy. The Commission therefore agrees that Courts should be required to consider the issue in all cases where an identifiable victim has suffered injury, loss or distress. Compensation should be available for human rights violations, not only criminal conduct, particularly where restitution is not possible. The establishment, strengthening and expansion of national funds for compensation to victims should be encouraged. Compensation does not have to be linked to prosecution or legal procedures and separate mechanisms can be created to receive, adjudicate and respond to claims for compensation.

iii) Rehabilitation
Rehabilitation measures such as therapy, counselling, education and training should also be provided where appropriate. Other forms of rehabilitation may also be appropriate.

iv) Satisfaction
Satisfaction relates to declaratory forms of reparation, whereby a public record of the truth or acknowledgement of suffering is made (e.g. an effective apology). While having the ability to tell one’s story publicly or attribute blame for a violation of rights is a positive outcome it is not usually a sufficient remedy in Convention terms.

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v) **Guarantees of non-repetition**
The right to guarantees of non-repetition is not only in relation to the violation against the individual, but of that type of violation, including through changes in law and practice.\textsuperscript{17}

5) **The proposal to introduce a victim surcharge and restitution orders, so that offenders contribute to the cost of supporting victims**

The Commission considers that ensuring adequate, effective and prompt reparation is an obligation of the State and yet in cases a (legal/natural) person could be directly liable for reparation to a victim. In those cases, this measure may strengthen the direct compensation provided by offenders to victims. Compensation orders may not always practicable or recommendable as there will be many cases where the offender lacks the ability to pay any meaningful level of direct compensation or there is no identifiable victim.

The Commission invites the Justice Committee to consider also the financial impact that a victim surcharge scheme could have on the offender's family which may have financial problems, ensuring for example that the best interests of the child is a primary consideration, as required by the UN Convention on the Rights of the Child.\textsuperscript{18}

Scottish Human Rights Commission
8 April 2013

\textsuperscript{17} UN Human Rights Committee, General Comment no. 31, para. 17.

\textsuperscript{18} Article 3, UN Convention on the Rights of the Child.
Foreword

Scottish Women's Aid (SWA) is the lead organisation in Scotland working towards the prevention of domestic abuse. We play a vital role in campaigning and lobbying for effective responses to domestic abuse.

We provide advice, information, training and publications to members and non-members. Our members are local Women’s Aid groups which provide specialist services, including safe refuge accommodation, information and support to women, children and young people.

An important aspect of our work is ensuring that women and children with experience of domestic abuse get both the services they need, and an appropriate response and support from, local Women’s Aid groups, agencies they are likely to contact and from the civil and criminal justice systems.

Introduction

SWA welcomes the opportunity to comment on the Victims and Witnesses (Scotland) Bill. We support the intention and spirit of Bill as an initiative to both take forward work already in progress in Scotland relating to support for victims and witnesses and also comply with the requirements of the EU Directive establishing minimum standards on the rights, support and protection of victims of crime (“the EU Directive”),\(^1\) which came into force on 15\(^{th}\) November 2012. The UK as a Member State, and thus, the Scottish Government too, has 3 years to translate the requirements into law/procedure or ensure that existing law and procedure complies.

This Bill contains proposals that, if implemented correctly, would greatly improve the experience of women, children and young people experiencing domestic abuse who become involved with the criminal justice system as a result of such abuse.

We note that much of the detail of the various duties and procedures will be “fleshed out” in secondary legislation and as a general comment, we would ask that the Scottish Government give a stated commitment that they will consult with the public and victims’ organisations on the content of any such relevant secondary legislation coming after the Bill.


Section 2 - Standards of Service

This section provides that certain persons must set and publish standards in relation to the services which those bodies provide to victims and witnesses, and also set out their complaints procedure. The persons are the Lord Advocate, Scottish Ministers, the Chief Constable of the Police Service of Scotland, the Scottish Court Service and the Parole Board for Scotland.

The Bill appears to allow the prescribed organisations the power to decide these standards for themselves as there is no duty placed on them in the Bill to consult with victims and victims’ representatives. Since it is important that these standards are not seen as a mere “minimum requirement” but are recognised as being a high threshold of best practice and within this, are devised so as to be realistic in what they can achieve in terms of fulfilling victims’ expectations of what service and support they can and cannot expect to receive, it is important that victims and witnesses and those who have experience of supporting them contribute to the production of these benchmarks. Therefore, there is a need for such a duty to be stated on the face of the Bill, to the effect that the prescribed “persons” must consult and actively involve victims of crime and organisations supporting them when devising these standards. We would also like to see this matter emphasised in the Explanatory Notes.

Further, there is a need for clarity on accountability, since the Bill is silent as to how these standards will be reviewed, monitored for consistency and compliance and actually enforced in practice. It is also unclear as to how it is intended that victims of crime and the organisations supporting them can both give feedback and secure compliance. The Bill should therefore provide that the standards will be measurable and must contain a procedure that facilitates regular monitoring, evaluation and feedback of the experience of victims, witnesses and support organisations, in order to determine how the various prescribed bodies are complying with their standards. This should include a process allowing the prescribed bodies to address shortfalls or deficiencies in processes and procedures, in addition to the complaints process referred to in the Bill. In furtherance of the obligations created by the EU Directive, these standards should also contain requirements on the provision of, and attendance at, training and awareness of victims’ issues.

We recognise that obligations and mechanisms for accountability, compliance, enforcement and training may be better included in secondary legislation but would like the Explanatory Notes to clearly state that there is an expectation that these matters will be fully addressed in any standards produced.

Finally, there are additional provisions in both Article 8 (Right to access victim support services) and Article 9 (Support from victim support services) of the EU Directive, in relation to raising awareness of rights and the development and promotion of specialist services which are not in the Bill, and we would like to see these included in the list of information that the standards should cover.
Section 3 - Disclosure of information about criminal proceedings

Article 6 (Right to receive information about their case) of the EU Directive states, inter alia, “1. Member States shall ensure that victims are notified without unnecessary delay of their right to receive the following information about the criminal proceedings instituted as a result of the complaint with regard to a criminal offence suffered by the victim and that, upon request, they receive such information”, meaning that they will not be obliged to themselves actively ask for such information. However, section 3 of the Bill only refers to a right to request, not receive, information.

Section 3(4) of the Bill indicates that any request made to a “qualifying person”, namely the police, Lord Advocate and/or the Scottish Court Service for information need not be complied with if disclosure of same is inappropriate.

While this clause is likely reflecting the caveats contained within the EU Directive at paragraph 28, viz “Member States should not be obliged to provide information where disclosure of that information could affect the proper handling of a case or harm a given case or person, or if they consider it contrary to the essential interests of their security” and those in Article 6(2) (b) “... information enabling the victim to know about the state of the criminal proceedings, unless in exceptional cases the proper handling of the case may be adversely affected by such notification” it requires to be clearer as there must be a limit to the circumstances in which “qualifying persons” could use this provision not to provide information.

The Bill, firstly, should state that where disclosure is refused, a statement of reasons for non-disclosure must be provided to the applicant and that the “qualifying persons” must develop and publish guidance on how they will comply with this duty; these obligations should be explicitly referred to and emphasised in the Explanatory Notes.

In relation to the specific areas of information set out in section 3, while the Bill specifies that information on “the nature of charges libelled against a person”, can be provided, it should, in fact, go further and include the provision of information disclosing any changes to these charges during investigation and proceedings, and the reasoning behind such decisions. This type of information, particularly where the prosecution is giving consideration to downgrading the charge to a less serious offence, or has actually gone ahead and done so, is of great importance and relevance to victims and we know that this is a matter which can cause them significant distress if they are not aware it is under consideration, or, indeed, that charges have actually been amended.

We would also comment that various Articles in the EU Directive specify that a greater range of information should be available than that prescribed in the Bill, with particular reference to Articles 4 and 11, outlined in detail below. While we are aware that the Bill was developed prior to the EU Directive being issued and that the Scottish Government is discussing with Westminster how both jurisdictions will comply with the Directive, it is important that these provisions should be included in the Bill, particularly a process in relation to any decision not to prosecute.
Article 4 – Right to receive information from the first contact with a competent authority

1. Member States shall ensure that victims are offered the following information, without unnecessary delay, from their first contact with a competent authority in order to enable them to access the rights set out in this Directive...

- the type of support they can obtain and from whom, including, where relevant, basic information about access to medical support, any specialist support, including psychological support, and alternative accommodation;
- the procedures for making complaints with regard to a criminal offence and their role in connection with such procedures;
- how and under what conditions they can obtain protection, including protection measures;
- how and under what conditions they can access legal advice, legal aid and any other sort of advice;
- how and under what conditions they are entitled to interpretation and translation;
- the available procedures for making complaints where their rights are not respected by the competent authority operating within the context of criminal proceedings.

Article 11 - Rights in the event of a decision not to prosecute

- Member States shall ensure that victims, in accordance with their role in the relevant criminal justice system, have the right to a review of a decision not to prosecute. The procedural rules for such a review shall be determined by national law.
- Where, in accordance with national law, the role of the victim in the relevant criminal justice system will be established only after a decision to prosecute the offender has been taken, Member States shall ensure that at least the victims of serious crimes have the right to a review of a decision not to prosecute. The procedural rules for such a review shall be determined by national law.
- Member States shall ensure that victims are notified without unnecessary delay of their right to receive, and that they receive sufficient information to decide whether to request a review of any decision not to prosecute upon request.
- Where the decision not to prosecute is taken by the highest prosecuting authority against whose decision no review may be carried out under national law, the review may be carried out by the same authority.

Section 5 - Certain sexual offences: victim’s right to specify gender of interviewer

We support this initiative but would comment that the wording may require amendment. The section will apply to various offences, including, at 5(d) “an offence consisting of domestic abuse.” This wording may be problematic because there is no specific offence of domestic abuse; domestic abuse in terms of criminal prosecution...
is dealt with through offences addressing the specific nature of the criminal behaviour, ranging from breach of the peace and assault through to sexual offences and murder in the most serious cases.

For the avoidance of doubt, and to give effect to the intention of the legislation, it may be preferable to word this as “an offence involving domestic abuse.” We have raised this in preliminary discussions with the Scottish Government and are aware that they are consulting the COPFS and Police Scotland on the matter.

Since the section also states that this duty need not be complied with if it would “prejudice a criminal investigation” or it is “not reasonably practicable to do so.” Reflecting our comments in relation to section 2 above, this requires clarification and explanation in order to limit to the circumstances in which this duty need not be complied with. Therefore, the Explanatory Notes should make clear that the relevant body, presumably Police Scotland, will be expected to develop and publish guidance on how they will comply with this duty.

**Section 6 - Vulnerable witnesses: main definitions**

In furtherance of the intention of the EU Directive and the obligations it puts on the Scottish Government in terms of responses to particularly vulnerable categories of victims and witnesses, we fully support:

- the extension of the definition of child to children under 18
- extending the automatic right to use standard special measures to victims of sexual assault and rape, stalking, domestic abuse and trafficking.

Since the widening of access to special measures was introduced via the Vulnerable Witnesses (Scotland) Act 2004, SWA has lobbied for those experiencing domestic abuse to have an automatic, as opposed to only discretionary, entitlement to special measures. We are informed that women are often not aware that the current discretionary option to use special measures even exists, quite apart from the fact that they have the right to ask that an application to use them be made.

Giving evidence against a partner, and for children experiencing domestic abuse, the experience of being questioned formally and giving evidence against a parent or carer, is distressing and threatening. Women who are already apprehensive about appearing in court can be further victimised and abused by the behaviour of the abuser in court and by the mere fact of his presence. These proposals will give certainty to women in that they will know that they will be able to give their evidence in a way that minimises any potential for their further victimisation or intimidation by the accused. Being aware that they will be able to give evidence without being faced by the abuser may actually be the deciding factor in whether women even report the abuse to the police and will certainly assist the Crown in supporting women as witnesses.

We would further comment that, while not essentially part of the Bill, there must be a requirement that the full range of special measures is proactively explained to women, children and young people, how they will work and what this means for the witness; vulnerable witness notices should be lodged with the court at the earliest opportunity in the proceedings and vulnerable witnesses should be given the
opportunity to visit the court and see how these operate in practice. If a child is giving evidence, then such a visit should be mandatory and the Crown, or defence, must confirm that this has been done before the trial diet starts.

This will support women, children and young people in making an informed decision whether or not they wish to use special measures and which option(s) to seek that best meet their needs and wants. We would also like to see the use of special measures actively monitored and evaluated by the victims and witnesses using them, which will be in line with the standards of service referred to Section 2.

Again, there is an issue with the terminology since the section refers to “an offence consisting of domestic abuse.” We would repeat the concerns raised in relation to this matter as it appears in Section 5 above and that the COPFS and Police Scotland should be consulted as to whether this wording would be problematic and defeat the intention of the legislation.

Section 9 - Objections to special measures: child and deemed vulnerable witnesses

We are concerned as to how this will work in practice, in that a routine challenge to use of special measures by witnesses in the expanded “automatic entitlement” categories may become the defence’s default position, meaning that the intention of the legislation to “automatic entitlement” is defeated. Such challenges must only be allowed in exceptional circumstances and the legislation has to reflect this accordingly.

Section 10 - Child witnesses

This section amends current procedures on children giving evidence in the court, as set out in section 271B of the 1995 Act, in order to place greater emphasis on the wishes of the child. We support these proposals as they will strengthen the position of children who want to give evidence in court but are currently being required, nevertheless, by an overly prescriptive interpretation of the law, to give evidence remotely and it will further support children in giving evidence remotely.

The presumption that a child will not give evidence in court must remain as the first option for protection of children in all cases. But, this can only operate successfully if the child has their options explained to them; the child must always be told that the default position is that they will give evidence away from court unless the child does not want to do this, and then the child’s wishes to give evidence in court must be respected.

We would also submit that there is an issue not covered by the Bill that could be addressed in the legislation. The earlier “Making Justice Work” consultation paper asked whether the submission of Child Witness Notices should be made a compulsory part of pre-trial hearings; Thirty-one consultees agreed that it should and we would like to see this requirement included either in the Bill as an amendment to the Vulnerable Witness legislation or, alternatively, as an amendment to the Rules of Court on criminal procedure governing Vulnerable Witness applications.
Section 16 – Special measures: closed court

Section 17 - Power to prescribe further special measures

SWA support both of these provisions and would comment that the power given to Scottish Ministers under section 17 provides the ideal opportunity to give serious consideration to the matter of intermediaries as a support measure for victims in court and to begin discussions on piloting this intervention.

Section 18 - Vulnerable witnesses: civil proceedings

It is noted that the Bill will not extend the right of victims of sexual assault and rape, stalking, domestic abuse and trafficking to have the automatic right to use standard special measures in civil cases. However, SWA supports the extension of these provisions to civil proceedings, including children’s hearing proofs and appeals, and we would wish to see the Bill amended accordingly to reflect this.

The fear and intimidation felt by women experiencing domestic abuse, sexual offences, and stalking, who are engaged in civil proceedings against their abuser in some way (perhaps through an application for a protective order, child contact and/or residence proceedings, an action for civil damages or in an action establishing or challenging grounds for referrals to a Children’s Hearing, particularly since domestic abuse is now a specific ground) does not diminish simply because the proceedings are being held under civil law under civil procedure.

In fact, the safety of the complainer is more likely to be compromised during civil proceedings because their well-being and protection is not a matter that would, as a matter of course, be considered by the court as it would if the proceedings were criminal. The obligation to submit a Vulnerable Witness Application lies with the parties themselves in civil actions; issues of the complainer’s physical safety and support to give evidence do not appear to be considered by women’s solicitors as a matter of principal in relation to civil actions involving domestic abuse, and they do not appear to routinely either bring to women’s attention the fact that they can apply to use special measures or submit applications to the court.

This is an access to justice issue; ensuring that victims of victims of sexual assault and rape, stalking, domestic abuse and trafficking have this protection in civil proceedings would assist in them giving their best evidence and would support them in their engagement with the courts during civil proceedings.

Section 19 - Victim statements

We support this proposal and would also like to raise two separate issues in relation to Victim Statements that are worthy of consideration by the Justice Committee

- Why it is that children under 14 can only make a Victim Statement through a third party such as a parent or carer, and not independently as an individual in their own right; and
- Why this applies to children under 14, when children aged 12 and above are considered to be capable of instructing their own solicitor.
Section 20 - Duty to consider making compensation order

We are concerned that, as it stands, this section has the potential to cause further harm or grief to victims, due to the fact that there is no provision, either under the 1996 Act, or in this Bill, for the views of the victim to be the deciding factor as to whether the court does or does not make a compensation order against the offender.

If the intention is to make it obligatory for the court to consider making one in every case, then it is crucial that they hear the voice of the victim; if the victim does not want a compensation order made, then the court does not make one at all. In cases of domestic abuse, such orders are a way for the abuser to continue to exert a degree of control over the victim, even though the money is paid via the court and for them to continue the abuse by delaying payments, etc. The woman may have fled her abuser and want no contact whatsoever, and certainly not money, from him; this is a particular issue where the offence involves rape or sexual abuse.

Also, the court must not be able to make a compensation order instead of any other disposal- this is simply adding insult to injury, in relation to sexual offences and those involving domestic abuse, especially where the abuser deliberately does not pay. Section 249(2) of the 1996 Act states that it will not be competent for the court to make a compensation order either instead of a Community Probation Order or where it is deferring sentence, but the section does not explicitly state that the court cannot make a compensation order as an alternative to a custodial sentence. Therefore, presumably the court could do so instead of making a custodial sentence, which is wholly inappropriate and unacceptable and it is necessary that this be clarified.

Conclusion

SWA supports the introduction of the Victim and Witnesses (Scotland) Bill and the commitment and principles behind it. The introduction of the Bill and the ongoing review of the criminal justice system affords an important opportunity to explore further how the experiences of women, children and young people engaging with the criminal justice system in cases involving domestic abuse can be improved from the moment they report the abuse, whether or not that reporting results in a prosecution being taken. We look forward to working with the Scottish Government in taking this work forward.

Scottish Women’s Aid
8 April 2013
Justice Committee

Victims and Witnesses (Scotland) Bill

Written submission from Helen Richardson

1. General principles and standards of service

1.1 I am in general agreement with the general principles as set out in the Bill however some mechanism needs to be put in place to ensure these are monitored and adhered to, with rectification at the earliest opportunity should failings be noted.

1.2 I would suggest that an appropriate means of doing so would be the establishment of a Victims Commissioner who could promote, protect and safeguard the rights of victims as well as a wider role for Victim Support Scotland. Victims can often be in a heightened emotional state and may not always be able to understand let alone defend their rights, particularly when they have recently experienced such a traumatic event.

1.3 The general principles and standards of service requirements set down in the Bill should be monitored and publicly reported on a regular basis either through each of the identified organisations annual reporting requirement or through the suggested Victims Commissioner. Reporting should be in a clear and readable format and not laden with jargon.

1.4 A Victims Commissioner could assist in developing much needed joint working between the identified organisations. Instead of victims being passed between agencies for answers to their questions, a culture within these organisations needs to be developed that is victim focussed.

2. Disclosure of information

2.1 This section of the Bill presupposes that the requester is familiar with the criminal justice system and my experience was that it was not always clear which agency held the information. There needs to be clear pathways that signpost the victim through the systems as well as a single point of contact for the victim. An up to date case specific information hub would be of assistance however many victims may need support to access information.

2.2 Information on any appeals process should also be included as it is not always clear that there is an appeals system.

2.3 Any form of communication with victims must be written and/or spoken in plain English. Too often there is a tendency for information to be given that is hard to interpret without reference to legislation or a lawyer. A clear and intelligible form of communication that offers an explanation of the implications of the information should not be impossible to develop.

2.4 There is a need to use the confidentiality of data/information responsibly and not as a shield to hide behind and therefore decline to provide information. In my
experience the first response to queries about system and process information was rejection due to data confidentiality reasons. This is not acceptable when no personal data was being sought.

2.5 This will require a period of supported culture change in the identified organisations that, in my experience, are perpetrator focussed rather than victim focussed.

3. Victim statements

3.1 There should be guidance given to judges that all victim statements should be read out in court either by the victim or their representative. The current lottery of whether the victims voice is heard in court or not seems to depend on the judge sitting. The victim statement needs to be given equal weight and be heard in court.

4. Release of offender: victim’s rights

4.1 The victim notification scheme should be widened and the opportunity for victims of mentally disordered offenders be given accorded an opportunity to be notified if the offender is to be moved/prepared for release.

4.2 Victims should be able to make representations in the Mental Health Tribunal system before release on licence.

Helen Richardson
8 April 2013
Introduction

Action Scotland Against Stalking is a voluntary organisation which was set up to campaign for victims of stalking to be protected through the introduction of specific anti-stalking legislation and to help progress the rights of victims within the criminal justice process.

In June 2010, the ‘Offence of Stalking’ was introduced into the Criminal Justice and Licensing (Scotland) Act 2010. Action Scotland Against Stalking quickly became a high-impact, national and international campaign. In March 2012, England and Wales introduced two new offences of stalking into the Protection of Freedoms Act, 2012, and in 2011 stalking was introduced into the Istanbul Treaty as item 34 to combat Violence Against Women and Domestic Violence.

The Scottish Governments Victim and Witnesses Bill is a welcome introduction into Scottish law as a first step towards strengthening the rights of victims to participate in the justice process as outlined and dictated by the European Directive for Victims and Witnesses.

This paper offers a review of the draft legislation to highlight areas which require further consideration and recommendations for inclusion into the Bill.

Section 2: Standards of service

This section identifies the Lord Advocate, Scottish Ministers, the Chief Constable of the Police Service of Scotland, the Scottish Court Service and the Parole Board for Scotland for being responsible for the developing and the setting of published standards of services and also the complaints procedure under which agencies who support victims must adhere.

The Bill does not include Victim Support providers as named persons nor places any responsibility or obligation on the named persons to consult with victim support providers in the development of these standards. The involvement of victim support services as named persons is central to the development and setting of published standards of service. All agencies must work in concert with one another with emphasis placed on the recommendations by victim support providers in the development, setting and evaluation standards of service and delivery.

There is no mention in the Bill how these standards will be evaluated for compliance and effectiveness. Without close involvement with victim support providers to provide on-going feedback issues such as service gaps, barriers to access; recommended
needed changes; and spotlighted successful programs and promising practices that reach and serve crime victims will fail to be identified.

It is important victim support agencies contribute to the production of standards of service and are included in the Bill as named persons.

Section 3 - Disclosure of information about criminal proceedings

Section 3 of the Bill requires further clarification to reflect more accurately the minimal standards set out by the European Directive.

Article 1 - Member States shall ensure that victims are notified without unnecessary delay of their right to receive the following information about the criminal proceedings instituted as a result of the complaint with regard to a criminal offence suffered by the victim and that, upon request, they receive such information”;

Article 4 – Right to receive information from the first contact with a competent authority

1. Member States shall ensure that victims are offered the following information, without unnecessary delay, from their first contact with a competent authority in order to enable them to access the rights set out in this Directive
   - the type of support they can obtain and from whom, including, where relevant, basic information about access to medical support, any specialist support, including psychological support, and alternative accommodation;
   - the procedures for making complaints with regard to a criminal offence and their role in connection with such procedures;
   - how and under what conditions they can obtain protection, including protection measures;
   - how and under what conditions they can access legal advice, legal aid and any other sort of advice;
   - how and under what conditions they are entitled to interpretation and translation;
   - the available procedures for making complaints where their rights are not respected by the competent authority operating within the context of criminal proceedings

Article 11 - Rights in the event of a decision not to prosecute

- Member States shall ensure that victims, in accordance with their role in the relevant criminal justice system, have the right to a review of a decision not to prosecute. The procedural rules for such a review shall be determined by national law.
- Where, in accordance with national law, the role of the victim in the relevant criminal justice system will be established only after a decision to prosecute the offender has been taken, Member States shall ensure that at least the victims of serious crimes have the right to a review of a decision not to prosecute. The procedural rules for such a review shall be determined by national law.
Member States shall ensure that victims are notified without unnecessary delay of their right to receive, and that they receive sufficient information to decide whether to request a review of any decision not to prosecute upon request.

Where the decision not to prosecute is taken by the highest prosecuting authority against whose decision no review may be carried out under national law, the review may be carried out by the same authority.


Proposed inclusion to the Bill

The right to privacy and disclosure of information

1: Protecting the right to privacy and the protection from unnecessary invasive discovery requests is critical to preventing re-traumatizing to a victim who has already suffered harm.

2: Access to information for the rights of victims to apply for an application for a private prosecution in the event their case is not successfully prosecuted within a public criminal court of law.

Section 5: Certain sexual offences: Victims right to specify gender of interviewer

Sub section 4: The investigating officer need not comply with subsection (2) if

A: Complying with it would be likely to prejudice a criminal investigation
B: It would not be reasonable practical to do so.

This appears to provide a loophole for section 5 not to be applied. The Bill requires to state reasons and situations to clarify:

A: Under what circumstances would this apply?
B: When might this situation occur?

Section 18: Vulnerable witnesses and civil proceedings

It is noted that the Bill will not extend the right of victims of sexual assault and rape, stalking, domestic abuse and trafficking to have the automatic right to use standard special measures in civil cases. However, being the victim of a crime within a criminal court and a pursuer within a civil court are not mutually exclusive terms. Victims require and should be afforded the same protection within civil courts proceedings as they are the criminal courts. The Bill requires to be amended to reflect this vulnerability and offer of protection. Failure to do so may prevent victims
accessing justice within the Scottish courts system. This is particularly relevant to victims of predatory crimes such as: victims of sexual assault and rape, stalking, domestic abuse and trafficking.

Section 19: Victim statements

It is proposed that children under 14 should be given the choice of making an independent Victim Impact Statement in their own right or choosing to be represented through a third party such as a parent or carer. (This conflicts with the view that children over 12 years old are capable of instructing their own lawyer)

Measures and applications

The threshold for victims of predatory crimes such as sexual offences, domestic abuse and stalking requires including all jail sentences.

Stalkers who receive jail sentences for 6 months may still pose a threat to the victim on release. The lack of an overt threat or physical violence is not an indicator of low risk.

If the sentencing is based on the nature of behaviours which may appear non-threatening or through weak or lack of evidence, it cannot be assumed they do not impose a continual threat to the victim. In all cases of stalking, rape or domestic abuse and regardless of the length of the jail term, the victim should be notified of the release of the offender.

Proposed inclusions to the Bill

1: Provide a means to protect a victim’s job or economic status when victims are subpoenaed to appear in court and during the criminal justice process

Temporary and short term work contracts have become part of the landscape for many within the workplace and as such do not fall within the remit of employment law.

Protection against employer retaliation for victims and witnesses called to testify and for victims of violent crimes and their family members who take reasonable time off to attend court proceedings or consults with the prosecutor.

Employers should be prohibited from terminating or penalising certain victims who miss work due to court appearances, meeting with procurator fiscais, support services or medical appointments. This many include requiring the prosecutors’ office to intervene with employers or creditors on request, or prohibiting employers from firing or punishing a victim from taking time off to participate in the criminal justice process.

2: Speedy return of property: To have any stolen or other personal property expeditiously returned by the courts or criminal justice agencies when no longer needed as evidence.
Victim of crime may suffer the loss of property in two ways: by theft or when property is seized and held as evidence in subsequent criminal proceedings. In most cases property is returned to its owner when it is no longer needed as evidence in a criminal prosecution. Since this often means the victim is deprived of his or her property for months or even years while the case is appealed or retried.

There requires to be specific time requirements for the return of property outlined within the Bill.

When feasible, all such property, except weapons, currency, contraband, property subject to evidentiary analysis, and property of which ownership is disputed, shall be photographed and returned to the owner within a set period of time of being taken.

**Case Study:** A victim of stalking was required to submit her mobile phone as a production for the provision of evidence of contact by the perpetrator.

The phone was handed over in the August 2006 and returned in the spring/summer of 2009. The text messages could have been downloaded or photographed and the phone returned swiftly. This was not the case and the victim had no choice but to purchase a new phone and the inconvenience of a new number but was still liable for the contract payments of the seized phoned. By the time the phone was returned nearly three years later it was well out of date and contract.

3: **Perpetrator residence relocation upon release or to protect the safety of victims and/or witnesses and the safety of the community.**

It is not unusual for victims of predatory crimes being forced to relocate when their perpetrator is released from jail or receives a lesser sentence but nevertheless may still pose a threat. This is pertinent in cases of children, elderly, domestic abuse, rape, stalking and murder.

4: **The right to a speedy trial as opposed to the term “unreasonable delays”**

This refers primarily to victims of serious crime and those identified as vulnerable witnesses. Prior to ruling on a continuance requested by a party, the court must also consider the impact of the delay on the victim.

5: **Victim characterisation within a court of law**

The term victim holds different definitions depending on the context in which it is used, who is using it and to what end. Labels can be linked to personal identities and also to larger social constructs.

As soon as a person engages within the Criminal Justice System they are automatically allocated the identity label of a victim with all its associations, connotations and attitudes. What it is deemed a person is, will usually determine how they will be treated.

We are entering into a new era where people who have experienced crime have now gained a measure of recognition within the delivery of justice. This is an important
step in our history and the opportunity to foster and develop healthier attitudes and new ways of thinking. I propose ‘victims’ are referred to as the ‘aggrieved person’ within a court of law thereby fostering new attitudes and allowing them to retain some sense of dignity and respect.

The plea bargain process

Whether the defendant’s plea to a lesser charge should be accepted.

The prosecutor should obtain the views of the victim before a disposition is final, whether this involves a plea agreement, dismissal of charges, or a pre-trial diversion of the defendant. The prosecutor will be required to certify to the court that he or she has consulted the victim before a plea can be accepted.

Implementing victims’ rights into practice: Ensuring rights are upheld and respected

Proposal for victims to be entitled to independent legal representation

Many victims of crime are under the impression that the Crown procurator fiscal is “their lawyer” and is obligated to act on their behalf. The first and primary legal obligation of a procurator fiscal is to represent and present the case and not to the victim per se. Victims are not represented within a court of law. Since victims interests are not the same as those of the prosecutor, they will ultimately become subordinated to those of the defendant during the trial process. Without a robust mechanism to ensure the protection of victims’ rights within the justice process there is an inherent risk that victims of crime will remain oppressive burdened by a system that was designed to protect them.

The next step for a maturing victim’s right bill is ensuring it is enforced within the courts. The two main barriers to victims’ rights compliance are structural procedural problems that prevent challenges to rights violations; and the lack of legal advocates for crime victims.

It is essential victims’ rights are not compromised but protected from the structures and workings of the Criminal Justice System.

One mechanism which would help overcome these barriers would be through the provision of an independent legal body allowing victims the right to be represented by counsel of their choice. This would ensure the victims’ are able to exercise their rights and any adverse ruling against a victim in any context involving these rights can be appealed to a higher court by victims through their own counsel. They would serve as the pivotal point for the victim. In essence, emerging delivery systems should augment, rather than interfere or collide with existing services and judicial processes.

Scotland like the rest of the UK is suffering from financial crisis with services being squeezed more and more. Consideration must also be given to the enforcement of these rights and the already over stretched duties of Crown Office Procurator Fiscals.
A recent report highlights what deems to be “serious concerns and unacceptable practices in Scotland’s prosecution service” (Glasgow Herald August 17th 2012).

- Fiscals do not have time to prepare for court cases
- Lost evidence and the citing of unnecessary witnesses and failure of making the correct request for productions
- Fiscals with very few exceptions did not read the full statements before court but cherry picked” the ones they would read in full
- Fiscals are not preparing thoroughly for summary cases” “failing to view CCTV evidence and read witnessed statements due to time constraints

Drawing from research studies and the experience of many victims in those countries which already provide strong protections for victims, the enactment of legislation is not enough and for many, victims’ rights have remained paper promises that have never been honoured or fully enforced.

I have proposed other potential scenarios experienced across a range of other jurisdiction where rights have been enacted but not be legally enforced.

This again substantiates the proposal for independent legal representation. The protection of victims’ rights is costly, but they are indispensable to ensure the success and legitimacy of the criminal justice service in years to come. It might prove to be a cost saving benefit in the long run.

1.1 Many judges ignore victims’ rights because they assume victims have no real “standing” within the adversarial criminal justice process.

1.2 Where victims do not have their own lawyer, judges have an added incentive to give little weight to the victim because unrepresented victims may not even know they have rights.

1.3 Judges hold the potential to work from the assumption that victims have no real “standing” to do anything about it if their rights are violated.

1.4 Judges and prosecutors and those working within the criminal justice system may be resistant to change. Attitudes are strongly embedded into criminal justice discourse.
1.5 To ensure systemic efficiency, courts might simply refuse to give any meaningful weight to victims interests.

1.6 The right of an appeal by a victim may be weakened and victims may not have the skills and resources to challenge the decision.

1.7 The right to challenge any violation of rights places another burden on victims who may already be highly vulnerable and suffering from the impact of the crime.

1.8 Prosecutors may not take appropriate steps to deter defence lawyers from violating victims’ rights in order to preserve the rights of the defender.
1.9 Well-intentioned prosecutors with heavy caseloads have little incentive to spend time and resources filing interlocutory appeals on issues that will not significantly affect the integrity of the criminal case.

1.10 While victims have access to victim advocacy workers they are not professionally skilled lawyers and hold no legal authority. They can provide support, but victim or indeed any citizen of the state should be expected to participate in a court of law without the choice of being legally represented.

For vulnerable victims and victims of serious crimes such as rape, stalking, domestic violence, fear of the criminal justice system is well founded. Most members of the public are familiar with horror stories and the most recent concerning Frances Andrade and the brutal and humiliating cross-examination conducted by the defence counsel.

Of course, a defendant must be entitled to confront witnesses. The court trial is sometimes the first opportunity that a defence lawyer has to hear the victim’s story.

There is acceptance that an in depth and often intense questioning and cross examination is often called for in order to expose any discrepancies or lies. However, there is a difference between the establishment of the facts and excessive badgering of a victim. Vulnerable victims or those suffering from post-traumatic stress disorder could quite easily be sent over the edge by an excessive and aggressive line of questioning.

Regardless, and whatever one’s view of defence counsel conduct, it is clear that even those who initially felt well prepared to face the onslaught are sometimes left shocked and shaken.

Testifying is difficult enough for victims because they are forced to relive traumatic events. Striking a balance is never easy, but there is the potential for judges and procurator fiscals to decide not interfere with aggressive trial tactics for fear of interfering with a defendant’s due process rights.

The law is not, nor should it be, an “all or nothing” approach and balancing the rights of the defendant and the rights of victims should not be viewed in mutually exclusive terms.

There will be times when the two will conflict. Independent legal representation of the victim will ensure these seemingly incongruent rights can be balanced so that one set of rights is not compromised by the other.

Independent legal representation is an important precedent which should enhance the system of representation for victims. This provision could be limited to victims of serious crime and those deemed as vulnerable witnesses as part of an integrated and comprehensive array of services.

**Conclusion**

ASAS supports the introduction of the Victim and Witnesses (Scotland) Bill and the commitment and principles behind it. The introduction of the Bill and the on-going
review of the criminal justice system affords an important opportunity to explore further how the experiences of victims of crime are afforded protected rights to engaging within the criminal justice process. I am willing to give oral evidence if called to do so and look forward to working with the Scottish Government in taking this work forward.

Ann Moulds
Action Scotland Against Stalking
9 April 2013
Introduction

The Scottish Court Service (SCS) is a non-ministerial public body, established by the Judiciary and Courts (Scotland) Act 2008 on 1 April 2010.

Its function is to provide administrative support to the Scottish courts and judiciary and to the Office of the Public Guardian (OPG). We deliver operational support to the High Court of Justiciary and the Court of Session and to sheriff courts and justice of the peace courts in over 60 locations across Scotland. The Office of the Public Guardian provides guidance and undertakes investigations to protect the interests of vulnerable people under the terms of the Adults with Incapacity (Scotland) Act 2000. The Public Guardian is also the Accountant of Court.

By way of background the following table shows the volume of new criminal cases registered in the year 2012.

<table>
<thead>
<tr>
<th>Court Type</th>
<th>Indictments</th>
<th>Summary complaints</th>
</tr>
</thead>
<tbody>
<tr>
<td>High Court</td>
<td>760</td>
<td></td>
</tr>
<tr>
<td>Sheriff Court</td>
<td>6,000</td>
<td></td>
</tr>
<tr>
<td>JP Court*</td>
<td>70,000</td>
<td>55,000</td>
</tr>
</tbody>
</table>

*Special measures provided for in the Victims and Witnesses (Scotland) Act 2004 apply only to criminal business conducted in the sheriff court and High Court.

The Scottish Court Service has a duty of care towards all court users including victims, witnesses and jurors who are required to attend at court. In conjunction with other justice partners commitments to witnesses and victims have been published, most recently in the joint protocol with the Crown Office and Procurator Fiscal Service (COPFS) and Victim Support Scotland (Witness Service) titled Working together for Victims and Witnesses. A copy of the relevant annex is attached hereto. The commitments include the provision of suitable accommodation and updates on available information during attendance at court. SCS also has a primary role in the provision of accommodation and technology to support the statutory provisions relating to special measures for vulnerable witnesses.

SCS has responsibility for the recovery and enforcement of court imposed fines and compensation, fiscal fines applied by COPFS and outstanding fixed penalties issued by the police. The process involves implementing immediate and tough sanctions against those that will not pay, whilst supporting those who engage because they genuinely cannot pay.

Commentary on the Bill

The Bill is part of the wider Making Justice Work programme, and is focused on making changes which require primary legislation. The aim of the Bill is to improve
the experience of victims and witnesses, and to make provision to implement the recent EU Directive on victims’ rights.

Joint collaborative working between justice organisations is an essential feature in promoting public confidence in the justice system. SCS was closely involved with Scottish Government policy leads and COPFS colleagues in the development of the Bill proposals sharing well established insight into policy intentions and objectives and operational, technology and financial impacts.

SCS submitted a response to the initial “Making Justice Work for Victims and Witnesses” paper identifying where the proposed changes would have resource implications for the SCS and provided input during the development of the Financial Memorandum.

Elements of the Bill

The following provisions are those seen as having the greatest bearing upon the operations of SCS.

- **General principles and standards of service** (sections 1, 2): As detailed above SCS is committed to certain principles surrounding standards of service for victims and witnesses and these have been published. These will inform further developmental discussion with Scottish Government and other justice agencies.

- **Access to case specific information** (s3): On request SCS will generally provide information to interested parties, such as the time and place of the trial and the current stage of proceedings or the disposal, as would have been available to those members of the public personally present within the courtroom. Discussions have commenced with Scottish Government and other justice partners on scoping the potential for on-line access to certain case relative information to be available to victims.

- **Vulnerable witnesses giving evidence** (s6-9, 11-18): The key changes proposed in the Bill include raising the age of child witnesses to 18; introducing an individual assessment of vulnerability for all witnesses; and creating a presumption that certain categories of alleged victim are vulnerable and giving such individuals the right to utilise certain special measures when giving evidence.

Since the implementation of the 2004 Act SCS has invested in excess of £3m in technology and facilities in order to support the special measures approved or granted by the court. This includes the installation of courtroom technology, in-court vulnerable witness rooms and equipment to enable links to be established with a dedicated site in each sheriffdom, outwith court accommodation, to facilitate the giving of evidence by live TV link principally by vulnerable child witnesses. These sites are supplemented by a range of ad hoc facilities provided by other agencies in more rural areas. Screens and monitor equipment has also been provided to all courts to enable witnesses to give evidence in the courtroom shielded from the view of the accused person.

The SCS is committed to defence and prosecution witnesses having separate waiting facilities, which are wherever practicable, located in safe and secure
areas, ensuring they are free from intimidation. Generally the SCS Courthouse estate provides appropriate and comfortable accommodation for victims of crime. Similarly child witnesses and vulnerable person accommodation have separate facilities. However this is governed by the size of the courthouses and the level of need. In some courts it may be necessary for such groups to share accommodation with other groups who similarly require secure space.

COPFS have scoped figures in relation to the likely increase in numbers of witnesses likely to be deemed vulnerable, and of right entitled to standard special measures in terms of the new proposals. This estimate sits in the region of 18,000 additional witnesses per annum.

This estimate is useful in projecting the potential increase in notices and applications to be presented to court. The actual impact on the delivery of special measures will depend on a range of factors – the potential for the trial to proceed, the choice of measures available and the likelihood that a proportion of those witnesses may otherwise have qualified in terms of the existing legislation. There is currently spare capacity within the system to accommodate live TV links but SCS has nonetheless planned to extend the availability of courtroom technology and screens. Discussions are also ongoing with Scottish Government regarding the potential to extend the network of sites available outwith court buildings.

- **Victim surcharge and restitution orders (s 21, 22):**
  The Bill proposes two new sentences to be enforced in like fashion to court imposed fines:
  - Restitution orders to allow the court to make offenders pay towards the cost of supporting police officers who are victims of violence while carrying out duties
  - A Victim Surcharge to make offenders contribute to a victims fund – mandatory in all cases where the offender is fined (except where restitution order imposed)

Fines collection and enforcement operations are working very well with collection rates showing continuing improvement. As at 11 January 2013, 86% of the value of Sheriff Court fines imposed over the period 1 April 2009 to 31 March 2012 has either been paid or is on track to be paid through instalments. We have identified a number of opportunities for improvement and our operational plan for 2013-14 will see us keep up the pace of change required to deliver continuous improvement. The changes we have identified will free up judicial, police and administrative time as well as contributing to higher collection rates and maintaining the credibility of the fine as a suitable deterrent for crime.

Quarterly fines publications demonstrate that the collection rates for all fine types – Sheriff Court, Justice of the Peace Court, Fiscal Fines and Police fixed penalty notices – have improved each quarter since the SCS took over responsibility for fines collection in 2008. The 15th quarterly publication was issued on 28th February 2013, a copy of which can be found [here](#).
Our Commitments to Victims and Witnesses

We will:

1. Ensure a clearly marked reception point for you at Court
2. Ensure that your attendance at court is recorded and that you are directed to the appropriate waiting room
3. Provide adequate, secure and comfortable accommodation with sufficient clean toilet facilities and, where possible, refreshment facilities
4. Treat you with courtesy and give a prompt response to enquiries, including requests for information about case progress and disposal
5. Treat you fairly and give consideration to your interests and needs
6. Co-operate in the provision of pre-trial visits to court, support and special measures for vulnerable witnesses
7. Ensure that while you are at court, where possible, information is conveyed to you on the progress of the case, at least once per hour
8. Ensure that while you are at court, information is conveyed to you as soon as possible where you are no longer required to give evidence.
Justice Committee
Victims and Witnesses (Scotland) Bill
Written submission from ASSIST

Introduction

Thank you for the opportunity to contribute to this consultation. This Bill is a very welcome development and has many positive features; however, there are still a number of areas that I believe require adjustment.

ASSIST is a specialist Domestic Abuse Advocacy and Support Project operating across the former Strathclyde Police Force area. Clients, both female and male, are referred immediately following a police incident and ASSIST establishes contact with the victim within 24 hours. The risks to clients, both adults and children are assessed and an Individualised Safety and Support Plan is enacted. Information is sent to COPFS to inform court proceedings and safety plans are adjusted depending on the court outcome.

High risk clients receive an enhanced service and ASSIST convenes three MARACs (Multi Agency Risk Assessment Conferences) in the Greater Glasgow Division of Police Scotland. ASSIST is a core partner of the perpetrator focussed MATAC (Multi Agency Tasking and Coordinating) process convened by Police Scotland in the former Strathclyde police force area.

Access to case specific information

This is a welcome development; however, it is the view of ASSIST that a limited amount of organisations should also be able to access this information. As the Bill stands, only the victim will be able to access case specific information, therefore setting an additional hurdle that victims will require to negotiate to obtain the information they need.

Due to the trauma that domestic abuse causes, ASSIST has serious concerns that our clients will be unable to access the information they require when they require it. It is extremely difficult when clients are in the midst of a criminal process to negotiate the processes and procedures of the myriad of agencies who become involved in the situation. ASSIST acts as a hub where actions and decisions by all other agencies can be discussed and the client’s Safety Plan adjusted as necessary. ASSIST then advocates on the client’s behalf to ensure all appropriate information is held in the right place. This institutional function that is an integral part of ASSIST’s service – and the safety of clients - will not be possible under the Bill as currently enacted. Holistic discussions and the resultant impact on safety planning will be affected as we will be reliant on the victim obtaining information from a website. Clients will not understand why this information is not available if all the agencies are supposed to be working in partnership. This apparent lack of connectivity could affect victims reporting incidents in the future.
This development will also disadvantage clients who do not have access to a computer. Victims don’t always know what information to request, or when information becomes available or at what stage. If a vital piece of information is not accessed, such as the date the accused will be released, victim safety will be compromised.

**Victim Notification Scheme**

ASSIST supports any proposed extension of the eligible sentence period covered by the Victim Notification Scheme. However, most domestic abuse cases will not be covered by this extension as sentences are usually less than 12 months. It is arguable that due to the nature of the relationship between the victim and the accused where there is or has been domestic abuse, it becomes even more important that this type of information is made available. It obviously becomes more difficult as sentences get shorter to provide this information, however, we would suggest the time limit is set at 3 months.

Information on release being made available to support organisations such as ASSIST (as per the previous points) is crucial in terms of the updating of safety plans, in order that the relevant safety procedures are in place prior to the release date.

**Vulnerable witnesses**

ASSIST welcomes the extension of the vulnerable witness category to victims of domestic abuse. This is a recognition of the additional difficulties faced by this category of victim, which is also important in relation to the points made above.

Although this Bill is intended to apply to criminal proceedings only, victims of domestic abuse can be involved in both civil and criminal procedures at the same time. Neither process happens in a vacuum and there are a number of important elements that have been missed.

The current time gap from domestic abuse incident to trial in Glasgow is 28 weeks, 39 weeks if an adjournment is agreed. It is therefore very possible that civil proceedings, for example on child contact, will run alongside a criminal trial. Under the welcome extension of the category of vulnerability, special measures will be automatically granted in the criminal proceedings, yet this is not the case in civil proceedings where the victim is usually in a closed court with greater informality and the perpetrator in close proximity. It is our experience that victims do not understand this dichotomy.

Although it is technically the case that special measures can be applied for in the civil courts, these are not often granted. It appears that there is a generally accepted view that as both parties have equal standing in a civil court, the granting of special measures to one party is viewed as prejudicial.

ASSIST would therefore support the extension of special measures to civil cases as well as criminal cases, especially where the criminal case is running at the same time.
Special measures – screens

There should be a default position where screens can be made available on the day of a trial to vulnerable witnesses. Many victims take the view before the trial that ‘facing their abuser’ is something they want to do and based on that view, may refuse special measures. However, when the reality of that decision sinks in and the day dawns, some victims find themselves unable to proceed. The facility for screens to be available on the day would ensure better evidence and less chance of an adjournment – the granting of a warrant for a witness to appear.

Special measures – accused’s ability to object

ASSIST has serious concerns about the proviso in the Bill that the accused would have the ability to object to special measures. This is particularly important in situations of domestic abuse. The very nature of domestic abuse is about the perpetrator exercising power and control over the victim and such a provision will offer the accused a state sanctioned ability to do this in the court room. It will result in a detrimental effect on the victim’s quality of evidence as well as illustrating collusion with the perpetrator of abuse. We would therefore argue that an exemption should be sought due to the particular nature of domestic abuse and the relationship between the perpetrator and the victim.

Children giving evidence from a remote site

ASSIST has noticed that the take up rate of children accessing a remote site is not what would be expected. It is our belief form speaking to families that this is due to practical difficulties experienced by both the child and the adult victim.

When children are cited as witnesses, the adult victim is usually also a witness. Currently the child is offered the ability to give evidence from a remote site and the adult witness, usually the mother, is expected to attend the court building. Giving evidence is a difficult process for anyone, but especially a child and the additional pressure of being away from their mother is such that they would rather forego the safer option of the remote site. This is hardly surprising given the particular nature of domestic abuse and the effect on the attachment system of children.

If the extension of vulnerability to domestic abuse victims, as envisaged by this Bill is enacted, we would ask that a strong message is given to sheriffs to ensure that both the adult and the child are able to give their evidence from the same place. Guidance should be drawn up to ensure that there isn’t a situation where children give evidence at a remote site, whilst the parent has a screen in the court.

Victim surcharge

ASSIST supports the introduction of a Victim Surcharge Scheme and the proposal that it should be available for all victims to apply to for help. However, it is crucial that the Sheriff when giving a judgement in court ensures that it is abundantly clear that any surcharge is for the victim surcharge fund and not the victim per se.
Self representation of accused being able to question victims

Although not part of the current Bill, this is an important issue. Anecdotally, ASSIST is aware that self-representation is increasing including in domestic abuse cases. The accused being able to question the victim in domestic abuse cases in particular is of great concern, particularly due to the dynamics and the coercive control that is such a feature of the situation. This practice is disallowed in rape cases and it is important that this facility is introduced in cases of domestic abuse and stalking.

Mhairi McGowan
Head of Service
ASSIST
8 April 2013
Barnardo's Scotland supports and welcomes the introduction of the Victims and Witnesses Bill to the Scottish Parliament and appreciates the opportunity to respond to the Stage One consultation.

There are number of areas of the Bill that relate to children and young people that Barnardo’s is interested in and below we have made comments in reference to those areas of Sections 1-25. We have developed a separate response for sections 26-27 referring to the National Confidential Forum, which have been submitted to the Health and Sport Committee.

General principles

Barnardo's Scotland supports the general principles of the Bill.

Improving support for vulnerable witnesses

Definition of child witness

Barnardo's Scotland supports the proposed change in definition of ‘child witness’ to be increased from those up to 16, to all those under 18. We support the proposal that all those under 18 will be automatically entitled to special measures to assist them in giving evidence. This will bring Scotland in line with the rest of the UK.

Barnardo's Scotland also supports the measures in the Bill to amend the definition of vulnerable witnesses to include victims of sexual offences, domestic abuse, human trafficking and stalking. These vulnerable witnesses will also be entitled to special measures to assist them in giving evidence, which we support.

Removal of presumption that child witnesses aged under 12 will give evidence away from court buildings.

The Bill’s proposal to create a presumption that a child witness will give evidence in the court-room where they have expressed a wish to do so is a measure that is supported by Barnardo's.

Duty to have regard to guidance on Joint Investigative Interviews (JIls)

Barnardo’s Scotland supports the proposals in the Bill to put the Joint Investigative Interviewing of Child Witnesses in Scotland 25 guidance on a statutory footing, which will require the police and social workers to have regard of it when conducting a JII with a child witness.
Victims statements – extend eligibility to carers of those under 14, and change definition of carer

Barnardo's Scotland supports the Bill’s proposals to allow a child under 14, who is not the direct victim of a crime to have a victim statement made on their behalf. Currently, children under 14 are entitled to have a victim statement made on their behalf by their carer if they are the direct victim of the crime.

Richard Meade
Public Affairs Officer
9 April 2013
Justice Committee
Victims and Witnesses (Scotland) Bill

Written submission from the Scottish Prison Service

1. I very much welcome the opportunity to provide the Committee with the views of the Scottish Prison Service (SPS) in relation to the Victims and Witnesses (Scotland) Bill (the Bill).

Agency status of the SPS

2. The Committee will be aware that the SPS is an agency of the Scottish Government and that I am accountable to the Scottish Ministers for the operation of SPS; for advising them on policy on prisons; for the management of the SPS; and for planning its future development. I confirm as part of the Justice family I was consulted by the Scottish Government on the areas of the Bill which impact on us. I am therefore pleased to offer the Committee my views on the provisions of the Bill as they affect the SPS. By way of scene setting, the Committee may find it helpful if I describe the SPS’s current role in contributing to the operation of the Victim Notification Scheme. I have also explained the impact of the additional requirements proposed in the Bill; and how we are planning for these changes.

Victim Notification Scheme (VNS)

3. The SPS together with the Parole Unit of the Scottish Government and the Parole Board for Scotland are responsible for providing information to victims at key points in an offender’s sentence through the VNS. This is one of the main interfaces that SPS has with victims and we have gained first-hand understanding of some of the issues that victims face. In our experience many victims find it difficult to come to terms with the injury or loss they have suffered.

4. 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.

5. The VNS became a statutory scheme in 2004 following the introduction of sections 16 and 17 of the Criminal Justice (Scotland) Act 2003 (the 2003 Act). At the commencement of the 2003 Act eligibility to join the scheme extended only to victims of crime where the offender received a long term sentence (4 +years) for a crime of violence, a sexual or indecent crime, a crime involving firearms, housebreaking, a hate crime or fire-raising. In 2006 the scheme expanded when the eligibility criteria for joining the VNS changed and victims could join the scheme if the offender received a sentence of 18 months or more for the offences already described.

How VNS operates

6. The Crown Office and Procurator Fiscal Service (COPFS) are responsible for identifying victims who are eligible to join the scheme. Eligible victims are provided
with information and registration forms. Where a victim decides to join the scheme, they send the completed forms to us. Victims can register at any point up to the Sentence Expiry Date (SED) of the offender’s sentence.

7. There are two parts to the scheme and a victim can register under part one or part two only or part one and two: this is entirely at their discretion. If a victim registers for part one only they will receive information from the SPS on the key occurrences in the offender’s journey through their sentence. Victims who register under part two of the scheme can also make written representations to us about an offender’s release on Home Detention Curfew (HDC). These representations are considered by us in reaching a decision on release and, if released, may inform licence conditions.

The information that victims currently receive

8. At a minimum a victim will be notified twice (in practice by letter) by the SPS and, depending on the sentence length, there could be more contact. At present victims of the prescribed offences as detailed at paragraph five can receive information about the release of offenders and some other relevant information including:

- if the offender dies before the release date, notification of the date of death;
- if the offender has been transferred to a place outwith Scotland;
- that the offender has become eligible for temporary release;
- that the offender is unlawfully at large from a prison or young offenders institution; and
- where the offender has been released or has been unlawfully at large, the date of return to custody.

The provisions are set out in more detail in Annex 1.

The provisions of the Bill

9. The three relevant provisions in the Bill that impact on the SPS in terms of the operation of the VNS and our input and support for victims are as follows:

- Temporary release: victim’s right to make representations;
- Victim’s right to receive information about release of offender etc; and
- Duty on justice organisations to set out standards of service

In addition to the Bill provisions, as set out in the Policy Memorandum, the Scottish Government also intends to seek to lower the sentence threshold so that victims of offenders sentenced to 12 months or more are eligible to join the scheme. This change does not require to be made through this primary legislation but will be made through the existing order making powers in the 2003 Act.
Temporary release: victim’s right to make representations

10. Section 25 of the Bill adds a new section (17A) to the 2003 Act to allow victims, who are registered on VNS and who have expressed the wish to do so, to make written representations about the licence conditions that may be imposed when an offender first becomes eligible for temporary release from prison. The Prisons and Young Offenders Institutions (Scotland) Rules 2011 (the Rules) makes provision for temporary release and details the various forms of temporary release. The temporary release provisions in the Rules are provided at Annex 2.

11. The SPS already writes to victims to inform them that an offender is eligible to be considered for temporary release. The Bill therefore extends the rights of victims and we welcome that. Whilst we already takes account of victims’ views, where they are made known to us, when considering temporary release licence conditions, the provisions in the Bill ensures that victims, through their representations, are at the very core of such considerations and have their voice heard. The impact of this provision will mean that we will expand the information that we currently send to registered victims to include an invitation to submit written representations.

12. By way of context, in the financial year 2012-13, we wrote to more than 400 victims to inform them that the prisoner had become eligible to be considered for temporary release. The provisions in the Bill will therefore mean that more than 400 victims a year will now have the opportunity to input to the current process that informs the licence conditions for temporary release. Additional statistical information is provided at Annex 3.

Victim’s right to receive information about release of offender etc.

13. Section 23 amends section 16 of the 2003 Act to remove the list of prescribed offences. As a result, victims of any offence will be able to receive information under this section. The VNS is not currently open to all victims of crime but only those where the offender has committed an offence set out in the Victim Notification (Prescribed Offences)(Scotland) Order 2004 as detailed at paragraph five. The Scottish Government considers that access to the scheme should be extended to better reflect the European Directive establishing minimum standards on the rights, support and protection of victims of crime (2012/29/EU). The Bill will therefore remove the list of prescribed offences in relation to the VNS, so that victims of all offences will be eligible. The SPS supports this measure.

14. It is difficult to assess the precise impact of the removal of the prescribed offences and the reduction of the minimum sentence length on the VNS. The number of victims who will be able to join the scheme to receive information will obviously increase. However the actual additional numbers is difficult to assess. It is estimated that up to 1500 more victims might register and therefore SPS has already agreed resources to manage this impact. The increase in the number of victims will be gradual and resources will be deployed incrementally as the number of victims seeking to join the scheme increases.
Duty on justice organisations to set out standards of service

15. The objective to create a duty on criminal justice agencies to set clear standards of service for victims and witnesses and to also set out, or make specific reference to, their complaints procedure is welcomed by SPS. The SPS website (www.sps.gov.uk) already contains information for victims including the National Standards for Victims of Crime that were published in 2005. In addition we have also set out our complaints procedure and how complaints will be managed, including an escalation procedure.

16. We have been working with Victim Support Scotland (VSS) over the past six months to better prepare our staff for working with victims and in turn explore how we might better support victims. We will continue to work with VSS to develop a clear set of standards of service for victims.

17. The SPS fully supports this Bill which puts victims’ interests at the heart of the on-going improvements to the justice system giving more victims access to more opportunities to have their voices heard.

Colin McConnell
Chief Executive
9 April 2013

ANNEX 1

Current provisions are contained in Sections 16 and 17The Criminal Justice (Scotland) Act 2003

Victims of short term prisoners who elect join the scheme can be told:

- **The date of release of the offender from prison.** The earliest date of liberation of the prisoner is provided at the point at which the victim joins the scheme. In addition SPS will write to the victim about one month before the date of release (unless the prisoner is released on HDC.).

- **If the offender dies before being released, the date of death.** This information will be sent to the victim as soon as possible after the date of the death.

- **If the offender has been transferred out of Scotland, the date of the transfer.** It may be possible to make arrangements for victims to continue to receive information about the prisoner from the country that he/she has transferred to. SPS will make enquiries on behalf of victims should they wish to continue to receive information.

- **That the offender has become eligible for temporary release.** SPS will inform victims when the offender first becomes eligible for temporary release. Victims are not told about each individual period of temporary release.
If the offender has escaped or absconded. Information about the offender escaping or absconding will be notified to victims if the offender remains at large after 48 hours. Victims are also told when the prisoner is returned to custody.

The date on which the convicted person has for any reason, in respect of a sentence, returned to a prison or young offenders institution before that sentence has been served in full. This might occur, for example, when a prisoner who has been released from a sentence commits a further offence before the original sentence ends or following an order of the court.

The date at which the original sentence ends. If an offender has been returned to prison because a further offence has been committed before the original sentence has expired, the victim is informed that the original sentence has ended and that the offender remains in prison. The victim is no longer eligible to receive further information as the victim is only entitled to receive information up to the expiry of the sentence.

Home Detention Curfew. The SPS will write to victims who have elected to join part 2 of the scheme to invite them to send written representations to the SPS which will be considered by the relevant Prison Governor before an offender is released on HDC. The SPS will inform the victim if the prisoner is to be released on HDC.

In addition to the information above victims of long term offenders, short term sex offenders and offenders with an extended sentence who elect to join part 2 of the scheme will have the opportunity to make written representations to the Parole Board or Scottish Ministers (in the case of short-term sex offenders) when they are due to consider release of the prisoner. In cases considered by the Parole Board, i.e. offenders serving sentences of 4 years or more in custody, the victim will be informed whether or not it has recommended or directed the offender’s release on licence. The victim will also be informed in all cases of the terms of any conditions which have been attached to the licence that relate to them. The Parole Board or Scottish Ministers will also write to victims who have opted into part 2 but did not send representations informing them of their decisions.

When an offender is granted parole at the halfway point of their sentence and has applied to be considered for release on Home Detention Curfew, the representations that had already been considered by the Parole Board can be considered, if the victim so desires, by the SPS. If an offender is approved for release on HDC, the victim will be informed of the date of release.

Annex 2

Forms of Temporary Release

“home leave” means the unescorted temporary release from prison of an eligible prisoner for the purpose of enabling the prisoner to visit his or her home or other approved place for a period not exceeding 7 nights excluding travelling time;
“unescorted day release” means the unescorted temporary release from prison of an eligible prisoner for a period not exceeding one day, including travelling time, for the purposes of enabling the prisoner, in preparation for eventual release—

(a) to develop further, or to re-establish, links with his or her family or community; or

(b) to develop educational or employment opportunities;

“unescorted day release for compassionate reasons” means the unescorted temporary release from prison of an eligible prisoner for a period not exceeding one day, excluding travelling time, for the purposes of enabling the prisoner—

(a) to visit any relative who it appears to the Governor is dangerously ill;

(b) to attend the funeral of a near relative;

(c) to visit a parent who is either too old or too ill to travel to the prison;

(d) to visit the prisoner’s spouse, civil partner or co-habiting partner who, for whatever reason, is unable to travel to the prison;

(e) to visit a child for whom they have parental responsibility and who, for whatever reason, is unable to travel to the prison; or

(f) to attend at any place for any other reason where the Governor is of the opinion that the circumstances warrant it;

“Temporary release for work” means the unescorted temporary release from prison of an eligible prisoner for a period not exceeding one day, excluding travelling time, for the purposes of enabling the prisoner—

(a) to undertake a work placement outside prison in terms of rule 84;

(b) to attend a college, university or other educational establishment in order to participate in vocational training or an educational class; or

(c) to undertake voluntary work outside the prison in terms of rule 84;

“unescorted day release for health reasons” means the unescorted temporary release from prison of an eligible prisoner for a period not exceeding one day, excluding travelling time, for the purposes of enabling the prisoner—

(a) to attend for treatment at a medical facility outwith the prison; or

(b) to attend counseling outwith the prison.
Statistical Information

By the end of the first year of the scheme in 2004, 278 victims had registered with SPS rising to 557 by the end of 2006. At the end of the financial year 2012-2013 more than 4000 victims had registered on the scheme and there are currently more than 1900 victims actively receiving information. These comprise of victims of 645 life sentence prisoners, 990 long term prisoners and 319 short term prisoners.

The successful operation of the VNS is largely dependent upon our IT system which alerts us to any changes in the circumstances of the prisoner against whom the victim is registered. Each change must be interrogated to establish whether the circumstances require further communication with the victim, for example, should the prisoner receive a further sentence as a result of an unconnected matter— we will write to tell the victim that the prisoner’s release date has changed. In a typical day we review around 30 “alerts”. Not all of these will require action but in the financial year 2012-13 we sent information to victims on more than 1200 occasions.

Scottish Prison Service
Justice Committee

Victims and Witnesses (Scotland) Bill

Written submission from South Lanarkshire Council

The proposal to create a duty on relevant justice organisations to set clear standards of service for victims and witnesses.

The current proposal in the Bill for the creation of minimum standards and the resultant publication of these standards does not include certain statutory bodies and any voluntary or third sector organisations. If the requirement could be extended to include any organisation who mainly or substantially provides a service to the victims and witnesses this would encourage a more seamless service for victims and witnesses. It would also allow for the services provided by a range of agencies to be compared and would hopefully result in an overall improvement in the services provided to victims and witnesses.

It is considered that one such minimum standard should be the publication and promotion of a complaints procedure.

The proposal to give victims and witnesses a right to certain information about their case.

This is a welcome proposal which will alleviate some of the frustration felt by some victims and witnesses. Further clarification of the circumstances when a qualifying person need not comply with a requesters submission as detailed in Subsection 4 of Paragraph 3, is needed. Overall though this is a very welcome development.

The proposal to give vulnerable witnesses a right to access certain special measures when giving evidence.

The widening of the definition of vulnerable witness and the extension of special measures to include victims and witnesses in relation to domestic abuse, trafficking and sexual offences is a very welcome development which will offer protection to a particularly vulnerable group of victims.

It is noted that the proposals in the Bill includes an ‘opt out’ clause for vulnerable witnesses who do not wish to be subject to special measures; again this is a very welcome development.

The proposal to require the court to consider compensation to victims in certain cases.

In principal this is a positive development, which will reinforce the link between an offence being committed and a victim being acknowledged and compensated. Compensation orders are recognised as being an effective option for Courts to use. This proposal will hopefully increase their use and re-establish their role within the disposals available to Courts.
The proposal to introduce a victim surcharge and restitution orders, so that offenders contribute to the cost of supporting victims.

The introduction of a victim surcharge is a welcome development, which will assist in appropriate compensation being made to victims.

The proposal for restitution orders currently only applies to offences made under the Police and Fire Reform Act 2012; it is our view that the scope of restitution orders should be expanded to include any worker undertaking duties in the course of public service as defined by the Emergency Workers (Scotland) Act 2005.

Human rights implications arising from the victims and witnesses provisions in the Bill.

There were no concerns regarding human rights arising from the Bill.

Call for Evidence National Confidential Forum (NCF)

The functions and powers of the NCF (as set out in the Bill).

The proposals for the creation of the National Confidential Forum are welcome and provide an important opportunity to recognise and acknowledge the experience of people who have been in care, particularly those who had negative experiences.

Status of the NCF – housed as a sub-committee of the Mental Welfare Commission – and its independence.

It is important that Forum is seen by those acting as contributors as being independent of government and of organisations involved in providing residential care. The current proposals achieve that.

Support for participants before, during and after their input.

The arrangements make good provision for receiving testimony from people who may be in distress. The exemptions from defamation give a clear signal that full and honest testimony is welcome.

Other aspects of the NCF.

The reporting provision made in the Bill seems limited and perhaps consideration could be given to providing institutional care providers with greater insight into the findings of the forum.

Harry Stevenson
Executive Director
9 April 2013
Thank you for the opportunity to comment on the general principles contained in the first twenty five sections of the Victims and Witnesses Bill.

The Crown Office and Procurator Fiscal Service (COPFS) is committed to providing victims and witnesses with a professional service at all times. We aim to take account of any additional support that individual victims or witnesses may require and to provide them with the information they need, when they need it. However, we are not complacent about the experience of victims and witnesses within the criminal justice system and recognise that there are still areas where more can be done.

The principles contained in the Victims and Witnesses Bill remind us all that victims and witnesses are not spectators in criminal proceedings. Each contributes a critical component in the criminal justice system.

Many have unfortunately encountered disturbing and distressing intrusions into their lives as a result of criminal conduct and find themselves having to engage with unfamiliar procedures and terminology in a system that they would have preferred to avoid.

A key objective of the Bill is to improve the experience of victims and witnesses, to enable them to fulfil their public duty effectively; COPFS is supportive of this objective and recognises that the experience of individual victims and witnesses is the responsibility of the justice system as a whole.

I have provided detailed comments in relation to the specific proposals raised in your invitation in the attached document. I hope that this information is helpful.

Catherine Dyer
Crown Agent and Chief Executive
9 April 2013

Standards of service

1. Section 2 of the Bill imposes requirements on persons and organisations to set and publish standards. COPFS recognises the need to let victims and witnesses know what they can expect from the criminal justice system in terms of standards of service.

2. In 2010 COPFS published “Our Commitments to Victims and Witnesses”, which consolidated information about the standards of service that victims and witnesses can expect from COPFS. This is available on the COPFS public website and copies of these commitments are displayed in reception areas of every Procurator Fiscal’s Office.
3. COPFS also published its refreshed “Customer Feedback Policy” in October 2010. This provides clarity to anyone who wishes to make any complaint, comment, compliment or suggestion regarding the work of COPFS and the standard of service provided to them.

4. COPFS is currently establishing a formal review process for victims of crime, to provide information on what steps they can take if they are unhappy with a decision about action in the public interest, which has been made by a prosecutor, in the case in which they are involved.

**Disclosure of information about criminal proceedings**

5. Section 3 of the Bill states that information may be requested about the following:

   a) a decision not to proceed with a criminal investigation and any reasons for it;
   b) a decision not to institute criminal proceedings and any reasons for it;
   c) the place in which a trial is to be held;
   d) the date on which and time at which a trial is to be held;
   e) the nature of the charges libelled against the relevant person;
   f) the stage that the criminal proceedings have reached; and
   g) the final disposal in the criminal proceedings and any reasons for it.

6. COPFS already routinely provides information set out in (a) to (g) to victims and witnesses if it is requested. The Victim Information and Advice (VIA) service has been an integral part of COPFS since 2004. Dedicated, specially trained members of COPFS staff support those identified as the most vulnerable victims and witnesses. Accordingly any victim of domestic abuse, a sexual offence or hate crime, any child witness or vulnerable witness and any victim in solemn proceedings is automatically offered VIA service. Additionally, information and advice is provided to bereaved relatives in any case involving a death, which is reported for consideration of criminal proceedings or where a Fatal Accident Inquiry is to be held.

7. VIA advise about procedures within the criminal justice system generally, update regarding developments in the particular case and pass on information about organisations which can provide specific assistance. Over the last 18 months or so provision of consistent information to victims and witnesses has been enhanced further by dedicated VIA staff who deal with requests for information by telephone being based at the Enquiry Point which is the COPFS national contact centre.

8. Even if a victim or witness does not fall within the categories normally referred to VIA as detailed above, any victim or witness who requires information will be provided with as much as possible.

9. The term “final disposal”, may need further defined within the legislation to clarify whether this is intended to refer not simply to type of verdict and sentence but to include reasons for the verdict and/or the rational for the particular sentence. This information would fall under the auspices of the courts and judiciary. It is understood
that at present, the reasons for verdict and sentence are not routinely sought or recorded in every case at present.

**Access to special measures**

10. COPFS considers that the proposals in relation to the use of special measures represent a significant benefit to vulnerable witnesses. These proposals will enable victims and witnesses to give their evidence to the court with increased confidence. In turn, this should result in the court being better able to fully assess all the available evidence in the interests of justice.

11. It is noted however that section 9 of the Bill allows for the defence to lodge an objection to a vulnerable witness notice with section 13 covering the same situation for vulnerable witness applications. It is appreciated that this has been included as a result of the decision in the case of *I v Dunn 2012 SLT 983*. However there is no further information about how such an objection should be considered by the court. The policy objective behind the extension of special measures is to ensure that the contribution of victims and witnesses is valued and supported. It would be unfortunate if this was to be undermined by objections to the use of special measures. Currently child witnesses can be certain that if they wish to give evidence with the use of special measures then they can do so. A major anxiety for many adult vulnerable witnesses under the current system is the uncertainty as to whether or not the special measure they would wish to be in place will be granted.

12. It is suggested that it should not be possible for any objection to a special measure for a child witness or ‘deemed vulnerable witness’ to be on the basis of disputed vulnerability or their right of access to a standard special measure. It is understood that the purpose of this section of the Bill is to ensure vulnerability is appropriately identified as applying to certain categories of victims who are to be automatically regarded as vulnerable. The automatic entitlement to standard special measures should not then be open to challenge. For example, it should not be possible to argue that a victim of a sexual offence is not vulnerable – in the same way that it is not currently possible to argue that a 15 year old is not a child witness. Furthermore, the ability to challenge the use of standard special measures would appear to undermine the purpose of creating two categories of special measures – standard and non-standard.

13. COPFS would also welcome positive inclusion of the use of special measures in appropriate cases in the Justice of the Peace Court. Although provided for in the Vulnerable Witnesses (Scotland) Act 2004, this has not yet been implemented.

**Human rights**

14. COPFS supports any work which improves the way that Scotland ensures the protection of Human Rights for everyone. It is particularly important to pay attention to the voices of those who tend to be marginalised in mainstream debates surrounding human rights. As a prosecuting authority COPFS is part of the criminal justice system, which has duties to the victims, witnesses and bereaved relatives who are an integral part of the system.
15. To ensure effective criminal sanctions are in place it is vitally important that courts are provided with the best evidence on which to make their determinations. Therefore COPFS supports measures which will reassure vulnerable witnesses about their safety and will ensure that the evidence given is of the highest quality and integrity.

16. The automatic entitlement to special measures for certain categories of witnesses will reduce the need to provide information about their personal and private lives, thereby enhancing the protection of a witness’s Article 8 rights. This is supported by COPFS, as it is recognised that treating victims and witnesses with dignity and respect is key to ensuring they have the confidence to report crimes and, where necessary, are willing and able to provide evidence in court.
I would like to thank you for the opportunity to give evidence to the Justice Committee on 16 April 2013 in relation to the Victims and Witnesses Bill. On that date the Committee asked that further information be provided in relation to the following:

- The number of people who have accessed the Victim Notification Scheme since its inception and how well the scheme has been received by victims. The Committee is particularly interested in how successful victims deem the scheme to be.
- The level of information that is routinely provided in Sheriff Courts in relation to bail cases, the process whereby, if a particular risk is highlighted, the court is made aware of that. The Committee would also be interested to know whether victims are being told when their offender is bailed and when a condition of bail is that they do not approach the victim or do not go into a certain area, as anecdotal evidence was provided that this was not happening on a regular basis. If victims are not being routinely told about bail conditions, the Committee would welcome details of why this is not happening.

I have set out a response in relation to these matters below.

**Victim Notification Scheme**

The Criminal Justice (Scotland) Act 2003 introduced the Victim Notification Scheme, which provides that Scottish Ministers must (unless they consider that there are exceptional circumstances which make it inappropriate to do so) give a person against whom a prescribed offence has been perpetrated information about:-

- the release date of the convicted person;
- their date of death if they die before that date;
- the date they are transferred to a place outwith Scotland;
- the date they become eligible for temporary release; or
- if the person is unlawfully at large, the date they absconded and the date they are returned to custody.

This information is provided where the convicted person was sentenced to a period of imprisonment of 18 months or more and victim has intimated that they wish to receive such information. The scheme also allows victims to make representations about any specific conditions if the convicted person is being considered for release on licence or home detention curfew.

COPFS is responsible for issuing the relevant forms to victims where an accused has been convicted of a prescribed offence and receives a prison sentence of 18 months or more. However, COPFS is not involved in the completion of the forms or
in any further administration of the scheme. The forms are sent by the victims directly to the Scottish Prison Service. Therefore, no records are kept by COPFS on the number of victims who wish to participate.

However, it is understood from the written evidence submitted to the Justice Committee by the Scottish Prison Service that they do have a record of how many victims have applied to the scheme. They stated that,

> “By the end of the first year of the scheme in 2004, 278 victims had registered with SPS rising to 557 by the end of 2006. At the end of the financial year 2012-2013 more than 4000 victims had registered on the scheme and there are currently more than 1900 victims actively receiving information. These comprise of victims of 645 life sentence prisoners, 990 long term prisoners and 319 short term prisoners.

The successful operation of the VNS is largely dependent upon our IT system which alerts us to any changes in the circumstances of the prisoner against whom the victim is registered. Each change must be interrogated to establish whether the circumstances require further communication with the victim, for example, should the prisoner receive a further sentence as a result of an unconnected matter— we will write to tell the victim that the prisoner’s release date has changed. In a typical day we review around 30 “alerts”. Not all of these will require action but in the financial year 2012-13 we sent information to victims on more than 1200 occasions.”

COPFS is not aware of any feedback process for victims in relation to the Victim Notification Scheme. Furthermore, there would appear to have been no formal evaluation of the scheme.

However, it has come to the attention of COPFS that some victims may find the process of formally applying to participate in the scheme too traumatic at the time of sentencing. There is a danger that they may decide to leave this until a later date and then miss the date that the accused has been released from custody. Alternatively, they may forget to return the forms at all.

For this reason COPFS would welcome consideration of running the scheme on an ‘opt-out’ basis, as opposed to the current ‘opt-in’ basis. This would ensure that victims are provided with the necessary information without any formal application process on their part. If a victim does not want to receive any further information about the accused, then it would still be open to them to choose not to participate in the scheme.

The process for notifying the victim of the procedure for opting out would be subject to discussion between COPFS, Scottish Prison Service and the Scottish Court Service.

**Application for Special Bail Conditions**

Prosecutors have a responsibility to have regard to any available information about the likely impact on the victim and/or vulnerable witness of release of an accused
person from custody at any stage in criminal proceedings. Recent guidance to legal staff within COPFS emphasises that the risk the accused poses to the public or particular victims is the paramount consideration in deciding whether bail should be opposed.

In cases reported from custody, information about the victim can be crucial in informing decisions about bail and the use of special conditions. A prosecution report received from the police may convey a victim’s fear of intimidation, or feeling of being at risk. The prosecutor will ensure that any information as regards the victim’s safety is brought to the attention of the court.

In appropriate cases the prosecutor will consider asking for additional bail conditions colloquially referred to as special bail conditions, given the nature of the offence. These bail conditions can often afford important legal protection to the victim while criminal proceedings are ongoing. This is particularly relevant to sexual offending and cases involving domestic abuse. These special conditions may include a requirement not to approach or contact the victim. Similar conditions may be sought on behalf of any child or vulnerable victim, any identifiable victims of hate crime and any victims where the case is proceeding at solemn level.

**Intimation of Bail Conditions**

COPFS is committed to providing victims and witnesses with the information they need, when they need it. This includes any information about the details of any special conditions attached to the bail order.

In cases where Victim Information and Advice (VIA) have an involvement, all bail information is provided pro-actively. These cases include:

- any case involving domestic abuse
- any case involving a sexual offence
- any case involving a hate crime
- any case where there is a child victim or witness
- any case where the accused has appeared on Petition
- any case where a victim or witness appears vulnerable for any reason
- any other case where a legal member of staff believes that the victim would benefit from VIA involvement

If a special condition of bail has been requested to the effect that the accused must not approach or contact a named witness, it is likely that a particular vulnerability has been identified. Therefore, the case will fall within the VIA remit and the victim will be pro-actively contacted regarding the bail conditions.

VIA staff intimate bail details to a victim or witness as soon as possible after the accused’s appearance in court. Contact will normally be made by telephone on the same day, or within 24 hours.

It is recognised that in cases involving domestic abuse, victims may be particularly vulnerable following the release of an accused person from custody. Therefore, where VIA staff cannot contact the victim by telephone on the same day, they will
raise an incident with the police, requesting that they inform the victim in person. This ensures that the victim is provided with the relevant information timeously.

In all other cases, where VIA does not have an involvement, this information is provided to victims and witnesses upon request. This is due to the number of cases calling in court in any one day. However, given the wide scope of the VIA remit, priority has been given to pro-actively informing those victims and witnesses who may be considered most vulnerable.

I hope that the Committee finds this information helpful.

David B Harvie
Director of Serious Casework
1 May 2013
Justice Committee
Victims and Witnesses (Scotland) Bill
Written submission from Victim Support Scotland

Welcome

Victim Support Scotland welcomes the introduction of the Victims and Witnesses (Scotland) Bill. We regard the Bill as a major step forward in improving the position of victims and witnesses of crime in Scotland. The Bill clearly demonstrates a positive steer in the direction of travel. Critical elements are the rights, support and protections it provides to victims and witnesses of crime. For any justice system to be effective it must ensure victims and witnesses are, at all times, treated with dignity, respect and recognition by the criminal justice agencies and professionals operating within it. Effective national legislation must provide adequate recognition, support, protection, assistance and remedies for victims and witnesses of crime.

This evidence may be read in conjunction with our accompanying document ‘For Justice’.

1. The victim surcharge fund

Victim Support Scotland strongly supports the introduction of the Victim Surcharge Fund. We regard it as an essential source of assistance providing immediate practical support in the aftermath of crime.

Victim Support Scotland believes that the victim surcharge should be applied to all convictions and fines.

It will be important that the definition of “support services” for the purposes of the fund is sufficient to enable access to support in the aftermath of crime.

2. Duty to refer victims to support

Victim Support Scotland calls for the Bill to include a duty on the police to ensure that all victims are referred to appropriate victim support organisations, such as Women’s Aid, Rape Crisis and Victim Support Scotland.

All victims should have access to support and assistance in the aftermath of crime; it is essential that the needs of victims are assessed by appropriately trained professionals to maximise the potential of victims to recover and to return, as speedily as possible, to a normal life. Early intervention can have a substantial effect on a victim’s recovery. The police have a critical immediate role in facilitating victims’ access to support and assistance.
Victim Support Scotland would welcome any discussion regarding the practical manner in which such referrals could be undertaken.

3. Training of professionals in contact with victims and witnesses

Victim Support Scotland calls for the Bill to include provision that all professionals, including statutory agencies and victims organisations, in contact with victims and witnesses must receive appropriate training. This is fundamental to ensuring victims and witnesses are treated appropriately and that professionals are knowledgeable on the rights of victims and witnesses.

4. Services to families of murder victims and young victims of crime

Victim Support Scotland believes more needs to be done in Scotland to ensure all people affected by crime, including those who choose not to report a crime to the police, have access to both universal and specialised / tailored services to meet their needs.

Fewer than 100 families are bereaved by crime each year in Scotland. Yet there are no effective national services in place for these victims. It is a similar picture for children and young people affected by crime. There is now a clear body evidence demonstrating that young people are significantly more likely to be victims of crime than the general population. Yet very few get any support in the aftermath.

Victim Support Scotland therefore calls on the Justice Committee to review support for these specific groups as part of its overall consideration of the Bill, to ensure they have access to services that can provide the necessary support and assistance to support and protect them in the aftermath of crime.

5. Right to object to special measures for witnesses

Of all the provisions in the Bill, the introduction of a right for parties to object to the use of special measures is the greatest concern to Victim Support Scotland.

Victim Support Scotland calls for the removal of this provision from the Bill.

This provision will have extremely negative consequences for witnesses; most notably it will increase witness’ anxieties around attending court and giving evidence, as well as slowing down the trial process and negatively impacting on the quality of evidence provided by witnesses.

6. Access to appropriate measures for evidence giving

Victim Support Scotland supports extending access to existing measures, special or otherwise, to all witnesses.
We strongly believe that a range of standard measures should be routinely available to all victims of crime in Scotland. The purpose of measures should be primarily to reduce anxieties and make witnesses more comfortable giving their evidence. This in turn is conducive to better quality evidence and therefore is in the interests of justice.

7. Improved treatment of all witnesses at court

Victim Support Scotland is aware that the basic needs of witnesses are currently not always being met. We believe witnesses giving evidence ought to have certain provisions and standards directly and routinely available to them when giving evidence in court, including:

- Direct access to water in the court room
- Access to refreshments at all times while in the court building
- Sit down when giving evidence
- Natural ventilation and lighting
- Reading materials
- Separate waiting room from the accused / accused’ family
- No unnecessary waiting time

8. Civil witnesses in court

Victim Support Scotland would wish to draw the attention of the Justice Committee to the fact that present provisions do not extend to civil witnesses in Scotland’s courts. Many participants in civil court cases are affected by crime, for instance in relation to domestic violence, antisocial behaviour orders, fatal accident inquiries, forced protection orders etc. In the 21st century all witnesses contributing to justice should be entitled to care and support from the system, whether in the criminal justice arena or the civil justice arena. Victim Support Scotland believes provisions and standards for witnesses should expressly apply to witnesses involved in the civil justice system, as well as those involved in the criminal justice system.

9. Rights of victims in the justice system

Victim Support Scotland has identified a number of rights of victims and witnesses that we believe need to be included or strengthened, in the Bill and in practice:

- **Right to information:**
  - **Case-specific:** We welcome the duty to provide certain case-specific information to victims. Rather than placing the onus on the victim to “request” the information, the information should be **routinely/proactively offered** to the victim by the relevant agencies
  - **General:** Victims should have a right to receive certain generic information, including: where and how to report the crime; where and how to access support services; information about the criminal justice system; protection
measures; criminal injuries compensation; Interpretation and translation services.

- **Right to support in the aftermath of crime**: all victims should be able to access appropriate support in the aftermath of crime. This should include: access to practical and emotional support; advocacy; assistance with matters related to housing, employment and social issues; financial assistance, assistance with the criminal justice process. Victims should be able to receive support in a method of their choosing.

- **Right to minimum quality standards of service**: Clear performance measurements, reporting mechanisms and complaints procedures are required to ensure agencies are held to account for the delivery of standards. Victim Support Scotland calls for the Bill to include a duty on agencies to measure performance against the standards and to report annually, to Scottish Parliament and the Scottish Ministers on performance. Victims must be proactively informed about the standards they should expect and about procedures for making a complaint. **Victim Support Scotland would supports extending the list of prescribed agencies upon whom there is a duty to set standards of service to include all statutory and non-governmental victims’ organisations.**

- **Right to review a decision not to prosecute**: Article 11 in the EU Directive calls on Member States to ensure that victims have the right to review a decision by the authorities not to prosecute. **Victim Support Scotland calls for this to be included in the Bill.**

- **Right to reimbursement of expenses when attending court as a witness or interested party**: Many family members and victims of for example murder, rape, serious sexual and violent crime will want to attend court, even if they are not cited to give evidence. Victim Support Scotland calls for the Bill to include provision for all witnesses and interested parties to have their expenses covered in respect of attending court.

- **Right to protections in relation to media reporting**: Victim Support Scotland calls on the Justice Committee to include in the Bill restrictions regarding the manner in which the media may portray victims and witnesses of crime, such that no intrusive details and no image of the victim or his/her family should be published before, during or after the trial unless the victim has consented to such publication.

10. **Victim impact statements**

Victim Support Scotland welcomes the Bill giving wider opportunity to submit a victim impact statement to the court. We believe it is time for a wider review of victim impact statements. **Victim Support Scotland calls on the Justice Committee to provide in the Bill for victims to give statements orally directly to the court.**
11. Victim statements to the parole board

Victim Support Scotland welcomes the new extension giving victims the right to provide information orally, in person, to the Parole Board. However Victim Support Scotland calls for the Bill to give the opportunity to all victims of crime to give evidence directly to the Parole Board.

12. The Victim Notification Scheme

Victim Support Scotland welcomes the improvement in terms of the Bill providing more victims the opportunity to access information from the Victim Notification Scheme.

We believe however that all victims should have the opportunity to receive information about the release, escape, transfer etc. of the offender, regardless of the length of the sentence or the crime committed. The safety and protection of, and any risk to, victims should be the primary consideration when considering who should be eligible to receive information about the release of offender.

13. Definitions

The Bill does not include a definition of who should be included in the definition of “victims” or “family members”. Victim Support Scotland believes this should be clarified to ensure all people affected by crime have routine access to the rights and support to which they are entitled.

Closing remark

Victim Support Scotland hopes that the above comments are helpful. We look forward to engaging in further discussion and consultation with the Justice Committee to assist in further developing and enhancing the Bill and ensuring the best possible outcomes for victims and witnesses of crime in Scotland.
A victim’s despair

In my 2 years of campaigning for victims’ rights since the end of my darling sisters’ murder trial, I have rarely felt more disappointment than I do today. Having seen the draft bill of the Victims and witnesses bill yesterday for the first time my initial reaction is not so much that it needs amending as it needs completely rewriting.

A quote from Mr MacAskill was that he felt “confident that the changes made in this bill will help make what is often the most difficult episode in someone’s life a bit easier”. The key words in this statement are, “a bit”. To say that this legislation as it stands will make any significant difference to victims’ lives is just not true. To say that this legislation is radical is not true and to say that this now puts victims at the heart of the justice system is also not true.

This legislation is minimal, as in keeping with the EU minimum standard of rights for victims, but that is all. It appears to have been written by lawyers with their interests primarily and not in the interests of victims. It does not appear to have any ambition to answer some difficult questions for example, where the rights of victims conflict with the rights of offenders, it does not explain the consequences of the legislation for example what impact will victims statements have on the judicial process and what does it do for victims if their statements are completely ignored by a judge or a parole board. That for me is purely an appeasement of victims, managing their H[JSHFWDWLRQVDQGJLYLQJWKHPDQ´DSSDUHQWYRLFH´

If victims had really been given a voice then surely the government would be proposing a “Victims Commissioner”, someone who could fight for victims’ rights, ensure a proper code of practice, administer new legislation and be constantly forward thinking in looking for further improvements to victims’ rights. By way of irony the government does suggest a code of good practice for organisations dealing with victims, which is great until you discover that nowhere in the bill does it suggest what the code of practice should be. I have written to Mr MacAskill and others with a suggested code of practice and have as yet had no reply.

Following up that point is where my disappointment really lies, in what the draft bill leaves out and does not include.

I have for some time felt that the criminal justice system is disjointed and has many gaps in dealing with victims, for example the need for victims to be passed from pillar to post with organisations such as police, courts, victim support all dealing with them at different stages of their case. The simple but effective policy of having a dedicated point of contact or case companion as I have dubbed it would go a long way to reduce the stress of victims having to establish multiple relationships whilst going through their case, this point has not at any point been acknowledged in the bill.
The need for effective post court case care to ensure that a victim not only gets justice but also fully recovers from their case is not addressed at any stage and naturally any victim will tell you that justice without recovery almost makes justice itself pointless.

This last point shows that those who have written this draft bill have very little empathy of what a victim has gone through, but then again the whole bill suggests a lack of empathy and it certainly suggests in its current form that those victims who have contributed to the consultation process have not been listened to. Another good reason for having a Victims Commissioner.

In its current format the “Victims Surcharge” is nothing more than an appeasement, the direct victims of as particular crime will not receive compensation from their offender, the money will go to the government and then be passed on to charities to disseminate as is their want. Is this really restorative justice? I naturally accept the principle as I do accept the principle of restitution orders for police, but I do feel that automatic compensation for victims would be a far more effective way of ensuring victims needs are met, another issue that has not been addressed in the bill.

The definition of “Vulnerable Victims and Witnesses” is also lacking in empathy. It is my belief that anyone who has to occupy the unknown world of the criminal justice system because of what someone else has done to them is a Vulnerable Victim and to say they are not is an insult to the definition of Victim, there are situations where young victims or other categories would need special provision and I fully support that, but let’s get the language right.

And finally for now the concept of a Victim information service or hub is an excellent idea but nowhere in the draft bill does it suggest how this would be delivered. For example how would you disseminate information to an elderly person who has no access to the internet, would that not surely add to the argument for a case companion?

Mr MacAskill said yesterday that the Scottish government gives over 5 million pounds per year to Victims charities, whilst this is true he failed to point out that over 100 million pounds is given by the Scottish government every year to pay for the legal aid of criminals and as far as this legislation is concerned it appears that no extra investment is planned for victims.

In conclusion, it would be churlish to oppose a bill that attempts to creates some improvements for victims and witnesses but I do not feel that within the current bill as it stands I feel that victims all over Scotland will feel nothing but a sense of disappointment at a missed opportunity to make some real and radical improvements to victims lives.

Peter Morris
21 February 2013
Justice Committee

Victims and Witnesses (Scotland) Bill

Written submission from Angela Geddes

1. The proposal to create a duty on relevant justice organisations to set clear standards of service for victims and witnesses

1.1 As someone bereaved by homicide, I hope that the Victims and Witnesses bill will bring effective change. Please enable victims to be enabled, empowered and integral in the system so that they can survive and move forwards in their lives. I had a very disjointed journey through the justice system and felt I had to actively ensure appropriate service. Information had to be continually chased, Court dates repeatedly changed and questions were not answered. I was left with little confidence in the system, a deep sense of injustice and nothing to help me cope and recover.

1.2 The single most effective way of ensuring that victims’ needs are met is to introduce a Victim’s Commissioner. Victims need a voice. There is so much improvement required that it will require a sustained effort by someone who can make Victims be at the heart of the Justice Process.

1.3 The service given to victims must be regularly inspected and audited. By so doing, victims and their families will not be left worse off by the system.

1.4 We need to go further than a charter or “minimal standards.” If we attempt to produce generic minimal standards, little will change. Make a victim’s law a priority.

1.5 The Bill should ensure that Court dates are fixed and RARELY changed. The cost of wasted Court time is well documented. But there are huge emotional and financial costs to victims and witnesses whenever there is ANY change of date. Do not underestimate how difficult it is for a family bereaved by homicide to try to return to work – already having had time off, only then to be faced with needing further time off for Court dates that are then changed at a moment’s notice and without reasonable explanation.

1.6 Change of court dates does little to provide confidence in the legal system to victims, witnesses and the public as a whole. For those who are self-employed the financial costs of going to court can be large and impossible to recoup. We were informed of a court date that was never going to happen as it was a training day. We were told it was cancelled with only a few days notice.

1.7 Victim personal statements (VPS) contain essential information about the impact of the crime and this could be analysed to enable more effective delivery of assistance. They should become a working document throughout the process until parole.

1.8 The number of VPS that can be made should not be limited, common sense should prevail. In our case, we needed to make a choice whether a sibling or a
parent would not submit a VPS as only 4 were allowed. Having to fight for things like this is devastating.

1.9 I strongly believe VPS should be read out in Court by the victim (or a representative) if they want to. It is important for the Court to hear the true effect of the crime.

1.10 We were told by a senior professional in COPFS when discussing VPS that “most Judges don’t read them.” This was infuriating and devastating as it had taken an awful lot of emotional input and time to write them. Once more the arrogance of COPFS affects victims and their families - those who have found themselves where they are through no fault of their own.

1.11 The Law Society in their consultation response state – “the committee agrees with the proposal [of victim personal statements], but suggests that the impact and effect, if any, will be minimal. The committee believes that since the scheme was rolled out in 2008 it has rarely been used.” Why is the impact and effect minimal? How can they tell this is they are rarely used? How do they know the benefit of these to victims and their families?

1.12 All families should have the opportunity to leave the Court before the post mortem results are read out. This remains one of the most horrific experiences of my life and there should be a break in proceedings for the family to choose to leave. Remember in a murder, many basic details may not be able to be issued to the family (in our case even the date of death) until Court and families will want to know some, but not all details.

1.13 Where a homicide has occurred in a home, consideration should be taken to leave it in a fit state after the investigation is completed. We entered the house to the stench of rotting food and the sight of horrendous bloodstaining. The family should never have to see bloodstaining, or pay for it to be cleaned up no matter what the legalities. That will stay with me forever.

2. The proposal to give victims and witnesses a right to certain information about their case

2.1 The days of COPFS not having to deal with or speak to victims are gone. COPFS need to become customer focussed for victims and their families. In some areas this will require a seismic shift. At one point I was told that I was “quite well informed for a lay person” by the Advocate Depute. I was the daughter of a woman who was brutally killed. I did not ask to be in the situation I found myself in. But I did have a right to ask questions to try and understand the system I had been thrown into. It was also mentioned to us that “most families don’t ask questions, they just go away and grieve.”

2.2 Before any letter is sent to a family bereaved by homicide I would like the person sending it from the public organisation to consider who they are sending it to and if the tone is appropriate. It is appalling that I even have to ask for this to be done but please do not underestimate the improvement this would make.
2.3 I therefore suggest an audit of correspondence and “standard” letters that are sent to bereaved families. They would fail the clear English campaign. I understand that certain information needs to be conveyed but it is still possible to do this with a lot more consideration and humanity. This is essential to offer an improved service to victims and witnesses. Information provided should be proactive, not reactive.

2.4 Our family continually had to chase information – often to be told “we’ll get back to you.” Usually they never did. A single point of contact from start to finish is essential. Our Police liaison officer was very good but when the case proceeded to Court we felt stranded. Often information was delivered by the VIA without explanation on a Friday afternoon, leaving us all weekend to worry and with no support. The killer had a legal team funded by the State. We had google.

2.5 There should be a single contact/ liaison for those bereaved by homicide from start to finish (for as long as the family need it). This is working well in England and Wales. This contact should be well informed and have full access to the other organisations (public and voluntary). The other organisations must respond to the contact as a matter of priority, rather than being disjointed and unable to communicate.

2.6 In fatal cases, the family should meet at an early stage with COPFS if they want to. We were told at one point “it is unlikely the Advocate Depute allocated will be in a position to meet you.” Where is the empathy and humility?

2.7 We were informed of VERY varying details after sentencing and then at another meeting. Consistent information should be provided to families. It is the least they deserve.

2.8 All victims should have access to court transcripts free of charge. It is very difficult to hear in Court, especially when in my case you are learning about the death of a family member. You cannot take in all the information, especially if you have also been a witness. At one point we were told it would cost us several hundreds of pounds to receive a written copy of what was said in Court.

2.9 A system needs to be set up if some of the victim’s family live in England to allow transfer of information so agencies can assist people locally.

3. The proposal to give vulnerable witnesses a right to access certain special measures when giving evidence

3.1 A decision should be made soon after the crime whether or not a vulnerable witness will be granted special measures. It is very worrying to have to wait several months for this to be decided and changing this would ease a lot of anxiety. We were told at least three different things in terms of what type of special measures would be available for an elderly and vulnerable member of our family who was a witness.

3.2.1 Special measures should be given automatically for all stalking and domestic abuse cases.
4. Any human rights implications arising from the victims and witnesses provisions in the Bill

4.1 It is a gross inequality that if your loved one is unlawfully killed and if it is decided that they are a Mentally Disordered Offender (MDO) you will not be part of the victim notification scheme (VNS), but if they are not a MDO you will be part of the VNS. This does not change the fact that your loved one has been killed. There is disparity of practice due to patient confidentiality. I would argue that the person who was killed had rights and these were taken from them. Stop this 2 tier system.

4.2 The prosecution should be as qualified and experienced as the defence. In our case the defence (paid for by the State) was a QC. The prosecution was not and did not have a criminal law background. It showed.

4.3 If victims and family can block their addresses so the offender cannot write to them, they should be informed of this. This is really important. People have a right not to live in fear.

4.4 I am very concerned that no data is gathered by COPFS regarding domestic violence as a factor in murder or culpable homicide cases. Data like this should be collected to enable research of domestic abuse and greater awareness. Instead the only data collected is for operational use.

4.5 It is therefore vital that domestic homicide reviews are introduced in Scotland. They are already providing useful information to allow prevention of deaths in England and Wales. By conducting a review, lessons can be learnt for the future. Families want to see change that will prevent further tragedies.
NSPCC Scotland welcomes the opportunity to respond to the Victims and Witnesses (Scotland) Bill. We support the aspirations of the Bill to strengthen support for victims and witnesses in Scotland. We believe that the Bill contains a number of proposals which have the potential to improve the experiences of children and young people who become involved with the criminal justice system.

The Children (Scotland) Act 1995 enshrines the principle that a child’s welfare is paramount. This principle is supported by Articles in the UN Convention of the Rights of the Child: the best interests of the child must be a top priority (Article 3); that government must do all they can to ensure that children are protected from abuse, neglect and maltreatment (Article 19); and that children receive special help to enable them to recover (Article 39).

These principles need to underpin the proposals in the Bill and inform the guidance on how we work with children and young people who are victims and witnesses. They also highlight the need for children and young people to be identified as a priority group in their own right within the legislative proposals.

About NSPCC Scotland

The NSPCC aims to end cruelty to children. Our vision is of a society where all children are loved, valued and able to fulfil their potential. We are working with partners to introduce new child protection services to help some of the most vulnerable and at-risk children in Scotland. We are testing the very best intervention models from around the world, alongside our universal services such as ChildLine, and the NSPCC Helpline. Based on the learning from all our services we seek to achieve cultural, social and political change – influencing legislation, policy, practice, attitudes and behaviours so that all children in Scotland have the best protection from cruelty.

NSPCC Scotland response

There have been a number of developments in legislation and policy in Scotland pertaining to both victims and witnesses. These include The Protection from Abuse (Scotland) Act 2001; The Sexual Offences (Procedures and Evidence) (Scotland) Act 2002; The Criminal Justice (Scotland) Act 2003; The Vulnerable Witnesses (Scotland) Act 2004; The Criminal Justice and Licensing (Scotland) Act 2010.

The Victims and Witnesses (Scotland) Bill is intended to comply with the requirements of the EU Directive establishing minimum standards on the rights, support and
protection of victims of crime ("the EU Directive")\(^1\). The UK as a Member State, and thus, the Scottish Government too, has 3 years to translate the requirements into law/procedure or ensure that existing law and procedure complies. NSPCC Scotland recognises that much of the detail pertaining to these duties and procedures will be set out in secondary legislation. We would urge the Government to ensure that a single, separate and specific code of practice is set out for organisations and agencies working with children and young people who are victims and witnesses. We would also encourage the Government to publish, to support the legislation, age specific guidance for children and young people about the impact and nature of the provisions being introduced. Children and young people have different needs to adults and those needs must be communicated in language that recognises their different age, stage and levels of maturity.

Children and young people are also uniquely vulnerable when appearing as victims of crime and/or as witnesses at court. They are disproportionately victims of crime\(^2\) and it can have a profound impact, affecting them deeply, making school a place of fear, limiting their ability and willingness to access facilities, preventing them from going to certain areas for fear of attack, and potentially limiting their life opportunities. These impacts are often more significant for children and young people than for older people and, critically, vary greatly depending on a range of issues including age and maturity – the younger and/or more immature the victim the greater the need is likely to be. These differing types and levels of need must be reflected in the skills of people delivering support services. The necessity for very specialised services, which recognise and respond to the distinct needs of children and young people, in their own right is essential. Therefore we believe the current Bill would be strengthened by the inclusion of a measure similar to Articles 8 of the EU Directive (Right to access victim support services) which promotes awareness raising in relation to rights and the promotion of specialist services. This is particularly important in relation to the promotion for special measures (as outlined below).

**Special measures**

NSPCC Scotland believes that the accessibility of special measures is potentially strengthened by the extension of the definition of a child to mean any person who is under 18 years of age. To encourage utilisation of special measures, where appropriate, we believe that the full range should be proactively explained to children and young people to support them in making an informed decision about whether or not to use special measures and, if they decide to do so, which options best meet their particular needs. The needs of a vulnerable adult and those of a child will be very different and require a distinct skills set (communication, assessment, support) in order to meet those

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\(^2\) The Guardian (10\(^{th}\) October 2007), Almost all children aged 10-15 are victims of crime. From a survey by the Howard League for Penal Reform
needs. If children and young people are included in a more generalised definition of vulnerable victims and witnesses of crime, their needs will be overlooked. Therefore, it is not sufficient to assume that children and young people will receive appropriate services simply by virtue of age. Children and young people need to be considered as a priority group, as they have different needs and require support from individuals who are trained and skilled in communicating, assessing and helping them.

Intermediaries

Children do not approach communication in the same way as adults and across all age ranges ability can vary considerably. Research has shown that at least half of young witnesses reported being unable to understand some of the questions they were asked in court\(^3\). Therefore NSPCC believes that every vulnerable child witness in abuse cases should be assessed by an Intermediary at the earliest stage and a report produced outlining their capacity to communicate during trial and their needs is provided to the court. The judge should then direct Advocates and other legal professional on appropriate questioning. NSPCC Scotland acknowledges that the Scottish Executive committed to evaluate the piloting of intermediaries in England and Wales in 2007 as part of their consideration of their applicability in Scotland. In spite of positive findings\(^4\), intermediaries were not rolled-out in Scotland. NSPCC Scotland recognises the successful use of intermediaries\(^5\) in a number of recent child abuse cases in England and Wales and greatly welcomes Ministers’ intentions to pilot their use more thoroughly in Scotland.

Reliving traumatic events

Reliving the trauma of sexual abuse in court is very difficult for children. Failure to provide sufficient support to young witnesses when giving evidence in court makes victims of abuse vulnerable to suffering further trauma. Delay, aggressive cross-examination and the anxiety of seeing their abusers may have lasting effects on vulnerable witnesses, and can affect the quality of evidence that they give. Special court measures afford young witnesses support in order to ensure that they are adequately prepared and protected from further harm.

The NSPCC believes that having specialist court sittings for children who have been sexually abused will help to address the above problems. Having trained judges, Advocates, solicitors and other legal professionals offering the full range of support will help children and young people give better evidence, avoid further trauma and achieve justice against their abusers.

\(^3\) Measuring Up? Evaluating implementation of Government commitments to young witnesses in criminal proceedings. NSPCC/Nuffield Foundation 2009

\(^4\) Scottish Executive (2008) Report on the Analysis of Responses to the Consultation on Intermediaries as a Special Measure for Vulnerable Witnesses, Edinburgh

\(^5\) 23,758 in the 12 months to February 2011 in England and Wales ; Joint Inspection Report on the Experience of Young Victims and Witnesses in the Criminal Justice System, HMCPsI/HMIC, February 2012.
**ChildLine**

ChildLine is the free 24 hour helpline and on-line service for any child or young person with any problem. Children and young people contact ChildLine with a range of concerns, but most commonly family relationship problems, bullying, physical and sexual abuse and self-harm. Most children and young people using the service are between the ages of 12 – 15. The majority do not contact the service about a single issue but rather talk about multiple, or ‘layered’ concerns. ChildLine works with these children, who in many cases are reluctant to seek help from the adult world for a range of complex reasons, to listen, advice and safeguard, as well as acting as a bridge to allowing children to access the range of help and support they need.

In the year 2011/ 2012, 1006 children and young people across the UK talked to the service about being involved in court cases (past or present), children’s hearing and custody cases. 242 children were counselled at Scottish bases about these issues, although not all of these children will be living in Scotland. It is imperative to set this relatively small number of children talking specifically about ‘court cases’ in the context of the far wider numbers of young people who contact ChildLine about all forms of abuse and other deeply traumatic life events which seriously impact on their mental, emotional and social development and their engagement with children’s services and the adult world in general. ChildLine hear consistently from these young people about the complexity of their feelings about abusers - not least fear and love; the deeply entrenched feelings of guilt and self-blame they experience; the range of impacts on their own behaviour, their reticence in seeking support from the adult world and their reliance on friends and peers for guidance.

**Child victims and witnesses**

Some of these issues are illustrated in contacts from young people who talk to the service about being involved in court cases, as follows:

*There’s no way I’m going to tell anyone. I couldn’t talk in front of all those people.*

*I’ve no one to talk to about it. It’s been ages since it happened and it still hasn’t gone to court. My social worker said something about lack of evidence, but I don’t understand. I wish I had never told anyone.*

*I’m in a really bad situation. I was sexually abused by my Dad’s friend. I’m so worried about going to court that I can’t sleep. I can’t sleep with this hanging over me.*

*My mum and dad split up. Dad hurt mum. Dad has a court case – I’m going to court on February 16th I’m terrified. I don’t want to go against my dad.*
I'm nervous about going to court. If my neighbour gets put away, I'll get a kicking. His family don't believe me. Cutting myself makes me feel better.

What is most apparent from the substantial number of calls ChildLine receive is the complexity of issues that young people are facing, and subsequent fears and concerns about giving evidence – real or perceived. These are young people whose lives have been turned upside down, who are intensely vulnerable, who often can lack support, who must give accounts of what has happened to them to an adult world they may have no trust in. These are young people whose behaviour can be erratic, who in many cases have not started to make sense of what has happened to them, who even long serving professionals can struggle, at times, to communicate with effectively. These are young people who may not even be perceived as ‘victims’ – as recent sexual exploitation cases have made us all so painfully aware.

We believe that the experiences of children and young people, as set out above, highlights the need for a range of special court measures to improve the quality of evidence and reduce the risk of further trauma being suffered by young victims of abuse.

**Additional information**

We would also welcome greater consideration of the types of support available to children and young people after their involvement in court proceedings. NSPCC Northern Ireland runs a Young Witness Service which is a free, independent and confidential service offered to children and young people who are under 18 years old, their families, friends and supporters who have to attend court as witnesses. The service is provided by a combination of social work staff, other qualified staff and trained volunteers. It aims to assist children and young people and their parents or careers before, during and after any trial so that they can give the best evidence to the court and prevent any further trauma caused by their experience. NSPCC Scotland believes that the proposals outlined within the Victims and Witnesses (Scotland) Bill highlights the need for a similar child witness service in Scotland to ensure that children and young people receive appropriate levels and types of support before, during and after giving evidence.

**Conclusion**

NSPCC Scotland greatly welcomes the Scottish Government's commitment to strengthen support for victims and witnesses in Scotland. We believe that the Bill contains a number of proposals which have the potential to improve the experiences of children and young people who become involved with the criminal justice system. Ultimately, it is our view that a range of special court measures are required to improve the quality of evidence and reduce the risk of further trauma being suffered by young victims of abuse. It is vital this happens throughout the court process. Better evidence means justice is far more likely to be secured for victims.
Justice Committee

Victims and Witnesses (Scotland) Bill

Written submission from Katrina Stewart

On the 21st May 2012 Nicola Sturgeon, Deputy First Minister stated that “Compassion is a long standing principle in the Scottish criminal justice system”. Really?

As a family we are still struggling to come to terms with the loss of our much loved son and brother Andrew Oates who, on the 22nd Oct 2010 was brutally, murdered by 3 members of his own family.

For the last 29 months we, the victims have fought continually with outdated laws and bureaucracy. Where was our compassion?

Outdated laws which found us as a family having to fight for 15 months secure the release of Andrew’s body, not from another country; but to bring him home, just 34 miles from a Police mortuary in Aberdeen, in order to lay him to rest. A basic human right. We begged Mr MacAskill to intervene, and help us bring Andrew home, but to no avail. Where was Mr MacAskill with his compassion when we asked for it?

Bureaucracy who found us unentitled to any financial aid whatsoever, nothing for funeral costs, nothing for solicitors fees and nothing for help towards court costs e.g. Time off work, travel expenses etc.; meanwhile the 3 convicted had all of their legal fees paid by legal aid (the Tax payer), how can this be right?

29 months on my elderly parents are still waiting for the payment of criminal injury compensation. This compensation is a legal right of Andrew’s parents this was applied for over 2 years ago in order to help ease some of the financial pressure, can anyone explain why my parents, both in their eighties have had to continually telephone and as yet have received nothing. Our fight to bury my brother created a financial cost to the family of just under £10,000

Can Mr MacAskill, who states that's "he puts the victim at the heart of the Justice System" please explain why, that after suffering the worst pain and horror of our lives, that we the family, the victims, have had to fight continually for 29 months when we are supposed to be “at the heart of the justice system”.

When the Hollinsworth family planned, and carried out Andrews murder, they then went back to the house the following day and tied Andrew’s legs and wrists together, dragging him onto a tarpaulin, wrapping his head in a towel then wrapped him in a duvet and used more cable ties to secure. They then began cleaning up his blood and brain matter from the walls, floors and doors with the intention of burying him in the garden. For this part of the crime, the 2 females involved each received a 10 month sentence. Can Mr MacAskill explain why we the victims have a life sentence through no fault of our own and a continual fight for closure?
The Justice Committee have issued a call for written evidence as part of its consideration of the Victim and Witnesses (Scotland) Bill. I am also interested in providing oral evidence.

In order to put the victim at the heart of this Bill the points I would like to make are:

- I believe that a case companion should be available for victims and witnesses of traumatic crime, instead of repeatedly having to form new relationships when being passed from one organisation to another at probably the most vulnerable time in your life my family’s experience was one of; having one visit from a victim support member, never hearing from them again and slipping through the net altogether. Clinging to each other and floundering. Very badly let down. And again on being taken out of the court directly after sentencing to have a media statement read to the waiting press, we were told to go straight back into the court where we would be given time to digest the outcome and have any questions we may have answered. On turning to go back into the court in a state of emotional shock we were met with locked doors and told by victim support member to get away quickly due to the press, we jumped into a taxi and left completely shell shocked. Again very badly let down.

- I believe it is a basic human right not to have to live within the same geographical area of the people involved with the murder of a loved one, before or after sentencing, In my case we had to live 200 yards from the 3 accused and my sister even lived in the same street for a period of 17 months, seeing them on an almost daily basis on buses, and being waved to in supermarkets and even having to pass them in the street. This made our lives almost unbearable; many of Andrews’s family were on medication for depression after this horrendous crime, and still remain so. Murderers should not be allowed to return to the same area on release from prison, the very thought of this is terrifying for us as a family; we would never be able to have any kind of recovery.

- I feel Victims are very often left in the dark as to what is going on in their case and are left running from one person to another with questions which more often than not go unanswered. They should have the right to access of information regarding the case and be kept informed of any developments.

- Compensation should be an automatic right in the case of murder; my parents are still waiting for criminal injuries compensation 29 months after my brother’s death. The cost incurred in way of legal fees, funeral costs have put extra burdens on a family already suffering the worst trauma ever.

- The victims surcharge sounds good in theory but I do not think it will work, by the time it filters down through all of the many organisations involved there would be little left. Again my sister and I were not even eligible to claim a penny to help with the cost of travelling to court in Edinburgh from Aberdeen and had to approach to a charity for financial help.
• Punishment should fit the crime. Sentences given should be served in full without discounts or time off for good behaviour.

• Sentences should not be concurrent but consecutive where more than one crime has been committed against one individual.

• Radical changes must be made to prevent victims suffering what my family have endured. Nothing will give us back our hearts desire, Andrew, and the changes can only be made with empathy not sympathy. We the victims need to be listened to.

Instead of spending our money on building bigger prisons put more time into introducing harsher deterrents.

Katrina Stewart
22 March 2013
1. The Faculty welcomes the Scottish Government’s commitment to improving the experience of witnesses and victims as they participate in the criminal justice system.

2. The Scottish criminal justice system is an adversarial system. This means that it is the prosecution and defence, rather than the court, that decides what evidence to lead, and that each party is entitled to challenge the evidence led by the other. The judge (in summary matters) and the jury (in solemn matters) assess the credibility and reliability of the witnesses and decide the following:

   (i) whether the prosecution has proved that the crime was committed, and;
   (ii) if so, whether the prosecution has proved that the accused committed the crime.

3. The burden of proving the charge or charges rests on the prosecution. The prosecution has a complete discretion in deciding which charges to bring and in which court. There is no obligation on an accused person to prove anything. An accused person is required to give notice to the court and to the prosecution of special defences (e.g. self-defence to a charge of assault, consent to a charge of rape).

4. The starting point of any prosecution is that the accused is presumed to be innocent. This remains the case unless and until the prosecution proves the guilt of the accused beyond reasonable doubt. It follows that, unless and until a finding of guilt is made, it has not been proved that a crime was committed and, as a consequence, that there was a victim in the first place. For this reason, the alleged victim of a crime is referred to as the “complainer” rather than the “victim”. Otherwise there is an implicit assumption that the “victim’s” account is a truthful one before a finding of guilt has been made, and the presumption of innocence may therefore be undermined. In the Faculty’s view, to avoid this unfortunate and unfair consequence, the word “complainer” should be used when discussing pre-trial and trial measures and the word “victim” only with regard to post-conviction procedure. This approach mirrors the Statute that governs Scottish criminal procedure (The Criminal Procedure (Scotland) Act 1995).

5. Clearly it is essential that the complainer and vulnerable witnesses are able to provide their evidence in as stress-free an environment as possible. In considering how best to achieve this, it is essential that the accused’s lawyer remains able to challenge properly, and that the judge or jury remains able to assess properly, the evidence led by the prosecution.
(a) the proposal to create a duty on relevant justice organisations to set clear standards of service for victims and witnesses

6. The Faculty is aware of improvements made in this field by certain organisations in recent years; for instance, the VIA (Victim Information and Advice) service is well established and provides useful support. It is important that all relevant agencies operate to similar standards.

(b) the proposal to give victims and witnesses a right to certain information about their case

7. While it is important that complainers and other witnesses are not ‘kept in the dark’ as to the progress of an investigation or trial, it is equally important that the independence of the prosecutor is not compromised. Prosecutions in Scotland are taken in the public interest and prosecutors are not the complainers’ lawyers. As the Faculty stated in its response to the Consultation, any new system should be focused on the flow of information rather than on allowing complainers and others to become active participants at the investigation and prosecution stages. To do otherwise would be to threaten the independence of the prosecution service.

8. The Faculty is in favour of an online information hub where procedural information can be accessed in a user-friendly manner. It is to be hoped that such information can be set out in an understandable format, avoiding the use of legalistic terminology.

(c) the proposal to give vulnerable witnesses a right to access certain special measures when giving evidence

9. The presumption should be that proceedings are always held in public with the judge continuing to have a discretion to exclude the public.

10. The Faculty believes that the existing system works well and that special measures are made available where appropriate. Under the proposed changes, where the charge contains an allegation of a sexual offence, domestic abuse, human trafficking or stalking, the complainer would automatically be entitled to standard special measures such as the use of a TV link. This would mean that in a case where there was no risk that the quality of the witness’s evidence would be diminished, the witness would nevertheless be entitled to give evidence by use of a TV link. As a consequence, the judge or jury would be unable to assess the witness in the same way as a witness who had given evidence in court. The Faculty understands that research has shown that evidence given by TV link is more difficult to assess and does not make the same impression as evidence given in court. Furthermore, the solemnity attached to giving evidence from the witness box before a Judge or jury in a courtroom, should not be given up lightly.
(d) the proposal to require the court to consider compensation to victims in certain cases

11. The Faculty supports the direct compensation of victims of crime by those guilty of attacks upon their person or property. Compensation orders are routinely imposed in courts throughout Scotland.

(e) the proposal to introduce a victim surcharge and restitution orders, so that offenders contribute to the cost of supporting victims

“Victim Surcharge”

12. With regard to the proposal for a “victim surcharge”, the Faculty is concerned that the Bill seeks to fetter the Court’s discretion as, by virtue of the new provision (s.253F), the Court “must” order payment of a victim surcharge.

13. Furthermore, the payment must be for a “prescribed” amount. By contrast, Judges are currently obliged by statute to take into consideration the means of an offender before imposing a fine (s.211(7) of the 1995 Act). In the Faculty’s view, the imposition of an additional minimum flat-rate payment is therefore a regressive, and unwelcome, development.

14. Additionally, it may well be the case that inevitable problems associated with non-payment and enforcement will increase the administrative burden on the Scottish Court Service.

“Restitution Orders”

15. Although the Police undertake a vital role in society and many officers face danger on a regular basis, so do others employed in the emergency services, as well as prison officers, hospital staff and others. If such a scheme is to be established, it should be extended to include all of the foregoing groups. There may also be difficulty in evaluating the level of restitution, especially where there has been no injury.

(f) any human rights implications arising from the victims and witnesses provisions in the Bill

16. Complainers’ rights to privacy are often considered at preliminary court hearings, most frequently when applications are made for disclosure of often extremely sensitive personal information such as social work records, medical records, psychiatric records. Invariably, the complainers do not appear or are not represented at the hearings; it is left to the Crown to make representations on their behalf. However, there may well be a conflict of interest between the prosecution position, representing the public interest, and the very personal position of the witness. The Faculty believes that there should be a presumption of entitlement to independent representation for complainers at such hearings, and possibly at other hearings during the process (such as an application to admit evidence of sexual history and character evidence of the complainer in sexual offence trials by virtue of s.275 of the 1995 Act).
17. The Faculty is aware that representation in such situations is commonplace in other jurisdictions.

Faculty of Advocates
11 April 2013
Justice Committee

Victims and Witnesses (Scotland) Bill

Written submission from the Information Commissioner's Office

About the Information Commissioner’s Office (ICO)

The ICO’s mission is to uphold information rights in the public interest, promoting openness by public bodies and data privacy for individuals.

The ICO is the UK’s independent public authority set up to uphold information rights. We do this by promoting good practice, ruling on complaints providing information to individuals and organisations and taking appropriate action where the law is broken.

The ICO enforces and oversees the Data Protection Act and the Privacy and Electronic Communication Regulations, as well as the UK Freedom of Information Act and the UK Environmental Information Regulations, both of which apply to reserved matters in Scotland.

1. Introduction

The Information Commissioner’s Office (ICO) welcomes the opportunity to respond to the consultation by the Justice Committee of the Scottish Parliament on the Victims and Witnesses (Scotland) Bill (the Bill). The ICO has noted that S26 and S27 of the Bill are being considered by the Health and Sports Committee. As the ICO is responsible for the regulation and enforcement of the Data Protection Act 1998 (DPA), a separate response has been made to that Committee on the data protection issues relating to the creation of a National Confidential Forum for adult survivors of childhood abuse while in care. Similarly, our response to the Justice Committee will be limited to S3 of the Bill which covers the individual’s rights to information.

2. Victims’ rights to information

Section 3 of the Victims and Witnesses Bill (the Bill) requires specified information about criminal proceedings to be disclosed to victims and witnesses on request. As an organisation which promotes individuals’ access to information through both the Data Protection Act 1998 (the DPA) and the Freedom of Information Act 2000 (FOIA), the ICO welcomes transparency in decision making which affects individuals and, hence, broadly supports the proposals within S3 of the Bill. The rights which will be conferred by the legislation are limited to victims of, and witnesses to, an offence or alleged offence (S3(2)) and the information to be disclosed (S3(6)) is largely procedural; these restrictions provide a degree of proportionality to the release of the information, some of which may be considered to be sensitive personal data as defined by the DPA. Our comments below address issues relating to such disclosure of sensitive personal data.

Sensitive personal data is defined in S2 of the DPA and, amongst other individual characteristics, includes:
• a person’s physical or mental health or condition (S2(e));
• both the commission or alleged commission of any offence (S2(f)); and
• any proceedings for any offence committed or alleged to have been committed by a person, the disposal of such proceedings or the sentence of any court in such proceedings (S2(g)).

By definition, therefore, the disclosures of information relating to the proceedings against an individual will involve the disclosure of sensitive personal data. However, although sensitive personal data are subject to stricter conditions of processing than are non-sensitive personal data, the DPA allows for disclosure where the disclosure is required by or under any enactment, by any rule of law or by the order of a court (S35(1)). Such disclosures must nevertheless conform with the data protection principles.

Information which qualifies for disclosure to victims and witnesses is described in S3(6) of the Bill. Necessarily, some of that information will be the personal information of the accused, albeit largely relating to procedural matters which will be in the public domain (eg, the place, date and time of when a trial is to be held). However, under certain circumstances, revealing the grounds of a decision not to proceed with a criminal investigation (S6(a)), to end a criminal investigation (S6(b)) or the grounds not to institute criminal proceedings S6(c), may disclose additional sensitive personal information of the accused or of a third party (for example, where there are medical grounds for not proceeding with a prosecution). Under S3(3) of the Bill, the qualifying person need not comply with the request for information if it is considered to be inappropriate to disclose it.

Whilst recognising that the decision to disclose will be one of public interest and will be dependent upon both the nature of the offence and the reason not to proceed with the investigation or prosecution, consideration should be given to requiring guidance to be issued to qualifying persons to assist them in making consistent decisions between cases. It may also be appropriate for qualifying persons to consult with one another when determining what information can be released.

To ensure that the rights of victims and witnesses are upheld promptly, it would be appropriate for qualifying persons to be required to respond to any request for qualifying information within a defined timeframe. The DPA requires that requests for personal information are provided within 40 calendar days whilst both the UK and Scottish FOIAs require information to be provided to requestors within 20 working days. Similar timeframes should be made be applicable here. In addition, consideration should be given to introducing a right of appeal for victims and witnesses who have been denied access to qualifying information.

Dr Ken Macdonald
Assistant Commissioner (Scotland & Northern Ireland)
12 April 2013
Justice Committee

Victims and Witnesses (Scotland) Bill

Written submission from Diane Greenaway

1. I am a former member of the Crown Office and Procurator Fiscals Service, who has set up a specialist trauma support service in Ayrshire called HALO Support Community Interest Company, (Healing and Looking Onwards ) to address the disparity of support to those persons and their families in Ayrshire significantly affected by trauma, through the loss of a loved one to murder and culpable homicide, unexplained death, fatal accident, and missing persons, or through being a victim or witness to a crime.

2. Over my 26 years in COPFS, 21 years of which I was a Precognition Officer I required to investigate serious criminal cases, by interviewing the necessary victims and witnesses, liaising with the police and expert witnesses to ensure that all of the available evidence was obtained and presented by way of a Precognition to Crown Counsel for a decision on whether proceedings would be taken. I was then involved in all aspects of trial preparation, witness problems, and when required I would attend the trial to assist the Advocate Depute prosecuting the case. The person precognoscing the case had a lot of responsibility in relation to victims and witnesses, as the Victim Information and Advice role, in my opinion is quite restrictive.

3. During my career I worked in 7 different offices throughout Scotland (including Glasgow and Edinburgh), and also completed a secondment in the Communications Department in Crown Office, as a Communications Officer. I also acted as an ad hoc High Court Sitting Manager at Kilmarnock High Court.

4. Latterly I was seconded to the Ayrshire High Court Unit from 2007-2012, where I was involved in many high profile murders, and serious criminal cases. I personally supported countless victims and witnesses through the justice system, and have always been passionate about victim’s rights. I am aware that a number of victims have attempted suicide through being affected by trauma and lack of support in the aftermath of a crime or loss. I am aware of two particular young victims who committed suicide in sexual cases, and this caused me considerable sadness, as convictions had been achieved in both cases. It confirmed to me how important it was for support to be tailored to a victim’s needs and that it was essential that support continued on completion of the court case. A one size fits all approach does not work.

Such was my determination for helping victims and witnesses, upon taking early retirement from COPFS in March 2012, I felt compelled to try and address the problem and use my experience to help bring about change. I set about ensuring I clearly understood the present services available locally, speaking with victim’s families, present support organisations and criminal justice partners, seeking their advice, and ideas for improvement.
5. This confirmed to me that there is a fundamental lack of collaboration between present support organisations, and COPFS with many organisations not understanding the basic court processes, and COPFS not being fully aware of the support available locally. Without this informed knowledge, the persons organisations seek to support cannot hope to clearly understand the role of being a witness in court. It is therefore not surprising that there are so many unhappy and misinformed victims and witnesses.

6. My research confirmed that those persons who receive support for domestic abuse and sexual crime throughout Scotland, receive a far more superior and comprehensive service, from Scottish Government funded charities, ranging from counselling, group support, and treatments. In contrast persons affected by all other crime, including the most serious crimes like murder, and culpable homicide receive a more restrictive service by Victim Support Scotland, who do not offer similar services. The exception to this is the valuable specialist support provided by PETAL Support, (a victim / next of kin run organisation) in Lanarkshire who offer support for persons affected by murder, culpable homicide, and suicide. The only other support available for persons affected by murder in Scotland is presently offered by the families and next of kin of person who have lost a loved one.

There is no equivalent support for persons affected by fatal accidents, missing persons, and unexplained deaths in Scotland. It should be noted that each of these categories has the potential to turn into a criminal case; therefore in my mind support must be offered at the outset.

7. There should be no disparity of service dependent on type of crime, whether the person is a victim or witness, or the area in which a person lives. Trauma and how a person reacts to being involved in a crime, is an entirely individual matter and a one size fits all approach does not work. Often a witness can require more support than a victim. Support should be assessed at the outset and continuously monitored, and tailored to a person’s needs. Minimum and clear standards of the support and information available by each organisation should be regulated by a proposed Scottish Victim and Witness Alliance, or Victim’s Commissioner. A victim / witness should be entitled to be told of pertinent and relevant case related information at certain agreed times.

8. I cannot stress strongly enough the need for dedicated, consistent and informed support persons (Case Companions) who have essential experience of criminal justice processes, and not just experience of having previously been through the system as a victim of a crime, or an individual who does voluntary work. The reason I suggest this is that it is often difficult to promote a process which you yourself, have a negative experience of. I would suggest a balance of both experiences is essential to effectively advocate of behalf of, offer regular informed, emotional and practical support, and make the process of being a victim / witness more bearable. A standard and comprehensive service to address the aforementioned issues requires to be provided nationally.

9. The issue of a Victim Surcharge requires to be carefully re-examined with more emphasis on serious crime, and less on road traffic crime.
The proceeds of the proposed Victim Surcharge should be available for all victims to access, and benefit from, and administered by an independent body or Victims Commissioner.

Diane Greenaway
16 April 2013
Justice Committee

Victims and Witnesses (Scotland) Bill

Written submission from the Law Society of Scotland

Introduction

The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

The Law Society of Scotland’s Criminal Law Committee (the committee) welcomes the opportunity to consider and respond to the call for written evidence on the Victims and Witnesses (Scotland) Bill and has the following comments to make.

It should be noted that the Society’s Mental Health and Disability sub-committee has responded separately to the call for evidence issued by Health and Sport Committee relating to sections 26 and 27 of the Bill. A link to this response is included for members’ information.

General comments

The committee responded to the related Scottish Government consultation; Making Justice Work for Victims and Witnesses in July 2012.

The committee is supportive of the policy intent and the overall objective of the Bill. However, as previously set out in its response to the Scottish Government’s consultation, the committee question how the additional services are to be funded and resourced given the current funding constraints and financial cut backs which is affecting the criminal justice system, including the Crown Office and Procurator Fiscal Service, the police and including the proposed court closure. Expectedly, victims and witness are anxious to avoid any further additional upset and stress and are keen that their case is managed in the most speedily and efficient way possible. Although the provision of further information and help, as set out within the Bill, will address one possible level of victims’ and witnesses’ concerns, an increased level of anxiety and dissatisfaction may arise due to prolonged cases which are as a result of insufficient and reduced resources.

The committee notes that the Bill is entitled the Victims and Witnesses (Scotland) Bill, and the Bill consistently refers to these two groups of persons. However, the committee further notes that other than a minimal definition under section 2(3) that “victim” includes a prescribed relative of a victim’ no clear and full definition of victim appears or is referenced on the face of the Bill. The committee suggests, and would

welcome, a statutory unambiguous definition to avoid any unnecessary anxiety by person who may consider themselves as “victims”.

Specific comments

Section 3 Disclosure of information about criminal proceedings
The committee notes the General Principles as set out in section 1(3) of the Bill, providing that a victim or witness should be able to obtain information regarding the investigation or proceedings relating to the alleged or suspected offence, and further notes that Section 3 (6) (a) includes ‘a decision not to proceed with a criminal investigation and any reason for it’.

The Scottish Government recently consulted upon, and proposed that the requirement of corroboration be abolished\(^2\), to which the committee responded\(^3\). The committee is concerned that without any requirement for corroboration, the expectation of many victims and witnesses will be for an increased likelihood of a prosecution. If a decision is taken not to proceed with a prosecution due to the credibility or reliability of victim’s and witnesses’ evidence, the committee question how this will be conveyed to the victim or witness as this may cause increased anxiety. Where the investigation or case arises from a single witness complaint, this may cause difficulties for the Scottish Court service, the Crown Office and Procurator Fiscal etc.

Section 3(2)(c) states that the information may be given to a person who has given a statement in relation to the offence or alleged offence. This suggests to the committee that any person may request information, even where that person will be taking no further part in the investigation or criminal proceedings. The committee believes that this is too wide a definition of persons for the purpose of section 3(2).

Section 3(4) provides that a qualifying person need not comply with the request where they consider it inappropriate to do so. The committee notes that there is no guidance provided as to when this discretion should be applied. For example, what factors should the qualifying person take into account when deciding to comply or not comply with the request for information? The section makes reference to the term ‘where it would be inappropriate to disclose’ but again there is no guidance of what is and is not considered inappropriate. The term ‘inappropriate’ is very wide and ambiguous. For the purposes of transparency and for clarification it is suggested clear guidance must be provided.

In conclusion to Section 3, the committee suggest and envisage that there will be many practical difficulties in considering and fulfilling any duty under section 3. A qualifying person may find it difficult to determine to whom the information should be released to and if it is appropriate to release this information.

\(^3\) http://www.lawscot.org.uk/media/596278/crim_additional_safeguards_following_the_removal_of_the_requirement_for_corroboration_final_15_march.pdf
Section 4 Interviews with children
The committee notes that a child for the purposes of section 4 is defined in Section 4(6) as a person under 18 years of age, and under section 6 (1)(a) a vulnerable witness is considered as a person under 18. Currently, under the 1995 Act a person is treated, for the purposes of arrest, detention and prosecution as a child if under 16. Any person over the age of 16, except in limited circumstances, for example where a person is subject to a supervision requirement, is effectively treated as an adult. The committee repeats its suggestions, put forward in response to the to the earlier consultation, that there should be consistency throughout the criminal justice system and all persons under the age of 18 should be defined as a ‘child’.

Section 6 Vulnerable witnesses
The committee notes the inclusion of “victims of alleged sexual offences, human trafficking, domestic abuse or stalking”. It is not clear to the committee why separate categories have been set out, to the exclusion of others.

In the committee’s view Section 271(4) of the 1995 Act adequately covers all those over the age of 18. The committee also questions, whether domestic abuse and stalking offences should be included where special measures may be unnecessary.

Section 9 Objections to special measures; child and deemed vulnerable witnesses
The committee welcomes the amendment to section 271A of the 1995 Act, and believes that this will result in full and transparent consideration being given to applications for Special Measures.

Section 13 Objections to special measure; other vulnerable witnesses
As with section 9, and for the same reason, the committee welcomes the proposed amendment to S271C of the 1995 Act.

Section 14 Review of arrangements for vulnerable witnesses
The committee welcomes the proposed amendment to section 271D(1)(a) of the 1995 Act, which the committee believes will provide greater flexibility.

Section 16 Special measures; closed courts
The committee is concerned with the extension in the powers to allow closed courts. There may be occasions where the relatives of the victims and, or, accused may wish to hear the evidence direct, for example domestic abuse cases. To exclude relatives in these cases may cause them additional concerns as to the nature of the evidence and to speculation of what indeed this evidence is.

Also, Article 6 of the European Convention on Human Rights provides ‘everyone is entitled to a fair and public hearing’ The committee accepts that in limited circumstances a ‘closed court’ may be appropriate. However, the committee suggests that this should only be in very exceptional circumstances and the current provisions are adequate.

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4 Section’s 15, & Part V Criminal Procedure (Scotland) Act 1995
It is often the case now that, with the advancement of technology and the increased use of TV links and screens, witnesses do not have contact with the accused or the public attending.

**Section 19 Victim statements**
Although the committee agrees with the use of victim statements, it questions their impact and effect. It is not known to the committee to what extent consideration is given to the victim statements by a judge prior to sentencing. It is unclear as to why there should be an extension of victim statements.

In addition, the committee believes that this section may cause practical difficulties. By way of example, if an accused has pled, or is found Guilty, the Court will then normally hear a Crown narrative, or will have heard evidence in a trial. The Defence will address the court in mitigation. The case may then be deferred for reports. A social worker is then provided with a summary of evidence. Problems could then arise, where at the deferred diet, some weeks later, a victim impact statement is suddenly produced to the court. The victim impact statement may be at variance with the Crown narration, summary of evidence and indeed the social work report. The defence may challenge the statement resulting in further hearings and delay.

**Section 21 Restitution order**
The committee notes that section 21 inserts into the 1995 Act a new section 253A which provides that the court may make a restitution order where a person is convicted of an assault against a police officer. The committee agrees in principle with this, but again raises the question of why such a restitution order is restricted to offences related to assault of police officers and does not include the assault of other emergency service workers, such as ambulance and fire service workers, who themselves are often exposed to potential and actual assaults while carrying out their duties. The committee raises the question for consideration of what will happen should the police officer have retired or been suspended by the time the accused is sentenced.

**Section 22 Victim surcharge**
As the judge already has the power to make a compensation order, the committee questions if this will have any impact. In the committee’s view the Bill and Explanatory notes contain few details regarding the practicalities of the proposed surcharge. The committee welcomes further information on this, to allow full consideration to be given.

**Section 24 Life prisoners; victim’s right to make oral representations before release on licence**
The committee notes that section 24(b) provides the opportunity for victims to make oral representation to a member of the Parole Board who is not dealing with the convicted person’s case. The committee further notes that this increased right above the current right to only make written representations as at present. The committee expect that the Scottish Government will consult upon guidance to this and look forward to considering this when published.
Section 25 Temporary release; victim's right to make representations
The committee notes that section 25 inserts a new section 17A into the 2003 Act. Section 17A(2) gives victims an opportunity to make written representations regarding the conditions to be attached to temporary release. The committee further notes that what conditions the victim may request is not clear on the face of the Bill. The committee understands that the range of conditions will be set out within guidance.

The committee looks forward to the publication of the consultation on the guidance, setting out the range of conditions which it will be open for the victim to consider, and will respond to this accordingly at that time.

Brian Simpson
Law Reform
18 April 2013
Justice Committee

Victims and Witnesses (Scotland) Bill

Supplementary written submission from the Law Society of Scotland

Please pass on the Society’s thanks to the Justice Committee for allowing us the opportunity to provide a possible steer on the definition of ‘victim’

The Society’s Criminal Law Committee has considered this, and looked at a number of definitions from other jurisdictions. For example, the UN Victims Declaration defines the term “victim” as

“persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power”

And the Council of Europe Committee of Ministers’ Recommendation on assistance to victims of crime defines victims in similar terms:

“Victim means a natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, caused by acts or omissions that are in violation of the criminal law of a member state. The term victim also includes, where appropriate, the immediate family or dependants of the direct victim.”

The committee notes that Professor Miller made reference to these definitions in his response to the Justice Committees’ call for evidence.

However, in the committee’s view, although the aforementioned international standards and definitions are useful, they are drafted for a slightly different purpose and so might not be suitable for the purposes of the Victims and Witnesses Bill.

The committee suggests that a useful comparator may be the Victims of Crime Assistance Act 2009 (Queensland: http://www.legislation.qld.gov.au/LEGISLTN/ACTS/2009/09AC035.pdf) which includes the following definition:

5 Meaning of victim

(1) A victim is a person who has suffered harm –
(a) because a crime is committed against the person; or
(b) because the person is a family member or dependant of a person who has died or suffered harm because a crime is committed against that person;
(c) as a direct result of intervening to help a person who has died or suffered harm because a crime is committed against that person.
(2) A person who commits a crime against a person as mentioned in subsection (1)(a) is not a victim of the crime under subsection (1)(b) or (c).
[Note (a) that “victim” is given a slightly different definition in certain sections of the Act (ss 8 (fair and dignified treatment), 9 (privacy of victim), 139 (functions of victim services coordinator)) where it is expanded to include “a person who has suffered harm as a direct result of witnessing a crime committed against someone else” and (b) “harm” is defined in Schedule 3 as “physical, mental or emotional harm” – i.e. economic harm is not included.]

Please let me know if you or the Committee have any other questions on this.

Brian Simpson
Solicitor – dual qualified
Law Reform
The Law Society of Scotland
29 April 2013
I am pleased to have the opportunity to comment on the proposals contained in the Victims and Witnesses (Scotland) Bill. I understand this Bill will implement EU Directive 2012/29/EU in relation to minimum standards on the rights, support and protection of victims of crime and forms part of the wider justice reform programme aiming to support victims and witnesses.

My office was established by the Commissioner for Children and Young People (Scotland) Act (2003) which lays out the general function of the Commissioner ‘to promote and safeguard the rights of children and young people’. I have a remit to review law, policy and practice relating to the rights of children and young people with a view to assessing their adequacy and effectiveness in line with the United Nations Convention on the Rights of the Child (UNCRC). The UK ratified the UNCRC in 1991, committing itself to bringing its law, policy and practice in line with this Convention.

Access to justice is an important children’s rights issue, enshrined in both domestic and international law. As Victim Support tell us, young people are significantly more likely to be victims of crime than the general population, yet get limited support in the aftermath of crime - their views are seldom sought and their needs not always met. Supports afforded to child witnesses are also inconsistently applied and not always in the best interests of the young person.

Children’s Rights Impact Assessments (CRIA)

In its 2008 Concluding Observations on UK compliance with the Convention, the UN Committee on the Rights of the Child stressed the importance of conducting Children’s Rights Impact Assessments (CRIA) as a useful aid to implementation. I would encourage the Committee to undertake or commission a CRIA on the proposals. Children are largely excluded from the decision making process and have limited advocacy powers, except through adults. I believe a CRIA will help make the child’s perspective more visible and ensure that their views are taken into account in decisions affecting them.

There are a number of relevant UNCRC articles relating to the Bill. Article 3, which underpins the whole Convention, notes that in all actions concerning children, whether undertaken by public or private social institutions, courts of law, administrative or legislative bodies, the best interests of the child shall be a primary consideration. Article 12 assures to the child capable of forming his or her own views, the right to express those views freely in all matters affecting them and due weight should be given accordance with their age and maturity. Other relevant articles are article 2, the principle of non-discrimination; article 19, rights to protection from all forms of violence; article 23, the rights of disabled children and
article 37 which focuses on the rights of children and young people in the youth justice system.

**General Principles**

The persons to which the duty to have regard to the general principles applies are clearly set out on the face of the Bill and there is scope for Scottish Ministers to modify by order the list of persons to whom the duty applies. The ability to obtain information, the safety of victims and witnesses, access to appropriate support and the ability to participate in investigations and proceedings are essential components of a fair and equitable justice system.

I do however have concerns around how ‘appropriate’ in S 1 (3) (c) and (d) may be defined by relevant organisations, given the lack of a legal definition and would suggest that further guidance is issued in this regard. Ensuring the effective participation of children and young people requires a skilled approach and understanding what is ‘appropriate’ for a child or young person may not be immediately apparent to an unskilled practitioner. Notwithstanding the implementation of the Vulnerable Witnesses (Scotland) Act 2004 Act, significant barriers still exist for child witnesses and the level of resources required to allow for effective and meaningful participation is often underestimated: inaccurate assumptions may also be made about the capacity of a child to give evidence based on age or on the child’s demeanour. For children with disabilities, the barriers may be more acute. Care and consideration is needed to allow them to be supported appropriately so they can give their best evidence in relation to investigations or criminal proceedings.

The policy memorandum refers to studies, surveys and stakeholder engagement which have informed the ‘key principles’ in relation to improving the experiences of victims and witnesses. I suggest that further consideration of child /young person specific needs is required, especially regarding the type of information about what is happening in the investigation and how such information is relayed to the child or young person. This should be articulated in future guidance and informed by young people and organisations working with and for them.

**The proposal to create a duty on relevant justice organisations to set clear standards of service for victims and witnesses**

I support the intention behind the duty. Clarity is essential if victims and witnesses are to be kept fully informed about what they can expect from the relevant justice organisations in terms of service delivery and the extent to which this can be provided. Best practice should be the goal rather than minimum standards. I was pleased to see the best interests principle emphasised in Article 1 (2) of the EU Directive which calls on Member States to ensure that ‘where the victim is a child, the child’s best interests shall be a primary consideration and shall be assessed on an individual basis’. It is essential that such considerations are included in the standards.
In the current Bill, the development of standards is left to the named organisation without a duty to consult with victims or witnesses of crime or those organisations supporting them. I believe that there should be a requirement on these organisations to seek the views of children and young people when developing these standards. The Children’s Charter (2001) provides a useful example of engaging with young people in the development of standards and illustrates what is important to young people and what they expect from child protection agencies.

Further detail is also needed on how the standards will be monitored, evaluated and reported on and there should be measurable standards to enable robust benchmarking on performance. In doing so, it will be essential to ascertain the experiences of children and young people (both as victims and witnesses) and organisations supporting them to assess whether the standards are making a difference to children’s lives. Consideration should also be given around enforcement and the consequences for organisations failing to meet the standards, who people can complain to and how complaints will be handled. Prescribed bodies should be proactive in ensuring that victims and witnesses are made aware of the standards and a duty to promote these standards would be welcome. I note the intention to introduce draft regulations during the passage of this bill and I will consider and provide comment on those as appropriate.

It is also worth highlighting that there are currently no standards to govern the quality of service provided to those taking part in civil proceedings. Consideration should be given to this to ensure consistency.

The proposal to give victims and witnesses a right to certain information about their case

I welcome the proposal under S. 3 which requires the Chief Constable of the Police Service, Scottish Court Service and any prosecutor to disclose information to victims and witnesses about criminal or alleged criminal offences in relation to investigations or proceedings. This is an important proposal: it is easy to underestimate the distress a lack of or unexpected information can have on a child e.g. a discontinuation of charges, change of date, change of location of pre-trial hearings. Prosecutors also need to carefully consider the type of information provided to the child, the method of communicating that information and the timescales involved.

Article 25 of the EU Directive states that officials likely to come into contact with victims, such as police officers and court staff, should receive both general and specialist training to a level appropriate to their contact with victims to increase awareness of the needs of victims and to enable them to deal with victims in an impartial, respectful and professional manner. This is essential when working with children and young people. Those charged with transmitting such information must undertake training in how to engage with children and young people, including how to check understanding.

Section 3(4) of the Bill indicates that the request need not be complied with if disclosure is considered “inappropriate”. I suggest that a statement of reasons for non disclosure is
Proposal to give vulnerable witnesses a right to access certain special measures when giving evidence

The Bill will amend some of the standard special measures (SSMs) and special measures (SMs) defined in the Vulnerable Witnesses (Scotland) Act 2004 Act in relation to criminal proceedings, to take account of additional groups of witnesses who will be entitled to use SSMs. Extending the definition of child to 18 is welcome and will bring Scotland in line with the rest of the UK, the EU Directive and the UNCRC. It is also worth noting that Lord Carloway’s Report into criminal law and procedure also recommends that a child should be defined as anyone under 18 “for the purposes of arrest, detention and questioning”.

As the child will be able to access special measures, these measures must be clearly explained to that child or young person. This could include familiarisation visits to the court or remote sites and explanations of how the equipment works. By getting a full picture of what is available, the child or young person can decide what best suits their needs and make an informed decision about the choices they make. It can also help instil confidence at an enormously stressful time. Whilst it will be impossible to eliminate all the anxiety, a proactive, sensitive and tailored approach which considers the child’s needs and wishes, will help to alleviate some of the fear around giving evidence. Child witnesses can often change their views about giving evidence using particular special measures so it is important that discussions are ongoing and certainly revisited prior to the trial date.

I would further suggest that the use and effectiveness of special measures is monitored and the views of children and young people taken into account as part of this. I am not aware of any evaluation since the 2004 Act and urge the Scottish Government to fund research with children and young people about their experiences of being witnesses. Listening to their experiences, will help establish what young people find helpful and what needs to change.

I also welcome the proposal to extend the automatic right to use SSMs to victims of domestic abuse. I believe that the extension will bring much needed relief to victims of domestic abuse and reduce their fears about appearing in court and having to face the alleged perpetrator. This will in turn help to limit the distress of their children.

Removal of presumption that child witnesses will give evidence away from court building

Part 1 of the 2004 Act amended S. 271b of the 1995 Act to include a presumption that child witnesses under 12 should give evidence away from court in trials concerning specific offences. The Bill proposes amending this, creating a presumption that child witnesses will give evidence in the court room if they express a wish to do so. The Policy Memorandum highlights feedback from some justice partners which suggested that the
current presumption was being applied too rigidly by the courts with little regard given to the needs and wishes of the child.

I support this proposal and am pleased to see flexibility introduced in the child witness provisions. I understand the intention is to maintain the presumption of non attendance at court but allow flexibility by introducing a requirement to consult with the child to seek their views on the issue and whether he or she wishes to be present. My view is that these proposals will strengthen the position of children who want to give evidence in court but are having to give evidence remotely and that it will further support children in giving evidence remotely. It also chimes with the concept of the ‘evolving capacities’ of the child embodied in articles 5 and 12 of the Convention. This recognises the changing relationships between children and adults as they grow up and focuses on capacity and children’s increasing autonomy rather than age alone. It also gives the State a role as facilitator in helping to achieve appropriate protection for the child and in encouraging their participation in decisions that affect them.

The presumption that a child will not give evidence in court must be the first option for protection of children in all cases and I would stress that appropriate safeguards be put in place to ensure this is the case. This can only work effectively if the child or young person is fully involved and has the options explained to them. The child should always be told that the presumption is they will give evidence away from court unless the child does not wish this. I suggest that this proposal is accompanied with a requirement to increase awareness of children’s rights across the judiciary, particularly with regard to listening to children’s views and taking these into account.

The proposal to introduce a victim surcharge and restitution orders, so that offenders contribute to the cost of supporting victims

I support the idea of a victim’s surcharge in principle and see this as having the potential to provide practical support immediately after a crime. I would be very interested to hear the views of young people on this subject and the benefits they feel they could gain from this. There are many unknowns at this stage – e.g. how courts will assess the ‘surcharge,’ whether it will be means tested and what happens in the case of non payment? It would be helpful to have more information about this in regulations.

Early intervention and support is essential. All victims should have access to support and assistance after a crime and children and young people are no exception. Their needs should be assessed by appropriately trained professionals to allow them to recover as quickly as possible. The police will have a significant role in signposting young people to appropriate services and perhaps there is scope for a duty on the police to undertake this function.
Additional comments

Objections (Section 9)

I have serious concerns about this proposal as it risks undermining the spirit and tone of the positive measures taken in the Bill and the original legislation. I note this proposal did not feature in the earlier Making Justice Work consultation on the proposals for the Victims and Witnesses (Scotland) Bill, nor in the EU Directive. It is not clear how this provision would operate in practice, and on what basis the courts would determine whether or not an objection should be upheld. It may therefore add to the fears and anxieties around attending court which may also have a detrimental effect on the evidence of some witnesses. I would therefore ask the Committee to closely scrutinise this proposal and seek clarity from Ministers and practitioners as to how it may operate in practice, and what its practical effects may be for child witnesses and other vulnerable witnesses.

Victim statements (Section 19)

At present only children under 14 are entitled to have a victim statement made on their behalf by a carer if they are a direct victim of a crime. The Bill extends the entitlement to children under 14 who are not direct victims. However, I note that in any civil matter, a child is presumed old enough to be able to instruct their own solicitor from the age of 12 and even younger if the child is deemed competent. I believe the focus should be on facilitating and supporting young people’s involvement and views, rather than assuming a child is not capable and relying on parents and carers to make these on the child’s behalf. I suggest the proposal to extend the reach should be accompanied by a lowering of the age of entitlement.

Conclusions

I support the introduction of the Victim & Witnesses (Scotland) Bill and the principles behind it and will work with the Parliament and the Scottish Government to enhance the protections and support afforded to children and young people.

I trust that the information provided assists the Committee in its consideration of the proposals, taking account of the rights of children and young people.

I am happy to comment on any of the points raised in my submission.

Tam Baillie
Scotland’s Commissioner for Children and Young People
23 April 2013
Thank you for the opportunity to give evidence to the Justice Committee on 16 April 2013 in relation to the Victims and Witnesses (Scotland) Bill. As requested at the meeting and in your subsequent correspondence, I am now in a position to provide the further information sought by members of the Committee.

Members firstly sought information about the level of information routinely provided in sheriff courts in relation to bail cases, and the process whereby, if a particular risk is highlighted, the court is made aware of that. In line with existing Guidance from the Lord Advocate, when preparing a Standard Police Report (SPR), police officers will highlight to the Procurator Fiscal any significant concerns they have that the quality of the evidence given by the victim or witness will be diminished by any fear or distress in connection with giving evidence at the trial or proceedings. In addition officers will also highlight the reaction of the victim or witness to the crime or to the accused and any personal characteristics exhibited by the victim or witness that might suggest vulnerability.

In such cases it is not the role of the police to conduct a formal assessment of the victim or witness, however, given that the police will often be first point of contact with the justice system it is important that all information about the possibility of any significant risk to them or to the quality of their evidence is provided to the Procurator Fiscal. As such, police reports will often seek to have an accused remanded in custody or seek appropriate bails conditions to protect victims or witnesses. The provision of this information ensures that the Procurator Fiscal is able to reach a view on the risk posed by the accused, particularly in custody cases where bail can be opposed or special bail conditions can be sought to minimise this risk.

Over a period of time, the majority of the 8 legacy police forces in Scotland have adapted the format of the SPR to include this information within a pre-defined section, or have included this information within another more generic section of the SPR. This is one area which Police Scotland will seek to standardise in the future.

In relation to the information sought by the Committee about the communication of bail conditions to victims and witnesses, you will appreciate that this is a matter for the Crown. However, where special bail conditions have been set by a court, Victim Information and Advice (VIA) is responsible for communicating these conditions to the victim or witness, normally within 24 hours of the accused’s appearance at court. In cases which involve a significant risk to the victim or witness, such as domestic abuse cases, bail conditions are communicated to the police who will contact the victim to ensure their safety and explain the bail process. This ensures the victim is sighted on the conditions imposed by the court, allows appropriate safety planning for the victim to be considered and ensures robust policing of the bail conditions set by the court for the perpetrator.
I hope this is helpful and would be happy to provide any further information or clarification south by members of the Committee.

Grahame Clarke
Superintendent
13 May 2013
Justice Committee

Victims and Witnesses (Scotland) Bill

Letter from the Victims Organisations Collaboration Forum Scotland

SECTION 9 AND SECTION 13: OBJECTIONS TO SPECIAL MEASURES

The Victims Organisations Collaboration Forum Scotland (VOCFS)* is a collaborative initiative comprising victim support organisations and other organisations concerned with victim issues across Scotland. The Forum, chaired by Victim Support Scotland, was established in July 2012 and meets on a quarterly basis. The main aims of the Forum are to advocate changes, make recommendations and improve the position and experiences of victims and witnesses in Scotland.

To date, the main focus of discussions at the VOCFS meetings has centred on the Victims and Witnesses (Scotland) Bill. We are fortunate to have been receiving regular direct updates on the development and status of the Bill from members of the Scottish Government’s ‘Bill Team’ during these meetings.

The VOCFS has been following the Justice Committee evidence sessions on the Bill with great interest. We welcome the Justice Committee’s recently published Stage 1 report on the Bill and broadly support the recommendations contained therein.

There is, however, one aspect of the Bill and the Committee’s Stage 1 report for which the Forum is united in being deeply concerned and strongly opposed; namely, the provision giving both parties the right to object to the use of special measures for giving evidence where they consider it to be “inappropriate in the circumstances” (articles 9 and 13), particularly in relation to challenges or objections to the granting of special measures that victims and witnesses are automatically entitled to through existing legislation.

If implemented, this provision will result in an increase in the number of witnesses re-victimised by the process of going to court. Not only will it create uncertainty, it will increase anxiety and reduce confidence among witnesses about giving their evidence. This seems particularly unfair, and indeed counterintuitive, in respect of child witnesses who currently have automatic entitlement to certain special measures but whom, as a result of this provision, could potentially find themselves subject to objections in relation to their use of special measures. Similarly, it seems wholly illogical to extend the categories of ‘vulnerable’ witnesses (as the Bill does) for whom access to special measures is automatic, while at the same time bringing in provision that enables those categories of individuals to be denied the use of such measures. This is not an acceptable outcome and we consider that it will undermine all the other provisions and rights contained the Bill.

The purpose of special measures is to assist witnesses to give their best evidence. Giving the accused the opportunity to oppose the use of special measures will seriously undermine this purpose, further prolonging the process and increasing the victim’s fear.
or distress in relation to giving evidence. It is entirely misaligned with the overarching aim of the Bill, which is ‘to put victims’ interests at the heart of ongoing improvements to the justice system and to ensure that witnesses are able to fulfil their public duty effectively’.

We do not believe that granting witnesses access to measures which, by virtue of reducing anxieties, are likely to result in them giving better quality evidence can be argued to be in any way prejudicial to proceedings or the rights of accused persons. We acknowledge that currently there is provision in place allowing for the court to review the appropriateness / efficacy of special measures during the course of proceedings. We support the court retaining this power to request a review, for instance when a measure is not working properly or is causing additional distress for the witness. We also accept that there may be very exceptional circumstances in which the use of a particular measure may be considered not ECHR compliant. In order to safeguard against ECHR breaches while avoiding the potential for objections to become ‘standard practice’, we consider the appropriate approach is to ensure those exceptional circumstances deemed “inappropriate” are tightly defined and that the power to object / request a review should remain with the courts.

A possible result of implementing these provisions is that witnesses will not be willing to participate in our justice system in future.

Therefore, in the interests of justice, and of facilitating witnesses’ ability to give their best evidence without undue uncertainty and anxiety, the VOCFS urges the Justice Committee to reconsider its position in respect of this provision and to call on the Scottish Government to remove sections 9 and 13 from the Bill.

Alan McCloskey,
Chair of VOCFS; and

* Organisations represented by VOCFS:

Victim Support Scotland
Action Scotland Against Stalking
Abused Men in Scotland
Children 1st
Moira Anderson Foundation
PETAL
Rape Crisis Scotland
SCID
Scottish Women’s Aid
SHAKTI Women’s Aid
Stop It Now! Scotland
Women’s Support Project

18 June 2013
Children’s Rights Impact Assessment

1. What is being proposed? (Name/description of the policy, legislation)

The Victims and Witnesses (Scotland) Bill was introduced in the Scottish Parliament on 6 February 2013 by the Scottish Government. The Bill seeks to make provision for:

1. rights and support for victims and witnesses (primarily in relation to criminal cases) and
2. the establishment of a National Confidential Forum for adults placed in institutional forms of care as children.

Please note that this assessment looks solely at the impact of the provision for victims and witnesses. It makes no assessment of the National Confidential Forum.

2. What is the aim, objective or purpose of the proposal?
(How does it relate to other initiatives? Does it seek to fulfil national targets?)

The overarching objective of the Bill is to improve support available to victims and witnesses throughout the justice system, putting victims interests at the heart of ongoing improvements to that system and ensuring that witnesses are able to fulfil their public duty effectively.

Key proposals in relation to victims and witnesses include:

- giving victims and witnesses a right to certain information about their case;
- creating a duty on organisations within the 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 certain special measures when giving evidence;
- requiring the court to consider compensation to victims in relevant cases;
- introducing a victim surcharge so that offenders contribute to the cost of supporting victims; and
- introducing restitution orders, allowing the court to require that offenders who assault police officers pay to support the specialist non-NHS services which assist in the recovery of such individuals.

In 2012 an EU Directive establishing minimum standards on the rights, support and protection of victims of crime (2012/29/EU) was finalised. This Bill includes provision for implementing this Directive. The Directive is a measure on the 'Budapest Roadmap' for improving victims rights. 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.

Improving the experience of victims and witnesses is a key objective in the Making Justice Work (MJW) programme set up in 2010 by the Scottish Government. The Scottish Government is working together with organisations across the justice system on five major projects which form the MJW. The Victims and Witnesses (Scotland) Bill is one part of ongoing work on project 2 - improving procedures and case management.
### 3. Who initiated the proposal? *(e.g. Scottish Government, Scottish Parliament)*

The Scottish Government. The Bill was introduced by the Cabinet Secretary for Justice.

### 4. Who is to implement the proposal?
*(e.g. Local Authorities, Health Boards)*

- **Section 1 - General principles:** the Lord Advocate; the Scottish Ministers; Police Scotland; Scottish Court Service (SCS); Parole Board for Scotland (PBS).
- **Section 2 - Standards of service:** Police Scotland; Crown Office Procurator Fiscal Service (COPFS); SCS; Scottish Prison Service (SPS); PBS.
- **Section 3 - Disclosure of information:** Police Scotland; COPFS; SCS.
- **Section 4 - Interviews with children:** police officers and social workers.
- **Section 5 - Gender of interviewer:** Police Scotland.
- **Section 8 - Child and deemed vulnerable witnesses:** COPFS; SCS; Scottish Children’s Reporter Administration (SCRA).
- **Section 21 - Restitution order:** revenue raised to be collected by SCS and passed to the Scottish Government (SG); fund administered by SG or contracted to another individual or body to administer.
- **Section 22 - Victim surcharge:** revenue raised by victim surcharge collected by SCS and passed to SG; administration of funds may be delegated to a third party.

### 5. Which articles of the UNCRC are relevant? 

The following two articles are of particular relevance when assessing the impact of the proposed legislation. They have been identified by the Committee on the Rights of the Child as general principles of relevance to the implementation of the whole UNCRC.

- **Article 3 (1)** “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”.
- **Article 12 (1)** “States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child”.

Other articles which are relevant and require consideration are:
- **Article 2 (1)** “States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind”.
- **Article 5** “States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians, or other persons legally responsible for the child, to provide in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.”
• Article 19 (1) “States Parties shall take all appropriate legislative, administrative, social and educational measures be taken to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has care of the child”.

• Article 23 (1) “States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child’s active participation in the community”.

• Article 34 “States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse”.

• Article 35 “States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale or traffic in children for any purpose or in any form”.

• Article 37 “States Parties shall ensure that a) no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment”.

6. Does the proposal contravene the UNCRC or any other laws? 

(e.g. European Convention on Human Rights, Children (Scotland) Act 1995)

Section 19 requests that victim statements for any persons under the age of 14 be made by a carer of the child. This does not reflect section 2(2) of the Age of Legal Capacity (Scotland) Act 1991 where it states that “a person of or over the age of 12 years shall have testamentary capacity, including legal capacity to exercise by testamentary writing any power of appointment”. Whilst the Age of Legal Capacity Act sets a lower age limit, in practice children below the age of 12 are able to instruct their own solicitor where they are deemed competent to do so.

In this respect Section 19 also fails to reflect Article 12 of the UNCRC which requires states to assure “that any child capable of forming a view has the right to express views freely in all matters affecting him or her and that the child’s views are given due weight in accordance with age and maturity”. In General Comment No.12 (2009) ‘The right of the child to be heard’ the Committee on the Rights of the Child noted that age alone cannot determine the significance or scope of the child’s comprehension of a particular situation. What is relevant is the capacity of a child to express his or her own views in a reasonable and independent manner. Furthermore in General Comment No.7 (2005) ‘Implementing child rights in early childhood’, the Committee suggested that the concept of ‘evolving capacities’ should be viewed as a positive and enabling process that supports the maturation, autonomy and self-expression of the child.

According to the Manual on Human Rights Reporting “This right should be ensured and respected even in situations where the child would be able to form views and yet be unable to communicate them, or when the child is not yet fully mature or has not yet attained a particular older age”.

7. Which groups of children will be affected by the proposal?

1. Children and young people under the age of 18 who are victims of crime.
2. Children and young people under the age of 18 who witness crime.
3. Children and young people under the age of 18 who are a witness in civil proceedings.
5. Children under the age of 14 who are not direct victims of crime.
6. Children under the age of 14 who are direct victims of crime.
7. Young people under 18 years who are convicted of a crime.
8. Positive Impact
(Note the groups affected)

1. The general principles set out that child victims and witnesses should be able to obtain information about what is happening in their case; should have their safety ensured; should be able to access appropriate support; and should be able to participate effectively where that is appropriate.
2. The Bill introduces standards of service and procedures for resolving complaints by named persons for child victims and witnesses.
3. The Bill proposes the disclosure of information about criminal proceedings to child victims and witnesses.
4. Where a police officer and social worker are carrying out a joint interview with a child or young person under the age of 18 they must have regard to any guidance issued by Scottish Ministers about the carrying out of such interviews.
5. In sexual offences, human trafficking, domestic abuse and stalking, child victims' will have the right to specify the gender of interviewer.
6. The Bill proposes a change of definition of vulnerable witnesses in criminal proceedings to include persons under the age of 18. This will enable all child witnesses under the age of 18 to access special measures. This will bring Scotland in line with the rest of the UK, the EU Directive and the UNCRC.
7. The automatic right to use standard special measures (SSMs) will be extended to victims of domestic abuse. This will help to limit the distress of children and young people experiencing domestic abuse.
8. The Bill will remove the presumption that child witnesses under the age of 12 will give evidence away from the court building. Child witnesses will be able to express if they wish to be present in the court-room to give evidence. This chimes with the concept of the 'evolving capacities' of the child embodied in articles 5 and 12 of the UNCRC.
9. Extends the restrictions of reporting by newspapers of criminal proceedings involving children (as the person against,

9. Negative Impact
(Note the groups affected, gaps or inconsistencies in the proposal)

1. Two of the general principles, (c) and (d) in section 1, use the term 'appropriate', however it is unclear as to how this will be defined and interpreted by relevant persons. This may mean that a child does not have the necessary support to enable them to participate effectively in an investigation or proceedings. It also has the potential to allow for inaccurate assumptions to be made about the capacity of a child to give evidence.
2. The development of standards of service is left to named persons with no duty to consult with child victims or witnesses of crime or those organisations supporting them.
3. There is no detail as to how the standards of service will be monitored, evaluated and reported on. There is no duty to ascertain the direct experiences of children and young people to assess whether the standards are making a positive difference to them.
4. There is no clear sense as to how the standards of service shall be enforced and what (if any) consequences there will be if a named person fails to meet them. There is no indication as to what (if any) national agency will have oversight over the enforcement of the standards.
5. There is no duty on a named person to promote and raise awareness of the standards of service with child victims and witnesses.
6. The standards of service only govern the quality of service provided to child victims and witnesses in relation to criminal investigations and proceedings, and do not cover civil proceedings.
7. Section 9 will allow any party to criminal proceedings to object to a notice requesting special measures for child and vulnerable witnesses. This may well add to the fears and anxieties that a child witness already has about a case and may well prevent them from giving their best evidence. Section 9 may also
or in respect of whom the proceedings are taken, or as a witness) to persons under the age of 18, rather than under the age of 16 thus preventing their identity from being revealed. This will bring the definition of a child in line with article 1 of the UNCRC.

10. The definition of a child witness in civil proceedings will be extended to include anyone under the age of 18. Currently this definition includes only those under the age of 16. This will bring the definition of a child in line with article 1 of the UNCRC.

11. The Bill provides that a child under the age of 14 who is not the direct victim of a crime but a close relative of the victim (victim may be a parent or a sibling) can have a victim statement made on their behalf by a carer. Currently children under the age of 14 can only have a victim statement made by a carer if they are the direct victim of the crime.

12. The Bill will establish a victim surcharge fund which can then make payments to child victims, or those who provide services to child victims.

dissuade victims and witnesses of domestic abuse from giving evidence in criminal proceedings.

8. Children under the age of 14 will be precluded from giving victim statements themselves; these must be made on their behalf by a carer. In any civil matter however a child is presumed old enough to be able to instruct their own solicitor from the age of 12 and even younger if the child is deemed competent.

9. There will be an onus on a child witness or victim to request information in relation to any criminal investigation or proceedings.

10. In some instances the disclosure of information may be refused, but it is not clear from the Bill if this decision will be communicated to the child witness or victim. Such a situation may well cause serious distress to the witness or victim and serve to undermine one of the general principles of the Bill.

11. A young person aged 16 or 17 convicted of an offence may be ordered to pay a victim surcharge or restitution order. Depending on the amount set for either penalty, a vulnerable young person may not be in a financial position to make such payments.

10. Has there been any consultation in the development of the proposal? (Note the groups affected)

There has been an informal consultation with organisations such as Victim Support Scotland, Children 1st and Rape Crisis Scotland during 2010-11. There have been focus groups, meetings and regional consultation events on witness issues along with a Victim Summit in 2011.

A formal public consultation 'Making Justice Work for Victims and Witnesses' was held during 2012 which asked for views on most of the proposals to be included in the Bill. The consultation received 76 responses.

There has been consultation with a number of key stakeholder groups, justice organisations and individual victims during the policy development process.

No information is available as to whether or not children and young people were directly consulted in the development of the proposals in the Bill.
11. What conclusions have been reached by the Commissioner?  
(Is the proposal the best way of achieving its aims, taking into account children’s rights? Please note any gaps in information)

Access to justice is an important children’s rights issue, enshrined in both domestic and international law. Young people are significantly more likely to be victims of crime than the general population, and yet they receive limited support in the aftermath of crime with their views seldom sought and their needs met. Overall this Bill seeks to address these failings by enshrining in legislation the rights and support for child victims and witnesses. Of particular significance is the extension of the definition of child to include all persons under the age of 18, in line with Article 1 of the UNCRC.

There are a number of provisions in the Bill that could and should be strengthened to take account of children’s rights, and these are outlined in the recommendations below.

It should be noted that the proposed intention of the legislation will be undermined if ‘Section 9 Objections to special measures: child and deemed vulnerable witnesses’ is allowed to remain as it is. At the very minimum there should be an exemption for all child witnesses (persons under the age of 18) from all objections under this section.

12. What recommendations should be made and who should be informed of them?  
(e.g. Should relevant groups be consulted)

The following recommendations are for the attention of the Scottish Parliament Justice Committee, the lead Committee considering the victims and witnesses provisions of the Bill.

Recommendations concerning the provisions of the Bill
1. The best interests principle outlined in Article 1(2) of the EU Directive which states that "where the victim is a child, the child’s best interests shall be a primary consideration and shall be assessed on an individual basis" should be included in all published standards of service.
2. The meaning of 'prescribed relative of a victim' should be defined in Schedule 1A part 7. It is necessary to clarify this to ensure that the standards of service are inclusive of a child who is a family member of a victim (e.g. child, sibling, grandchild) and who has suffered harm as a result of the crime.
3. Introduce a requirement for named persons to consult with children and young people and those organisations supporting them when developing the standards of service.
4. Include a duty to promote and raise awareness of the rights set out in the Bill in line with Article 26 (2) of the EU Directive which states that "Member States shall take appropriate action, including through the internet, aimed at raising awareness of the rights set out in this Directive...in particular by targeting groups at risk such as children".
5. An obligation to provide a statement of reasons for non-disclosure of information needs to be added to section 3(4).
6. Consideration should be given to removing section 9 from the Bill and at the very minimum there should be an exemption for all persons under the age of 18 from all objections to special measures.
7. Age of entitlement to have victim statements made on their behalf to be lowered from children under 14 to children of or below the age of 12 to take account of the child’s capacity to form and express their own views.
8. Disclosure of information to be changed from ‘right to request’ to ‘right to receive’ in line with Article 6 of the EU directive which states that "Member States shall ensure that victims are notified without unnecessary delay of their right to receive the following..."
9. Consideration to be given to extending the right to standard special measures for child witnesses to civil proceedings.

Recommendations concerning secondary legislation and/or guidance accompanying the Bill
1. Further guidance should be issued as to how named persons define 'appropriate support' for section 1 (3) (c).
2. Further guidance should be issued as to how named persons will determine when it is appropriate for child victims and witnesses to participate effectively in an investigation and proceedings.
3. In terms of the disclosure of information there needs to be guidance on the type of information provided to a child, methods of communicating that information and the timescales involved. Article 25 of the EU Directive should be reflected in secondary legislation to ensure "that officials likely to come into contact with victims receive both general and specialist training to a level appropriate to their contact with victims..." There is an imperative to ensure that specialist training includes skills and methods for engaging with children and young people; in particular assessing their level of understanding.
4. It is suggested that the use and effectiveness of special measures be monitored and that this evaluation take into account the views of children and young people.
5. Introduce a requirement to proactively explain the full range of standard special measures to child witnesses and victims to maximise their capacity to give evidence.
6. Submission of child witness applications outlining any special measures should be a compulsory part of pre-trial hearings.
7. Further clarification is required as to the likely amounts of the victim surcharge and restitution orders and whether these will vary depending on type of offender or other circumstances.

13. Is a full impact assessment required? (Please elaborate)
This initial impact assessment along with written and oral evidence submitted to the Justice Committee from key stakeholders, the Policy Memorandum and Explanatory Notes to the Bill should ensure that children’s rights are taken into account when reviewing the draft legislation. No full children’s rights impact assessment is therefore required at this time. The Bill however should be appraised at stage 2 to assess whether or not our recommendations have been taken account of and to what extent any proposed amendments infringe children’s rights.

Preliminary Screening by: Gillian Munro, the office of Scotland’s Commissioner for Children and Young People  Date: 14/05/2013

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1 Regard should always be had to the four general principles of the UN Convention on the Rights of the Child (UNCRC): articles 2, 3, 6 and 12.
Purpose

1. This paper summarises the key issues raised during an informal discussion relating to the Victims and Witnesses (Scotland) Bill, which the Committee held on 26 March 2013.

Background

2. At its meeting on 12 March, the Committee agreed to hold an informal round-table discussion with victims and witnesses to allow them to speak more freely in an informal setting about their experiences of the criminal justice system. The discussion also aimed to inform Members in advance of taking formal evidence on the Victims and Witnesses (Scotland) Bill during April and May.

3. Individuals agreed to participate, either through their MSP or through Victim Support Scotland, on the basis that the discussion would be held in private and that they would not be identified in any published material.

Summary of key issues raised

4. Key issues raised by participants during the discussion are summarised below:

Communication

- Victims and their families often found themselves having to explain very traumatic events to several different organisations on separate occasions. More collaboration between agencies was needed and a single point of contact for victims and their families should be introduced.

- Organisations tended to react to requests for information from victims, including on the progress of their cases, rather than being proactive in providing that information as a matter of course.

- When organisations are providing information to a victim or their family over the phone, this communication should be followed up through written correspondence. However, it was noted that formal correspondence often took some time to be received and so the use of texts and emails should be explored.

- Correspondence with victims and their families was often complex and difficult to understand, particularly when they are already in a confused and traumatised state. Written correspondence should be in plain English.

- As it can sometimes be difficult to hear in court, court transcripts should be made available without cost to the victim or victim’s family.
• Victims and their families can, in certain cases, opt into the Victim Notification Scheme to receive information about the release of a prisoner. The Committee heard that, rather than having to opt-in to the scheme, victims should automatically be enrolled, with the choice to opt-out if they wish.

• One individual spoke of how disappointed and upset she had been that the police did not appear to follow up a breach of bail by the accused and that there was no explanation as to why this had not been investigated.

Support

• While support organisations such as Victim Support Scotland and Rape Crisis Scotland provided excellent support to victims before, during and after a trial, more support was needed from the ‘official organisations’ such as the Scottish Court Service, Crown Office and Procurator Fiscal Service, the police, etc. A family liaison officer should be assigned to a victim or family at the beginning of a case.

• Case companions should be assigned to victims of serious crime and their relatives to help them navigate the justice system.

• Some participants agreed that the Bill was ‘tokenistic’ and did not provide any real improvements in support for victims. A Victims Commissioner should be established to report on victims’ experiences and support annually.

• Those who have experienced murder, loss, suspicious deaths, fatal accident inquiries, should receive similar levels of support to other victims. Families of these crimes tend to have to set up their own support bodies.

• There was concern that support for victims and their families was not available once the trial had concluded and this was often a particularly difficult stage if the accused was found not guilty or the case against them was not proven.

• The Victim Information and Advice service only operates 9 am to 5pm. Out-of-hours support was sometimes needed.

• Victims and witnesses were not being fully prepared for what would happen in court, particularly in relation to the defence’s approach.

**Victim impact statements and the right to make oral representations before release**

• Victim impact statements should always be read out in court. The Committee heard that this did not always happen.

• Victims and their families should have the right to submit another victim impact statement at appeal stage.

• The Bill allows victims to make oral representations to the Parole Board before an offender is released on licence. Some victims believed that this should be extended to all murder cases.
Training

- Training was needed for staff involved in the criminal justice system to ensure more compassion when dealing with victims and their families. Some advocate deputes may benefit from interpersonal training. Victims were met with a great reluctance when they tried to meet with staff to discuss their cases.

Delays and waiting facilities

- One individual waited 14 months for the trial in which she was a victim to take place, which added to her suffering.

- Due to adjournments, another individual waited all day on six separate occasions before the trial in which she was a witness took place. There was consensus that the constant changing of trial dates was unacceptable especially as witnesses were already extremely traumatised.

- On the day of the trial in which they were to give evidence, some victims had to wait in the same area of the court as the accused, which they found intimidating.
Victims and Witnesses (Scotland) Bill: Stage 1

10:04
The Convener: Item 2 is our first evidence session on the Victims and Witnesses (Scotland) Bill. We will hear from two panels of witnesses today. I welcome to the meeting our first panel: David McKenna, chief executive of Victim Support Scotland; Cliff Binning, executive director of field services at the Scottish Court Service; David Harvie, director of serious casework at the Crown Office and Procurator Fiscal Service; and Superintendent Grahame Clarke from the safer communities team in Police Scotland. Superintendent Clarke, I have to say that I love how you spell your first name. My name is always misspelled—is yours?

Superintendent Grahame Clarke (Police Scotland): Always.

The Convener: Good—we are in the same team then.

I thank you all for your submissions. We will go straight to questions from members.

Roderick Campbell (North East Fife) (SNP): Good morning. My question is for David McKenna and is on reviewing a decision not to prosecute. Section 3 of the bill provides that victims will be able to ask for information about a decision not to proceed with a criminal investigation and any reasons for it. Are youcontending that the European Union directive goes further and saying that, having been provided with that information, victims should somehow or other be able to challenge a decision? Is it not the case that the Crown must, in the public interest, take a decision at the end of the day on whether to proceed with criminal charges? Perhaps you could enlighten us as to what steps have been taken to avoid such situations arising in courts. Is there an on-going plan to avoid similar situations happening in the future?

David McKenna (Victim Support Scotland): We are saying that the European Union directive requires that they have the right to have a prosecutor’s decision not to prosecute reviewed. I believe that the Crown Office and the Lord Advocate intend to introduce such a measure here in Scotland.

The Convener: Rod Campbell screwed up his face there.

Roderick Campbell: David McKenna is giving me information of which I was unaware. Where did you get the information about the Lord Advocate?

David McKenna: I understand that it is information that has been provided to the committee.

The Convener: I am not aware of that information being provided to the committee. However, it is now on the record, so we can put the question on it.

Roderick Campbell: I will not follow that through. My question was just to open things up.

The Convener: That put your gas at a peep a wee bit, did it not? [Laughter.] We are just out of recess—I ask the witnesses to go easy. We have been working, but not in committee.

Colin Keir (Edinburgh Western) (SNP): Good morning. Mr Binning might be able to help us with my question. One issue that came across in our round-table meeting with witnesses and victims a wee while ago concerned the structure of court buildings and how those people are treated once they get to court. In some instances, people who had been victims of a crime were shown into a waiting room or area where the alleged perpetrator was sharing the same space. That proved to be quite difficult emotionally and in terms of space, as victims tried to keep clear and they felt quite intimidated. Perhaps you could enlighten us as to what steps have been taken to avoid such situations arising in courts. Is there an on-going plan to avoid similar situations happening in the future?

Cliff Binning (Scottish Court Service): It is certainly true to say that there are unfortunate instances in which that situation occurs, but thankfully they appear to be few and far between. The reality is that, certainly in the High Court and the main sheriff courts, the level of accommodation provision makes it a matter of course to ensure that there is segregated provision for Crown and defence witnesses, so a degree of safety and assurance can be derived from that.

It is probably more of a challenge to provide that level of segregation in the smaller courts, but I assure the committee that we take all possible steps to ensure that such an occurrence does not arise. We undertake a combination of actions—through, for example, being alert prior to a trial to the potential for the situation, giving notice to reception and court officer staff and ensuring that, in the conduct of business, the court precincts are patrolled so that such an eventuality does not occur. We seek to do everything that is practically possible to avoid such an occurrence.

Colin Keir: You said that there are only a small number of examples. There is obviously a fairly high turnover of court cases in the High Court and the senior sheriff courts. When you talk about a small number, what number are we talking about?

Cliff Binning: The number of instances of which we have received reports is probably fewer than five a year, to be honest with you. We
become aware of them through representations that are made at the time of the occurrence or through later representations in the form of complaints. As I said, the number of reports that we have of such occurrences is—thankfully—very small. There are less than a handful a year.

Colin Keir: Does the situation happen only in the smaller courts or has it happened in the High Court?

Cliff Binning: I am aware of one instance in recent years in which there was such an unfortunate circumstance in the High Court. In the main, the number of occurrences is a very small proportion of the number of cases that are dealt with, and it certainly does not indicate to us that there is a systemic or systematic problem. As I said, we take all practicable steps to ensure that the eventuality does not materialise.

David McKenna: I agree that, in recent years, the situation in relation to the propensity for prosecution and defence witnesses to be mixed has significantly improved. However, our experience is that there are still inconsistencies in the policy's delivery in practice.

We regularly have reports of witnesses not being separated. A couple of places where that seems to be particularly obvious are Falkirk and the annexe in the Aberdeen court complex. I do not know whether Cliff Binning is aware of that.

The Convener: Did you report those issues to Mr Binning?

David McKenna: We routinely draw all our concerns about the care and treatment of witnesses to the attention of the Scottish Court Service's chief executive, and we have a meeting with the new chief executive tomorrow.

Cliff Binning: As a matter of course, we invite David McKenna's organisation and other organisations to raise such matters with us when they occur.

Colin Keir: Considering the adversarial nature of many of these situations, I find it astonishing that such instances are not always avoided and that people can be in the same room together. That seems rather odd. I hope that the matter is dealt with.

Cliff Binning: I want to ensure that I make my position clear. Incidents in which victims and the accused or the accused's witnesses find themselves in the same room would be exceptional. There can be occasions on which they are in the same place at the same time in the precincts of a court building, but we take studious steps to avoid that, particularly in cases of vulnerability, where, on request and in consultation with the Crown, we take stringent steps to ensure that segregation occurs at all times of the day.

The Convener: I do not want to put Mr Harvie on the spot, but I let it slip past when the remark was made that the Crown Office is considering having a review of cases on the call, as it were, of witnesses when a decision not to prosecute has been taken. Can you assist us with that? If not, that is fine, but I thought that I would ask, as you are representing the Crown Office.

David Harvie (Crown Office and Procurator Fiscal Service): I am happy to assist, convener, and I welcome the opportunity to do so. The Crown's perspective is that the current arrangements that we have in relation to the procedures that are available to victims and witnesses to challenge decisions that have been made already comply with the directive. Having said that, we think that there is always room for improvement, so the Crown Agent has commissioned further research to establish whether further improvements can be made and whether a system of formal review would enhance the current position.

The Convener: There we are—you have cleared it up. Are you happy now, Mr Campbell? [Interruption.] He was not listening! That was for his benefit.

David Harvie: Shall I repeat my answer?

The Convener: The last line will do, for Mr Campbell's assistance.

David Harvie: We are already compliant, but we are looking at enhancing what is already there, so the Crown Agent has commissioned a review.

The Convener: There we are. That is your embarrassment over for the day, Roddy.

10:15

Graeme Pearson: I have three or four areas to cover, if we have time. The first is on victims and witnesses. At a previous session, which we held in private, we took evidence from people who have been involved in the system and who have first-hand knowledge of it. The strong message that was passed to us was not only that they were concerned about their security in the courts when they were there to offer evidence, which Colin Keir covered, but the separate issue that they felt that they were treated like a parcel being passed between various services. The police dealt with the first line, then passed the case on to the procurator fiscal, and then Victim Support or the Crown Office's victim information and advice service sometimes got involved.

The people from whom we heard felt that there was no continuity of knowledge and no feeling that something was in place to manage their needs and interests. They were left adrift as they passed through the system. Some of the cases were very
serious ones that involved a great deal of stress. Anyone handling those people could be in no doubt that the case was serious and that they were under tremendous pressure. However, our witnesses felt that the system was distant from them. Will the bill resolve that issue and enhance the service, or are there other matters that the committee should bear in mind when trying to improve the circumstances for victims and witnesses?

David McKenna: That goes to the heart of the greatest concern about the experience of victims and witnesses in the formal criminal justice system. There is a widespread sense that the justice system does not provide recognition of the individual’s experience and does not demonstrate respect or treat the individual with dignity. Critical to that is the fact that people who come into contact with victims and witnesses in the justice system need to be properly trained to understand the impact of their behaviours on such individuals.

We all know how to show respect and give recognition to the judge, prosecutor and other officials in the court, but we are not as good at showing that respect or giving that recognition to the witnesses and victims for whom the system is actually in place. As we mention in our submission, everyone who comes into contact with victims or witnesses needs to be trained.

David Harvie: At different stages in an investigation and subsequent prosecution, different authorities have the most up-to-date and relevant information. Initially, that is law enforcement when the matter is being investigated; thereafter, there is the prosecution phase; and, towards the end, the Court Service is involved. To pick up on Mr McKenna’s point, the primary interaction from the Crown’s perspective is through VIA, which has fully trained and professional staff.

I am aware that there is consideration and exploration of the possibility of an online case information hub, for want of a better phrase, to which agencies would contribute and which would become a one-stop shop. One key issue is the multiplicity of agencies and individuals with which people have to deal throughout the process. As with all online services, that is not necessarily the solution for every individual and particularly some vulnerable people. However, that hub would present an opportunity to provide up-to-date information throughout the process, with the various authorities contributing. The Crown is certainly keen to support further work on that.

The Convener: Does anyone else wish to comment? What about the police, who were mentioned? You are all aware of what is happening but, for some people who are involved in the justice system, it is a foreign land. They are there to assist the prosecution but, from the examples that we heard, some people are still very traumatised years on.

Superintendent Clarke: When that happens, it is indeed regrettable. The bill presents Police Scotland with an opportunity to provide standardisation and consistency. We have good practice out there in each of the eight legacy forces and we provide victims and witnesses with information. When that fails or when people do not feel that they have enough information, the bill will mean that they will be able to ask for information and it will create the footing for them to get the information. Moreover, the bill will compel us to come up with standardised levels of service that we will deliver. To do that, we will take all the good practice out there. I think that the vast majority of practice is good practice.

Some of the recent work done by Her Majesty’s inspectorate of constabulary for Scotland certainly indicates that, on the whole, victims and witnesses are content or satisfied with the information that they get from us. However, the task is to drive that forward, recognise witnesses’ needs and—as David McKenna said—their dignity and treat them with respect. We must try, where possible, to ensure that they do not feel that they are being parcelled up and passed on to the next person in the process. My view is that the bill goes a considerable way in trying to make that happen.

Graeme Pearson: To go back to David McKenna, my question at the end was: will the bill make the difference? Will you give us your response to that?

David McKenna: The bill has the potential to make the difference. Again, we are talking about putting in place systematic processes to ensure that all victims get access to support services, which are the principal means through which victims get advice and support and understand their rights in the criminal justice system.

Most victims will tell you that they have to tell their story time and again. We think that they have to tell their story about 16 times. Everyone tells them that everything will be all right. Well, it will not be—it will not be all right for many people. The experience of victims tells us that they need to be treated with recognition and respect and to have access to effective support services.

It does not matter who in Scotland works with victims and witnesses; because they will not be properly trained to support victims and witnesses—not even the victims organisations, including my organisation. We need to invest more money to ensure that any such training is the best possible training and that it is effective in delivering not just for victims and witnesses but for justice in Scotland.
Graeme Pearson: I have three specific questions, one of which is for Mr Harvie. The victim notification scheme is mentioned in our paperwork. Can you tell us how many people have accessed that scheme since its inception and give us some idea of how it is working and how successful it has been?

David Harvie: I am sorry, but I do not have that information to hand. May I come back to you with an answer?

The Convener: You can do that later in the proceedings or you can write to us with the information.

David Harvie: I am obliged to you.

Graeme Pearson: It seems to me that the victim notification scheme is important. One would have thought that we would have a clear view of how well the scheme has been received by victims, how many people have accessed it and how much success they deem has resulted from it.

On the surcharge concept in the bill, can any of the panel members give us insight into whether it would be proposed that all offenders would pay a surcharge? For example, as has been mentioned elsewhere, would people such as road traffic offenders pay a surcharge?

David McKenna: Our position is that everyone convicted of an offence in Scotland should be asked—or required—to contribute to the fund to help victims. I appreciate that there are arguments about what the charge might be and how it might be applied, but it is certainly our position that it should be applied as widely as possible.

Graeme Pearson: Motorists would be involved in it too.

David McKenna: We propose that it should be applied as widely as that.

Graeme Pearson: Mr Harvie, have you a point of view on that?

David Harvie: Not on that perspective.

Cliff Binning: Just to clarify, I understand that the surcharge will be applied to court-imposed penalties. I am not aware of any limitation on the court-imposed penalty.

Graeme Pearson: Can I have one final question, convener?

The Convener: I think that you are scooping up everyone’s questions but, if you want to be unpopular, go ahead.

Graeme Pearson: You know me—I like being unpopular.

The Convener: Yes, I think that is your modus operandi.

Graeme Pearson: The bill introduces restitution orders, which are a new departure. To play devil’s advocate, can I ask whether Police Scotland sees any conflict of interest there, given that police officers may be prosecution witnesses in a court case whose outcome may result in a restitution order, from which the facilities and services provided to police officers will be paid for by the accused at the end of the court case?

Superintendent Clarke: As an organisation, we broadly support the proposal for restitution orders, but that support is subject to having more information on how they will operate. I agree with you that, unless such orders operate in a manner that establishes a firewall between the court proceedings and how the restitution is made, they may leave police officers open to the accusation of a conflict of interest.

Having spoken to the Government, I understand that the moneys from restitution orders will be placed in some form of fund that will be administered on officers’ behalf. Whether that is through the police welfare fund or something else, as long as that happens at arm’s length and we avoid the conflict of interest that you have highlighted, we would generally support the proposal. However, I feel that we need slightly more information on how restitution orders will operate before giving a conclusive answer.

The Convener: I see that the relevant section requires the Scottish Government to lay reports, so there will be a watching brief on what is happening.

I do not know whether there are any questions left now for Sandra White, but she is welcome to go ahead.

Sandra White (Glasgow Kelvin) (SNP): I got an answer to a couple of my questions—that was very kind of Graeme Pearson.

Before coming to my more substantive question, I have a supplementary to Graeme Pearson’s original question on the standards of service. Several witnesses who have given evidence on the standards of service—I think that Mr McKenna also mentioned this—have said that a duty on how witnesses are treated should be included in the bill rather than that being left to the open-ended interpretation of judges or sheriffs. In your opinion, should such a duty be included in the bill?

David McKenna: That is a complex area, but the issue is really whether the standards ought to be in the bill or in some form of regulation. Certainly, the evidence from England and Wales and other parts of the world is that, other than when procedural rights are involved, such standards are mainly provided for in regulation. I think that it would be a good first step for Scotland if the standards were in regulation. Putting them in
the bill may be writing things in concrete when you do not want concrete.

**Sandra White:** Do any of the other witnesses want to respond?

**David Harvie:** Regarding sections 1 and 2, which set out the general principles and standards of service, the Crown has already published our commitment to victims and witnesses, our customer feedback policy and so on. Therefore, those are matters that we have already taken into account. I appreciate that that is a different issue from including the standards in the bill, but we are certainly comfortable that the ethos behind the bill is being approached in the correct manner and that our commitment to the levels of support that should be on offer is publicly available.

**Superintendent Clarke:** Likewise, I share the view that the ethos of the bill is correct. We will shortly publish the standards that we will achieve and deliver, which I think will be in line with the ethos of the bill. My view is that it is not required to put the standards in the bill.

**David McKenna:** Let me be clear that I do not believe that the present arrangements for ensuring standards of service to victims of crime by the statutory agencies in the criminal justice system in Scotland actually work. The standards need to be included in regulation and there needs to be a reporting mechanism. Most victims do not know that the standards exist and they do not know how to complain if they believe that the standards have not been met. Even if they could complain, it is not clear what the remedy for that complaint might be. I believe that there should be a requirement for regulation and that it should be made in such a way that it is agreed by the Parliament.

10:30

**Sandra White:** I completely understand that. Witnesses have said various things on the matter. Some have said that those provisions should be set out in the bill, but others have said that they should not. I wanted to get a feel for what the panel thinks, and I will perhaps ask the next panel the same question—if Graeme Pearson does not come in first.

**Graeme Pearson:** I will say nothing.

**Sandra White:** Graeme covered the bit about restitution orders. The point was answered very well and to my satisfaction.

I turn to my more substantive question, which is about the victim surcharge. We have received a number of representations from people who say that they do not think that it would be workable as a fine and that it might be better if the money went to the community.

Mr Binning, you have said that there has been an improvement in respect of court fines and so on. What are the panel's views on the victim surcharge? Is it workable? Would we be able to get the money in?

**Cliff Binning:** At the Scottish Court Service, we are confident of our capacity to recover financial penalties. The position on financial penalties is strong across the board. The recovery level of sheriff court fines after imposition is reaching 86 per cent, and there is evidence of improvement for justice of the peace court fines, where the recovery level is now at 81 per cent.

I emphasise that we are not complacent about that by any stretch of the imagination. In addition to what we regard as creditable performance, we have a number of steps in hand to make improvements, including gateways to information systems that are held by other organisations. We are in dialogue with the Department for Work and Pensions in that regard, and we are in dialogue with the Driver and Vehicle Licensing Agency regarding driver information. We have a number of process and technology improvements in hand to make financial penalties easier to pay. In the round, we are confident with those arrangements as we proceed and on an on-going basis. We do not think that the surcharge would in any way be an impediment to the whole process.

**David McKenna:** I agree with Cliff Binning. The international experience is that, when a penalty is introduced that involves returning something to the victim, recovery increases. The rate should go up from 86 per cent to 90 or 95 per cent.

**The Convener:** The amount recovered does not go to the individual victim.

**David McKenna:** No, it does not.

**The Convener:** I say that just for the record. Otherwise, people following the meeting—some people actually pay attention to the committee, strangely enough—

**David McKenna:** It will go to an individual victim, but not directly from the offender.

**The Convener:** Exactly, yes. Are you happy now, Sandra?

**Sandra White:** Yes, I am fine.

**John Finnie (Highlands and Islands) (Ind):** I am interested in how the present system deals with individuals who have literacy issues and how the proposed system will deal with them. One difficulty concerns people who identify themselves as such. Given the volume of paperwork that any system invariably generates, I invite your comments on how literacy issues are dealt with.

**The Convener:** Who wants to start on that? The police are one of the first ports of call for working
out whether someone is able to understand what is happening.

Superintendent Clarke: Absolutely. As an organisation, Police Scotland will try to identify any vulnerabilities with any victim early on. The sooner we can identify any vulnerability attached to a victim, the sooner we can take steps to address it. That might involve literacy issues, the safety of the individual or their wider vulnerability in the criminal setting. We can put steps in place and share information with partners.

We are well into the routine of picking up vulnerabilities so that any assistance that is required—be it interpreting or help with literacy—is flagged up early in a police report. That report makes its way to the Crown, which can take the appropriate measures. That does not fall within special measures under the legislation, but the victim’s wider vulnerability and safety are considered early doors by police officers when they compile a police report.

The Convener: I will move on. Mr Harvie, when you receive such a report at the Crown Office, do you always have that information? Do you sometimes get surprises?

David Harvie: As with all systems, there will occasionally be a surprise if a particular issue has not been raised by an individual at the time or it has not been apparent to the officer concerned. An issue might well arise at a later stage in the process when we have the initial interaction with the victim or witness. At that stage, it is a question of putting in place measures to ensure that there is appropriate oral communication with the individual and ensuring that they have the necessary reassurances.

Therefore, there is an understanding that there is not just an automatic reliance on the information that the police provide and staff are aware that, if further vulnerabilities are identified that were not in the original police report, they need to be considered and addressed in relation to how the individual gives evidence. That might be of less significance in the majority of cases; it is much more to do with all the other processes around appearing as a witness, such as the completion of expenses forms. They would have to be gone through by the individual and the member of staff concerned.

David McKenna: Again, I will probably disagree with my colleagues. Our experience is that many vulnerabilities and needs of victims and witnesses do not get picked up in the formal process. To be perfectly honest, our view is that the police service, the prosecution service and the courts are probably not the best means to ensure that those assessments are undertaken.

We believe that there should be a single point of contact from the beginning that provides a continuum of support and care and assessment of need across a broad range of areas, such as social, economic, financial and justice issues and the relationship to the offender, to ensure that the victim does not have to tell their story again and again every single time, that we have a joined-up picture of the individual’s needs, and that their preparation can take place in advance of their interaction with the justice system at its various stages. Our view is that there should be a formal and wide-ranging assessment process that follows the victim through the whole process.

John Finnie: I thank the panel for those answers.

One principle that is set out in the bill is 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."

Will the panellists tell us what that means for each of them, their organisations or their overall view? I am particularly interested in the phrase

"participate effectively in the investigation".

Superintendent Clarke: I have often heard Mr McKenna speak. Each of the criminal justice organisations asks a lot of victims. We ask them to do a lot and we ask them to do things many times. I suppose that it is about ensuring that the individual feels respected and supported, that they have a voice, that they understand what is happening to them, and that they are confident to go forward, perform their civic duty in a liberal democracy and give evidence in a court of law that will lead to a conviction.

David McKenna: We do not know what that means, either, and we think that the word should be struck from the bill.

John Finnie: As the convener said, people pay attention to what takes place in the committee. Does Mr Harvie have a view? Would he solicit the support of victims or witnesses to assist with any investigation?

David Harvie: Forgive me. I was looking back at the original directive to see whether that is where the wording came from.

The answer to the question is, of course, yes. Of course we would look for victims or witnesses

"to participate effectively in the investigation and proceedings."

Without looking in detail at the directive, I can only think that the issue may be something to do with situations in which there may be a tension in relation to a wider public interest decision. Sometimes there may be a perceived issue between an individual’s view and the view that is
finally taken. That is the only situation that I can think of in which there might be any qualification.

The Convener: I did not know what that meant either, and I did not understand your explanation, although I was paying attention.

David Harvie: Indeed. I suppose that, when there are situations in which a variety of victims and witnesses perhaps have different perspectives on what the outcome should be, for example, some of them may feel that they have not participated as effectively as others, depending on the nature of the outcome. Beyond that, I find it hard to know what that wording means.

The Convener: I am more confused than I was when we started. Thank you for that, John. Which section were you reading from?

John Finnie: I am reading from the fourth bullet point on page 7 of the Scottish Parliament information centre briefing, which is on the statement of general principles of the bill.

The Convener: Mr Clarke, did you want to come in?

Superintendent Clarke: I took a much more simplistic view of that statement. It is a statement of empowerment for victims. The fact that there is confusion might be worthy of reflection, especially if not everyone understands what it is intended to mean.

The Convener: Yes. It just sounds like soft words that do not mean much. We will challenge that.

John Finnie: Thank you, convener.

The Convener: Thank you, John.

John Lamont has a question, and he will be followed by Alison McInnes, Jenny Marra and Roderick Campbell.

John Lamont (Ettrick, Roxburgh and Berwickshire) (Con): My question is about the victim notification scheme—Graeme Pearson has already touched on the issue. In its evidence, Victim Support Scotland suggests that more information should be routinely and proactively offered, and that that offer should be extended to all victims of criminals who have been given a custodial sentence. Will Victim Support Scotland give us a bit more detail on the types of information that it would expect to be made available routinely? Mr Binning and Mr Harvie, will there be a resource implication as a result of that additional information being made available?

David McKenna: We appreciate that it is challenging to ensure that victims are provided with appropriate information at every stage of the criminal justice process, but we know how important it is to victims and communities that are affected by crime to have information about what is going on in their case.

We want victims to be aware that an individual has appeared in court and been bailed or not bailed, or that they have appeared in court again for any reason or been released from prison for any purpose such as to attend a funeral, for integration back into the community or for work purposes. Basically, we want to ensure that victims are kept informed all the way through the process up to and including parole.

The Convener: I cannot understand the bit about a victim not being told when someone is bailed when a condition of bail would be that they do not approach the victim or that they do not go into a certain area.

David McKenna: If you go to a sheriff court and sit and watch the process, you will see that a hearing takes approximately 45 to 50 seconds. The victim does not know that the hearing is taking place and no information is made available to the court about the risk, threat or security issues in relation to the victim because that information has never been gathered, so the court is unable to take account of it. The least that should happen is that the court or the appropriate agency should advise the victim that the individual has been bailed or not bailed.

The Convener: You are making a different point. If a condition of bail is that the offender does not approach the victim or go into the same vicinity, surely the victim or witness would be told about that condition.

David McKenna: No.

The Convener: How would they then know to report a breach of the condition?

David McKenna: That is exactly the point that I am making. The ideal situation is that the safety, security and concerns of the victim should be taken into account when bail conditions are set. That does not happen at present.

The Convener: I do not think that we knew that. Mr Harvie, can you take us any further?

David Harvie: With respect, that is a somewhat sweeping statement. If material is available about a particular vulnerability or a risk that has been identified, the court is invited to apply particular conditions. If the risk is known to the prosecution, its nature is shared with the court so that it can take an informed decision on how to manage the risk through tools such as bail or remand. If the information is available, it is placed before the court.
The conditions are imposed. Victims and witnesses know, one person can often be both victim and witness. What is said to victims and witnesses—

David Harvie: Those are special conditions of bail. They should be intimated to the individuals concerned.

Superintendent Clarke: That is particularly the case for domestic or violent crime. We have a relationship whereby we are informed of special bail conditions on the day of the court hearing, and that information is delivered to the victim on the same day to advise them and cater for the victim’s safety planning. If we have highlighted that somebody poses a risk to a particular individual and they are back out on the street, we need to begin to look at how we can plan for that individual’s safety.

David McKenna: Convener, I think that you should invite the Crown Office and the police service to give you information about the level of information that is routinely provided in sheriff courts in relation to bail cases. My experience is that, unless the crime is a very serious violent or sexual crime, it is unlikely that anything will be said in court about bail conditions. It is with double respect that I say to David Harvie that, although it is not the case that that does not happen, it rarely happens.

The Convener: We have invited the people you mentioned.

David Harvie: I am not quite sure what we are being asked to do, but I am certainly willing to explore the issue further and explain the position as it stands.

Superintendent Clarke: We are making a supposition that every case has a bail condition, but that is not the case.

The Convener: No. I homed in on a bail condition that is applied to a witness or a victim.

Superintendent Clarke: In many cases there will be no bail conditions to keep an individual away from the victim.

David McKenna: There are standard bail conditions for every case.

Superintendent Clarke: Yes.

David McKenna: Every case has standard bail conditions about not interfering with witnesses.

The Convener: We will ask you to expand on what is said to victims and witnesses—as we know, one person can often be both victim and witness—and on what happens when bail conditions are imposed. Victims and witnesses should know about them so that they can tell if they are breached. They should also have a sense of security from knowing that an individual who is out on bail cannot come up their street.

David Harvie: Convener, in the return that we will make, we will also explain the process whereby, if a particular risk is highlighted, the court is made aware of that. As the public authority, the court has a responsibility not only to the accused but to victims and the wider public, so it is crucial that it has information about risk. We fully accept that, if such information is available, it should be placed before the court.

David McKenna: One might argue that such information should always be put before the court and that a victim safety assessment should be done for the court papers that are provided when bail decisions are made. I appreciate the complexity of that and the short turnaround time for it. All that I am saying is that, in general, victims and witnesses do not know whether an individual has been bailed and they do not know about the standard bail conditions, never mind any special conditions.

The Convener: We will leave it at that for now.

John Lamont: My second question relates to sentencing and transparency in sentencing. I appreciate that sentencing is a very complex issue, but I am also conscious that, from the perspective of victims of crime, it is an issue that is often raised. Certainly, from my perspective as an MSP, constituents express a lot of frustration about how sentences are handed down and about the practice of automatic early release. Is the bill a missed opportunity in that regard? What are your thoughts on sentencing and how it could be dealt with more effectively?

David McKenna: We would say what we have said for a number of years: we have called for a sentencing commission in Scotland that would set out what can or should be expected in our courts in terms of sentencing. We do not comment on individual sentences; we would never comment on the sentencing of convicted individuals.

However, what we would say is that, although we will never necessarily get a victim to agree with a sentence—for example, when it comes to families of murder victims, I have never spoken to a family that agreed with a sentence, no matter what it was—surely all victims have the right to understand how the sentencing decision was arrived at. We ask that victims be supported and informed, so that even if they do not agree with the sentencing decision, they understand how it was arrived at.

Alison McInnes (North East Scotland) (LD): To follow up on John Lamont’s earlier question, could you provide the committee with information
on where responsibility lies? It would be useful to know whether there is a single responsibility to provide notification in relation to bail conditions, and whether it lies with the police or the Crown.

The bill provides for special measures for vulnerable witnesses, but also allows the right to object to those. I would be interested to hear the panel explore why there should be a right to object and what problems that will bring for witnesses.

David McKenna: Victim Support Scotland—in common, I believe, with all victim organisations in Scotland—strongly objects to that proposal. We believe that it will undermine all the good work that was delivered through the Vulnerable Witnesses (Scotland) Act 2004; that it will present a substantial barrier to witnesses accessing special measures; that it will further distress them and lead to a reduction in the quality of evidence that they give; and that it will possibly even result in witnesses not being willing to participate in our justice system in the future. If there is one provision in the bill that we believe should not be there, that is it.

David Harvie: I would echo David McKenna’s comments, to an extent. The extension of the provision of special measures is most welcome—in particular, the extension in use of notices, as opposed to applications. However, I will pause to reflect: if notices are to be used, and if the bill is attempting to create a level of expectation and certainty for children and others who are deemed to be vulnerable, it seems to be odd that there is that right to challenge in respect of those who are going through that notification process.

That is not to say that there should not be an opportunity for the court to review how a particular measure is working once it is running on the day, which would be different from the right to challenge. The efficacy of the measure is always subject to the court’s assessment, but beyond that—from the Crown’s perspective—the right to challenge, especially in relation to people who are deemed to be vulnerable, seems to run contrary to the intention of the bill.

Alison McInnes: That is helpful. Thank you.

The Convener: Can I be difficult and ask, “What about the defence?” There is the presumption that the accused is innocent until proved guilty beyond reasonable doubt. Victims are alleged victims, in terms of court procedure, and witnesses are not all nice people. For example, there might be people who are part of the proceedings and who are criminals themselves.

I will challenge David Harvie’s point. Is not it appropriate for courts to have at least a right to challenge whether someone should have security as a vulnerable witness, and to test it? In terms of the European convention on human rights, I would be a bit concerned if they did not have a right to test. I can see the point of testing. Many people who now work for the Crown have worked as defence advocates at some point in life. Without putting you in a difficult position, is not there a balance that we must remember in court?

David Harvie: I have worn both hats in my career and regardless of what chair one happens to be sitting in, compliance with the ECHR is crucial. Both sides of the table should regard themselves as human rights lawyers.

From the Crown’s perspective, the situation is different when we deal with a notice as opposed to an application. In a situation in which we are looking for additional special measures, or in which there are people who have not been deemed to be vulnerable, under the current system the Crown expects to have to justify why the special measure is necessary, so it seems to be sensible to have a corresponding right to challenge that.

However, on the key right that is being protected for the accused persons in proceedings, I return to the point that I made earlier: in the end, it is the public authority—the judge in court—who has responsibility for ensuring that the proceedings are article 6 compliant and fair. Therefore, once the proceedings are up and running, there is always the opportunity, through the review process, for the court to say that the way in which things are working on that day will not be effective and that there is an issue that might prejudice the trial. That would be in truly exceptional circumstances.

Separate from that, the bill gives vulnerable victims and witnesses certainty and confidence that special measures will be available for them in giving evidence in court. One key issue in any justice system is surely to ensure that anyone who gives evidence, whether it is an accused person, a victim or another witness, is comfortable in doing so to the extent that they can give a true and accurate account of their recollection of events. The proposal, in so far as it relates to the notification scheme—and, as I say, subject to the removal of the right of challenge in respect of those notifications—goes a long way to achieving that aim.

Roderick Campbell: Mr Harvie’s written submission touches on a case that had human rights implications. I am not entirely sure whether you think that the right to object to special measures in section 9 should be removed. Is it possible to amend that section and save it to provide the balance that you are talking about?

David Harvie: I am talking about the difference between notices and applications. In situations where an application is made for additional special measures, the Crown would have to be able to
It is important to bear in mind the level of demand the process concerns the availability of measures. The bill.

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to the extension of special measures elements of activity that derive from the bill relate resourcing or capacity is concerned, the main

considerations in context. One important point is

If such measures promote delivery of best evidence and there is no evidence that they affect the fairness of the trial for the accused person, I do not even know why they should be called “special measures”—they should simply be measures through which people can give evidence in court in Scotland. We work with 80,000 witnesses a year, and we find that most people want to go in, give their evidence and then get out. Our view is that the answer is to allow everyone to use the existing measures—screens, CCTV or the witness stand—and that should be the end of the story.

Jenny Marra: What will be the impact on victims and witnesses of court closures?

Cliff Binning: It is important to put a number of considerations in context. One important point is that the redistribution of business that is consequent on the proposed sheriff court closures amounts to 5 per cent of the overall business of the courts. On the proposed jury trial reforms, it is important to reflect on the fact that 86 per cent of court business already takes place in the centres that are recommended in those reforms.

11:00

That implies two things. One is that the impact is very confined and the other is that the business is redistributed to the remaining courts. As far as resourcing or capacity is concerned, the main elements of activity that derive from the bill relate to the extension of special measures—the notice and the consequent handling at various stages.

The procedure around the notice and approval by the court is a quick administrative procedure that is dealt with by the sheriff in chambers. In that respect, no real resource implications derive from the bill.

From the court’s perspective, the next stage in the process concerns the availability of measures. It is important to bear in mind the level of demand at the time of the trial. There is the potential for 18,000 applications to emerge, but there are important points to bear in mind. One is that the proportion of trials in respect of which evidence is actually led is between 15 and 20 per cent of the cases raised, and the other is that, in any event, the concentration of business will be in the busiest courts, which is why we have made provision for additional screens in the busiest courts. We are confident that under whatever regime emerges, we have the capacity to deal with the special measures.

David McKenna: In responding to the consultation exercise, we said that we believed that court closures would further inconvenience witnesses and victims, and we were concerned about additional travel. I do not know whether members are aware of this, but if you take your car to get to court as a witness, you do not get your parking charges paid, which can be £10 or £15. We knew that court closures could mean additional travelling time. We were also concerned that the accused and the victim could end up travelling to court on the same bus or train.

We are 15 years on from the witness service being introduced in courts; it is time to look at what has been learned about looking after witnesses. That does not start just when we sneak them in the back door of the court. It is time to look at how we support witnesses in the home and in the community and then as they go into court and back out again.

The possibility of a court closure programme has led to a meeting, which I think is taking place tomorrow, with the chief executive of the Scottish Court Service.

The Convener: I do not want to go into detail, because we will deal with that matter and we will be calling witnesses.

David McKenna: Okay. We are going to consider how we can mitigate the potential impact.

Jenny Marra: Can I put my question to Mr Harvie as well?

The Convener: Of course.

David Harvie: We have been involved from the outset in consultation with the Court Service. On Mr Binning’s point about the volume of case work that is conducted within the courts, the other courts would be in a position to cope with that without significant increases in delays in the processes. Witness expenses would continue to be available and would be paid as per the existing guidelines, until such time as they are changed. That is the position at the moment.

On the point about travelling to court, the same would apply in all the courts at the moment. Whether witnesses are coming to Glasgow,
Edinburgh or wherever—whether to a city court or a small town court—there is always the risk that when the court is dealing with a local incident people will travel on the same bus. That is true regardless of where the case is being heard. Those are the kinds of issues that need to be addressed in relation to witness safety and security.

The Convener: I want to focus on isolating of witnesses from each other, with the court closures discussion; I do not want to go into it too much now. We can do so next week, but as Mr Binning, Mr Harvie and those of us who have practised law know, in some old court buildings it is almost impossible to separate people. There are things that assist neither witnesses nor victims, and there are instances where potential closures would be to the detriment of witnesses and victims.

I want to leave that matter—if you will forgive me for that, Jenny—because we will take evidence later on the subject from, we hope, three panels. It is not closed down.

Jenny Marra: Thank you, convener.

In our private session, we heard from victims of crime about delays in court. Having sat in sheriff courts, I have seen that at first hand, and colleagues have put a number of questions to the Scottish Government on the cost impact of delays in court. We heard from one victim that her case was delayed six times. Delays have an impact through lost days at work for both victims and witnesses and there is severe inconvenience. How can such delays be avoided now, and how might they be reduced under the bill?

Cliff Binning: Set in the context of delay and the need for expeditious handling of prosecutions in the court processes, there is currently an unprecedented energy across a range of fronts to ensure that delays are kept to an absolute minimum. Under the making justice work programme are a series of projects that are designed to ensure that, for example, all measures are in place to ensure that witnesses appear on the appointed day.

From the courts’ perspective, we are absolutely determined to ensure that we optimise programming of court business in order to avoid delay. In the context of sharing information and approaches, and optimising our processes, strong efforts are being made to ensure that delays are kept to an absolute minimum.

As a matter of course, there is now reporting on a wide range of information, and specifically on the overall time lag from case initiation to disposal, to ensure that we all, collectively, keep our eyes firmly on the ball in ensuring the expeditious delivery of justice.

Jenny Marra: Has your organisation done any work on the cost impact of delays? We are told that the Scottish Government does not hold that information; I presume that your organisation does.

Cliff Binning: We are guided by a number of sources. One of the most instructive recent sources was the Audit Scotland report on the criminal justice system, which was a very instructive document from the perspective of all agencies as it highlighted the costs to the system at the various stages of the process. The Scottish Court Service and, I am sure, colleagues are alert to that, and it is one reason why there is a determined effort to bring about systematic improvements to the whole process.

Jenny Marra: Do you have any targets for that—

The Convener: Excuse me. I want to get back to the bill, which is the Victims and Witnesses (Scotland) Bill. I want to know the impact—

Jenny Marra: Absolutely, convener, but—

The Convener: No, Jenny. I am sorry. I want to get back to the important question that you asked about the impact on witnesses and victims who turn up time after time and find that they are losing their wages and the case is not going ahead. Why is that happening? How can the situation be improved? What are they told at the time when they turn up? That is what we would like to know in considering the bill.

Jenny Marra: If you will let me explain, convener, what I am trying to elucidate is whether there are measures in place to reduce the inconvenience for victims and witnesses.

The Convener: That is fine. That is exactly what we want to find out, along with why the delays happen and how we can get rid of them. Mr Harvie, you must have experience of this.

David Harvie: Indeed, convener. Thank you for the opportunity to comment.

Mr Binning has already mentioned the making justice work programme, and there are a number of activities under that heading precisely to deal with what is classically called—it is a somewhat derogatory term, I have to say—churn. I see Mr McKenna rightly smiling at that. That term is obviously used from a system perspective rather than the individual’s perspective, and that is why I made that comment about it. When we look at the system, that is the way in which we address it, but with the imperative of trying to improve the experience of victims and witnesses to try to get cases resolved as early as possible.

 Witnesses might lose citations or not attend for other reasons. An measure that has been very
successful is texting witnesses in advance of their court appearance to ensure that they are aware and are reminded of the need to attend court. Very often, witnesses' attendance at the trial can be the very thing that focuses the mind of the accused person on deciding whether the matter will proceed to trial or can be resolved. Getting witnesses there can be crucial.

Equally, with a court that is too heavily loaded, you do not want to invite too many witnesses to whom you will never get. There is significant work to study the optimum weighting of a court in order to make sure that there is a prospect that the witness can give evidence. If the accused appears and all witnesses appear, there is the prospect of a case proceeding.

**The Convener:** Who tells witnesses, “This is going ahead today”, “It's 4 o'clock—the sheriff is going home”, “There is another case going ahead—your one is postponed”, or whatever? Who explains what is happening?

**David McKenna:** It is very important to know that a lot of activity is going on around getting witnesses to court, and we support that agenda. The real challenge for us is witnesses who manage to get to court but do not manage to take part in the criminal procedure in that court.

We are regularly made aware of witnesses who are called time and again. Do you know how soul destroying that is for an individual? Do you know how difficult it is to keep trying to get through on the phone to find out whether you have been countermanded or not and whether you have to go in tomorrow, and then to go to court only to find out that your case is not going ahead? We need to understand the huge burden that is being placed on witnesses in our criminal justice system and we need to do everything possible to alleviate it. I believe that a lot more could be done.

Perhaps what is most wasteful is the number of witnesses who turn up to give evidence in court, but sit there all day and are told to go home at 4 o'clock in the afternoon, when they could have been told to go home at 11 o'clock in the morning. We experience that regularly. [Interuption.] Cliff Binning will get a chance to say something in a minute.

**The Convener:** Perhaps he will get a chance if he goes through the chair. Do you want to take over as chair?

**David McKenna:** No, thank you; it is too hard.

We experience regularly that, because the court is so busy, no one finds the time to go down and discharge the witnesses. That is another issue about which we want to talk to the Scottish Court Service.

**Jenny Marra:** I am just trying to get an answer to my question. What David McKenna said is exactly why I asked whether there are targets to reduce churn. Are there targets?

**The Convener:** Before we get to targets, we should let Cliff Binning answer why people are not told at 11 o'clock in the morning, and instead sit until 4 o'clock.

**Cliff Binning:** There are a couple of points. One point that I want to deal with is the number of occasions on which cases are adjourned because of pressure of court business or lack of court time. We have a performance measure for that and we monitor it rigorously. The position is that less than 5 per cent of cases that are set down for trial are adjourned because of lack of court time. I am not suggesting that it is a model of perfection, but it is very important to put the issue in its proper context.

It is clearly unfortunate when, for whatever reason, trials are adjourned on the day. My understanding of practice is that when a trial is adjourned, steps are taken on two fronts: first, to advise witnesses who are in court, and secondly, to get information on witness availability. I take David McKenna's point that it may not always be the case that that is communicated properly and effectively to witnesses.

On the question of whether it is appropriate to adjourn a case at 11 o'clock or 4 o'clock, a decision would be taken at the earliest opportunity. There is an inherent unpredictability in the conduct of court business, and we all have to make our best judgments in the best circumstances. There may well be occasions on which the preferable course of action is to allow more time, during which, for example, negotiations on a plea could take place. It is not always cut and dried and there is not a conscious effort to keep people waiting until 4 o'clock. As a matter of routine, usually at the mid-point in the day, a judgment is made in consultations between the Crown, the bench and the clerk, as to whether it is appropriate for the loading to be maintained.

I do not say that the things that have been described do not happen, but it would be quite wrong to say that we do not make serious attempts to manage what is an uncertain situation.

**The Convener:** I thank you for your oral evidence and your written submissions. We will have a little break for a few minutes.

11:15

_Meeting suspended._
On resuming—

The Convener: I welcome our second panel of witnesses, who sat and listened to the first panel. Feel free to comment on what you heard; I am sure that you will, and that is what we want. We have Sandy Brindley, who is the national co-ordinator at Rape Crisis Scotland; Louise Johnson, who is a national worker, legal issues at Scottish Women's Aid; and Peter Morris, who submitted petition PE1403, on improving support for victims and witnesses, and has campaigned on that issue for a number of years. We agreed to consider your petition, Mr Morris, as part of our scrutiny of the bill, so there you are—persistence pays off.

I thank you all for your written submissions. I ask members for questions. Does Sandra White want to start? Graeme Pearson has a self-denying ordinance to wait to ask questions until after three or four others.

Sandra White: Good morning. I will perhaps leave the victim surcharge issue to Graeme Pearson and pick up on something else that I wanted to ask regarding the vulnerable witnesses provisions. Most people who have put in a submission have said that although the provisions are great, they are available only in the criminal justice system. People are asking for them to be available in cases in the civil justice system—in particular, cases relating to domestic violence, rape and stalking, as well as children's hearings. Will the panel comment on that?

Louise Johnson (Scottish Women’s Aid): First, thank you very much for the opportunity to address the committee. We are quite concerned that the provisions to extend automatic entitlement to standard special measures for victims of sexual assault, rape, stalking, domestic abuse and trafficking are not going to be extended to civil proceedings.

We have set out our concerns in our submission. Being vulnerable does not stop just because you go into a different arena. The submission from the advice, support, safety and information services together project made a good point that a criminal case can sometimes take 38 weeks. At the same time, a woman can be questioned, she said that she was fine to go along with the view of David McKenna from Victim Support that any victim or witness has the right to be protected. I tend to go along with the view of David McKenna from Victim Support that any victim or witness has the right to be protected. You will not be any safer just because you are in a civil arena. In fact, you are likely to be less safe because the criminal issues are considered in a completely different way. You are likely to be even more vulnerable because of the nature of the case. In domestic abuse, contact and residence cases, some very personal and probably sensitive information is being thrown at you, but you have to sit there and face the person whom, in another arena, you perhaps did not have to sit and face. That is not in the interests of justice, and it is certainly not in the interests of evidence being given freely.

We mentioned children's hearings proceedings because the Children’s Hearings (Scotland) Act 2011 provides domestic abuse and forced marriage as grounds for referral. If the grounds for referral to a children’s hearing are being disputed or there is a lack of protection, it is incredibly important that people who are more or less engaging in the system because they were referred—and so are not necessarily there of their own volition—are protected.

Sandy Brindley (Rape Crisis Scotland): I echo Louise Johnson’s point. To date, we have not had a civil case relating to rape, but it is likely that we will have at least one in the near future, and we are concerned about what protections are in place if somebody goes down the civil justice route. Particularly in the case of rape, people who go down the civil justice route consider doing so because they feel that they have been failed by the criminal justice route. There are concerns about the lack of protection deterring people from feeling able to pursue a civil route.

It is broader than just special measures because there are real privacy issues. We do not have any legislative protection in terms of anonymity for rape complainers in Scotland, and it is unclear whether anonymity would apply in the civil courts. There are a number of issues around privacy that it would be helpful to consider as part of the bill. Those issues are linked to special measures but they go above and beyond them.

The Convener: Can you explain how you can bring a civil action for rape? I got a bit lost.

Sandy Brindley: It would be an action against the perpetrator—a civil case for damages against the perpetrator.

The Convener: That clarifies it. Thank you.

Peter Morris: One of the things that struck me about the vulnerability provisions in the bill is that when I watched the debate on the issue last June in the chamber, there was some discussion as to the interpretation of a vulnerable witness. I tend to go along with the view of David McKenna from Victim Support that any victim or witness has the potential to be vulnerable. I also think—and recent cases have highlighted this—that some victims and witnesses can become vulnerable during the process. I quote the obvious example of the tragic figure of Frances Andrade in Manchester. When she was questioned, she said that she was fine to go into the witness box, but because of the
strength of the cross-examination from the defence lawyers, she became vulnerable.

I quite agree that special measures should be available to all victims and all witnesses, bar none. Rather than trying to say that a certain group of people are particularly vulnerable, if you just classify everybody under the scheme, you will not go too far wrong.

**The Convener:** Even crooks with criminal records who are appearing as witnesses?

**Peter Morris:** If a crook is giving evidence in circumstances in which he did not commit a crime, why should he not be vulnerable?

**The Convener:** Some witnesses are pretty tough. I am not saying that there are no extremely vulnerable witnesses, but there are pretty tough ones.

11:30

**Peter Morris:** I am trying to say that special measures, such as giving evidence behind a screen, should be available to everybody. What is it about that that you do not like?

**The Convener:** The credibility of a witness must be tested, which sometimes means relying on body language, behaviour or the manner in which they give evidence. Many things can happen.

I am not parking people who are deemed to be vulnerable in all circumstances, but it is not the case that all witnesses are somehow frail little eggshelly people. In some of the criminal courts in Scotland, pretty tough guys and women can be up as witnesses, and their evidence must be tested. There are circumstances in which they deserve to be seen as well as heard.

**Peter Morris:** Yes, but we are talking specifically about rape victims and stalking victims, for instance.

**The Convener:** You said that special measures should be available to all witnesses.

**Peter Morris:** I know that I did. The point is that, if somebody appears on a video screen, it is still possible to interpret their body language in a cross-examination.

**The Convener:** I will leave that issue. Does Sandra White have a question?

**Sandra White:** I am happy with the replies that I got. I may come in later, but I will leave it at the moment.

**Graeme Pearson:** It would be fair to say that the system—if we can describe it as such—has spent a considerable declared time dealing with cases that involve sex crimes and domestic abuse. Two of the panel members in particular are in a good position to report on witnesses’ and victims’ experiences of the alleged additional support that they have been offered as they go through that part of the system.

The panel members heard the first panel’s evidence. Given your situation and experience, do you think that, if the proposals in the bill are enacted, witnesses and victims with whom you have been in contact and whom your organisations support will be better placed in the future? If not, what weaknesses do you identify in the provisions?

**Sandy Brindley:** The proposals will make a positive difference. The key element for us in the provisions is the ability to give greater certainty to sexual offences complainers. Automatic entitlement to special measures would mean that a victim would know further in advance what will happen when they go to court. Given how nerve-wracking the prospect of giving evidence on a sexual offence is, that is to be welcomed.

I hope that that provision is relatively uncontroversial. However, I do not think that, in itself, it will significantly reduce the documented trauma that sexual offences complainers experience in going through the judicial process. Giving evidence of such an intimate nature will always be a traumatic experience.

There is far more that we could do, not least—as I highlighted in my written evidence—by re-examining the issues connected with sexual history and character evidence and the increasing use of complainers’ medical records in rape trials. Medical records are not used in any other crime. If somebody reports a burglary, nobody will look for their medical records to find out whether they have a mental health issue.

Significant privacy issues are still at play in relation to sexual offences and definitely act as a deterrent to complainers coming forward. The bill does not address those issues, and they require urgent attention.

Although there have been significant and very welcome attempts to improve legal responses to rape in particular, nobody has spoken directly to rape survivors to ask them what their experience was and whether those provisions have made a difference for them. There is a dearth of research in which complainers have been directly asked what would have made the experience okay or bearable for them. Anecdotally, we still hear that the experience is extremely difficult.

**Louise Johnson:** I will echo a number of Sandy Brindley’s comments.

First, the extension of the automatic right to use special measures will certainly be of great use. We know from women’s experiences that such
measures are not used routinely and would be of great help in supporting women to give evidence.

Secondly, with regard to the proposed standards of service and the other reforms, we know that information on bail and bail conditions is not routinely and timeously given to women. I have already mentioned the need for assessments for vulnerability—almost from the word go—in relation to protection and the use of special measures, and there is a need for information on delays and churn, and on actually appearing in court.

The standards of service are a great opportunity to address those issues, depending on how the standards are used. We can have a lot of nice shiny standards that just sit on the shelf, or we can have standards that have the capacity to change things. There is commitment at the highest level, but it does not permeate down to the people at the sharp end who deal with victims and witnesses day to day. That is why we said in our submission that the monitoring conditions should be in the text of the bill.

On the duty to consult victims and witnesses, as Sandy Brindley said, there must be much more consultation with people to ask, “How did this work? Did we do things when we were supposed to? Did that have the effect that it was supposed to have?”

We engage with various criminal justice and statutory organisations on training, but there should be much more of a duty in that regard. It is not just about dignity—those people need to recognise that they are dealing with a person. Dignity and respect are quite nebulous concepts, but we are talking about the person in front of them whose information is being shared. They should think about what is going to happen to that person. Really sensitive and controversial information on which the person will be judged is being sent out into the public arena in front of a whole array of people whom the victim has never seen before. The people involved must be treated as individuals and as human beings. That is the most important thing.

Graeme Pearson: On access to case-specific information, the bill makes no mention of timescales and when that information should be passed on. Should there be a timescale in the bill? If, as you describe, people do not receive the information timeously, it will be useless to them a fortnight, three weeks or a month later. Is that too onerous a responsibility to place on the Crown and others?

Louise Johnson: If they have the information, they could pass it on. They can pass on only what they have, so there is a question of how and when they get the information to pass on. As soon as they have any information, whether it involves trial dates or witness callings and citations, a message to say, “Do not turn up”, or whatever, it should be passed on probably within 24 to 48 hours.

We have situations in which women are saying, “I’ve just found out he’s got bail conditions”—in fact, sometimes the man has just turned up—or, “I’m turning up to give evidence and I haven’t got childcare”. There are systems in place for passing on information, but there is perhaps an issue with information technology. How is information conveyed to people who cannot pick it up via their computer or who do not have a mobile phone? How do we ensure that people get that information? It might be sent out timeously, but how do they receive it? The vehicle by which the information is conveyed is an issue.

The Convener: What do you suggest for those who are not technological or who do not have the technology?

Louise Johnson: In some cases, they could get letters or phone calls. In certain cases, the police or the victim information and advice service are supposed to let the person know about bail conditions in relation to domestic abuse. [Interruption.] Does Mr Morris want to come in?

The Convener: No, you finish. Everybody wants to chair, but that is not a problem.

Louise Johnson: I am sorry—I thought that I had interrupted Mr Morris.

Peter Morris: No, you have not interrupted me at all.

Louise Johnson: I have lost my train of thought now.

The Convener: We will come back to you once you have found it.

Graeme Pearson: Before we go to Mr Morris, while we are still on the theme—

The Convener: Oh, now you are chairing too. That is all right; it does not matter. [Laughter.]

Graeme Pearson: I want to get the best out of our witness. You have put me off my train of thought now.

The Convener: The tactic worked. Mr Morris wants to come in now.

Peter Morris: I seem to have caused all that.

I just wanted to make the point that what has been said reinforces completely my idea—which I have been propagating for some time—that there should be a case companion or single dedicated point of contact. On a point of language, I would rather use the term “case companion”, because in my view the term “single dedicated point of contact” means a victim talking to a robot, and there must be an emphasis on personal contact.
The solution to the problem that has just been mentioned is to have a dedicated point of contact—someone who will disseminate information and act as a go-between.

**Graeme Pearson:** The point that I was going to make to Ms Johnson is that, as I said earlier, the system is deemed to give the client group whom you represent an enhanced service because of perceived threats. If the victims and witnesses whom you deal with face the frustrations that we have talked about, do you think that the service received by those involved in mainstream court business is no better and in fact may be less supportive?

**Louise Johnson:** I suppose all that you can do is extrapolate from the information that I have given you that the particular approach that is required in specific cases is not happening and ask what is therefore happening in mainstream cases.

**Graeme Pearson:** But you do not know.

**Louise Johnson:** I do not know about that. As I said, we can speak only from our experience, which shows that some of the required process is working and some is not. Part of getting it to work is about having information on time, passing it on, and letting other people know about it. Women should not have to phone up to find out when a case is being heard or what is happening about it. Our local groups have to phone up the Crown Office to find out what is going on with a case and whether there are bail conditions—that should not be happening.

**Sandy Brindley:** It makes sense that, to get the best evidence, we should keep witnesses informed and support them, particularly in sexual offence cases.

**Graeme Pearson:** I have a final question for Mr Morris. You referred in your submission to case companions and so forth. Were you disappointed that that idea was not reflected in the bill?

**Peter Morris:** Absolutely. I was extremely disappointed.

**Graeme Pearson:** Were you also disappointed that there was no mention in the bill of a victims commissioner? Would that have helped?

**Peter Morris:** I thought that those were two central planks that absolutely had to be in the bill. Louise Johnson just referred to rape victims having to ring up to find out when they will have to appear in court. I would much rather that that information went to a single, dedicated point of contact in an organisation—a case companion—rather than the victim being caused grief or emotional distress. It would be much more preferable for whoever does the advocacy or provides the support—such as Rape Crisis or Victim Support Scotland—to have the problem of getting through or trying to make contact about the case. They can then give the information to the victim, rather than the victim or witness having to get the information for themselves.

Aside from the bill not taking the case companion concept on board, the most disappointing thing is the lack of empathy shown for individuals’ experiences. The case companion concept is based on the principle that prevention is often better than cure. Although the crime against the victim cannot be prevented, the bill shows a lack of understanding that what can be prevented is the angst that can come from going into the criminal justice system. I therefore agree with the point made by the chief executive of Victim Support about training in providing professional support being required. There should also be communication between all parties, including the police and the courts. We would then start to have a big, joined-up, co-ordinated system.

The point was made to the previous panel that victims are passed along in the system like parcels, and it is absolutely true that a certain section of the criminal justice system deals with victims in that way. Without wishing to be disparaging, that was reflected in the panellists’ answers. The gentleman who represented the police force said that the police are trying to follow best practice and what have you, and I have absolutely no doubt that they are. However, one has to remember that the primary purpose of family liaison officers is to collate information for the police rather than to support the victim. They do their job in a sensitive and family-friendly way, so I am not criticising them at all, but if we had a single, dedicated point of contact—the case companion—they could do more.

I was involved with family liaison officers for three years, because that is how long my case took from investigation to court, and I remember that quite often it could take a month to get an answer to a simple question. Having reflected on that, I think that that probably happened because the family liaison officer already had the information, statement or whatever it was that they needed. Although they were trying to follow best practice, answering my questions was not their primary concern or interest.

11:45

**The Convener:** I do not think that you answered the point about the victims commissioner. Louise Johnson looked as if she is not in favour of a victims commissioner. Did I read you properly?

**Louise Johnson:** Yes.

**The Convener:** That shows the importance of body language. I could see that.
Louise Johnson: You would probably feel it, if I were not here. [Laughter.]

We are not in favour of a victims commissioner, and we would probably echo the comments that Victim Support Scotland made in its response. Like other organisations, we already have very good links with the Scottish Government, and we have direct links to people at very senior levels in the Crown Office and the police, for example. We do not think that another body’s intervention would help us at all. Why should we have to go through an intermediary? We know what we are talking about, so I do not think that that would be a particularly positive move.

On the comments about a case worker or support person, that is down to support organisations being there. In our submission, we said that the standards do not mention the terms of the EU directive on the provision of support services. Our local groups have dedicated case workers, and there are moves with Police Scotland to standardise procedures in relation to domestic abuse across Scotland, with multi-agency risk assessment conferences, multi-agency tasking and co-ordinating groups and all that business looking at those who are affected by domestic abuse and ensuring that they have a response and someone to go to. Before we do anything nationally, we must look to see what is already in place.

Sandy Brindley: We would need to see the detail of any proposal relating to a victims commissioner before we could say whether we would support it.

Peter Morris: I understand the point that has been made, but my argument is that victims would possibly disagree. They would think that they should have a representative, powerful voice that can lobby the Parliament and co-ordinate the police, the court services and all the other organisations that are involved—in other words, co-ordinate the system. Many victims to whom I talk feel that they are not listened to, that they are not heard, and that they do not have representation. Organisations may feel that they have the proper access to the authorities that they need, but I know quite a few victims who do not feel that.

Louise Johnson: That is why it is important that the standards should include a duty to consult victims of crime and organisations that support them and a mechanism through which people can feed back regularly, not just now and again via an intermediary. There should be timed and prescribed review periods and there would be feedback to the Parliament on the standards—I think that that has been suggested elsewhere—covering the feedback that was sought and received and how that was sought to ensure that a wide spectrum of people responded.

The Convener: We will leave those two opposing arguments sticking to the wall, as people say.

Alison McInnes: I have a supplementary question on special measures. The extension of special measures has been welcomed, but you will have noted that I asked the previous panel about the right to object to their use. I am interested in your views on why that particular provision is in the bill and the difficulties it will create for the people whom you represent.

Sandy Brindley: A limited right to object to special measures is already in place under the current system, and I am not aware of that limited right causing significant problems. However, I cannot say what the impact might be when there is a more general right.

Louise Johnson: Our concern is about routine challenges if there is an automatic category of witnesses who are deemed to be vulnerable. We are talking about sexual offences, domestic abuse, trafficking and stalking, which are very emotive crimes, and we know that the defence utilises certain procedures, if I can put it that way. We would not like to see such objections being raised as a matter of course. If someone is deemed to be vulnerable, that is it.

John Finnie: I had a number of questions for Ms Johnson, although the bulk of them have been answered comprehensively.

I will focus on two small points, Ms Johnson—and other panel members may wish to contribute, too. This concerns your evidence on section 3, disclosure of information and the right to request but not to receive. You highlight in your evidence the fact that the bill was developed prior to the EU directive. You suggest that there should be a statement of reasons for non-disclosure, and you give examples. Could you expand on that evidence? Why would that be important?

Louise Johnson: That derives from a translation of the requirements of the EU directive. The directive says that victims should have a right to receive the information and I think that, in the interests of justice and probably in the interests of the prosecution—or not, as the case may be—they are perfectly entitled to receive information or to be told clearly why they cannot get information to which they are legally entitled. We do not want an attitude of “We can’t be bothered” to develop, such that the information is just not given. If the reasons for not providing information that someone is legally obliged to receive must be justified, there will be much more focus on ensuring that the information is provided, as opposed to the default position, which is, “If we
can’t get it, we just won’t do it.” People must be accountable.

John Finnie: Who would provide the information? The term “qualifying person” covers the police, the Lord Advocate and the Scottish Court Service. Who do you anticipate providing it? Could it vary?

Louise Johnson: It could be all of those or any individual among them, depending on the type of information that is sought. It might relate to court times, the reason why a case has been delayed or the reason why a case is not proceeding.

The directive is different from the bill as regards decisions not to prosecute. The directive says that victims shall have a right to review a decision, not just to get information. Article 11 of the directive goes quite a bit further. We would like that right to be enshrined in the bill.

John Finnie: What would you mean by reviewing a decision?

Louise Johnson: That is as opposed to simply being told, “We are not prosecuting” or “We are going to change the charge.” The question is why. Suppose that the answer is that there is no evidence. Why not? Was that down to a failure in process? Was the evidence not collected? People might think that they have not been believed. Why will the case not be prosecuted? Questions can be asked about whether X, Y and Z were spoken to or whether certain information was obtained, and the whole evidential and investigative trail can be followed. That gives certainty to the investigating and prosecuting authorities and to the victim.

John Finnie: That would mean having clearly different standards of service.

Louise Johnson: Indeed. It ties back to that, too. Does that answer your question?

The Convener: You heard what was said by the Crown in respect of that.

Louise Johnson: Yes.

The Convener: The matter is being considered.

The wording has changed, but I think that letters are now issued, saying that the Crown is taking no further proceedings unless further evidence comes to light. At one point, they just said that they were taking no further proceedings. I had a case where evidence did come to light, but it was no longer possible to prosecute. At least that caveat is now in place, and the proposed measures would add to that.

Louise Johnson: Yes. That is especially important for women and children and young people who experience domestic abuse, who are being told that they will not be believed—they are victims of crime who are being told that nobody will believe them and it is all nonsense. If that decision is made in a bald, frank way, without any justification or explanation, that does not help victims at all.

There is a twofold benefit here: one for the victim and one for the process and ensuring that standards are complied with.

Sandy Brindley: I agree. It is an omission that the bill does not provide for a right to request a review of a decision not to prosecute. That particularly impacts on rape complainers. Only 25 per cent of rapes that are reported to the police lead to a court case. The majority of rape complainants get a decision not to prosecute, and that can be incredibly distressing. Having an explicit right to request a review of decisions not to prosecute could be very helpful, and it provides a certain level of accountability for those decisions.

Peter Morris: One of my compatriots—Action Scotland Against Stalking—advocates that independent legal representation should be available because the procurator fiscal is there primarily to promote the case for the Crown. Independent legal representation for victims is the right way to get the victims’ rights recognised within the system.

The Convener: For what purpose?

Peter Morris: Well, to consider whether a case needs to be reviewed and whether a victim can challenge a decision.

Sandy Brindley: We have been researching how independent legal representation works in other jurisdictions in relation to sexual offences. They have it in Ireland in very specific circumstances around sexual history applications. We are interested in looking at how it would work in Scotland, particularly in relation to medical records and sexual history applications, which are very contested areas. You could say that the Crown is acting in the public interest, but who is representing the complainant’s interest? There is a potential conflict of interest in terms of disclosure obligations. Often we hear from complainers that they do not feel that they have a direct route for protecting their privacy in these areas. There is a strong argument for legal representation for complainers. How else could they defend or assert any privacy rights in these contested areas?

The Convener: How would that enter the court process in a trial?

Sandy Brindley: It would not form part of the trial at all, because these matters would be decided pre-trial. Sexual history and character applications are dealt with at the preliminary hearing. There is a process that could incorporate a representative.
The Convener: I understand now what you mean by representation.

John Finnie: I have another brief question for Ms Johnson, which is on section 5, which relates to the right to specify the gender of an interviewer. You have suggested that the present wording might lack some clarity that would be beneficial, as it refers to

"an offence consisting of domestic abuse."

You say in your submission that there have been preliminary discussions about that. Can you update us on those discussions? Perhaps it is too soon. If so, will you keep us updated on how they go?

Louise Johnson: Yes, certainly. The issue with section 5 is that it refers to

"an offence consisting of domestic abuse."

There is no specific offence of domestic abuse. I met the Government bill team to say that that could be problematic and suggested that the bill be amended to refer to "an offence involving domestic abuse." Obviously the best arbiters of that are likely to be the Crown Office and Police Scotland. They will give you an idea of whether what I have suggested would be workable. We told the Scottish Government that there could be a problem with the definition and wanted to see whether the Crown Office or the police thought that it might be an issue. If you say that someone has a particular right where the specific offence of domestic abuse has been committed, but there is no specific offence of domestic abuse, you are really torpedoing the whole intention of the bill, which you would not be able to give force.

The Convener: That would apply to men or women who might be victims of domestic abuse. It would apply to children, grandparents or whomever.

Louise Johnson: Yes. It would apply to anybody.

Roderick Campbell: My question is also aimed at Ms Johnson. In your submission, you comment on section 20, which is on the duty to consider making a compensation order. The bill seems to make that a statutory requirement. It is something that already exists. Quite often in cases of fraud or dishonesty an accused might have repaid sums that he has misappropriated, which might impact on the nature of the sentence that he is given. I am not quite sure that I understand the logic of your position that a compensation order could not be considered as an alternative to custody. Is that not trying to shackle the judiciary slightly in its approach to sentencing?

Louise Johnson: The issue is the victim’s right in respect of sentencing. In cases where there is no domestic abuse, rape or sexual assault, considering or making a compensation order might be appropriate. However, we would be very concerned if in every case, particularly cases of the nature that I have just outlined, the court had to consider making a compensation order without taking the view of the victim into account. We know that there are women who would want absolutely nothing to do with the abuser. Obviously, they have fled the abuser, they are living somewhere else and they would not want what is essentially blood money. There are cases when compensation would be appropriate, but what is important is to ask the victim. If they are told that a compensation order will be made—perhaps in addition to or instead of something else—they should be asked whether that would be an appropriate disposal or whether that would revictimise them.

The opportunity for the courts to make a compensation order instead of something else is a bit of an affront to victims of crime. For example, in a case of domestic abuse in which the victim does not want compensation, it would be wrong to do it anyway and say that it was the only disposal that the court is going to give out to someone who will possibly deliberately string out payment, in effect to re-abuse the victim.

12:00

Peter Morris: Would I be right in saying that the issue touches on the victim surcharge? I have been arguing for some time that compensation should be an automatic right in serious cases. The fact is that one has to apply for compensation. However, that is another thing that the next of kin of a murder victim, for example, does not want to do when they are going through a court case. The last thing that I was thinking about when I went through my court case was how much money I could make out of the situation. However, next of kin have needs following a conviction—sometimes they have basic needs prior to a conviction, such as funeral costs and what have you. In my particular case, I would have liked to have met the cost of therapies for the anxieties that I have gone through and to meet the needs of my mother. People’s needs are as individual as people are. There is certainly an argument for awarding automatic levels of compensation after conviction. That would make the process a lot less stressful for the victims.

The Convener: I am not quite clear on when compensation orders are paid. However, the bill refers to section 249 of the Criminal Procedure (Scotland) Act 1995, so there are specific cases in law in which a compensation order may be made. There is judicial discretion for that, but there are also particular constraints on that discretion under
that act. We must look at that to consider what impact that has on what you referred to.

Louise Johnson makes a clear case—I certainly understand why someone might not want to have anything to do with their abuser. However, the position on compensation to which she referred may not apply. I am not quite sure about that, so we will need to look at the previous act to see whether that would apply in the cases that she was referring to.

**Louise Johnson:** Let me clarify that. Courts have the option to consider compensation. However, section 20 of the bill would make that obligatory in every single case: courts would not have the option to sidestep the matter and the issue would have to be discussed.

**The Convener:** Section 20 of the bill states:

“In section 249 of the 1995 Act (compensation order against convicted person), after subsection (4) insert—

‘(4A) In any case where it would be competent for the court to make a compensation order, the court must consider whether to make a compensation order.’”

I am not sure how far that reaches, so we will need to look at that. It suggests that compensation does not appear to be appropriate in all cases, but I do not know.

Before I conclude the evidence session, is there anything that I omitted to ask the previous panel that we should have asked? You are taking a deep breath, so the answer is yes.

**Louise Johnson:** That is not a bad sign—I am just catching my breath.

We would like the committee to give serious consideration to civil proceedings and to be aware of the fact that children’s hearings can be dealt with separately from the rest of civil proceedings.

I am glad to hear that the committee will look at the Scottish Court Service. We are concerned that the intention behind and the impact of the Victims and Witnesses (Scotland) Bill will be lessened; that victims and witnesses will be disadvantaged by the proposed court closures and reorganisations; that protection, safety and access to justice will be compromised; and that there will be inconvenience as a consequence of longer travel times and higher costs, which will impact adversely on victims and organisations.

**The Convener:** You will have your opportunity to comment on the proposed court closures when we deal with that, but I want to keep to the bill for now.

**Louise Johnson:** Sure—thank you.

**Sandy Brindley:** I have two quick points. One is about the right of people to choose or have a say in the gender of their forensic examiner straight after a rape or sexual assault. The bill recognises people’s need or right to choose the gender of their police interviewer. If we accept that, it would make sense to consider provision for someone to be examined by a female doctor after a rape or sexual assault. That issue has been raised with us for at least 20 years, and it is a considerable source of distress. Most women and men in Scotland are examined by male doctors. The bill gives us a good opportunity to consider how we can get a basic level of care that meets the needs of complainers.

Another point, which I raise in my written submission, is about closed courts becoming a discretionary special measure. We are keen to ensure that that does not lessen the current provision, which is that closed courts happen automatically in rape cases. Complainers need certainty that the court will be closed. We do not want an inadvertent impact of making closed courts a discretionary special measure to lessen the certainty for rape complainers. That is something to consider when the committee is thinking about special measures. We want to ensure that the bill does not lessen certainty around something on which we want to give more certainty.

**Peter Morris:** I have a couple of quick points. First, with the previous panel, the committee discussed the issue of victims and accused occupying the same space in a court house. I hope that that discussion can be extended to examples that I have been involved with in which victims or relations of murder victims and the accused have had to live in and occupy the same space. I was recently made aware of a victim who, for 18 months, had to live in the same road as the person who was accused of her brother’s murder. Although I fully accept that one is innocent until proven guilty, I just think that the issue needs to be considered. I do not accept the comment from, I think, the Court Service witness that victims and perpetrators occupying the same space is an infrequent occurrence. In my four months in Glasgow, on four or five occasions I had the accused murderer—who was later convicted—next to me in the canteen queue. I find it distressing that that level of emotional stress can be put on people during what can be a lengthy process.

Members will have to correct me if my second point does not relate to the bill, but I have the impression that there is not much difference between the proposals that went out to consultation last June and the bill. I want reassurance that funding will be available for new and innovative projects. I refer specifically to a case companion project that has been designed not by me but by ex-Procurator Fiscal Service people and ex-policemen in Ayrshire, who are
looking to get off the ground with fairly minimal funding. They are certainly under the impression that no funding is available and they are having to go cap in hand round various trusts. I am keen to support that project, which supports my proposals for case companions. Frankly, if no further funding is available for new ideas, why was that not made clear before the consultation process?

The Convener: Obviously, the Government consults before it drafts a bill, and we then challenge the bill that comes before us. Obviously, if something on case companions is inserted in the bill, funding would have to be available for that. We cannot put in something saying, “There shall be a case companion blah blah blah,” if the funding does not follow. The other issue is that, if that is not in the bill, funding is a matter for policy, rather than legislation, as you will understand from your organisations in the voluntary sector. There is Government funding, charitable funding and so on. I will leave it at that. Mr Morris has made a good argument about case companions, which the committee will consider, as indeed we will consider the argument about a victims commissioner. We have not missed those ideas.

I thank our witnesses for their evidence.
VICTIMS AND WITNESSES (SCOTLAND) BILL: STAGE 1

10:01

The Convener: Agenda item 2 is our second evidence-taking session on the Victims and Witnesses (Scotland) Bill. I welcome the first of our two panels: Peter Lockhart from the criminal law committee of the Law Society of Scotland; Murdo MacLeod QC from the Faculty of Advocates; and Professor Alan Miller, chair of the Scottish Human Rights Commission. Thank you for coming and for your written submissions.

I do not want to single you out, Professor Miller, but I am advised that you have to leave at 11 am to give evidence to the Education and Culture Committee. You are a busy bee. As a result, if members have any questions specifically for Professor Miller, they should ask them before 11. Of course, we can if necessary go on a bit longer with the other panellists. This panel will focus on the balance of rights between the victim and the accused, but we are not limited to those issues—heaven forfend I should try to limit members in that way.

With that, I seek questions from members.

Roderick Campbell (North East Fife) (SNP): Good morning. I should first declare an interest as a member of the Faculty of Advocates and as someone who has worked with Murdo MacLeod in the not-too-distant past. What are the panel's views on the definition of “victim” in the bill? How should that term be defined?

The Convener: I should say that if the witnesses look up, I will pick them out. The microphones come on automatically.

Professor Alan Miller (Scottish Human Rights Commission): The term “victim” has been defined very much in the context of criminal justice. I note that, as far as international human rights are concerned, the definition would be broader than that in the bill and would include victims of human rights breaches that might or might not be the result of criminal offences against them. For example, the commission has been very much involved on behalf of survivors of historical child abuse. Some of those instances amount to criminal activity against residents in care homes; although other instances will not amount to criminal offences, those people will still be victims in the sense that everyone will understand.

My only comment, therefore, is that the definition of “victim” is contextualised in the criminal justice system and is not as broad as the definition under international human rights.
Murdo MacLeod QC (Faculty of Advocates): I urge a note of caution with regard to the definition of “victim”. As the faculty’s written submission makes clear, a victim should be called a victim only when a person is found guilty at the end of a trial. That said, I think that under the Criminal Procedure (Scotland) Act 1995, which dictates criminal procedure, the use of the term comes in only at that point.

Beyond saying that great care must be taken in using the term “victim” in an emotive sense, I have no comment to make. I am more interested in the debate on vulnerable witnesses and the provisions that apply to them.

The Convener: I have no doubt that we will come to that debate.

Peter Lockhart (Law Society of Scotland): I endorse my colleagues’ comments and note that the point made by the Faculty of Advocates is good and valid.

As for the definition of “victim”, I have to say that as a solicitor practising at the coalface I would not really want to take on the task of drafting legislation. However, as we say in our submission, it is important that we have a full, clear and unambiguous definition that people can understand.

The Convener: Does anyone have a supplementary on that?

John Lamont (Ettrick, Roxburgh and Berwickshire) (Con): I have a question for Mr Lockhart on how the bill defines the term “victim”. I acknowledge what you say about not being a bills drafter, but could you or the Law Society provide us with a bit more clarity or certainty about how you think that the bill’s definition of “victim” could be improved?

Peter Lockhart: I am sure that we could attempt that, although I would not like to do it today as it is not an area in which I have practice. We would be happy to work with the Government to try to get a better definition that meets our criteria. The short answer is yes, we could.

The Convener: We look forward to amendments being lodged from some direction.

Alison McInnes (North East Scotland) (LD): I want to focus on the bill’s provisions on vulnerable witnesses. You will be well aware that the bill will extend the categories to which special measures can apply and extend the child witness definition to all those under 18. I would like the panel to explore in detail whether the balance of rights between witnesses and the accused will be properly achieved by the provisions in the bill.

Murdo MacLeod: It is perhaps self-evident, but it bears repeating that an inevitable consequence of the adversarial process is an on-going tension between the Crown trying to secure a conviction and the defence trying to secure an acquittal. For years, the alleged victims, complainers or vulnerable witnesses have fallen into the middle ground and have been largely overlooked in the process.

Developments have been far reaching in the past 20 years or so, triggered by a Lord President or Lord Justice General’s practice note in the early 1990s, which suggested, for example, that wigs and gowns should be taken off when children give evidence. That was the springboard and the 1995 act sets out the further special measures that are required. Those have been modified over the years, through the Vulnerable Witnesses (Scotland) Act 2004 and so forth.

Of course, there are mandatory special measures for children, the continuation of which the faculty agrees with. The faculty also agrees with the proposal that the age of a child should go up to 18, in accordance with the United Nations age of majority and many other jurisdictions, and because in certain crimes, such as human trafficking, it is obligatory. That mirrors Lord Carloway’s proposal for accused people: he suggests that the rights that are afforded to children be extended to those up to the age of 18.

However, the current provisions draw a line there and stipulate that an application has to be made for special measures to be applied to other witnesses. Currently, judges study carefully the factors in those applications in determining whether that is appropriate. One of the factors, I have to concede, is the nature and circumstances of the alleged offence, but there are other factors such as the nature of evidence that witnesses are likely to give, the relationship between the accused and the complainer or alleged victim and so forth. It is a careful exercise that is carried out by the judge.

In my experience—Peter Lockhart will be able to confirm the experience at his coalface—it is routine for such applications to be granted. The defence looks carefully at them, takes instructions from its client and routinely, 90 to 95 per cent of the time, they go through on the nod, as it were. The question is whether the measures should be mandatory.

I may be wrong about this—I am sure that the committee will tell me if I am—but I have not seen any evidence to suggest that the current system, whereby the judge makes that determination, is not working. I think that it is estimated that these special measures will be automatically available to 18,000 witnesses, which we are concerned about. The reason for that concern, which is self-evident, is that the interests of justice, in terms of a fair trial for the accused and of allowing the jury to assess
a witness’s demeanour—a very important function—are greatly assisted by having the witness present in a courtroom. That should always remain the presumption, in our opinion, and should be departed from only when a judge says so or in response to an application having been made.

In short, we are not satisfied that there is enough information or evidence to necessitate a departure from that test at present.

Peter Lockhart: I agree with all of that. Again, I am not entirely sure why the provision is being extended to domestic abuse and stalking cases, for example. Under the present legislation, if there is fear and distress on the part of the witness, there is vulnerability, and measures would be put in place. My experience is that in some, although not all, domestic abuse cases, applications are made by the Crown in relation to either the complainant or, for example, children who will be giving evidence. I would say that, in my experience, almost 98 per cent are granted. I cannot think of a single example in which an application has been refused. If that is the case, I wonder why we have to extend the provision.

It is not entirely clear to me how the proposal will work, from a practical point of view. I presume that, if it is automatic, there would be no need to lodge an application or a notification.

One of the difficult issues is that, for example, I have seen in quite a few domestic cases—is the application would be framed based on information that has been supplied via the Procurator Fiscal Service. There is a statement to explain why there is vulnerability and why special measures are necessary. Sometimes, from the accused’s point of view, damaging points are made in that application that go to the character of the accused, if I can put it that way.

I normally go through the notice with the client. In a recent case, the client said to me, basically, “I am hung, drawn and quartered before the judge has even heard a single witness.” Therefore, if the proposal means that the use of special measures would be automatic and there would be no need to lodge a notice, that might be something that we would welcome.

We welcome very much the fact that there is a right to object. We think that that is an excellent provision. I anticipate that there will be some cases—although not many—in which the use of special measures will become a live issue in a trial, and the defence will raise an objection.

It appears that, increasingly, the Crown is prosecuting domestic abuse cases in the justice of the peace court. I am not convinced that that is necessarily the best forum for that. However, putting that aside, the fact is that some of our JP courts are not equipped to operate television links and other special measures. That might need to be considered.

Professor Miller: The Scottish Human Rights Commission broadly supports the bill and recognises that achieving a balance between the rights of witnesses and the rights of the accused is not easy. However, if you take a step back and consider the provisions in the bill from the point of view of the justice system as a whole, you can picture the system as a pyramid. The bottom two corners of the pyramid are the right of the accused to a fair trial, and the public interest in effective investigations and prosecutions and in the rights of victims and witnesses in that process being properly addressed. The apex of the pyramid is an independent and impartial judiciary, on whose ability we rely almost entirely to ensure that that balance is struck on a case-by-case basis.

My suggestion, therefore, is that you should ensure that you are satisfied that there is nothing in the bill that undermines the role of the court and its capacity to make decisions on cases in a way that will strike that balance. Ensuring that there is the capacity to object and for a hearing to take place when an application is made is a critical way in which the bill can ensure that that balance is maintained.

10:15

Alison McInnes: Murdo MacLeod and Peter Lockhart said that 95 or 98 per cent of applications were granted. Women’s Aid argues that if that is the case, witnesses have certainty about how they will be handled as they go into the court process. It argues in favour of the automatic right to special measures. Victim Support Scotland has said that its “greatest concern” is the right to object; it is very worried about that. Do we want to consider that issue further?

The Convener: You have just taken up John Lamont’s supplementary question. That does not matter—he has waived his right. He had to, as you have made the point. Who wants to deal with the concerns of the victims organisations?

Murdo MacLeod: The faculty is fully aware of victims’ concerns, which were expressed very thoroughly in their responses. The faculty has gone further than other organisations in suggesting that consideration be given to further representation for victims in particular instances, such as when there is a request to look through their medical records. Currently, victims have no way of participating in that process. On the matter of section 275 of the 1995 act and applications to explore sexual history, the faculty suggested that
consideration be given to introducing the participation of victims.

On Alison McInnes’s primary point about objections, the Government has perhaps got itself into a bit of a pickle. David Harvie from the Crown Office gave evidence about that. If the measures are mandatory, why should there be a right to object? My answer is that the measures should not be mandatory; that would be a solution to the conundrum. As Alan Miller said, the judge is best placed to adjudicate on the respective submissions and to come up with a subjective decision. There is a right of appeal contained in the objection. That seems to be perfectly sensible. In my respectful submission — although I have given evidence myself and it can be a terrifying ordeal — we should have faith in judges to make those decisions, rather than make the measures mandatory. We are talking about 18,000 witnesses who will be given the automatic right to those measures. In our submission that right should not be automatic, but left to the judge.

Alison McInnes: We can all think of people who would benefit from the special measures. Can you help us by giving any examples from real life in which objections have been made and upheld and people have had to give evidence in open court without any special measures?

Murdo MacLeod: I have no examples from my personal knowledge. However, as Peter Lockhart suggests, up to 98 per cent of the time the applications go through anyway. The point is one of principle, or rather, a little more than that. There might be a case in which the application is not well founded; it is up to the judge to determine that.

With child witnesses, it is self-evident that the child is a child. One is not looking at the class of case; that is just one of the factors that a judge should be entitled to look at. If we extend that objective test — that the child is a child — to classes of crime we will stray into a difficult area. There can be many classes of crime in which a victim, or an alleged victim, or a witness, is quite capable of giving evidence. Another way of looking at the issue is that in some cases applications are not made. That is presumably so for quite a few of the cases. We are wary therefore of giving a blanket right to the proposed measure.

The Convener: The matter of cases held in camera has not been raised. As I understand it, that can also protect the accused. Does that have any interaction or relevance here—can holding cases in camera assist the accused, if I may put it like that?

Peter Lockhart: As we mention in our submission, we need to be careful about going down the route of conducting trials in private. There are occasions when that needs to be done, but the judge should make the decision. The difficulty is that, particularly in domestic cases, there might be family members who are caught up in the case — not in the sense that they are witnesses, but because there is a domestic situation within the family — who will want to be able to hear and see the evidence, so I have concerns about that.

The other factor — again, we mention it in our submission — is that, with the use of videolinks, we wonder why it would be necessary to conduct the trial in private, because in effect the witness is not in court and does not know who is there. However, I am not sure that that necessarily answers your question.

I want to pick up a point that Murdo MacLeod made. From a defence point of view, I cannot give you a specific example of a case in which I or another practitioner in the court that I practise in has been successful in challenging the use of special measures. That is very rare. Although we welcome the right to object, I envisage that it will be difficult to satisfy a judge with a valid objection, particularly where the case falls into one of the mandatory categories. I am not sure what type of argument could be put forward to challenge the use of special measures.

The Convener: Presumably, you might say that the case is not a domestic abuse case. Would that not be an example? Domestic abuse cases are a mandatory category, so if you believed that the case was not a domestic abuse case, that could be an argument.

Peter Lockhart: Well, yes. That is an interesting point. That might be an argument. I do not know. Domestic abuse now covers quite a wide area.

The Convener: I just thought that I would throw that out.

Peter Lockhart: Yes. That is a possibility.

The Convener: It is obvious what a child is, but what a certain case is might not be obvious to one of the parties.

Roddy Campbell has a question about objections.

Roderick Campbell: It is just a technical point.

Murdo MacLeod: Convener, may I make a point on the issue of victims?

The Convener: Yes. I beg your pardon.

Murdo MacLeod: It is not really for the faculty to say, but I wonder whether the process that is envisaged in the bill might build up expectations on the part of vulnerable witnesses and complainers. They will hear that special measures will be mandatorily granted to them, but an
objection might come in later on and the thing will be ventilated again. Might it not be better to have an application and deal with it there and then? At least the victim will then know where they stand.

The Convener: Thank you for that.

Roderick Campbell: Murdo MacLeod touched on where I was going, which is the timing of the vulnerable witness notice and any objection. Will you clarify how late in the process a vulnerable witness notice could be served and how late in the process an objection could be made? A concern that we have heard from the victims organisations is that victims would want clarity as early as possible so that they do not have things hanging over them and do not suddenly find at the last minute that the position has changed. Will you comment on that?

Murdo MacLeod: Perhaps the obvious comment is that the matter should be dealt with as soon as possible for everyone’s sake so that everyone knows where they stand. There are provisions on that, however. I do not have them to hand, but in the statute there is a seven-day period for the matter to be determined once the application is in. Lord Carloway, in the case of Dunn, suggested that the defence has the opportunity to write in to raise an objection, under the current process, once it becomes aware that it is unfolding, as it were. However, the sooner it is done, the better.

Peter Lockhart: I agree. In general terms, in summary cases, the Crown would usually have its vulnerable witness notice in by the intermediate diet, which is four weeks before the trial, so the matter is dealt with at a fairly early stage. In solemn cases, we would certainly expect the notice to be in before the first diet.

The difficulty that the Crown faces is that, under the current legislation, it will usually write to or have contact with the witnesses and ask whether they want any special measures. They do not always respond right away, and occasionally it happens that an application comes in fairly late in the process. For example, the victims, witnesses or complainers—whatever we want to call them—may have moved, or they may have lost contact with the fiscal’s office. Obviously, if the measures were mandatory that would not apply because we would know at the outset that witness A, B or C had mandatory special measures and so it could be dealt with early doors.

Sandra White (Glasgow Kelvin) (SNP): Good morning, gentlemen. I want to follow on from Alison McInnes’s first question, about the vulnerable witnesses provision. We have heard from previous panels that the vulnerable witnesses provision should perhaps be extended to civil cases and children’s hearings. Do you have any thoughts on that issue?

Murdo MacLeod: I have no particular comment about that, but I suppose that the same principle applies in other adversarial cases. One would hope that that would be the case in fatal accident inquiries and in particular public inquiries, which are more inquisitorial than adversarial. Certainly in my experience of a lengthy public inquiry, strenuous efforts were made to ensure that the provision of evidence was made as easy as possible for witnesses. However, I am afraid that I am not an expert on civil procedure.

Peter Lockhart: I am the same; I am here from the Law Society of Scotland’s criminal legal aid committee and I am a criminal defence practitioner. However, logically we would anticipate that a witness in a civil case may be equally fearful of and stressed by giving evidence, particularly in children’s panels and referrals. Logically, there is a good argument for extending the provision but, as I said, I do not practise in that area.

Professor Miller: That is a very good question. The commission’s experience in dealing with the frustration of the victims of historical child abuse—some of whom have had contact with the criminal system and some of whom have had contact with the civil system—is that they have found great problems in the system adapting to their situation in the way that it should. Very often their experience is that neither criminal nor civil processes are particularly fit for purpose for bringing in very vulnerable victims or witnesses to participate. It has to be recognised that, even if we take all the special measures, the process is still very fraught for someone to be exposed in the way that they will inevitably be, no matter what measures are brought into being.

Therefore, we need to look more broadly at other forms of access to justice for victims and not only in the criminal justice process or civil proceedings. That can include reparation, restitution, different forms of alternative dispute resolution or conciliation. We have to look at the system as a whole and make it fit with the circumstances of a particular individual, rather than try to shoehorn them into the system better than has been the case until now, because that is difficult. I do not think that there will ever be a perfect solution because of the different interests that are at play such as the rights of the accused and the role of the judge. We must look more broadly at access to justice for victims.

Sandra White: I appreciate your answers as a layperson who does not have as much knowledge about the law as you do. However, we are considering the bill and other panels have said that the provision should be extended.
I want to follow up what Alison McInnes said regarding the right to object. I come to the issue from the perspective of the public, as a punter, or whatever you want to call it. You say that the decision should be up to the judge but, when we speak to witnesses or victims—this is a terrible thing to say—many of them do not have much faith, not in certain judges or sheriffs but in the system as a whole.

I was interested in what was said when we talked about the vulnerable witnesses application, which Roderick Campbell teased out a bit. You said that that should be dealt with as soon as possible, that there is a seven-day notice period and that an objection could go in four weeks before the trial, although lawyers could also put an objection in whenever they feel the time is right, for example if evidence comes forward or their client wishes it. How would that work? Would it be possible for people to say that they are not going to object and then, two days before the trial, there is an objection? Could that happen?

10:30

Peter Lockhart: The short answer is yes. The bill allows for objection at any stage. Indeed, my reading of the bill is that it allows for objection even once the trial has commenced, although that would be an unusual situation. I cannot think off the top of my head of a practical example to give you. The important principle is that there should be a right to object. That is because there may be quite a gap, particularly in domestic situations, between the time of the alleged offence, police involvement and first appearance in court, and the trial. There might be a change in circumstances during that time that puts a different perspective on matters and renders the special measures unreasonable. I think that the principle is correct; we will have to wait and see how that will work in practice.

Let us assume for a moment that an objection is made and that a sheriff upholds that objection. Obviously, that might be subject to appeal by the Crown. Sandra White suggested that some sheriffs may grant the objection and some may be against it. However, there is judicial training; presumably those questions about the judicial system could be raised then. There are other mechanisms in place and if there was a problem with the particular judge or sheriff, that could be dealt with.

Murdo MacLeod: Under section 271D, which is not going to be revoked, the judge can review the situation as it progresses. One has to have faith in judges and in the legal system. As Peter Lockhart says, there is now extensive judicial training for the fiscal service; that also applies to defence practitioners to an extent.

Professor Miller: Sometimes we can become very concerned with local or national ways of dealing with these problems. That is quite right; one of the functions of our Scottish Parliament is to oversee the criminal justice system in Scotland. However, there is broader international experience on the matter. I will read out to you the relevant United Nations declaration, which comes from the experience of a whole range of different systems. The declaration says that measures to help victims are very positive and are needed but should be facilitated by

“Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system”.

In other words, that suggests that there has to be a balance. Victims’ rights must be safeguarded at appropriate stages in the proceedings, but in relationship with the other interests that are at stake within a criminal justice system—the right to a fair trial, effective investigation and so on. Anything that undermines the role of the judge and the court in a specific case with all the facts in front of them is inconsistent with international best practice.

John Lamont: My question is to Mr MacLeod, on the use of a TV link to give evidence as one of the special measures. You suggested in your written evidence that research shows that evidence given by TV link is more difficult to assess and does not give the same impression in court compared with evidence from someone who is physically in the courtroom. Could you give us more information about that research, particularly in relation to the bill? The research is relevant also to the Government’s proposals to close some of Scotland’s courts; the proposal to use a TV link would have a wider impact than simply on the bill.

Murdo MacLeod: I am afraid that I cannot give you much more about that research. Essentially, that information is anecdotal. One of the members of the faculty recalled being told by instructors who were talking about the provision of a TV link that there were difficulties with the assessment of witnesses. I will certainly see whether we can firm that up a bit.

However, it is obvious from my submission that, all things being equal, it is better to see a witness giving evidence. For example, the issue might be whether the accused restrained a witness in a particular way, so it would clearly be better for the jury to be able to see the size of the witness, which they would be able to do only from having the witness in court. In my experience, there have also been problems with the audibility of witnesses giving evidence from the live-link centre. Another example might be the assessment of demeanour,
because a witness’s look to the side in some remote room might look suspicious in some way, although it might in fact be quite innocent.

Of course, the live link can be very difficult for lawyers. If you ask any criminal lawyer, or any other lawyer involved in examining or cross-examining witnesses by means of a live link, they will tell you that it is extremely difficult to build a rapport with the witness. In my submission, it must be better in terms of the ability of the practitioner to question the witness and in terms of the jury’s assessment of a witness’s demeanour for the witness to be present in court. There is of course the counterbalance to that, which is the right of the witness to give TV-link evidence, which will be granted in the right circumstances. However, in my submission, the best evidence is evidence given in court.

**Peter Lockhart:** I agree with that view. Having done the job for more than 30 years, I know that the witness’s body language, even when they come into the court, very much sets the tone. In many trials in which I have been involved, I have led a defence witness whose body language was not good and I have thought, “Oh, dear.” For example, if I was not here today and you were looking at me through a television link, you would find it a different experience.

The other point that I would make is that—

**The Convener:** We are reading your body language very carefully—all of you.

**Peter Lockhart:** I am sure you are.

The other thing that I would venture to suggest is that, although we have the technology, in practical terms and on a day-to-day basis, there are quite often problems with it. For example, in the smaller courts—I practise in Ayr, where the technology is not being used every day—when a trial is using a videolink, there can be problems with the link and perhaps the technical person who operates the link is off ill and somebody else comes in to do it who does not have the same experience. I therefore think that we must improve not only the technology but the training of the people who operate the system in our courts, which I think is sometimes an issue.

**The Convener:** I found interesting Mr MacLeod’s comment that a videolink is not always in the witness’s interest, because a look might be misinterpreted.

**Murdo MacLeod:** There are other examples of that. For example, a witness might not like being filmed, particularly if the very nature of the crime involved filming, or the witness may prefer to see the person who is asking them questions rather than just hear their disembodied voice. Such factors would be taken into account, though, in the decision whether to grant permission for the link in the first place.

**John Finnie (Highlands and Islands) (Ind):** Good morning, panel. My question is for Professor Miller first and foremost. It is about oral representations by victims and families to the Parole Board for Scotland and the right of an accused to challenge them. How should that be facilitated?

**Professor Miller:** Thanks very much for the question, because that issue is one of the commission’s concerns about the bill, which we otherwise broadly welcome. It goes back to the point that I tried to make at the beginning of the meeting, which is that it is very important that the independent and impartial sheriff, judge or Parole Board is not fettered by not being able to look at the facts of a case independently and decide for themselves what weight to give to different forms of representation that are made to them.

When a prisoner becomes eligible for temporary release or release, it is quite appropriate for information to be passed to victims and for them to make representations about their concerns or perspective. That should be part of the decision on conditions of release or on release at all. In order for the Parole Board or the appropriate body to determine how much weight to give to that information, and in order to give the other party—the prisoner in this case—the right to respond to the concerns that have been raised, which may or may not be well based, it is important that all the facts are made available to whoever is going to make the decision. If I were in your shoes, I would want some assurance from the bill and from the Parole Board—from which you will be hearing, I think—as to how to ensure a level playing field and equality of arms between the prisoner and the victim in the decision that must be made.

**Murdo MacLeod:** I agree in particular with Professor Miller’s statement that there is scope for an accused to be unfairly prejudiced by information being passed over to the Parole Board or another organisation without their having the opportunity to respond to or perhaps challenge that information.

**Graeme Pearson (South Scotland) (Lab):** There are a couple of areas that I wanted to discuss with you that have not so far been covered. The bill contains a provision for certain information to be given to victims or witnesses as of right. There is a section that sets out what that information might include. Are the witnesses happy with the categories of information that would be given to victims and witnesses? Is there any information that you would wish to exclude from or add to that list? I am referring to section 3(6), on page 3 of the bill.
Murdo MacLeod: I had the opportunity to read David Harvie’s evidence to the committee on the matter. As far as I understood what he said, all the information as specified in paragraphs (a) to (g) of section 3(6) is disclosed by the Crown, in any event, to the respective and relevant witnesses. The faculty has no great concern about that.

The broad difficulty in having too much interaction between the prosecution and its witnesses is that the independence of the prosecution is compromised. Although we are not saying that disclosure of the facts is particularly controversial, we are concerned about the possibility—as is envisaged in the European directive—that witnesses or complainers could essentially appeal a decision or seek for it to be reviewed, which puts pressure on the independent prosecutor.

Having said that, we have no inherent difficulty with the measures in the bill.

The Convener: I do not think that that measure is in the bill—it is something that has been proposed.

Murdo MacLeod: It is not in the bill, fortunately, no.

The Convener: I do not think that it is in the bill, but I may be wrong.

Murdo MacLeod: It is not.

The Convener: A witness suggested that people should have the right to seek a review.

Murdo MacLeod: Yes. I read the responses of some organisations. Ms McInnes and others are keen for such provisions to be in place. We hope that there is not a drift towards that in due course.

10:45

Professor Miller: From the commission’s point of view, I have no issue at all with any of the paragraphs—(a) to (h)—of section 3(6). Before I became chair of the commission I ran a law practice for 15 years in Castlemilk, where I gave advice not only to those charged with crimes but to victims of crimes who had contact with the procurator fiscal system. I remember the frustration that many victims experienced because the information that will be provided under paragraphs (a) and (b) was not provided as a matter of course. People had experienced a bad situation and had co-operated with the police, but they were left hanging, without knowing what was happening. If no proceedings were taken, they felt that that was a reflection on their integrity or credibility, although there might have been good legal reasons why the evidence was insufficient.

I very much support and welcome paragraphs (a) and (b) of section 3(6)—the state has an obligation in that regard and should do better—and I have no issue with any of the other matters being part of the information flow. I understand what Murdo MacLeod said. There is a line that cannot be crossed, but what is envisaged can be done without crossing the line.

The Convener: But people should not have the right to seek a review.

Peter Lockhart: I do not think that the Law Society has any difficulty with paragraphs (a) to (h) of section 3(6). Like Professor Miller, I often find people coming into my office to seek information. That still happens, which clearly indicates that there is a need.

The devil will be in the detail, and my concern is about how the provisions will work in practice. As we said in our paper, we are moving to a single witness complaint situation, and we can envisage practical difficulties. If someone wanders into the procurator fiscal’s office in Ayr and says, “I want to know what’s happened to my case,” will the desk clerk have to say, “Well, your case has been dropped, because we didn’t believe you, frankly,” or will it have to go back to a depute? Will the person have to go to the police station? The bill covers the courts too, so what happens when someone wanders into the police station? The bill covers the courts too, so what happens when someone wanders into the procurator fiscal’s office in Ayr and asks what has happened with their case?

There will be practical difficulties. However, a witness—and I use the word carefully—in the proceedings should be entitled to the information that is set out in section 3(6). They should be aware of what is going on. If they have made the effort to give information to the police that has resulted in criminal proceedings, they are entitled to that information, in my view. As we said, the one caveat might be that we need to define slightly better who can have that information and who cannot. For example, if the police are investigating a criminal offence in the high street and they take a statement from a person that is subsequently found to have no evidential value, and the person will not be giving evidence, is there any justification for that person to have the information? I throw that in for the committee to think about.

Graeme Pearson: There are two other areas that I want to cover. At our most recent meeting, there was a bit of a quandary about the notion of victims or witnesses participating in the investigation and proceedings. We were at something of a loss to understand what the inclusion of such a provision in the bill was meant to achieve. Do you have comments on that?

Murdo MacLeod: Mr Pearson, are you referring to concerns about the wording of section 1(3)(d)? The paragraph provides that
"a victim or witness should be able to participate effectively in the investigation and proceedings."

Graeme Pearson: Yes, that is it.

Murdo MacLeod: I am not sure why the word "effectively" is in there. If someone is to participate at all, one would hope that their participation would be effective. From my reading of the provision, I can only imagine that it means that people can effectively participate in terms of giving evidence, for example. Of course, that is best achieved if evidence can be given in an easier way. Beyond that, I have no idea what the provision means.

Graeme Pearson: Should we leave it in or would it be safer to take it out?

Murdo MacLeod: As I said, I do not know why it is in. There might be a reason, which is lost in all the paperwork.

Graeme Pearson: Should we search for the reason, then?

Murdo MacLeod: I think so, yes. Good luck to you.

Graeme Pearson: We might well do that.

The Convener: Does anyone else want to comment on that?

Professor Miller: I take the point. This might be a help or a red herring: in case law over the years the European Court of Human Rights has said that if someone is given a right, including a right to a fair trial in a criminal justice system, it should be a practical and effective right and not just something on paper that does not have much relevance. The provision might just be borrowing that language.

Graeme Pearson: Finally, I invite comment on the reference in the bill to restitution orders and a restitution fund—there is a new idea in that regard. The idea is that if a police officer is subjected to an assault, it will be within the power of the court to decide on a restitution order. I raised with the previous panel whether a conflict of interest would be involved in that, given that the police officer would presumably give evidence for the prosecution and that the police may benefit at the conclusion of the case. Am I being overly sensitive about the matter?

Murdo MacLeod: I think that you are. I have faith that police officers in particular would give evidence truthfully in accordance with the oath that they take. I have a wider point to make about restitution orders, if I may. The question is why they have been confined to police officers. The faculty states in its written submission that although

“many officers face danger on a regular basis, so do others employed in the emergency services”.

For example, I have been involved in cases involving prison officers who have been traumatised by being badly assaulted in prison riots. In addition, hospital staff come in for a lot of abuse and assault, as do others. Although this is not in our written submission and police officers are not in a different category otherwise, it should be borne in mind that police officers are trained, as perhaps are prison officers, in how to respond to violence. It is part of their occupation, as it were, that they will face danger from time to time, but that is not the case for other occupations. Although this is not strictly within our remit, we thought that it might have been better or fairer to have rolled out restitution orders, if they are coming in, to other occupations.

The Convener: Would that not cause some issues with other emergency services, such as the ambulance and fire services? We already have special legislation to deal with assaults against hospital staff, for example. I do not know where you would end the list in that regard.

Murdo MacLeod: Why have a list at all? That would be my answer. Compensation orders work and are routinely granted. If it is going to be impossible to draw up a list, perhaps there is no need for a list at all.

Peter Lockhart: Graeme Pearson’s point is a very interesting one, which I had not thought of.

Graeme Pearson: I am now sorry that I raised it.

Peter Lockhart: But it is a valid point. I know that sometimes in a criminal trial I may be aware that, for example, the victim has a current claim for criminal injuries compensation. I may well say to such a witness, “You have a financial interest in this man being convicted. Is that correct?” I am sure that professional police officers would be above all that, but your point is well made.

My general observations on the matter would be very much in tune with what Murdo MacLeod said about it. The police do a fantastic job, but there is a danger with restitution orders. We already have compensation orders and sheriffs impose them regularly. If there was evidence that compensation orders were not being used and that that was felt to be a problem, that could be a matter for the sentencing council and judicial training. However, that is not my experience.

The other difficulty, to be quite blunt, is “the punter”, to use Sandra White’s expression. The punter will not understand the difference between a compensation order, a restitution order and a victim surcharge. At the end of the day, if the punter is fined £500, as far as he is concerned he is paying £500. Whether that is made up of fines, restitution orders or whatever will be lost on him. Another difficulty will be a practical one from the
collection point of view. I think that there may be problems with that.

I very much believe in compensation orders and I think that they work. It is a good idea for someone to have to pay for their misdemeanours, particularly if that brings some restitution where there is criminal damage or personal injury. We therefore already have legislation in force and we have compensation orders. If they are not working, the question is why not.

Roderick Campbell: I want to move on to the victim surcharge. My question is particularly aimed at Professor Miller. Section 22 provides for a victim surcharge and inserts into the 1995 act a new section 253F(2), which says:

"Except in such circumstances as may be prescribed by regulations by the Scottish Ministers, the court, in addition to dealing with P in any other way, must order P to pay a victim surcharge of such amount as may be so prescribed."

Professor Miller, you are obviously concerned about the impact on the families of offenders of this provision, but the Government might be able to deal with that in the regulations. Perhaps you could comment on your concerns and how you think the victim surcharge fund should operate.

Professor Miller: Yes. The concern that we put in our submission was about getting blood out of a stone. If someone is convicted, they can be fined or ordered to pay restitution or a surcharge, but such individuals are often not of great financial means in the first place. Many of them come from families that do not have any great financial means either. You would want to ensure that the relevant court takes into account the impact on those families, particularly on the children, as I expect it would do. The particular circumstances of the offender and the offender’s family background should be taken into account by the court when it is deciding what sort of financial penalty should be imposed and what the consequences of that might be on the offender and on those members of their family who had nothing whatever to do with the crime that was committed. I would hope that the relevant judge or sheriff would weigh up that sort of thing.

The Convener: Does that not happen already?

Professor Miller: Yes.

Murdo MacLeod: That happens already, convener, but the Faculty of Advocates has difficulty with the proposal, which, as we read it, says that the court "must" order the payment of a victim surcharge. The judge will have no discretion whereas they did previously.

Furthermore, the payment must be for a prescribed amount, whereas—this is mentioned in our written submission—by virtue of section 211(7) of the 1995 act, the judge or sentencer is statutorily obliged to take into account the means of the offender before imposing a fine. We are therefore concerned that the measure is regressive and potentially very unfair.

The Convener: So the line "Except in such circumstances as may be prescribed by regulations" is not helpful.

Murdo MacLeod: We do not know what those circumstances might be.

The Convener: No, but you have put a marker down. It would have to be tested.

That seems to be it. Do you wish to add anything that we might have missed? We are two minutes away from Professor Miller’s deadline but, as he does not have anything to add, we will let him go to his next committee.

Professor Miller: Thank you.

Peter Lockhart: I have a general observation that we put into our written submission. The Law Society endorses much of what is in the bill but, as I said earlier, the devil will be in the detail and how it works in practice. I suspect that there will be funding issues and that those will have to be considered carefully. It would be unfortunate if victims and witnesses had expectations that could not be fulfilled due to current financial constraints. There is a danger of that.

The Convener: Can you be more specific about the funding issues? There is, of course, a financial memorandum to every bill.

Peter Lockhart: A lot of the burden will fall on the Procurator Fiscal Service and, to an extent, the police and the Scottish Court Service. All their budgets are currently under tight review. The bill does give an indication of the financial cost—I think that there was a figure of on-going costs of around £2 million, which is not an inconsiderable sum of money. One wonders where that will come from. Will it have to come out of other budgets? As I said, that is just a general point.

The Convener: We can raise that point with the cabinet secretary. Thank you both very much for your evidence; it is very useful. I will give everyone a five-minute break.
Scottish Prison Service and a regular visitor; John Watt, who is chair of the Parole Board for Scotland; and Heather Baillie, who is vice chair of the Parole Board. I know that you were listening to the previous evidence. Thank you for your submissions.

The focus of this panel is on considering victims’ rights in relation to the release of offenders, but we are not limited to just that aspect of the bill. The committee knows what your remits are and the questions will be within those remits.

**John Finnie:** I have a question for the Parole Board people. If you listened to the first panel, you will be aware of a question that I posed earlier. How do you envisage the representations that victims and families will make to you working in practice? Do you intend to share that information with the individual who is being referred to?

**John Watt (Parole Board for Scotland):** Yes. How we expect the process to work is that a member of the board will interview the victim, find out what they have to say, record that in writing and then check it with them. That information will thereafter form part of the dossier that goes to the prisoner. Of course, we will ensure that it has no personal information—addresses, phone numbers and the like. It will go to the prisoner, who will be able to comment on it at any parole hearing. Prisoners will have ample opportunity to know and understand what the victim is saying before the tribunal.

**John Finnie:** That is very reassuring.

**Graeme Pearson:** Good morning, panel. Thank you for coming along. My question is about the practicalities of maintaining information and passing it to victims or witnesses who have been involved in a trial. It is about the Prison Service’s ability to maintain links with those who are designated to receive such information and to keep up to date with the current process with a prisoner.

Do you feel that you have effective systems that will allow you to pass on the type of information that the bill would demand? Would that information include circumstances in which prisoners are released on day release, the release of prisoners to go out with the prison for further education or whatever and escapes?

**Colin McConnell (Scottish Prison Service):** I am content that the systems that we have are sophisticated enough and reliable enough to cope in the current circumstances and with the provisions that are set out in the bill.

As for the proposed changes, as I set out in our submission, we expect more victims to register with the victim notification scheme, so the demands on the SPS will undoubtedly increase. However, I am confident that we have the resources to ensure that that will work, given the projections. As a witness said earlier, we will have to wait for the test of time, but I am confident at this stage that we could cope with the demand that those changes could bring.

**Graeme Pearson:** Would that include day release and training for freedom and so on?

**Colin McConnell:** In so far as that is provided for in the bill, yes—I am confident that we can cope with that.

**Roderick Campbell:** In its submission, the Parole Board talks about the difficulties around raising “false expectations on behalf of the victim that their representations will influence the ... decision on whether or not to release” life sentence offenders when the test is “protection of the public”.

Do you have any practical advice that can be given to try to deal with that issue of raising false expectations?

**John Watt:** The problem lies in the basis for the Parole Board’s decision, which involves an assessment of risk to the public. The input of victims of crime will tend to relate more to the original crime and the sentence. If they have something to say that bears on risk, that will be taken into account. However, victims might make their representations in the expectation that they will prevent someone from being released. We have to deal with that by ensuring that, when they are interviewed by a member of the board, they are given a full explanation of what can and cannot be taken into account. I doubt that we could do anything in advance of that point. The information would probably be irrelevant until the victim had an opportunity to speak to someone who knows the parole process and can answer their questions.

**Sandra White:** That comes to the nub of the issue. Obviously, as Roderick Campbell said, expectations might be too high, and you have explained that the Parole Board is there to assess the risk to the public. You said that, when the victim speaks to the Parole Board, a full explanation should be given to them. That would be done on an individual basis. Should a full explanation be written in guidelines in the bill, so people can find out what the position is, or are the issues so individual that we could not put guidelines in the bill?

**John Watt:** I suspect that the advice will depend very much on the circumstances of an individual case and the nature and quality of the information that a victim can give. It would be extremely difficult to write comprehensive
guidance. It would have to be so comprehensive that it would be incomprehensible—that is an oxymoron, but you know what I mean.

**Sandra White:** In that case, every victim who appears before the Parole Board will be given different advice. That could lead to one witness giving wrong advice to a witness in another case. How do you square that circle for members of the public who are witnesses?

**John Watt:** As I said, the advice will have to be case specific. I do not know how likely it is that a victim of a crime that was committed 10 or 12 years ago will talk to another victim of another crime that was committed around the same time. I suppose that there might be multiple victims in one case, who would all be seen individually and would have the circumstances in relation to that case explained to them individually. I see no other way of doing it. The advice is case specific.

**Sandra White:** I take that point.

I think that Graeme Pearson wants to ask a question. Sorry, convener—I am not trying to chair the meeting.

**The Convener:** You were, but it is forgivable.

**Graeme Pearson:** No doubt the Parole Board has a website. Even though many of the decisions are particular and are tailored to the circumstances of the case, I presume that you could put broad guidance on the website that would let people know what to expect. A victim who contacts the Parole Board and thinks that going through the gruesome detail of an event from—in the example that you gave—12 years previously will have some impact on the board’s decision would be frustrated to learn belatedly that that information is not relevant to the decision.

**John Watt:** Any such information would have to be in the broadest of terms and would have to be couched in terms of future risk rather than past offending, but that could be done.

**Graeme Pearson:** The bill’s underlying approach is to empower everyone who participates in the criminal justice system, and information is power. I hope that victims will never need to read your website but, if they do, there will be valuable information on it if you share the approach with them ahead of time. Would that not be a useful way forward?

**John Watt:** There is information on the website already, but I am sure that we could enlarge on that.

11:15

**The Convener:** When victims are being told that an offender is permanently to be released or released on licence, are they told where that offender will be released? There are dangers both ways: a victim might know that an offender has been released and might see them on the same street, or vigilantes might act if they know where an offender is. If I had been the victim of and the main witness to a really serious crime, such as assault to serious injury, what information would I be given when the offender was released from prison?

**Heather Baillie (Parole Board for Scotland):** If an issue was raised before the Parole Board, the board could impose a licence condition, the terms of which would be advised to the victim. For example, if there is a concern that a particular geographic area would raise the risk for the victim or in the other direction, the Parole Board can and does impose a licence condition that the offender should not enter that geographic area without the supervising officer’s permission.

**The Convener:** It is useful to know that. The punter—let us say that I am the punter—would not necessarily know about that if they were just told that the offender was being released.

**Heather Baillie:** The issue is raised by victims under the existing scheme from time to time and the Parole Board addresses the situation by way of licence conditions.

**John Watt:** At the moment, victims have to raise the issue in their representations. There are times when it is pretty obvious that there will be a problem, and the board can take account of that.

That forms part of the victim notification scheme and the written representation that the victim submits to the tribunal for consideration. The situation can be controlled by licence conditions, breach of which raises the risk of the offender being recalled to custody.

**The Convener:** You say that the victim must raise the issue, but can the Parole Board address potential problems off its own bat?

**John Watt:** Yes, it can.

**Sandra White:** It is right that victims and witnesses are given opportunities to make representations. Does the panel believe that prisoners should be able to challenge statements that have been given to the Parole Board?

**John Watt:** Yes. If a prisoner thinks that the information provided is inaccurate in some way, it is only fair that they can bring information before the tribunal to challenge that. That is the essence of fairness.

**Heather Baillie:** It is important that the victim providing the statement is aware that the statement will be disclosed to the offender when the Parole Board considers the dossier that includes that statement.
The Convener: It is a difficult balance to strike. Victims know that, if their application is not successful and the Parole Board decides not to impose a licence condition, there might be retribution. I am not saying that that happens, but it is a judgment call for a victim, is it not?

John Watt: The answer is yes, it is, but the situation can be talked through with a member of the Parole Board. Obviously, there is a limit to how much advice a Parole Board member can give. However, they can at least highlight the difficulties and the issues and, if so advised, victims can then take their own advice.

We can reassure victims that we will impose whatever licence conditions are necessary to manage the risk and that those will be policed. The conditions might concern a curfew, geographical exclusion or having any form of contact with the victim. There are ways to manage the situation. Victims often say, “You can’t guarantee anything,” and we cannot—there is always a risk.

Alison McInnes: Victim Support Scotland has called for the bill to give all victims of crime the opportunity to give evidence directly to the Parole Board when it considers a release rather than just to a member of the board, which is seen as being an option that is once removed. What problems might that cause, if it were the case?

John Watt: The board tends to operate on consideration of dossiers. It hears evidence from witnesses only in exceptional circumstances. A tribunal hearing in relation to a life sentence will take place in a small room in a prison, with all that goes with that. If a victim were to attend, they would be in close proximity to the prisoner—again, with all that goes with that. They would be open to a form of cross-examination—we could call it questioning—by the solicitor who was acting for the prisoner or directly by the prisoner. Attending the tribunal to explain their position would expose them to all those things.

It is not the norm to have witnesses there at that point. The chair could permit witnesses to attend, but I believe that that would create a difficult position. I do not know whether the Scottish Prison Service has a view on the matter.

People are in close proximity to each other during the meetings, so I can see difficulties with the idea. Victims who knew that that would be the case might view that as a disincentive to their turning up. I think that it would be more difficult for them to get their account across in that setting. Giving evidence is always difficult. Those of us who have done it realise what a lonely place it is. It is not a nice place to be—Mr Pearson can tell you that.

The Convener: I hope that we are being kind to you and that you do not feel that you are in a lonely place at the moment, even though you are giving evidence.

John Watt: This is not a lonely place to be, but a witness box can be, when someone is under examination by a solicitor. With the best will in the world, someone’s message can become distorted. My view is that the best way for someone to set out their position is in writing. I appreciate Victim Support Scotland’s position, but I do not agree with it.

The Convener: Mr McConnell, do you want to comment from SPS’s perspective?

Colin McConnell: From an operational perspective, if the proposal were included in legislation, SPS would accommodate it. In most circumstances, it is just about making things work and building in the best protections possible. My only observation is that the proposal would add a level of complexity, but not to an unmanageable extent.

Graeme Pearson: I presume that the increased complexity, as well as being challenging, would have a cost attached to it, because one would need to cite witnesses to come to the prison and would need to make arrangements to manage that process. I am not saying that that means that one would judge that the measure was not desirable; I am just saying that there would be a financial impact.

John Watt: A cost would be associated with the measure.

As I am talking, I am thinking about the disconnect with criminal proceedings, in which we would probably do our best to keep the victim, the accused and their associates separate. Getting to a point at which we actively put them together—

Graeme Pearson: In a very small room.

John Watt: Yes. That does not seem to be logical. An expense would be involved but, if the Government decided to act in that way, we would find a way to deal with it.

Heather Baillie: The hearing would be after a considerable time. If we are talking about people serving life sentences, the consideration of their case for release takes place after the punishment part, and an average punishment part is in excess of 10 years. That would be a factor as well.

The Convener: Do not go back to the punishment part and the other part, because that left us with scrambled eggs for brains.

Graeme Pearson: I have a practical question, which the Parole Board might be able to answer. When you receive a file concerning the parole of a prisoner who has spent a decade in jail, what
practical steps are taken to ensure that the right people are informed that parole is in the offing, so that they can be given the opportunity to give evidence? Are there papers in the file that list the people who, 10 years previously, said that they wanted to be included in the process, or does someone review the file and select people who, in their view, need to be informed? Is there any difficulty in finding those people a decade later?

Heather Baillie: Victims are registered as part of the existing scheme.

Graeme Pearson: So they apply.

Heather Baillie: Yes. If they register under part 1, they are advised by the Scottish Prison Service of the decision that has been reached. If they register under part 2, they are given more information. They are told in advance—

Graeme Pearson: I am sorry. When you say part 1, what do you mean?

Heather Baillie: I mean part 1 of the victim notification scheme.

Graeme Pearson: Does that apply at the time of conviction?

John Watt: It comes immediately post-conviction. Intimation goes from the fiscal service to the prison, and the prison manages it thereafter. There are two aspects, which relate to the stage of release. Under part 1, an individual can opt to be informed of certain stages of release, and part 2 is an extended version that goes up to parole. In our papers, there will be a victim notification scheme notice that says that the victim has been given an opportunity to make representations to the tribunal. If representations come in, we have up-to-date details from the victim as part of the dossier. That is how it works.

Graeme Pearson: Given the change in approach, although a victim might have decided that they had had enough and thought, “He’s gone into the blue yonder and I want to forget about it,” they might have a different view eight years later. What if they found out by accident that a parole hearing had occurred and they were not informed of it? I know that we cannot manage every outcome, but the question is whether people should be registered in any case so that they are informed as a matter of right, or whether only those who apply to be registered should be informed.

The Convener: I was just thinking that, if the scheme was mandatory, it could be counterproductive for someone who wanted to forget all about a case.

Graeme Pearson: Indeed. What are the witnesses’ views?
Victims and Witnesses (Scotland) Bill: Stage 1

10:01

The Convener: Agenda item 2 is our third evidence session on the Victims and Witnesses (Scotland) Bill. Today, we will hear from two panels of witnesses. I welcome our first panel: Tam Baillie, Scotland’s Commissioner for Children and Young People; Alison Todd, children and families service director at Children 1st; and Kate Higgins, policy manager for Children 1st.

I advise members that we invited the Association of Directors of Social Work to participate in the panel, but it declined our invitation on the basis that its committees have not considered the bill in any detail. However, the ADSW said that we should get in contact if any issues arise from our evidence session that we would like it to address. I will park that issue for the moment.

I thank the witnesses for their written submissions. I think that they have all appeared before the committee before, so they will know that if they want to answer a question that has not been directed straight at them, they should indicate to me and their microphone will come on automatically. We will move straight to questions from members.

John Finnie (Highlands and Islands) (Ind): The Children 1st submission comments that the provisions in the bill appear to apply only to criminal proceedings; civil proceedings are not included. Is sufficient attention given to the needs of children in identifying them as witnesses in the initial police contact?

Alison Todd (Children 1st): We would like the same standards to apply to civil proceedings as are laid out in the measures in the bill, which we welcome. Sorry, will you clarify the last part of your question?

John Finnie: Forgive me. I asked two questions that were overlapping, so let me park the question on civil proceedings for the moment. For someone to be a witness, they need to be identified as such—as a witness to a crime. We know that young people are frequently the victims of crime. In the initial police contact, is enough consideration given to the rights of children?

Kate Higgins (Children 1st): First, Children 1st has long-standing experience of working to support children as victims and witnesses, particularly through justice for children. Over the past 10 to 15 years, things have certainly moved on apace and children are now generally better supported, but there is still a long way to go.
On the police’s role in identifying children as potential witnesses, practice is probably quite patchy and inconsistent, as the decision comes down to individual officers and individual application of people’s innate resources. As far as we know, no training is provided to police recruits on how to engage with children and young people directly. Training would help to address the issue. We know that the joint investigative interviewing techniques that are being rolled out—the guidance for those is put on a statutory footing in the bill—have improved the experience of child victims of sexual offences and serious crimes. That is making a big difference, but there is still some way to go on how children are treated by all aspects of the justice system.

For example, an unhelpful, inadvertent consequence of our justice system taking domestic abuse more seriously is that children have become more involved as witnesses, because they were in the place and can speak to what happened. We are not convinced that that is necessarily a good thing. We accept that there is a need to gather all the sound forensic evidence that makes the case and that, in some situations, that will involve a child acting as a witness, but in others that might not necessarily be in the child’s best interests. Where there is other sufficient, appropriate evidence to support the case, on balance it might be in the child’s best interests not to be involved as a witness.

I am sorry if that is a bit convoluted, but the issue is not clear cut.

The Convener: No, that was a helpful explanation.

Tam Baillie (Scotland’s Commissioner for Children and Young People): There are two parts to the issue, as far as I am concerned. If my understanding is correct, we miss an awful lot of children who are victims of crime. We need only look at the report published yesterday about those who suffered abuse as children to see that we are still in that position. We do not know how many children we miss, but we know that we need to look at how readily children think they will be believed as victims of crime in our justice system. All the coverage of the Savile case, the Rochdale case and the reopening of the Welsh case signals that we need to get much better at listening to and trusting children and young people who are brave enough to come forward. We also need to create circumstances in which they are able to feel comfortable telling about the traumatic things that have happened to them. One issue is that, time and again, we are missing children.

The second issue is about how well supported children are in the justice system, how well resourced agencies are in providing them with support and how well attuned the people are who play different roles in the justice system. As I will probably say later in the evidence session, I think that there is a real need for training and awareness, so that people can see the world through the eyes and with the perspective of a child. We have a long way to go in that respect. That would help people to have a better understanding of the potential role that children can play as witnesses to offences that have taken place in their vicinity.

John Finnie: Let me ask then about civil proceedings. Should the same considerations apply to civil proceedings as to criminal proceedings?

Alison Todd: We call for that to happen. As Tam Baillie and Kate Higgins have alluded to, people who deal with children need to have proper training. We need to consider what the core skills are for dealing with children and young people and how those apply to people who work in the system.

In civil proceedings, it is important that the standards for dealing with children and young people also apply. Children can end up giving evidence in many civil proceedings, such as divorce and custody cases. Quite often, those can be quite complicated, given the different adults who play a part in a child’s life, and that can cause conflict and challenges. To get the best from children and to ensure that their needs are met, we should apply the same standards right the way across.

The Convener: Having been a civil practitioner in family law, I thought that we had come a long way: children can have their own representation; sheriffs can come down off the bench and take their wigs off; sheriffs can sometimes hear evidence in private; and children can have their own reports. I thought that we had come a long way in allowing children to feel relaxed in what can be very difficult circumstances involving parent versus parent. Are there still issues there?

Alison Todd: Yes, I think so. We certainly have come a long way, and there is evidence of very good practice right the way through the system, but some practice is not always in the best interests of children and young people, who do not always get the opportunity to give the best evidence. In particular, they are possibly constrained by some of the conflicts that might exist between parents. We need to consider the bill in that light.

I refer in particular to section 10. As the law currently stands—and I know that this is not directly related to civil proceedings—all under-12s would be exempt from appearing in court. We would like that exemption to remain. To remove it could mean that more children and young people
end up in court, depending on who decides whether or not they should be there.

Tam Baillie: On standards, one of the problems is consistency of practice. Some examples of progressive practice have been given, but the opportunity through the bill is to have a requirement for standards—I would suggest that we even need to go beyond that and consider how we monitor and report on those standards. If the bill provides an opportunity to have that across court systems, the question should be: why not do it? Whatever legislation the Parliament produces must include something to address standards of practice. We have the opportunity, so the simple answer to John Finnie’s question is yes.

Alison Todd: Although things have improved, and although we have special measures, I agree with Tam Baillie that we have an opportunity to get something into legislation under which people are trained and must apply all the standards and guidance consistently, which is not the case at the moment, despite the improvements.

The Convener: There is nothing about training in the bill.

Alison Todd: The bill could be stronger. The issue is having clear standards and how those are applied. We should be referring to the common core skills, in particular for people who are dealing with children and young people.

The bill does not cover the fact that we would have a child witness support service, which is where much of the training and awareness raising could be applied so that children and young people know what is expected and are treated consistently in the process.

Tam Baillie: When it comes to putting together standards, it would be helpful to have something about the best interests of the child, which would chime with the requirements of the United Nations Convention on the Rights of the Child. It would be useful to check the views of children and young people on the kind of things that would assist them. I would always suggest that we engage with children and young people when setting up standards of practice and so on. We could usefully consider that as a requirement under the bill on agencies or organisations with responsibility for setting and adhering to standards—they should always check with children and young people.

The Convener: Perhaps that could be in guidance or something—we cannot consult on it now if we want to put it in the bill.

Tam Baillie: If it is in guidance, people will have the opportunity either to follow it or not; if it is in regulations, it is much stronger. If such a requirement is included in the bill, it is much more contentious, however. In any case, there should be something that ties public bodies or other organisations with responsibility to engaging with children and young people regarding their views. I will probably repeat that point in respect of other evidence later.

Roderick Campbell (North East Fife) (SNP): I have a supplementary point on what Alison Todd said about section 10 and children under 12 giving evidence in person. My reading of section 10 is that children would be required to give evidence only in very exceptional circumstances. There are safeguards in place. Will you expand on what you said, Alison?

10:15
Alison Todd: We would say that there are already safeguards in place. It currently says in legislation that a young person should not give evidence in court unless under exceptional circumstances. We think that that is strong enough. To move it the other way might have the unintended consequence of other people—the defence—deciding that the young person should be in court. We have talked about the complex relationships in children’s lives. A parent might think that appearing in court would be in the child’s best interest. We think that the current legislation protects children well enough, but there needs to be training and awareness so that it is implemented properly. We do not think that there is a need for change.

Roderick Campbell: So you would just keep the Criminal Procedure (Scotland) Act 1995 as it is in that respect.

Alison Todd: In that area, yes.

Kate Higgins: The bill goes a long way towards completing the work started by the Vulnerable Witnesses (Scotland) Act 2004 around special measures for vulnerable witnesses, in that there is almost an automatic entitlement there. It is much clearer, and entitlement is raised to the age of 18 for children and young people. Provision is made so that new measures can be piloted, which was missing, and the standard measures have been tidied up. However, we feel that section 10 pulls the rug out from under that.

While you see safeguards, we see complex tests to be satisfied. We can see defence solicitors having a field day around proving the case. It just opens up so many questions around when and how the child expresses a wish and who is going to ensure that the child does not feel under duress to be a witness in a case involving their parents or is not being put under pressure by someone else. Where the child has expressed a wish, the court must take account of that unless it is not appropriate. How do we define what is appropriate and what is not? There is huge scope for
discretion there. The bill does not lay out in what circumstances it would be appropriate.

Even if a child is absolutely adamant that they do not wish to be present in court to give evidence, that can be got round. The child’s wishes and interests then become subject to a test about what is in the interests of justice as well as what is in the interests of the accused. We have years of experience of working to support children as victims and witnesses through the court system in some quite horrible cases. Even in those cases—even today when we have moved on so far—children’s interests are quite often paid lip service to. We fear that the bill undermines the entitlement to special measures when the 1995 act is fine as it is. What is needed is training on and awareness of how best to apply it.

The Convener: I just want to correct you a bit. You said that there would be no idea of when it would be appropriate for the child to be in court. The wording of proposed new subsection (6) of section 271B of the 1995 act, which section 10 will insert, is:

“the giving of evidence by the child witness in some way other than by being present in the court-room for that purpose would give rise to a significant risk of prejudice to the fairness of the trial or otherwise to the interests of justice, and that risk significantly outweighs any risk of prejudice to the interests of the child witness if the order were to be made.”

So, there is a test. There must be “significant risk”. As you know, in law quite often a case establishes the ambit of what is “significant risk”. Provision is there in the bill. I take on board what you said, but there is a test.

Kate Higgins: We would be quite keen to hear about the relationship between the significant risk of prejudice to the fairness of the trial or the interests of justice and what is appropriate for the child. From our experience, the two are quite far apart in terms of where the child sits in that deliberation. There should be quite clear guidelines and regulations on how the bill is to be applied—but then you would start to interfere with the discretion of the court.

The Convener: You saw my face there.

Kate Higgins: Absolutely. It is using a sledgehammer to crack a nut. You just need to make the existing legislation work a bit better.

Alison Todd: If a trial could be prejudiced because a child does not give evidence in court, that would undermine the use of special measures and be a backward step. Our thinking should be that special measures will allow children and young people to give the best evidence.

The Convener: Sandra White has a question.

Sandra White (Glasgow Kelvin) (SNP): I think that Mr Baillie wanted to come in.

The Convener: Is yours a follow-on question?

Sandra White: Roderick Campbell has posed my question, but I have another to ask. However, I want to hear Mr Baillie’s comments on that because they will be entirely different from those of Children 1st.

Tam Baillie: My reading of section 10 is similar to Roderick Campbell’s—children would be required to give evidence only in exceptional circumstances. What is key are the views of children and young people, which I have mentioned. That places an onus on the court to ensure that it has an informed view of that child or young person.

I welcome the opportunity for children to express a view. You have heard evidence from other organisations about circumstances in which it is just as distressing for a child to be separated from who else might be in court. The underlying presumption that children do not appear in court is key. There will be exceptional circumstances when flexibility will need to be built in, in which case it will be key to listen to the views of children and young people.

This is about not only asking children and young people for their views, but making sure that our systems are sensitised to elicit and confidently take due account of those views. There is a challenge in framing the legislation to ensure that that is properly attended to. That takes me back to my comments about how the views of children and young people figure in the legislation, particularly if the change is in emphasis rather than in what I think will be the substance of the legislation. We all know how difficult and traumatising the circumstances are for the child and how difficult it can be to reasonably get their views. I therefore welcome the court process waking up to the fact that we must get their views on those terrible circumstances.

Sandra White: Can I ask my question now, convener?

The Convener: Kate Higgins wants to come in first.

Kate Higgins: We hear all the time from children and young people whom our services have supported through court processes. One of the most traumatic things for them is going into an open court in order to give evidence without the benefit of special measures; they liken it to going through the trauma of the circumstances that have taken them to court. Indeed, there is a recovery process for those giving evidence in open court. We welcome anything that can be done in law to minimise the risk of children having to appear in
open court to give evidence without the support of special measures.

We are well aware of the circumstances through which these situations come about. We have huge empathy, because we also work with women and children and young people who have been affected by domestic abuse. We argue that the special measures that are already in place for women who have been victims of domestic abuse and who have to go to court as vulnerable witnesses outweigh the need for section 10.

What should be happening is that women and children who have been victims or are witnesses do not give evidence in open court and are entitled to use special measures, such as using a microsite or giving evidence by videolink. Because we have augmented special measures, which we are going to make more available precisely for women who feel very vulnerable about going into court to give evidence as victims of domestic abuse, we can be assured that they will be together—or at least in the same place—with their children and young people while they give their evidence.

Sandra White: I want to ask about the objection notice because I note that all the witnesses have concerns about it. Mr Baillie has concerns about how it will affect child witnesses, and Kate Higgins and Alison Todd have concerns about how it will work. Can you expand on what you said about the issue in your submissions?

Tam Baillie: The issue is about automatic entitlement. For me, there are two points about the capacity to lodge objections, one of which is about when an automatic entitlement is not automatic. The second one is that I think that the default position for those who would want to undermine a case would be to lodge objections.

I agree with the extension of the definition of a child to include those up to the age of 18. That will mean that it is clear whether someone is a child or is not. Therefore, where would an objection come from as to whether someone qualifies as being considered a child? There is a similar argument about the nature of the offences, although certain nuances might be involved in that. However, I do not understand how an objection could be raised on the basis of age, because someone would be either a child or an adult—it is quite simple.

The Convener: I know, but it seems such an odd definition of “child”, given that people in Scotland can marry at the age of 16, which means that we are now saying that children can get married. We are all over the place with definitions.

Tam Baillie: That is another debate.

The Convener: I know, but it is just an odd thought. Does anybody else wish to say something about objection notices?

John Lamont (Ettrick, Roxburgh and Berwickshire) (Con): I want to pursue the issue. The Law Society of Scotland and the Faculty of Advocates said at last week’s meeting that they are very much in favour of the objection notice. Do panel members believe that the objection notice provision should be removed from the bill?

Tam Baillie: Yes.

Kate Higgins: From what we understand, there is a human rights or rights of the accused aspect involved in the appearance of the objection notice provision in the bill. Our biggest concern is the widening of the right to any party to object, which would mean that anybody involved in the process could object to the application of special measures. If the objection notice provision can be removed from the bill, we would like it removed.

Tam Baillie: Can I just qualify that for the case of children? Other circumstances, especially in the assessment of a vulnerable witness, might be subject to challenge. However, if the use of special measures is automatic for people under a certain age, the objection notice provision should not apply.

Alison Todd: I echo what everyone has said on the matter. If we believe that special measures will allow children to give the best evidence and tell the truth in court, that is a good reason for removing the ability for anyone to object to their being used. The point is to get the best evidence from children and young people.

John Lamont: Given that the views on the issue that we have heard today conflict with views that we have heard previously, is there any compromise position that you might accept that would amend the objection notice provision in the bill as it stands? If we could not remove the provision completely, would you be willing to accept a compromise position?

Tam Baillie: I suggest that there should be an exemption for children on the basis of age. I am sorry, but I cannot put it any simpler than that.

John Lamont: I am thinking more about the timetable, which is a seven-day period. If there was a shorter period in which an objection notice could be lodged, would you find that more acceptable? You suggested in your submission that it would create anxiety for a witness, so perhaps having a shorter period for the notice to be lodged would make the provision more acceptable.

Tam Baillie: The operation of the notice is for the committee to decide, but I am coming from a position of principle. If we automatically have
special measures for children because of their vulnerability, I cannot see what the grounds of any objection would be. The committee might have to take advice as to whether that approach is competent under rights legislation, in which case I would be happy to come back and argue the case again. However, if you want children under the age of 18 to be able to give the best-protected evidence, for which they automatically get special measures, I do not see where an objection could come in.

The Convener: I am looking at proposed new subsection (4B) of the 1995 act, which says:

“The court may, on cause shown, allow an objection notice to be lodged after the period referred to in subsection (4A)—

the seven days. I seem to remember that we took evidence that said that, even in the middle of proceedings, someone could lodge an objection notice and ask for that protection to be removed. Am I wrong?

10:30

Kate Higgins: We are in very technical waters, convener. A number of lawyers and members of the committee who have been involved in the justice process can probably dissect the issues better than us. However, we agree with your interpretation.

Our other question is: if an objection has been lodged in the original seven days and has fallen, can another party—if there are multiple offenders, for example—lodge an objection after that?

We hear from children and young people that they want to be kept informed. They want to know what is happening, they want certainty in the process and they do not want any delay in proceedings. It can often take years for a court case to begin and be concluded, which can be a huge amount of time in a young child’s life. The kind of provision that we are talking about can undermine all three of those things.

We welcome absolutely the duty to provide information, but every time that there are incidental objections it becomes harder to keep on communicating and to ensure that child victims and witnesses are properly informed.

Again, the whole thing is almost an instance of the rug being pulled from under the application of special measures. Although limits can be applied with regard to the impact of objection notices, if the provision stays in the bill it will add to the case for a specific child witness support service in Scotland, so that children are informed about what such objection notices mean and what can be done about them.

We agree with the commissioner that there should just be an exemption for children and young people from all objections under section 9.

John Lamont: I am sorry to pursue this, but the Faculty of Advocates said that the quality of evidence can be improved by having the witness in the courtroom. If that resulted in a conviction, surely the witness or victim would find that more advantageous than the special measures. I accept that it is not ideal, but we have to make a difficult decision. The choice is between the courts getting good-quality evidence and the vulnerable witness being protected. We have to get that balance right.

Alison Todd: We must act in the best interests of the child, and we must communicate with the child and explain that to them. I think that there are exceptions. For example, older children can make some decisions and we could go down the route of objections to special measures if the child fully understood what was expected of them and was able to make a decision. When objections to the use of special measures come at a cost to the safety and wellbeing of the child, however, there should not be such objections.

The situation is different if the child is going to give their best evidence in court. That is a conversation that can be had with the child. It is a conversation that could be had if we had a child witness support agency or someone who was trained to support the child. We know that many workers will be able to do that, but it should definitely be on the basis of getting the views of the child and explaining the situation as opposed to the result of a third party objection.

Tam Baillie: I understand the committee’s difficulty in trying to weigh up conflicting evidence from its witnesses. You may want to look at how assertions about the quality of evidence in court and the quality of decision making are backed up—that may be a reasonable request of the bodies that are making those arguments. Although there has not been a lot of research on the impact of the 2004 act, those bodies may be aware of other evidence that backs up their position.

Kate Higgins: The argument goes back to the debate—which has always existed—about the role of special measures. We would always argue that using special measures to support children in giving evidence and to remove them from the possibility of having to go into open court allows those children to give their best evidence. We know that, where additional special measures have been used, such as with the intermediaries that have been piloted by the national sex crimes unit, they have worked to enable children to give best evidence and cases have been more likely to result in a conviction.
We agree that there is a need for evidence and research in the area. We have been calling for that and pursuing the issue for some time. The idea that a child or vulnerable witness has to appear in open court in order to meet the best evidence rule goes against the grain of what special measures exist to achieve. We commend the work of Joyce Plotnikoff and Richard Woolfson on how special measures can support children to give their best evidence. We see the issue in an entirely different way from the Faculty of Advocates.

Graeme Pearson (South Scotland) (Lab): Good morning. I will stay on the issue of special measures and best evidence. Children 1st has presumably had a great deal of experience of the reality of taking witnesses along the route to court. As John Lamont mentioned at a previous Justice Committee meeting, the legal community seems to be indicating a preference for seeing a witness in court, noting the body language and so on.

I want to hear about your experiences of dealing with vulnerable witnesses and children. How do they feel about offering their evidence from a remote location? How have they experienced that? From their perspective—forgetting about the technicalities of best evidence—did they feel that they had been given the opportunity to unload properly what they wanted to share with the court? In your experience, was there a better outcome all round in terms of delivering justice?

Alison Todd: As you are aware, Children 1st has worked for a number of years with young people who have been vulnerable witnesses. We run the justice for children work group that has been battling for special measures. We know just how abusive the court system has been to children and young people, as they have told us horrific tales about their experiences in court.

The ability to use special measures has certainly made that experience less traumatic. However, we must make it clear that that is due not just to special measures alone but to the support that is given to young people and the steps that are taken to ensure that they know what is going to happen in the process.

It is really important that children and young people are heard and listened to, and it is not just the videolink—if that is the special measure that is used—that allows that to happen. Those young people would say that not having to appear in court and face the person who may have abused them and not having to face some of the questioning that they might have had to face, while still getting to tell their story, has had an enormous impact.

Although the bill states that other special measures can be considered, we would like intermediaries to be mentioned, because the inclusion of trained people who are able to elicit the story from the young person—the truth, in that interpretation—would make the bill even stronger. From what children and young people have told us over a long time about their experiences in court, we believe that special measures are the best way to get the truth from children and young people. Such measures are about support.

Graeme Pearson: Earlier, one member of the panel said that the system pays lip service to children’s wishes. Is that because of a lack of empathy on the part of individual people in the service? Is it about the culture of courts? Why are children’s wishes only being paid lip service in the current environment?

Kate Higgins: The best way in which to explain the situation would be to give a recent example, which concerns a young person with learning disabilities who was sexually abused.

The young person and her family were well supported in the early stages. They had a visit to the court, during which people were hugely empathetic. They got to see the room that they would be in for the videolink, they were able to understand what would be going on, and they were able to take that away and process it. However, when they arrived at court, the room in which they were expecting to give evidence had changed. To you or me, that would not be a big deal, but to a young person with learning disabilities, who has come to court expecting one thing, it is a different matter.

The new room was very enclosed and made the family feel claustrophobic. The videolink did not work at first, which was a problem because the young person does not like engaging in conversation with people whom she does not know. At one point, the defence advocate and solicitor, the procurator fiscal and all the court officers appeared in the witness room at the same time, so there was a room full of strangers.

Basically, the young person would not speak. The court came up with a compromise, which was that she could write down the evidence. However, because of the way that she was spoken to and engaged with over the videolink, she just totally shut down and could not give evidence at all. What is all that about? It is one example of many such instances.

Courts are very busy places and have a huge pressure of work to get through. With the best will in the world, processes and procedures sometimes cannot come to fruition, so there is a need to understand the impact on somebody with learning disabilities of the changes that have to be made. There needs to be training to ensure that the culture of courts includes an awareness of how
to treat a vulnerable young person who is asked to come to court to give evidence.

**Alison Todd:** I do not think that people are deliberately choosing to pay lip service to children’s wishes; I think that there is an issue with the culture of the legal profession and the fact that people are really busy and pressured.

The issue also relates to the fact that many people in the profession are not people like us, who have worked for many years with children and young people. In order to ensure that the proposals are implemented, we need to ensure that people in the profession have an awareness of the needs of children and young people. That is why we would like there to be provision of some kind of support service, even if it is a volunteer-led service, for children and young people who are going through the court system. Such a service would mean that people who have the skills to listen and support children and young people can do that and can support the professionals who are very busy making sure that justice is done.

We need to ensure that there is a balance and that people have all the skills that are needed to ensure that the system is much more rounded and better supports children and young people.

**Graeme Pearson:** Presumably, the person you identify who might operate in that fashion would need to have a status and some empowerment within the system. If not, they would be paid the same lip service as a child, particularly if they come from a voluntary background. You can imagine such a person swimming against the tide within the court environment when they try to advise the professionals about how to deal with a witness. It is a wonderful person that you have identified; I am just saying that I can foresee some problems.

**Alison Todd:** I would say, though, that if we have both systems that do not pay respect to children and young people and volunteers who are doing a job, we need to look at and change the systems and the culture, as opposed to getting lots of qualified people to do the job.

10:45

**Graeme Pearson:** I take your point entirely. You have hit the nail on the head for me.

**Tam Baillie:** I will just make a quick comment because Alison Todd and Kate Higgins have covered the ground.

There is no perfect solution, because we are talking about children who have lived through traumatising circumstances and we will not be able to make it not traumatising. What we have to do is to mitigate whatever additional stress and trauma they will feel as a result of going through the processes. Giving evidence is traumatising in most circumstances—I almost asked for special measures today.

**The Convener:** Come, come. We are so genteel.

The committee will remember that the evidence about body language was anecdotal, and the witnesses were good enough to say that. We have written to the Faculty of Advocates to ask for more information in that regard, as we cannot just have anecdotal evidence.

After Graeme Pearson’s next question, I will call Colin Keir and then Alison McInnes.

**Graeme Pearson:** My next question might not be appropriate, but I would like to ask it and, if it is not appropriate, I can be ruled offside. I ask it given the latest exposure in the press of horrendous historical cases, and given the experience of the people that we have sitting here.

Over the past couple of days, I have struggled to get my head round why it is years after the event that we begin to get a perspective that there is some truth in allegations, and yet at the time they are made the allegations are passed by. Is it a matter of not trusting children and not believing that they are telling the truth, which you mentioned earlier, or is there some other mechanism at play that allows things to be reported but passed by? A decade later, we go back and say, “This is a terrible situation.” What makes that happen?

**Tam Baillie:** There is a cultural aspect. It was said earlier that the debate is not just about court processes. For me, it is about the value that we place on children’s views and opinions.

To continue in the vein of the discussion not being just about the bill, I add that we are at a critical time and place. I have never lived through a period when there have been so many allegations on top of each other. The revelations will continue to shock us as the court cases unfold. As a society, we have to take stock and consider the very question that you asked: why did children not come forward previously? Why is it that, right now, children who are suffering trauma are not coming forward?

I suggested to another committee that we have to look at whether our protection systems are tuned in to pick up things and give children and young people the confidence to come forward and tell what is happening to them. We are at a stage at which, if we do not make improvements and question ourselves, we never will. I genuinely believe that we are at the stage at which we will question ourselves.

**The Convener:** We will move on, as we must try to get on to the bill again.
Colin Keir (Edinburgh Western) (SNP): Good morning. My question is about the comments in Children 1st’s submission on the human rights implications. Obviously, the European convention on human rights stuff is looked after, given that the legislation that the Scottish Parliament passes must be compatible with that. However, you also mention UNCRC compatibility—the submission discusses reporting duties and other things that you mentioned earlier. I am not an expert on UNCRC legislation. Is there anything in that legislation that could be difficult to bring into the bill?

Alison Todd: I ask Tam Baille to answer the question, as he is probably the expert on that.

Tam Baille: I would turn the question on its head and ask whether there are things in the UNCRC that can assist with the progression of the bill.

In fact, in our written evidence, we suggested that the committee might look at a children’s rights impact assessment, which is a framework for assessing the proposals in the bill against the requirements and obligations under the UNCRC. That exercise would be useful—it would take up a whole evidence session to consider the implications of the bill proposals set against not only the UNCRC but any additional points that should be taken into account in considering those implications.

Our office could prepare a children’s rights impact assessment on the bill to develop understanding of the rights impacts of the proposed legislation. If you want me to be here for the rest of the day, I am quite happy to do that.

The Convener: I am just mulling it over. That assessment would need to be done within the next couple of weeks; it would have been helpful if it had been done earlier, because we have a timetable to work to. We can stretch the timetable at times, but could you do that assessment within two weeks?

Tam Baille: You have called my bluff.

The Convener: Yes, I have.

Tam Baille: Okay—leave it with me.

Colin Keir: I do not have anything else to ask. I just wondered whether there was anything that made it impossible to integrate some of that with the bill. That was what I was after.

Tam Baille: I commit to give an initial screening on the bill proposals—

The Convener: You are rowing back a little now, but there we go.

Tam Baille: I will get something to you within two weeks.

Kate Higgins: Such assessments are quite complex things to do—it takes bill teams quite a long time to pull bills together because they have to do the different impact assessments. Children 1st and the commissioner both mentioned children’s rights impact assessments in our written evidence because the Scottish Government has made a commitment in principle to start applying such assessments to appropriate legislation, but nothing has happened yet. That is why we raised the issue. With the best will in the world, two weeks is quite a short time in which to achieve that—

Tam Baille: But we will do something.

The Convener: It is just that we have a deadline. We have the cabinet secretary on 14 May, so it would be handy if we had the assessment for that meeting. There you go—clear your diaries.

Tam Baille: Thank you for that, convener.

The Convener: That is quite all right—any time.

Alison McInnes (North East Scotland) (LD): I have a supplementary that follows on from Graeme Pearson’s exploration of the special measures issue. Is it not the case that what is wrong in the system is that special measures are always seen by at least some of the players in the criminal justice system as being second best, rather than as the best way to get the evidence—and probably as a hassle by other people such as court officials? How do we get special measures to the point where they are continually developed and enhanced rather than plugged in as and when we have to use them?

Alison Todd: I agree with your point. We have raised a couple of issues about the bill where it seems that special measures are being further undermined. I do not know whether there is any way of doing this but we need to try culturally to move to a place where all of us believe that special measures are used to get the best evidence from children and young people. It is only when we get to that stage that we will see special measures being implemented.

Special measures might be seen as a hassle, and that is why they need to be properly resourced, with people involved who understand the needs of children and young people. It is crucial that we get to a stage where everyone sees special measures as being equal—as far as evidence goes—to any other way of obtaining evidence.

The Convener: Can I be really naughty and suggest something? We are talking about children up to the age of 18. To take the defence position, someone is innocent until proven guilty, there is a presumption of innocence, and there is a duty—an
onus—on the Crown to establish its case. Let us say that a 17-and-a-half-year-old ladie—a child, according to the bill—is involved in a case. He is as tough as can be and has a bit of a track record and so on. Before the witnesses jump in, let me first ask why it should not be possible for the defence to argue, “We really want to test this person’s credibility. They are a key witness against the accused, there is a bit of a track record between them and it might be a vendetta or something”? In exceptional circumstances, why should the defence not be able to put in an objection and have such a person up in front of the court? Why should it be an absolute ban?

Tam Baillie: This is not about the bill determining at what age a child is a child; it is following the UN Convention on the Rights of the Child as well as other measures such as the Carloway review, which accepted that definition of a child. This is partly—

The Convener: I am not tackling the definition of a child; I am talking about the ability to object to the use of special measures. Your comment was that the ban on the ability to object would be absolute. Once someone is deemed to be a child, the defence will not be able to say, “I want this person to appear in front of us in court. I want to test their credibility—to rough them up a bit.”

Tam Baillie: But the issue is not the person’s age; it is whether they meet the definition of a child. If we accept that someone who is under the age of 18 is a child, everything else to do with vulnerability, special measures and looking at that person differently from the way in which an adult would be looked at falls into place, regardless of whether they are 17 and a half or 15 and a half.

The Convener: But it will be possible to object. I am sorry, but I thought that your point was that it should not be permissible to object if someone is deemed to be a child. As the bill stands, it will be possible to object in exceptional circumstances. I am arguing that there are times when, to deliver justice, it is appropriate that such an objection be put and perhaps sustained.

Tam Baillie: In that case, why make the use of special measures automatic? The policy intention is for the use of special measures to be automatic. If there is capacity to object, regardless of how it is fettered or qualified, my view is that that would become the default position, which would undermine the intention of the bill—and of the committee, if it agrees with what the bill, as drafted, proposes.

The use of special measures is not just to do with whether the person is a child; it relates to other categories, although those other categories might well be defined not by the offence but by some form of assessment, which might lend itself to objection. For me, if the desire of the committee and the intention of the bill is that the use of special measures should be automatic, on the basis of the witness’s age, I cannot see the ground for objection.

The Convener: I am just beginning to feel that we are swimming in the direction of saying that all children’s evidence is good, that they never tell lies and that their evidence is never corrupted. However, we know that people perjure themselves in court.

Tam Baillie: But the reason for the use of special measures is not to say that the child’s evidence is the truth; it is to maximise the capacity of the child to give evidence. That evidence must still be subject to scrutiny and to judgment; it will still be subject to all the court processes. The purpose of putting in place special measures is to ensure that the child’s opportunity to give evidence is maximised in those traumatising circumstances.

The Convener: The circumstances might not be traumatising for them—that is my argument. I accept a lot of what you have said, but I think that we are all swimming in the direction of not looking at ensuring that there is a balance. We need to give the accused a fair trial. I wanted another member of the committee to ask about the issue, but no one did, so I got extremely agitated. Everyone seems to be moving in the same direction. No one has asked what would happen if the witness was a really tough cookie or if someone presented themselves as a vulnerable witness who was not vulnerable at all. It might be a domestic abuse case or something like that. In the event that someone is not really a vulnerable witness, there should be an opportunity to object to the use of special measures and to test whether they are telling a load of porkies.

Alison McInnes: I do not want to get into a debate with the convener—

The Convener: I was asking a question.

Alison McInnes: What you are saying presupposes that somehow special measures are especially protective and less testing. I think that the argument is that they can still be testing and that it is still possible to explore the evidence. In that regard, special measures are not some sort of extra protection.

The Convener: I do not quite know how a witness could be roughed up—if I can use that term—through a videolink, whereas it is possible to get the chemistry going across a courtroom when a witness needs a bit of that. Judges will intervene to stop that happening if they think that it is inappropriate.
I am beginning to think that we are coming to the view that every witness is a good person, but that is not necessarily the case.

Tam Baille: In that case, you might have to think about what automatic entitlement means, because that is what you are debating.

The Convener: Yes, that is the problem.

Alison Todd: I also think that with any legislation in which there are cut-off points—whether they are financial or age based—there will always be exceptions or cases that teeter on either side of those points. The minute that we create an opportunity to make an objection, a judgment will have to be made about whether someone is a tough cookie or is hard and a decision will have to be made about their level of need. We know that children—particularly traumatised children, regardless of their age—will present in all sorts of ways, and we might think that they are not vulnerable.

I think that the age 18 guideline is the result of a lot of thought. If someone is a child, we need to treat them as such—if that is what the definition is—rather than trying to make a judgment.

11:00
Kate Higgins: I want to add to Alison Todd’s suggestions. The issue of the credibility of evidence that is given under special measures is to do with a culture of people not keeping up with developments. Whether we like it or not, special measures are here to stay, but cross-examination can still be effective. People need to learn the techniques that they need to use to do what they need to do in the court process when special measures are used to test the evidence rigorously. Evidence that is given under special measures is not less credible and it should still be capable of being tested. People need to keep up with technology and shifts in the process.

Under existing legislation, the over-12s can still request to be in court to give their evidence. That is exactly the point that we are making: that provision is already there.

On the issue of children telling lies, Graeme Pearson made a point about the recent case of historical abuse, with children not being believed and not being seen, perceived or presumed to be credible by some parts of the system. We need training and awareness raising to get around that.

For some reason, the Crown Office decided that the policy in the Criminal Justice and Licensing (Scotland) Act 2010 about access to prior statements made when witnesses are precognosced by the police does not apply to under-16s. We would like that policy to be changed or the legislation toughened up a little bit to avoid that exemption for children and young people, because the evidence that they give in court, whether via special measures or otherwise, might be improved if they are given the same access as adults to what they said when the offence happened.

The Convener: That is interesting. We have the police in the next witness panel.

Jenny Marra (North East Scotland) (Lab): Kate Higgins talked about the impact of busy courts on child victims and witnesses. What does the panel think about the potential impact of court closures on child victims and witnesses?

The Convener: Brief answers, please. I let Jenny Marra ask that question last week so I will let her do so again this week, although the issue is not in the bill.

Kate Higgins: The matter goes all the way back to civil proceedings. The committee knows as well as I do how difficult it will be to keep up with all the changes and bills that are coming through on civil and criminal proceedings, including the current bill, as well as court closures and reforms. We are concerned that it is not all joining up, particularly for children and young people. There are many disparate elements, which is why some of the measures should apply to civil proceedings. A children’s rights impact assessment needs to be done right across all the measures, including the Gill and Carloway reviews and the proposed court closures.

We are disappointed with what is being proposed because an invest-to-save approach is not being taken. Rationalising the current court infrastructure could realise money to invest in brand new, fit-for-purpose, 21st century courts. Our experience of supporting children and young people is that courts are not that great for children and young people because they are not child friendly. For example, in some of them, children are not able to keep apart from defenders, which causes problems.

We are also disappointed that the very early proposals to create specialist courts have more or less gone for financial reasons, although we understand why.

The only concern about the location of High Courts at three static sites around Scotland, if that is still what is proposed—

Jenny Marra: It is.

Kate Higgins: We have not caught up totally with the detail. We are concerned about the long distances that children and young people will have to travel. Some families do not always enjoy the sympathy of employers and, given the fact that court cases can last two or three years, it can be hard for people to get days off to go to court. The
practical arrangements around the proposals are of concern to us.

The Convener: Does Tam Baillie want to say anything?

Tam Baillie: I have not come prepared to take a view on that.

The Convener: That is all right.

I think that Roddy Campbell is still lurking in the undergrowth with a question.

Roderick Campbell: Lurking, yes.

The Convener: It is a metaphor.

Roderick Campbell: I have a small point that arises from the Children 1st submission; it is one that we can also address with the Scottish Government.

Kate Higgins referred to the fact that the Scottish Government does not hold data centrally on the use of special measures since 2004. That is an important point. Have you had any discussions with the Government that you might wish to tell the committee about? Alternatively, can you refer us to any other sources that the committee might want to take account of when we address the use of special measures both generally and with regard to children?

Kate Higgins: Are you talking about research sources?

Roderick Campbell: I am looking for anything that might be helpful. I appreciate that you might want to write to the committee about that.

The Convener: You can write to us later. It can be quite hard to come up with something.

Alison Todd: We could send you some research on special measures in different countries. We have been involved in justice for children in quite a lot of other countries, so we could provide some written evidence.

Kate Higgins: In particular, we could give information about how the hugely successful child witness support service works in Victoria in Australia. It was established with a specific purpose but has supported training, awareness raising and issues to do with best evidence in a much wider way, particularly through the direct feedback loop that has been established between children and young people and judges. That has worked really well.

Research has also been done on the application of intermediaries in South Africa, which is part and parcel of the system there.

A number of academics have looked at the application of special measures and we can pull that together for the committee.

The Convener: That would be useful. I should say that the committee will consider the draft stage 1 report for the first time on 28 May, so we will need that information before then. You came here to give evidence and now you have a lot of homework to do. If you do not want to get in trouble with teacher, your homework is expected before 28 May. Tam Baillie’s homework is expected within the fortnight because he has a special exercise.

Tam Baillie: I feel very special.

The Convener: I hope you do.

Tam Baillie: I am being specially treated.

The Convener: There are no further questions. I thank the witnesses for their evidence and suspend the meeting for 10 minutes.

11:07

Meeting suspended.

11:16

On resuming—

The Convener: I welcome our second panel of witnesses. I am glad that they heard a substantial part of the evidence from the previous panel. We have Chief Superintendent David O’Connor and Chief Superintendent David Suttie from the Association of Scottish Police Superintendents, along with David Ross, who is vice-chairman of the Scottish Police Federation. With this panel, we will focus mainly on interviewing children, victims’ rights to specify the gender of an interviewer, and restitution orders, but I cannot limit the committee to that. I wonder why I have to say that, because members know it. However, those are the specific areas that we will focus on.

John Finnie: What challenges will arise for Police Scotland from the provision that will enable the victim to specify the gender of the interviewer?

The Convener: Who wants to answer that first?

Chief Superintendent David O’Connor (Association of Scottish Police Superintendents): Each of us will probably have something to say on that.

The service will face practical challenges in providing that option to victims, but it is certainly doable and it should be pursued. It is not an insurmountable problem, but we need to give due consideration to it and to the other practical implications of the bill.

The Convener: Will you expand on the term “due consideration”?

Chief Superintendent O’Connor: We need to consider logistics across Scotland: we need to
have the right interviewer in the right place at the right time. As with everything else, when such investigations come our way, we must be in a position to respond.

Chief Superintendent Craig Suttie (Association of Scottish Police Superintendents): That provision will be more of a problem in some parts of the country than in others, but one benefit of Police Scotland is that we can draw on resources from across the country, so interviewers might be available to come from other areas. It often takes time to set up an interview, which will allow that. It will be less of an issue than it was previously.

The bill allows for SIOs to justify why they could not provide an interviewer of the requested gender. However, we would encourage SIOs to be more proactive so that when they know that they will have that type of investigation they will do their best to ensure that an appropriate person is available.

The Convener: I am sorry. What are SIOs?

Chief Superintendent Suttie: SIO stands for senior investigating officer.

David Ross (Scottish Police Federation): The practical implications will come when it is necessary to interview an individual immediately, rather than during the course of an inquiry. It is relatively easy for us to get people to a location to carry out investigative interviews after an incident. However, delivering that at the time of an incident is far more difficult. There will be practical implications for us—certainly in the area that is covered by my former force, the Northern Constabulary, where I know John Finnie has a significant history and connection.

The Convener: He has a history? Oh-ho!

David Ross: It would be difficult on some of the islands to carry out interviews with the necessary expertise and experience immediately after an incident.

John Finnie: I do not know whether the panel members were present when I asked the previous group of witnesses about training. The legislation will kick in at the point when people are identified as witnesses. Do you believe that current police training is sufficiently up to speed to deal with the bill’s provisions? Is there sufficient focus, in training, on the needs and rights of children as witnesses and victims?

Chief Superintendent O’Connor: This is a journey. Many new pieces of legislation are coming our way and many changes to policing are happening at this time, so we as a service must examine the training needs of officers to ensure that they have the right competencies and skills to meet the expectations of victims and witnesses. It will be incumbent not just on the police service but on other criminal justice partners to consider their training to ensure that we can deliver the bill’s aims and objectives and meet the expectations of victims and witnesses across Scotland.

Sandra White: Good morning, gentlemen. I want to move on from the previous question on the choice of investigating officers and to consider Rape Crisis Scotland’s submission, which states that victims should have a choice about who undertakes their forensic examination, and that in most cases—male and female—victims ask for a female doctor to examine them. How do you feel about Rape Crisis Scotland’s proposal in that respect? Do you have concerns that it would be difficult to achieve?

David Ross: Forensic examination of victims, in particular victims of sexual offences, has been a significant difficulty for the service in general since we moved to outsourcing of such medical examinations. Irrespective of the gender of the person who carries out the examination or, indeed, of the fact that they may travel significant distances to do so, victims of sexual offences have frequently to wait a significant length of time for the examination to take place. I think that what Rape Crisis proposes would compound those difficulties.

I absolutely accept that individuals should have the right to choose the gender of the individual who will carry out an examination, especially when issues are involved that will have a significant impact on the victim, but it may be very difficult to achieve that without further delaying the process and causing significant angst to the individuals concerned.

The Convener: Can you expand on the point about outsourcing?

Sandra White: I was just going to ask about that.

The Convener: I am sorry.

Sandra White: That is all right, convener.

David Ross: Previously, the service employed local doctors across the different forces. However, before we moved to a single service, we outsourced the work to particular companies. I do not want to name them, but a number of companies provide the services of doctors; the companies deliver them to the required location. Each force signed up to that with different companies about five or six years ago. As a consequence of that and of attempts to reduce costs to the service, there have been significant delays in carrying out examinations—individuals have on some occasions had to travel significant distances for examination.
Sandra White: I was going to raise that point. Obviously, it is imperative that, in cases of sexual abuse, rape and so on, examinations take place as quickly as possible. Can you give us a timescale? I was under the impression that local doctors could be used; I did not know that agencies are being used.

Chief Superintendent Suttie: The practitioners are specially trained and the Crown must authorise them. There are issues before the police get involved. There are good examples of centres being developed where victims can go and samples can be taken before they make the decision whether to report the offence. We would very much welcome anything that can be done to encourage that.

However, the reality is that some of the medical practitioners—although I am not one of them—who take samples feel discouraged from taking part in the procedure because of delays in the court process later on. Anything that can be done to streamline the court process in respect of the requirement to attend and give evidence would be welcome.

Sandra White: Thank you. That is a very interesting point.

The Convener: No other member has a question at the moment, so I will address you. I think that the previous panel mentioned the right to see one’s previous statements, which children do not see. Is that correct? Can you speak to that? Is it a matter for the Crown?

Chief Superintendent Suttie: The provision of statements is more a matter for the Crown. The police provide statements, but that is through contact with the Crown.

The Convener: I did not know that. I was quite surprised to learn that people are not able to see previous statements. Several statements might be taken over a period.

Chief Superintendent O’Connor: Yes—and all the statements would be submitted to the Crown. It may be necessary to interview a victim or a witness on a number of occasions. A number of statements might be submitted to the procurator fiscal or to the Crown Office, but the authority—as I understand it—to return statements to victims and witnesses rests with the Crown.

The Convener: We must ask about that.

On interviewing techniques, we have spoken about training for court officers, solicitors and judges. What training of police officers is there on dealing with children as victims or witnesses—or, indeed, as the accused?

Chief Superintendent O’Connor: Investigative interviewing has been in the service for 20 years. Joint interview training with police and social workers is carried out to ensure that cognitive interviewing skills and techniques are learned and tested in a training environment. The joint training that is available is delivered to a very high standard.

Detective officers are also trained to a high standard on investigative interviewing; they are trained to deal with the sensitivities of witnesses, complainers and victims while dealing with the various rules and parameters that are put in place for interviewing suspects.

The Convener: Do you use continuous professional development as a means of assessment, as many professions now do?

Chief Superintendent O’Connor: Yes—the process is continual. After accreditation there is refresher training to ensure that skills are kept up to the high level that is needed.

Alison McInnes: The consultation that preceded the bill included a question on investigative anonymity orders. The bill does not mention those, although they are in operation in England and Wales. There has been concern that not including such orders may raise cross-border issues. Do you have a view on that? Do you think that it would be sensible to extend anonymity further back into investigation of cases?

Chief Superintendent O’Connor: I am aware that such orders are being used in England and Wales, although I have not seen them in operation. I am also aware that there are cross-border issues, although they are not insurmountable.

On protection, there are concerns about how we give witnesses the confidence to come forward. Very often witnesses refuse to give statements to the police, or when they do give statements and those are provided to the Crown, they are then unwilling to give evidence in court. That is the reality. Anything that can be done to assist in that should be encouraged.

Graeme Pearson: The bill provides for disclosure of information to victims at various parts of the process. Police Scotland is one of the bodies that will be responsible for disclosing qualifying information. Is the service prepared to manage and release information in a timely manner to victims as they go through the procedures?

11:30

David Ross: All partners in the criminal justice system would probably accept that we have been poor at keeping victims and witnesses informed as to the progress of cases in which they are involved. As to whether we, as a service, are
prepared with regard to disclosure of such information, my personal view is that we are not. As far as our information technology systems are concerned, even our ability to share information across the various areas of Police Scotland is not joined up at the moment.

Graeme Pearson: You are pressing my buttons.

David Ross: It is work in progress. Are we prepared to do it at the moment? I do not think so. We absolutely want to disclose the relevant information and to embrace the aims and objectives behind that, but we are probably not prepared for delivering that.

Chief Superintendent O’Connor: This is an area in which Police Scotland needs to do an impact assessment on the bill to identify our capacity and capability to deliver on that level of commitment.

Graeme Pearson: If we pass the bill, how will you deliver on your responsibilities when day 1 of the legislation’s being in force arrives?

Chief Superintendent O’Connor: That goes back to David Ross’s point; the responsibilities under the eventual act will rest with Police Scotland and other agencies—it is not just for us.

Graeme Pearson: So, it is not a case of saying, “Let’s not worry about everybody else.”

Chief Superintendent O’Connor: We all need to know what the bill means for us in terms of disclosure of information. We need to know what the responsibilities are, and we need to know what information needs to be shared with whom, when, why and where. We need to assess the bill carefully and identify its implications.

Graeme Pearson: That sounds like a challenge.

Chief Superintendent O’Connor: It is a challenge.

Graeme Pearson: I will move to a different topic. The bill covers restitution orders. There is a notion that restitution orders will be paid into the benevolent fund, and that there will be some form of support for treatment centres for police officers and so forth. At an earlier evidence session, I asked whether there could be a perceived challenge in people’s minds about a conflict of interests in cases where officers are giving evidence in court, knowing at the back of their mind that the outcome could end up being a restitution order. Does that give rise to any concern within the service? Is that notion overly simplistic and too sensitive?

Chief Superintendent Suttie: I can understand where people are coming from on that. There are concerns elsewhere about why that provision is just for the police, and whether it should be widened out. We have been supportive of those payments being widened out to other emergency workers and others who work at the front line. I do not think that there is a direct link between officers giving evidence and restitution orders. The systems that are in place, which will be managed by the Scottish Government, will be dealt with separately.

We welcome the restitution orders, and we think that they are a good move. I have paid so many pounds a month towards the Police Treatment Centres and the police benevolent fund for 29 years now, and my colleagues have done likewise: most officers do. Fortunately, I have never had to use those facilities, but they are very good. The police are perhaps ahead of the game compared with some other services in having such facilities.

To return to the question, I do not have any real concerns about there being an impact on officers’ evidence.

Chief Superintendent O’Connor: I do not see there being any conflict of interests in relation to officers being assaulted and having something in the back of their mind about restitution orders. I have no doubt that officers go about their business and carry out their duties to the highest professional standards. Unfortunately, assaults on the police continue to happen. Ultimately, it is for the courts to decide on disposals. If the disposal is a restitution order, we would certainly support that.

David Ross: The courts can already impose compensation orders on offenders who have assaulted police officers; that has not impacted on the evidence that officers give in courts. I do not envisage that restitution orders will have any such impact.

It is a sad fact that the rate of assaults on police officers continues to rise. Between March 2011 and March 2012, the number rose by 20 per cent to 570. There are two former police officers on the committee and three officers on the panel. Sadly, I can say confidently that all of us have been assaulted at some stage in our careers, if not on several occasions.

The Convener: Schoolteachers and ambulance workers are assaulted, too. That is the problem.

David Ross: Absolutely. There is no resistance from us to extending the provision beyond the police service.

The Convener: I hear that—the other emergency services were mentioned. What happens in a criminal case in which a schoolteacher is assaulted?

Colin Keir: Or a transport worker.
The Convener: Indeed. A person could be assaulted in performing their job when they are driving a bus or working in a supermarket, for example. That is probably an issue. Could it be quite divisive if only the police are covered? Would it be counterproductive if you were seen as being special?

Chief Superintendent Suttie: We would welcome the inclusion of emergency workers and front-line staff. You are right: it is a matter of how we define the front line. Shopkeepers are essential front-line staff to some communities, in that they ensure that shops stay open. We do not want the bill to be divisive, but police officers, by the nature of what they do, are more likely to be assaulted; David Ross has provided statistics on that. The impact is that some might say that we would have better protection. We may anticipate that, and that is a wider issue, but we would support widening out the restitution orders to others.

John Finnie: I would like a bit of background information. Is it still the case that the Police Treatment Centres is entirely funded by subscriptions from officers, that it is not the service that is funded but the individual officers, and that the same applies to the benevolent welfare fund?

David Ross: There are subscriptions and donations from individuals. Police Treatment Centres is a registered charity.

The Convener: Okay. You now have that on the record.

Roderick Campbell: At the risk of going back to an issue that Graeme Pearson raised, can you help me with the issue of information having to be provided on decisions to proceed with or end criminal investigations and the reasons for that? How much of a cultural change from the existing practice will it be for you to have to qualify with the provisions under the bill?

Chief Superintendent Suttie: From a police perspective, that rightly takes things back to the investigation. I think that the bill talks about whether we are going to instigate criminal proceedings or end them, and about justifying them. I do not think that it should be too much of a problem. One of my frustrations as a divisional commander was that, when surveys came out, we were regularly found to be lacking on updating victims of crime. Training will come in. We need to change our culture and understand far better what it is about, and that something is taking people away from being complainers to being victims of crime, because they are victims of crime. Thankfully, crime is going down—I hope that that will continue—but we need a far better service to victims.

Chief Superintendent O’Connor: To build on that, communicating with victims and witnesses and keeping people informed are key to the service.

To build on something that David Ross said earlier, I have absolutely no doubt that there have been occasions in the past when we have not got it right; keeping people informed about what is happening and giving as much information as possible are critical. I go back to the point about training. An issue for new officers who are joining the service right through to the most senior managers in the service is that we need to go the extra mile to ensure that people are kept absolutely up to date on where their investigation is and at what point it will pass across to the Crown and the prosecutors and beyond. That may sound like basics in some quarters, but the service and much of the service delivery hinge on that.

The Convener: Should there be a case companion, which has been mooted to us, if people want that? Should there be someone who supports people and tells them about things? If so, when would the case companion kick in? Would it be when you come into a case and investigate, or when the Crown decides that the case is going to court? For most people, it will perhaps be the one and only time in their life when they are involved in the court process, and it can be overwhelming.

Chief Superintendent O’Connor: Being involved in a court case can be extremely daunting, as you know. For me, the answer depends on the nature and gravity of the offence and the circumstances of the crime.

I would entrench in officers’ minds that the case companion must be the officer who is dealing with the victims and witnesses. During the course of the investigation, and depending on the allegations that have been made, the officer may change and more experienced or specialist officers may be drawn into the investigation. However, right from the outset, officers need to adopt the attitude that they are there to support and encourage witnesses and victims through the process, which can be daunting.

Chief Superintendent Suttie: Others can help us with that. Victim Support Scotland can be good in helping us with that because it brings different skills and can approach cases from a different angle. It is perhaps incumbent on the police to get better at making referrals to support agencies—I see that as being a route to go down. I am not so comfortable with case companions, given issues about how they would be serviced and how they would get information.

The Convener: Of course, putting things in language that people understand is perhaps the most important thing.

Roderick Campbell: On victim support, I want to clarify in my own mind what kind of interaction,
if any, the police have with victim information and advice. Is dealing with VIA left to the Crown?

Chief Superintendent O’Connor: The VIA service is overseen and delivered by the Crown. There will be interaction between the police and the Crown in relation to VIA. From where I stand, I say that the VIA service has taken us forward significantly in supporting witnesses and victims. The actual interaction may be through local liaison groups in different parts of Scotland, but interaction does take place.

The Convener: I think that we have no other questions lurking in the woodpile. Do you have anything to add that we have not thought to ask about?

I see that Superintendent O’Connor has put his glasses on, so there is definitely something coming.

Chief Superintendent O’Connor: Yes—these are my Eric Morecambes.

We fully support the aims and objectives of the bill. As probably all of us have alluded to at various points in evidence, we need to assess the bill’s impact on the service, ensure that there is a commitment to its provisions across the service and manage public expectations. The measures in the bill are an opportunity, but there will be some risks. One of the big risks will be the information technology infrastructure and the ability to speak to other key agencies in providing witness and victim support. We need to be pragmatic and realistic, but the bill provides a solid foundation to build on.

David Ross: I support everything that David O’Connor has said. We fully support the aims and objectives of the bill, although we have some concerns about the practical implications. Most of those will not be known to us in detail in terms of their direct impact on day-to-day practice—

The Convener: Have you mentioned all those practical implications? Those were about IT and the ability to have someone of the same sex for interviews. Was there anything else?

David Ross: The ability to deliver gender-specified interviewers is an issue. Another issue is whether we have enough appropriately trained people to carry out the interviews in all areas of the country. I am confident that the training is adequate, but I am not as confident that we have enough people trained throughout the country.

The Convener: That will all be put to the cabinet secretary, who I have no doubt is listening.

Thank you very much. That ends our evidence session. As agreed, we move into private session, for which I will wait until the public gallery has cleared.
Victims and Witnesses (Scotland) Bill: Stage 1

10:01

The Convener: Item 2 is the final evidence session in our stage 1 inquiry on the Victims and Witnesses (Scotland) Bill.

I welcome the Cabinet Secretary for Justice, Kenny MacAskill; Graham Ackerman and Gary Cox, who are both from the Scottish Government’s criminal law and licensing division; and Craig McGuffie, who is a principal legal officer in the Scottish Government. We move straight to questions.

Alison McInnes (North East Scotland) (LD):
Good morning, cabinet secretary. I will explore some of the bill’s provisions for vulnerable witnesses. The extension of the special measures to other categories has generally been welcomed, but we have received quite conflicting evidence on the provisions that would allow a challenge to those special measures. Victim Support Scotland argued that allowing the challenge to special measures was its “greatest concern”, while the Faculty of Advocates, among others, said that the accused’s lawyer must be able to challenge their use. Does the bill strike the right balance between the victims and the accused?

The Cabinet Secretary for Justice (Kenny MacAskill):
Thank you for raising that important point. You are right to articulate the concerns that have been raised with the committee, and we have taken them on board. As a result of the European Union directive, we require to go in the direction that you outlined, but we are more than happy to discuss the matter with the Crown Office and Procurator Fiscal Service to ensure that we get the balance right. It is about achieving a balance. The points that have been raised cause us some concern, too, and we will liaise with the Crown on the matter.

Alison McInnes: Will you also liaise further with Victim Support Scotland?

Kenny MacAskill: Absolutely. I take that as read.

Alison McInnes: In what circumstances might objections to the standard special measures be lodged?

Kenny MacAskill: We think that they should not be lodged regularly, which is to some extent why the judiciary and the courts have to be involved. The issue is to get the right balance.

We might envisage a scenario in which there has been a gang fight and the accused is under the age of 16, but not significantly under that age,
and he—or, sadly, sometimes even she—might have known those who were involved. In such situations some variation might be deemed appropriate.

Alison McInnes: Do you envisage the mechanism being used in quite limited circumstances?

Kenny MacAskill: I tend to think so. The ethos of the bill is to provide protection, and I think that we should try to provide such protection. As the convener has said, we need to weigh in the scales of justice not only the rights of the victim but those of the accused. However, in the main we are here to provide protection and support for those who have to deal with these very stressful circumstances.

Alison McInnes: The representatives of victims and witnesses were at pains to stress in their evidence to us that they want to ensure that people are able to give their best evidence. They feel that the uncertainty that would arise from the possibility of an appeal would cause greater upset than is caused by the current system. Can you describe the timescale for an appeal and explain how an appeal would be processed?

Kenny MacAskill: I do not think that we can go into specific details, unless Graham Ackerman can help me out. Alison McInnes’s point is quite valid: that situation would create uncertainty. However, we have to balance the right of the victim with the right of the accused. Such challenges will arise. Similar matters are already being dealt with in the courts, and they are always accelerated. Indeed, that would be our general intention, so that there is some certainty and so that the case can be dealt with quickly—not simply for the sake of the accused, but for all those involved, including the Crown and the defence.

Graham Ackerman (Scottish Government): On specific timings, any party in the proceedings can lodge an objection notice no later than seven days after a vulnerable witness notice or application has been lodged. The court can allow later objections to be lodged if it considers that to be appropriate in the circumstances.

It is worth noting that the existing procedure in the Criminal Procedure (Scotland) Act 1995 allows the court to review special measures once proceedings have started. I know that that issue was a subject of discussion at a previous committee meeting.

Colin Keir (Edinburgh Western) (SNP): A number of questions have been raised about victims and witnesses having the ability to “participate effectively”, which is one of the principles in section 1(3). What is meant by that principle?

Kenny MacAskill: That is a high-level provision. I think that it relates to the EU directive. Clearly, we wish to engage with Victim Support Scotland, Scottish Women’s Aid and Rape Crisis Scotland, as well as, in other matters, with those who represent the accused, such as the Law Society of Scotland and the Faculty of Advocates. High-level discussions take place regularly between Government officials, other parts of the judicial system, the Crown and Police Scotland. I know from experience—committee members are probably aware of this—that that process filters down, with courts having user panels. From discussion with the clerk at Edinburgh, I know that the courts engage with those who have been, for example, the victims of domestic violence, so that they can work out in practical measures what the user experience—if I can put it that way—has been or should be.

Colin Keir: Victims of crime might have raised expectations about what is on offer, or what is possible, in terms of effective participation. They might think that they have a bigger part to play, on a personal level, than is actually the case.

Kenny MacAskill: The whole ethos of Scots law is that we take the victim as we find him. In the legislation, the directives and protocols are laid down to deal with matters as best we can. That is why there are clear expectations for the Crown and the Scottish Court Service; that is how it should be. Equally, we must remember that victims come in all shapes and sizes and have different needs. We need to have an element of flexibility. What is intended here is that we engage at a high level, so that as the terrain changes—as needs arise, or as problems are brought to our attention—all those involved, not just the Government but those in the SCS, the Crown and the police, are able and willing to engage with that, while allowing for an individual’s needs. That is what we hope to achieve.

John Finnie (Highlands and Islands) (Ind): We have received a letter in response to a matter that we raised with Police Scotland about the level of information in bail cases that is routinely provided in sheriff courts. Police Scotland’s letter states:

“police officers will highlight to the Procurator Fiscal any significant concerns they have that the quality of the evidence given by the victim or witness will be diminished by any fear or distress in connection with giving evidence at the trial or proceedings. In addition officers will also highlight the reaction of the victim or witness to the crime or to the accused and any personal characteristics exhibited by the victim or witness that might suggest vulnerability.”

That sounds very good, except that the letter goes on to say:

“In such cases it is not the role of the police to conduct a formal assessment of the victim”.

The letter makes reference to guidance provided by the Lord Advocate. Can you say whether that guidance will be reviewed? Will there be training? Whose responsibility is it to provide the formal assessment of the victim?

**Kenny MacAskill:** Obviously, the guidance from the Lord Advocate is a matter for the Lord Advocate. The police are quite right in saying that such information should be made available to the procurator fiscal, but clearly there are limitations on what individual officers are able to do, given their skills and resources. The general principles of the bill are that each body that is involved—whether that is Police Scotland, the Crown Office or the Scottish Court Service—should make an assessment of the individual witness and, where possible, try to meet the witness's needs and requirements.

I am happy to feed back the issue to the Crown Office, which I imagine will review those matters. Clearly, the Crown Office has its own procedures, but I think that it is almost certain that it will seek to vary its guidance once the legislation goes through. I am more than happy to get further information for the member on that.

**John Finnie:** Convener, may I move on to other matters?

**The Convener:** Yes, unless you are poaching someone else's question. We will find out.

**John Finnie:** Well, my clairvoyant skills are not with me this morning.

Cabinet secretary, is it your understanding that it would be permissible for a defence agent to challenge any aspect of proceedings at any time, regardless of the consequences?

**Kenny MacAskill:** I will defer to Graham Ackerman on that, but I would have thought that, probably, yes, other than for spurious challenges. We would rely on the good sense of the judiciary on that.

**Graham Ackerman:** In its provisions on objections to special measures, the bill states that objections can be raised about the particular circumstances of the case and about the special measure that has been granted or notified. The grounds for such objections are not stated, but the bill states that the defence—or any party to proceedings—must set out the grounds on which the objection is raised and why the special measure would be inappropriate in the circumstances. As the cabinet secretary said, it would be for the judiciary to decide whether there was merit in the objection.

**Kenny MacAskill:** Equally, I can give you an assurance that I will liaise with Sheriff Tom Welsh of the Judicial Institute for Scotland to ensure that these matters are brought to the judiciary's attention. I cannot think of a way that we could preclude such matters—as you say, we are not clairvoyant—but we rest on the good sense of the judiciary. The same applies to how a witness is cross-examined. As you know from experience, firm questioning sometimes needs to be allowed for justice to be done. Equally, where that would constitute clear harassment, we expect that the judiciary would act to rule out the manner in which that questioning was being done.

I can give you an assurance that we will liaise with the judicial studies people to ensure that the work that is outstanding will take into account the necessary knowledge and information that should be provided to judges and sheriffs.

**John Finnie:** At the risk of poaching further questions from other members—

**The Convener:** Well, we will find out. I am not clairvoyant, either.

**John Finnie:** On the issue of oral representations that victims and their families may make to the Parole Board further down the line, can you confirm what the Parole Board said to us about such representations being made available to the prisoner and being open to challenge?

**Graham Ackerman:** Yes, that is correct. That is not a massive departure from what happens at the moment. Written representations can be made to the Parole Board, and those written representations are included in the dossier that is sent to Parole Board members. The dossier is also made available to the prisoner, who in due course can make representations to the board.

In the case of oral representations, the victim would make such representations to a member of the Parole Board. Those would then be put into an agreed statement, which would also go into that dossier and the same procedure would be followed.

**The Convener:** We will now find out whether any of Graeme Pearson's questions have been poached.

**Graeme Pearson (South Scotland) (Lab):** The issues have been covered very well so far.

First, I have a supplementary question on the oral submissions. In what format would the oral representations be received? Would the Parole Board member go to the victim's home, or would there be an arrangement whereby the victim would need to go to the prison? How is it envisaged that that would work?

**Kenny MacAskill:** We have tried to be flexible on that. The original idea came from Margaret Curran in the previous parliamentary session—it has also been suggested that it might have come from Margaret Smith—which is to her credit. Given
that people wish to make representations, we have tried to avoid a scenario in which the victim would need to go to the prison or be subject to cross-examination by the prisoner and his agents. Unfortunately, in terms of the European convention on human rights and fairness, that is where we would have gone. We have discussed with the Parole Board the ways in which we can allow families to make those appropriate and vital representations without having to endure such things.

10:15

Some of the details will have to be worked out with the Parole Board. I cannot imagine that the representations would take place in a prison for any reason. We are happy to allow some of the issues, such as whether the representations are held in the victim’s home or in an office, to be worked out with regard to what is best for all parties, within reason.

There would have to be a balance with the need for formality so that the Parole Board can record the representations appropriately, but the driver for the bill is to allow victims’ families to make representations without going to the prison or being subjected to cross-examination.

Graham Ackerman: That is absolutely right, and we have discussed those matters with the Parole Board.

When the Parole Board considered the costs for the financial memorandum, it recognised that some travel would probably be involved for Parole Board members and that a neutral location would perhaps be chosen. The board’s concern is to make it easy for the victim and to ensure that—as the cabinet secretary said—they do not have to go to a prison or go through an overly formal process.

Graeme Pearson: First, the Scottish Prison Service—as it makes clear in its evidence to the committee—does not feel that it has the right environment or the necessary arrangements to cope with such oral representations. That should be borne in mind no matter what arrangements are made.

Secondly, a number of representations have been made—certainly in emails and letters to me—that suggest that the victim notification scheme is not particularly helpful. The witnesses, victims and families feel that they need to pursue information, chase after updates and so forth. The sudden shock of correspondence arriving on their doormat years later to indicate that there is a new phase in the case is very hurtful and takes them right back to the start of their terrible saga.

Thirdly, another concern that has been mentioned is that victims and witnesses do not know where the prisoner is and what their intentions might be, subject to decisions that are taken by the Parole Board. There is nothing in the bill that seems to address those issues. Do you intend to ensure that those sensibilities are fully considered and properly dealt with in policy?

Kenny MacAskill: Absolutely, and we recognise that there are difficulties. The VNS scheme is, in the main, very much welcomed, although there are difficulties and challenges that have been brought to me. Sometimes people have been released and that has caused a great shock, but the scheme has had to start from somewhere. There are people who are released as their cases pre-date the scheme, which causes distress, but that is not the scheme’s fault as there had to be a start date.

The Scottish Prison Service’s role is restricted in some areas, and matters must be dealt with through legislation and guidance under the Parole Board.

We are trying, through the bill, to deal with the issue that Margaret Curran correctly raised, as we undertook to do in the previous session of Parliament. We have to get the balance right. We could not go down the path of having an automatic right because that might result in the scenario that Graeme Pearson mentioned, in which the victim would have to go to the prison. That would be inappropriate, never mind the consequences thereafter.

Some aspects will have to be dealt with through bodies such as the Parole Board, but we intend that as much information as possible should be available. Most people have to be released at some point, and they have to have some rights in that regard, but we have to protect individuals, especially in cases in which there is a clear likelihood that people will run into each other.

Does Graham Ackerman have anything to add with regard to the Parole Board?

Graham Ackerman: No.

Graeme Pearson: There is a more substantive issue in which I have a particular interest. We have received powerful evidence from all the victims concerned to suggest that—as I described at a previous committee meeting—they feel like a parcel in the post. They are constantly being addressed and having to go over the various elements of the case, and they repeatedly have to give their name and background and the details of the crime. They are constantly telling people about it, and therefore constantly reliving the experience.

In the justice environment, as the cabinet secretary is aware, we have the police, the victim information and advice service, Victim Support Scotland, the Crown Office and Procurator Fiscal
Service, the Scottish Court Service and the defence agents, all of whom operate individually. No doubt they are all well meaning, but at the end of the process the victims and witnesses are left bruised and often deeply concerned at how they have been treated.

The idea of case companions has been mentioned. I am not suggesting that I would want case companions to be introduced at this stage. However, was it agreed that someone in the system should be seen as the key link with an individual so that other agencies would not need to go back to the victim constantly and take them through all the basic stuff yet again? The bill does not appear to address that issue, which seems to be a major concern for victims.

Kenny MacAskill: First, I state on record that we are introducing the legislation not simply because of the EU directive, but because we know that more needs to be done. We should recognise the considerable progress that has been made. The previous Lord Advocate, Dame Elish Angiolini, identified that issue—to her credit—even before I came into the Administration. However, we need to go further. The present Lord Advocate has, to his credit, identified that the process can be stressful and difficult not just for victims but for witnesses, which is why the bill addresses both those groups.

We have an adversarial system, and as a consequence certain things must be done. Victims have to endure certain elements because of the nature of how their evidence must be tested, and they are dealt with by police officers and the Crown Office because there are different roles as we need checks and balances. They have to have their evidence led in court if people plead not guilty, and that evidence has to be tested in cross-examination.

However, we believe that case companions as such are not necessary. We already have family liaison officers: the police do an outstanding job by identifying two officers to deal with those matters. The Crown Office also has systems by which it seeks to help victims, and organisations such as Victim Support Scotland, Rape Crisis Scotland and Scottish Women’s Aid are available to provide support.

We need to ensure that the individual victim gets the support that they need from the appropriate authority. To some extent, there will always be different people who are representing a particular agency because of data protection and other issues, but Graeme Pearson is correct that the concept of supporting individuals through the system is vital. The police have recognised that for a while, and are addressing the issue with family liaison officers. The Crown Office has recognised it, and the Scottish Court Service provides a walk-through for victims who are wondering where and how they will give their evidence.

All those things are in place, and the concept of a case companion therefore exists in practice, but our system enables the individual to choose which person they want. Equally, the organisations must recognise that they have a role to play and that, although they might have to progress their work in order to put the case before the court or lead evidence in court, they must bear in mind the rights of and the need to respect the victim.

Graeme Pearson: Victims and witnesses did not complain so much about the adversarial situation in court, although many of them found that quite harrowing. They were concerned about the handover between agencies, and the apparent perception by a new player that the victim or witness was unknown so they had to go through everything almost from day 1. They had to go through the whole process, answering questions such as, “Why are you here?”, “What are you complaining about?” and “Where do you live?”

There is an inability to carry through all the basic information that would ease the way for victims and witnesses. Even when they appear in court to give evidence, the person who meets them at the court does not seem to know who they are, what they are involved in or what arrangements have been made for them. They gave evidence to the committee on those issues, and it made a huge impact on us to listen to the concerns of folk who were already going through a very difficult experience on behalf of their families.

Kenny MacAskill: We can never rule anything out. I accept your point, but I would not want to cut across the current role of Victim Support Scotland, Scottish Women’s Aid and Rape Crisis Scotland. In my experience—and doubtless even more so in Mr Pearson’s experience—the police will refer to many of those organisations at the outset.

I would not want a scenario in which somebody was told, “You can’t see Mr X—we are sending you to Miss Y.” If it is felt that a new agency should be created, we would be happy to look at that to some extent. We hope to ensure—I say “hope”, because sometimes things fall through the cracks, not by design but by accident or because things do not work out—through the Crown, the police and the good work with family liaison officers that when people need the support of a case companion, that support can be provided by organisations such as Victim Support Scotland, Rape Crisis Scotland and Scottish Women’s Aid. Some such situations are case and crime specific. For example, the work that is done by Rape Crisis Scotland is outstanding, but it is deeply specialised. A case companion who was more generic, perhaps, might not be able to provide that level of care and support.
We rule nothing out. We would not wish to cut across the bows of the organisations that we have in Scotland. Our principal aim would be to help those organisations to do an even better job than they do already, rather than perhaps to create another agency when agencies already exist.

Graeme Pearson: Under section 3, on the disclosure of information about criminal proceedings, the bill requires the various agencies to supply information to designated people. When I asked the police whether they were in a position to supply that information to witnesses and victims in a timely manner, they indicated that they were not; their systems were not sufficiently subtle to offer that. I suspect that many of the other agencies involved are in a similar position.

How can that be dealt with immediately after the bill becomes an act, if it does?

Kenny MacAskill: We must ensure that we get an information technology system that enables us to have an appropriate exchange of information; some of the process will come down to doing that. Work is on-going: the bill is part of a making justice work programme that deals with a variety of matters, whether that is technology in courts or other aspects relating to police and crime. Technical difficulties exist that we must address. The bill is about principles and some practical matters. On administration, we will work with the police to ensure that their systems are appropriate, not just for dealing with victims but on all other aspects of justice that the police have to address.

Graeme Pearson: I did not see anything in the financial memorandum that might cover some of those additional costs—in terms of IT and so forth—for the various agencies. Was that aspect considered?

Kenny MacAskill: No, because the work that the police referred to me in relation to i6 information technology and other matters is getting done and progressed anyway. The work that is being done to allow the management of police information systems will, as a consequence, improve matters for victims, but it is being done to improve the system. Quite understandably, you have commented on that before. To some extent, therefore, although the costs are dealt with in other aspects of policing, they will have the benefit of improvement for victims.

Graeme Pearson: But i6 will not come soon.

Kenny MacAskill: We are on the case.

The Convener: Graeme Pearson is on the case as well—all over the place.

Before I move on to Sandra White, I am concerned by our use of the word “victim” throughout. At the end of the day, a person is only a victim because somebody has pled or because we have come to the end of a trial or an appeal. The committee has been talking about victims in the bill from the point of view of police involvement. Do you have any concerns that doing that impacts on the presumption of innocence until proven guilty beyond reasonable doubt, with the burden of proof on the Crown? That may not be an impact for you, but for the public there may be a perception that the person discussed is a victim, even though—as members have suggested—the “victim” might be somebody giving evidence against another gang leader. Under this bill, that person might be a victim.

Kenny MacAskill: We have to accept that, where somebody is the victim of a crime, they are a victim, whether they are a beacon of righteousness and truth—

The Convener: I will stop you right there. A person is not a victim of crime unless the crime has been proved against them. That is my problem with the definition in the bill that talks about victims pre-trial, at police stage, right through the process. In fact, there is a point of transition in a case where someone becomes a victim. For the Crown, a person might always be a victim, but they certainly are not so for the defence.

10:30

Kenny MacAskill: You could be a victim and there could be no case. Somebody could be assaulted and no perpetrator could ever be traced—no assaillant could be found. They would remain a victim and to some extent the same definition that we have is accepted in the criminal injuries compensation scheme. For example, with criminal injuries there does not have to be a court case. You have to be the victim of what is perceived to be a crime, whether or not that assaillant is ever identified and whether or not anything can be proven or taken to court. We hope, for justice’s sake, that that would happen, but people can be victims without matters ever going to court. You are the victim of a crime if your car is scraped or damaged—

The Convener: You are teaching your granny to suck eggs. That is not my point. My point is that this would also be applicable during a court process, when there is a party in the dock who is accused of a crime against another party, who is being referred to throughout the bill as “the victim”. That gives me concern about the language in the bill and I do not know why perhaps we could not have a definition in the bill about when a person is designated a victim and when they are not designated a victim.
Kenny MacAskill: That is for the judiciary to balance; we always have the presumption of innocence. The term “victim” is used in the bill in terms of the procedures. In terms of the leading evidence—in terms of evidence before the sheriff, before the sheriff and the jury or before the judge and the jury—doubtless the victim would be referred to by their own name unless anonymity was granted. The term is more for the systemic structure—for the existing bureaucracy—than for the language that would be used in the court. In my experience, the term “victim” is very rarely used within the precincts of the dock or indeed the witness box—you talk about the “individual”.

The Convener: The Faculty of Advocates argues that the alleged victim of a crime—which is what we are talking about in a court process—should be referred to as the “complainer” rather than as the “victim” both before and during a trial. Of course, at the end of a trial, they may or may not be described as the victim of a crime, depending on the outcome. Do you see why I and perhaps others on the committee have issues about the use of language which, as a practitioner yourself, you know is terribly important in legislation?

Kenny MacAskill: In 20 years’ practice, I do not remember somebody being referred to in a court trial as “the complainer”. They were always referred to as “Mr X” or “Miss Y” or “the person that you see seated over there”. Yes, language can be critical in terms of the definition in the bill but in the main, people should be dealt with respectfully. Also, it is in the best interests of those who are going through the process that we try to use language that is understandable. We have to have the term “complainer”—those of us at this meeting are aware of that term—but for a victim to be told that they are not the victim but the complainer might cause some consternation.

We can assure the Faculty of Advocates that the term “victim” in the bill is used in a broad sense, but it will vary on each of the specific matters. In terms of ensuring the balance between what is necessary in the scales of justice for the accused and for the victim, we can provide that. Equally, we have to have legal language, but I also encourage all those in the court system—those who are acting for the Crown or for the accused and indeed the judiciary—to use language wherever possible that is understandable to the man or woman in the street, such as the word “victim”.

The Convener: My last point on this issue is that you have undermined your argument because you talked about using language that people understand. If people hear that somebody is being referred to as the victim in a case, they understand that that person is a victim when in fact that person may not be a victim at all. The problem for me is that the language in the bill makes an assertion in simple language that a person in a court process has been the victim of a crime when they may not have been a victim. That is the issue.

Kenny MacAskill: It has gone through investigation. We have the presumption of innocence. These things are not brought in on a whim or a fancy. There is a case to argue, which is why it is before the court. There is a case that has to be proven beyond reasonable doubt, which is a high standard. A case is not brought because a police officer thinks that somebody might have done it or on the basis that the Crown wants to satisfy the police. It happens because there is a case to be faced. We have other ways of providing protection for the accused to ensure that there is a fair trial. The word “victim” is used sparingly in the court when evidence is being given. However, it is important that we maintain flexibility in its definition in statute and so on.

The Convener: Perhaps there should be a definition in the bill then.

Kenny MacAskill: We think that the word changes in use. Equally, I understand that the definition that we use is the same as that used in the criminal injuries compensation legislation.

The Convener: That is an entirely different matter.

John Lamont (Ettrick, Roxburgh and Berwickshire) (Con): I share your concerns, convener. The Law Society also expressed concerns, although it looked at it from a slightly different perspective. Its argument for having a definition was so that individuals knew whether the bill—or the act, when the bill is enacted—would apply to them. It has suggested some wording to define “victim”. I think that you are saying that you are not minded to accept its argument in favour of defining victim or indeed its suggested drafting.

Kenny MacAskill: I am happy to reflect on it. However, we have a definition of victim that is used generically throughout the legal system in Scotland, which is based on the Criminal Injuries Compensation Authority and is understandable to those using it. That suggestion has come from the Law Society and the Faculty of Advocates. Others in the system have no issues with the definition.

John Lamont: In the ordinary use of the language and the word “victim”, are there any victims who will not be caught by the provisions in the bill?

Kenny MacAskill: Only those who have been victims of crime and have not reported it to the police or who suffer in silence. We would implore them to report the crime. We are here to take the victim as we find them, not to be judgmental.
There are other processes in the judicial system to address that. It is not for us, in introducing legislation, to decide whether there are any contributory factors and so on. That is why we have a court system.

Jenny Marra (North East Scotland) (Lab): On that point, cabinet secretary, you said that the term “victim” was used throughout legislation in the criminal justice system. In fact, the Criminal Procedure (Scotland) Act 1995 uses the word “complainer”. You gave the example of criminal injuries. That is once a case has been brought, and guilt and a victim have been established. Would it not be more consistent to use the language in the 1995 act?

Kenny MacAskill: No, I do not believe so. A victim is a victim if a crime happens. It might be that no one saw your car being damaged. It might be that no one could trace the assailant who assaulted you. Just because a matter does not get to court does not mean that you are not a victim; you are a victim. Once we start using the term “complainer”, everything is dependent on being in that judicial system.

We would prefer that we recognise that there are victims who will have to give evidence in court. That is why, as Alison McInnes and others have touched on, there are ways in which we have to provide for them and deal with them differently. However, we must recognise that a victim of a crime is not simply somebody who is going to be giving evidence in a court of law. There are probably many more victims of crime who will not give evidence in a court of law, which is why the definition has to be wide.

The Convener: But section 1(1) of the bill says:

“That each person mentioned in subsection (2) must have regard to the principles mentioned in subsection (3) in carrying out functions conferred on the person by or under any enactment in so far as those functions relate to a person who is or appears to be a victim or witness in relation to a criminal investigation or criminal proceedings.”

That is the context.

Kenny MacAskill: If I phoned the police today to report that my car has been scratched or my wing mirror has been kicked off, a crime report will be recorded. I am a victim of crime. It does not mean that I will appear in court. It is possible that no one can identify who the accused is.

Graeme Pearson: Can I say something, convener?

The Convener: I have John Finnie waiting on this point. I am afraid that he has got there before you.

Graeme Pearson: He stole my question.

The Convener: We will see.

John Finnie: Cabinet secretary, we had a lot of representations from the children’s commissioner and Children 1st. Although I would not put words in their mouths, I think that they would be greatly concerned if children were being referred to as alleged witnesses. Would that be your understanding?

The Convener: It is “alleged victims”.

John Finnie: Alleged victims—I beg your pardon.

Kenny MacAskill: That is a fair point, and I agree with that.

Graeme Pearson: What I will say relates to some points that were made earlier. If someone reports a crime to the police and the police fill in the necessary form—or database, now—they are described as a complainant. The police officer taking the report would indicate that the complainant was John Smith, for instance. They would not be indicated as being the victim.

The Convener: I am grateful for that point. Sandra White has been patient. We have aired the matter, and there is clearly a dispute in the room as to whether we are content with the terms “victim” and “complainer”.

Is your point about something different, Sandra?

Sandra White (Glasgow Kelvin) (SNP): It is. I have found something different. I am awfully glad that I am not a lawyer, a policeman or an ex-police officer. I see myself as a layperson—a punter. We have spent about 10 minutes discussing the semantics of whether people are victims or complainers, and that says an awful lot about the people—

The Convener: The ex-lawyers are sitting guffawing. It is about more than semantics, I am afraid.

Sandra White: That says a lot about why we need a bill that clarifies things for people—we can decide at the end whether they are victims or complainers. It is for people to get justice and to understand the justice system.

I was going to ask what Graeme Pearson has asked about. I have spoken to a number of people, and things have moved on as regards contacting complainers or potential witnesses, and there has been no appetite from organisations such as Victim Support Scotland for another agency, because the experience that exists could be watered down. That has been borne out in the evidence that we have received.

In relation to victims, John Finnie raised a point about child witnesses, or whatever they might be called at the end of this process. Children 1st was rather concerned regarding a minor amendment to the current arrangements whereby more children
under 12 might have to go to court to give evidence—not forced to go, which would be the wrong word; that is semantics again. Can the cabinet secretary or others clarify that point? Do you agree with Children 1st, and do you recognise its concerns in that regard?

Kenny MacAskill: We are taking that point on board. You have correctly identified the change that is being made under the bill, which will not force child witnesses to appear in court, nor will it make significant changes to the current presumption, which we believe is sensible, that young witnesses should give evidence remotely. The bill provides that, in cases where a child witness has expressed a desire to give evidence in court—that is for them—that preference is heeded, unless there is some good reason why it would be inappropriate.

We believe that the provision will give children more choice, not less, and the measure was welcomed by the Commissioner for Children and Young People in Scotland. It is a matter of building on what we already have. If there is a clear desire on the part of the child, it should be adhered to, unless there is some good reason otherwise. The court has to have the overarching right to reflect on that, however.

Sandra White: Do all children under 12 really have the capacity to make up their minds? Are they advised or helped in some way to make up their mind whether they want to appear in court?

Kenny MacAskill: In my experience, we have moved on a long way from when I appeared in courts, when the method of dealing with a child witness was for the sheriff to sit in the sheriff clerk’s chair and take his wig and gown off. Tom Welsh and his predecessors at the Judicial Studies Committee moved on from that. Efforts have been made by the Scottish Court Service to ensure that any child understands the where, the what and the how, and that arrangements are in place to provide for them. The courts are now much better briefed about the understanding of a child and on how to decide whether the child should be able to give evidence.

Sandra White: I might come back later—but on a different issue.

10:45

Alison McInnes: I want to pursue this further because, as far as Children 1st is concerned, the issue is capacity and whether children understand what they are submitting themselves to when they say that they might want to be in court to give evidence instead of giving it remotely. Are you aware of any other jurisdictions where children under 12 give evidence directly in court?

Kenny MacAskill: I am not aware of any such comparisons, but my colleagues might be able to help me in that respect. I can say that the current presumption is that, in trials that concern certain offences, children under 12 will give evidence away from the court building, but what we are talking about is a minor amendment that seeks to place greater weight on the child’s views. For example, they might wish to give evidence in court to avoid being separated from a parent. Of course, in addition to the presumption that I mentioned, the judiciary has a role in making such assessments and being cognisant of the child.

Alison McInnes: Although I am sure that the provision is well intentioned, I seek some assurance that research, perhaps on the longer-term impact of appearing in court, was carried out before you chose this option. If there is no such research, will you be able to carry some out in the run-up to stage 2 to further inform the debate?

Kenny MacAskill: We are happy to provide the information that we have, but it is fair to say that this has not been done without its being discussed by my officials, the children’s commissioner and the children’s charities. The provision is based on the best evidence about appropriate methods that has been built up over many years from all those involved with children.

Alison McInnes: I do not have the Official Report with me, but my recollection is that Children 1st was surprised by this measure and felt that it had not been consulted on it. I would certainly be grateful if you could provide the information that you have.

Kenny MacAskill: We will do so.

Roderick Campbell (North East Fife) (SNP): Good morning, cabinet secretary. I have a number of slightly unrelated questions.

First, do you have any thoughts on evidence from police representatives—the Association of Scottish Police Superintendents and the Scottish Police Federation—and written evidence from the Faculty of Advocates that consideration be given to extending restitution orders to others in the emergency services, not just policemen?

Kenny MacAskill: We have not ruled that out. The overwhelming majority of those in the uniformed services who suffer assault tend to be police officers, but I am aware that dreadful incidents also happen to others.

The point is that the police already have an organisation to which they can go. I do not preclude considering this particular suggestion, but I do not want to create a system in which the administrative costs and burden of running it outweigh any benefit. After all, courts are also able to hand out compensation orders. I think that we...
should proceed with the police, who tend to comprise the majority of victims, who are already in a situation in which individuals can make a contribution and to whom we can provide treatment and restitution. I am happy to look at other issues in due course but I do not wish to burden certain organisations by establishing a system in which the running costs would outweigh the benefit to the individual who had suffered.

Roderick Campbell: Before I move on to my next question, I should refer members to my entry in the register of interests as a member of the Faculty of Advocates.

Do you have any views on the suggestion made by the Faculty of Advocates that, particularly with regard to the introduction of sexual history in section 275 applications, consideration be given to the participation of the victim—or the alleged victim or whatever they might be called—in that process and the possibility, I suppose, of that victim receiving legal advice?

Graham Ackerman: The issue has been raised both by the faculty and fairly recently by Rape Crisis Scotland. We are open to receiving further detail from them on the proposal; I certainly think that we need a bit more clarity about the role of legal representation in the process and whether it would, as you have suggested, be limited to those application hearings.

Roderick Campbell: I suspect so, but I do not want to speak for the Faculty of Advocates on that point.

Graham Ackerman: Quite.

Roderick Campbell: Has there been any academic review of the use of special measures to date and whether the best evidence in that respect has been given?

Graham Ackerman: No extensive research has been carried out on special measures in Scotland. A report published in 2008 covered the initial implementation phases—in other words, the year before and the two years after the introduction of the Vulnerable Witnesses (Scotland) Act 2004—and found that the act had raised awareness of vulnerability and had led to increased use of special measures to help vulnerable witnesses. However, the main point that it highlighted was a lack of data about the number of special measures being used and their effectiveness. Indeed, I think that is probably still a bit of an issue.

Roderick Campbell: Do you have any further comments, cabinet secretary, on the reasoning behind closed courts being used as a special measure and ruling out the accused’s right to be treated as vulnerable?

Kenny MacAskill: The court already has powers and rights to address the challenges that face those who are accused. The bill seeks to improve matters for victims and witnesses. If people have thoughts about changing the scales of justice or changing what we should be doing, I would be happy to consider them, but we already have methods for alleviating some issues for the accused. I think that the matter would best be considered separately.

Jenny Marra: I have two questions, one about the families of victims and one about witnesses.

Over the past few weeks, we have been aware from what we have read in the press and from what we have heard in the chamber of issues to do with witnesses coming to give scientific evidence. If there is a better understanding of witnesses giving scientific evidence among the jury, the judiciary and the prosecution and defence lawyers, justice is better served. A number of proposals have been made to improve the understanding of scientific evidence and the procedure for scientific witnesses in courts. Would the Scottish Government consider lodging an amendment to the bill to provide for the accreditation of scientific witnesses in courts?

Kenny MacAskill: Procedures are already available in courts to deal with any doubt or dubiety. I put on record my gratitude to the Lord President for taking a bold and appropriate step to clarify matters in that regard. Our position is that the legislative basis is already in place to ensure that we get the correct balance. I will be meeting the Lord President tomorrow, and we will doubtless be discussing the matter. The system already exists: we have procedures through which such matters can be tested if that is desired.

Jenny Marra: The feeling among the experts is that the current procedures are not sufficient to improve the understanding of scientific evidence in our courts. The English Law Commission has considered the matter recently, and the Scottish Law Commission might wish to consider it, too.

My specific question is about an accreditation process, which I do not think would have any resource or budgetary implication, but which would be a good measure in giving courts, prosecution and defence lawyers and the public confidence in the scientific evidence that they hear. Would the Government consider having a simple accreditation system for scientific witnesses under the bill?

Kenny MacAskill: If you want to specify who would accredit and on what basis, and who would staff the organisations that would be necessary to provide the accreditation, I would be more than happy to consider the proposal.

However, there are criminal procedures whereby, if there is any doubt or dubiety over a witness’s competence or capability, evidence in
that respect can be led. We already have that provision. I do not think that additional bureaucracy is necessary, although I am happy to take on board any thoughts that you may care to send me.

**Jenny Marra:** This is more of a pre-emptive suggestion. If the accreditation is there, we would hope that things would not reach the point that you are talking about in which procedures have to kick in, which takes up more of the court's time.

**Kenny MacAskill:** That is why sheriffs and judges often have to sit with lay advisers in the course of their inquiries. Judicial knowledge tends to be legal, not scientific. I am open to suggestions about how someone in the judicial system with a lifetime's training in law would be qualified to decide whether or not somebody was an expert in a scientific field in which the judge had no knowledge. Some organisation would have to deal with that.

Normally, the witness would be put to the test by going through the evidence of their qualifications and what they have done. That is how we deal with that under the current system. We can pre-empt such issues and deal with them under the existing procedural systems if there is any doubt or dubiety over the individual's competence.

**Jenny Marra:** You have hit the nail on the head: there is not sufficient understanding of scientific evidence among the judiciary. One of the proposals that I put to the First Minister was to have scientific advisers in the court. If you would be open to consider such a measure, that would be very welcome.

**Kenny MacAskill:** I am happy to consider the cost.

**The Convener:** Would that fall within the purposes of the bill? It is described as

"An Act of the Scottish Parliament to make provision for certain rights and support for victims and witnesses".

It could be argued that such measures would be a support, but I am not sure.

**Kenny MacAskill:** I will be seeing the Lord President in the course of our normal catch-up sessions and meetings. I am grateful for the steps that he has taken. I am happy to engage with the Lord President, and I am also due to engage with Professor Sue Black when she is back, and I have been in correspondence with her.

**Jenny Marra:** Thank you, cabinet secretary. To clarify, convener, I am not raising the matter spuriously—I have taken some legal advice and I believe that such measures may be competent under the bill. We can investigate it on that basis.

**The Convener:** I was just taking my own legal advice—it may or may not be within the purposes of the bill.

**Jenny Marra:** I turn to an issue concerning the families of victims. We heard evidence last week from families of people who died in road collisions and fatal accidents. A campaign group is seeking to have a right to get information from the police and the Crown Office enshrined in the law, which an amendment to the bill could cover.

We understood from the evidence that was presented last week that families have a right to such information under the current guidelines. In practice, however, they are not receiving it, and they are not being told that they have such a right. Would you consider giving comfort to families that want the information—not all families do—by enshrining in the bill a right to receive such information on request?

**Kenny MacAskill:** I put on record my tribute to Margaret Dekker and her colleagues in Scotland’s Campaign against Irresponsible Drivers, who have done a remarkable job in raising the issue and in pressing the Administration in which I serve and previous Administrations. I am grateful for that.

The Crown Office and Procurator Fiscal Service releases investigation documents to bereaved families who request them, unless criminal proceedings are on-going and could be prejudiced by the release of the documents. In those circumstances, release is delayed until the trial is concluded. You correctly point out that some families do not wish to receive such information.

We think that the balance is probably right, but we are happy to discuss with the Crown Office and Procurator Fiscal Service whether further measures can be taken. We do not believe that it is necessary to have a statutory right, as the Crown Office already releases documents. However, I am happy to discuss the matter with the Crown Office and to come back to the committee with its views.

**Jenny Marra:** I will press you on the matter. We discovered in evidence last week that the Crown Office does not in fact release the papers, and not enough information goes to families to tell them that they can request the information. The right that could be enshrined in law would give them that protection and allow them to make such a request. Would you consider that for those families?

**Kenny MacAskill:** I am happy to engage with the Crown Office to ensure that the appropriate level of information is given whenever possible. There are things that the Crown Office correctly disseminates. Sometimes the information and the evidence include distressing photographs of the deceased. We would not wish to send somebody
such pictures in a large pile of documents in accordance with their statutory right, and I do not think that that is envisaged.

As I say, I am happy to engage with the Crown Office, although I do not believe that a statutory right is necessary. I have no doubt that there may be further improvements that the Crown Office can and should make, and I am happy to liaise with it and then return to the committee. We have to take into account the rights of the accused, so that a trial is not prejudiced, but we should use common sense: before information goes out, it should perhaps be screened to ensure that it is not horrific and distressing for families.

**John Lamont**: I believe that the victim surcharge will apply to all offenders who are given a fine. Most of the victims groups from which we have heard evidence have welcomed the measure, which is a positive move. Who will be responsible for collecting the surcharge? How will the cabinet secretary ensure that the existing backlog of uncollected fines is not just added to?

**11:00**

**Kenny MacAskill**: I know that, sometimes in Scotland, people prefer the glass half empty to half full, but the court fine collection rate is 86 per cent—the committee has had assurances from Cliff Binning on that. We expect that the matter will be dealt with by the sheriff court service and that the service will do an outstanding job in collecting the surcharge, as it seeks to do in collecting fines. There are people who are reluctant to pay, but with good support and willingness and with further information now becoming available—I pay tribute to the Department for Work and Pensions on that—I think that matters will get better.

**John Lamont**: How much is owed in uncollected fines?

**Kenny MacAskill**: I do not have that information before me. However, as I said, we are at an 86 per cent collection rate.

**John Lamont**: That was not quite what I asked about.

My next question relates to automatic early release. The bill provides for information to be given to victims and gives them a role to an extent in the sentencing of offenders. One of the great frustrations that I hear from a lot of people—from my constituents—is about the practice of automatic early release. I am conscious that the Scottish National Party has had two election campaigns in which it has made a commitment to abolish automatic early release. Do you see the bill as a missed opportunity?

**The Convener**: Automatic early release is not covered in the bill, but never mind.

**John Lamont**: That is my point. Do you see the bill as a missed opportunity to abolish automatic early release?

**Kenny MacAskill**: No. The bill is a welcome opportunity to improve matters for victims and witnesses. I am aware of the long-standing issues relating to automatic unconditional early release, which was of course brought in by a Conservative Administration long before we even came to power.

We will look to work through those issues as and when appropriate in criminal justice bills. We prefer to keep our focus in the bill on those—too many people—who for too long were perhaps viewed without the respect that they were entitled to until, as I mentioned earlier, Elish Angiolini and Frank Mulholland drove matters forward, and they are the victims and witnesses of crime.

**John Lamont**: To clarify what you just said, is that a commitment to bring forward abolition of automatic early release in other criminal justice bills that are coming before Parliament in this session?

**Kenny MacAskill**: We have a manifesto commitment. We are also building on Henry McLeish’s advice that automatic early release could not be addressed until prison numbers were reduced. However, we are considering matters, and we always look to ensure that Scotland is as safe as possible. We have inherited the Conservative Administration’s policy of automatic early release from many years ago, but we are happy to discuss the issue. I have just signed off a letter to your party leader about it and I am happy to engage in such questions.

**The Convener**: I have no doubt that the party leader will share the information with Mr Lamont.

To return to the bill, section 5 is an important section that deals with certain sexual offences that are specified in section 5(5) and with the victim’s right to specify the gender of an interviewer, which is, as my old history teacher used to say, a good idea. However, that will not always be practicable. Section 5(4) states:

“The investigating officer need not comply ... if ... it would not be reasonably practicable to do so.”

In rural areas and so on, how possible will it be to put that right into practice, given the logistics in certain crimes of taking evidence early? How possible will it be to have an officer of the appropriate gender—or even culture—present to take evidence?

**Kenny MacAskill**: Obviously, that is fundamentally a police matter. However, one of the significant benefits of the single service is that we can move towards having a national rape investigation unit, which is long overdue. We have
a specialist crime division that has divisional areas, so the expertise is there. There is a consciousness that it is not just desirable but, quite often, necessary for a victim to be able to specify the gender of an interviewer.

There may be instances when that is not possible, but I think that they will be few and far between, because the police are working on the basis of ensuring that they have ready access. The first person on the spot may be a police officer of a different gender from that specified by the victim, but the single service, the establishment of a national rape investigation unit and the specialist crime division will allow the police to provide at a very early juncture the appropriate person with the relevant skills and the gender of choice.

The Convener: What you say sounds reasonable. Section 5 relates to interviews, and Rape Crisis Scotland, for example, wants it to be extended to forensic examinations. Would you be prepared to do that?

Kenny MacAskill: I am happy to look at that. Some such matters are more than one step removed. I cannot direct the police in such investigations—only the Lord Advocate can do so—and, simply going on my discussions with the police, I believe that police surgeons, who are one step removed from the police, would be involved in such procedures. However, we have seen a culture change and the recognition that questions such as who examines and investigates a person and how they do so matter.

I can certainly give you an assurance on behalf of Police Scotland and police surgeons that we will ensure that, whenever possible, we all work together on providing such support. After all, the process is traumatic, and anything that can be done to reduce distress will be important.

The Convener: So it might be possible to amend section 5 to extend its provisions beyond interviews to examinations.

Kenny MacAskill: I am happy to look at the suggestion, but the question is whether we need to amend the bill or whether we simply need to ensure that, with proper guidance, such practices happen. No one whom I am aware of who deals with such matters in the police, the Procurator Fiscal Service or the health service will want to compound the agony of the individuals involved. We want to ensure that there is flexibility to deal with any dreadful incident that might arise and that, no matter the shift pattern, the locality, the geographical element or whatever, people immediately know that they should ask the victim, “What can we do for you?” If the victim says that they want a doctor of a specific gender, we should seek to provide that doctor.

The Convener: Does Sandra White have a supplementary?

Sandra White: I am going to ask about compensation orders, convener. I tried to get in earlier when Rod Campbell mentioned the issue, but the questioning moved on.

Scottish Women’s Aid has expressed concern about compensation orders. It suggested that victims should have a right to refuse such orders and that, if a compensation order was granted in a rape trial, the victim might then suffer distress from being in contact with the accused. Can there be flexibility to ensure that victims’ views are taken on board before a compensation order is granted?

Kenny MacAskill: Absolutely. If someone did not want a compensation order because it might rub salt in the wound, it should not be granted. We will ensure that appropriate guidance is given and action taken.

Sandra White: Thank you.

The Convener: I hate saying, “As there are no more questions, we will move on quickly,” because as soon as I do so someone puts their hand up.

As there are no more questions, we will move on quickly. I thank the witnesses for their attendance at what has been a comprehensive question-and-answer session.
Health and Sport Committee

3rd Report, 2013 (Session 4)

Report to the Justice Committee on the Victims and Witnesses (Scotland) Bill

Published by the Scottish Parliament on 27 May 2013
# Remit and membership

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Health and Sport Committee

Remit and membership

Remit:

To consider and report on health policy, the NHS in Scotland, anti poverty measures, equalities, sport and other matters falling within the responsibility of the Cabinet Secretary for Health, Wellbeing and Cities Strategy apart from those covered by the remit of the Economy, Energy and Tourism Committee.

Membership:

Bob Doris (Deputy Convener)
Richard Lyle (from 16 May 2013)
Mark McDonald (to 14 May 2013)
Aileen McLeod
Duncan McNeil (Convener)
Nanette Milne
Gil Paterson
Dr Richard Simpson
Drew Smith
David Torrance

Committee Clerking Team:

Clerk to the Committee
Eugene Windsor

Senior Assistant Clerk
Rodger Evans

Committee Assistant
Bryan McConachie
Health and Sport Committee

3rd Report, 2013 (Session 4)

Report to the Justice Committee on the Victims and Witnesses (Scotland) Bill

The Committee reports to the Justice Committee as follows—

SUMMARY OF RECOMMENDATIONS

1. The Committee recommends that the Bill – accepting that it has scrutinised only that part concerning the provisions to establish the National Confidential Forum – proceeds to Stage 2, but draws the attention of the Justice Committee, the Parliament and the Scottish Government to the following points.

2. Justice matters are not within the remit of this Committee but it heard that a lack of remedies, other than acknowledgement, could impact detrimentally on survivors’ health and wellbeing. It draws this to the attention of the Justice Committee.

3. The expectations of survivors must be approached with sensitivity and while just being heard and acknowledged might be right for some, others will have wider needs. Accordingly, the Committee welcomes the Scottish Government’s participation in the InterAction process, consultation on the time-bar on civil litigation, work undertaken on restorative justice, and emphasis on the Survivor Strategy. It is imperative that this momentum is maintained if the best interests of survivors are to be served.

4. The Committee suggests that links between the NCF and care providers, in the context of policy learning and prevention of the same mistakes being made in care settings now, merit further consideration by the Scottish Government.

5. The Committee welcomes that the Scottish Government has commissioned CELCIS to carry out a piece of work on the suitability of an acknowledgment forum for people who might have experienced abuse in foster care.

6. Many witnesses told the Committee foster care was a serious omission from the coverage of the Forum; among them Kathleen Marshall – the Time
To Be Heard report, of which she was co-author, having recommended that foster care be included in the admissibility criteria. It was suggested that foster care was the setting from which we have “most to learn” and one in which children had “suffered just as much”.

7. Given the evidence from a series of witnesses – CELCIS, ICSSS, the Care Inspectorate, Who Cares? Scotland, Aberlour Child Care Trust, Barnardo's Scotland, and the Care Leavers Association included – the Committee recommends that further consideration be given to including foster care in the criteria.

8. How participation works in practice, regarding demand to access the Forum from those individuals who do not meet the criteria and the supports to which they are then signposted, is something the Committee would expect the Scottish Government to monitor, especially in the early days of the NCF’s operation.

9. As the Scottish Government recognises, access to counselling, therapeutic support, mental health services and advocacy will be essential if survivors are to see the benefits in their health and wellbeing from participation in the Forum. The appropriate services must be available for all who take part in the NCF – whether they are older people, young adults, disabled, living outside Scotland, with mental health issues, or whatever their life circumstances.

10. The extent of the knowledge and expertise required of mental health professionals to engage with survivors was a question that arose during the evidence. It would be welcome if the Scottish Government could elaborate on any plans to further develop or “up-skill” the people who will be working closely in support of survivors, whether those taking part in the NCF or otherwise.

11. The Committee acknowledges the frustrations of people who have heard promises of support in the past and feel as if they have been passing through “revolving doors” since leaving care.

12. The person-centred approach being crucial; the need for survivors to have a choice of supports; a one-stop approach to counselling and advocacy; the case for long-term support – up to two years; the merits of the Towards Healing model (in Ireland); the importance of a continuous relationship support-wise throughout the NCF process; exploration of the links between NCF and care providers, and a Church of Scotland call for guidance regarding the responsibilities of the latter – all are issues drawn from the evidence and set out here for the further consideration of the Scottish Government and others.

13. Given that support is so crucial for the health and wellbeing of those who suffered childhood abuse, the Committee seeks also an undertaking from the Scottish Government that it will ensure the availability of services for those who choose to participate in the Forum – so as to be supported
before, during and after taking part – and more widely still to all adult survivors who may require psychological or counselling support.

14. On balance, the Committee considers the confidentiality aspects as set out in the Bill to be sensible, proportionate and intended to weigh the emotional and therapeutic benefits of participation with the public interest and safety, should information come to light that indicates an immediate or current risk.

15. The Committee believes the parameters of confidentiality ought to be set out as clearly as possible. Nobody should be expected to take part in the Forum without a proper understanding of the process, including its benefits, outcomes and consequences.

16. The NCF must have operational autonomy if it is to perform its role effectively and with credibility, especially in the eyes of the survivor community. The memorandum of understanding will be vital in ensuring the Forum can carry out its core work as it sees fit while benefitting from the infrastructure, governance and expertise of the Mental Welfare Commission.

17. The Committee welcomes the assurance that those survivors who come forward to participate in the Forum can do so with the clear understanding that they are taking part in the NCF as opposed to a sub-committee hosted by the MWC.

18. Survivors who come forward to participate will expect to recognise their testimony in the reports of the NCF, and the Committee suggests that the coding of testimony as practised in the Irish model – the Ryan report as highlighted by the SHRC – could be explored.

19. The Committee heard that, in addition to the personal and, it is to be hoped, therapeutic value of taking part in the Forum, survivors were often motivated by a desire to contribute to the improvement of the care system for the next generation; the big question being how to shape a system that could properly fulfil the role of corporate parent and provide children in care with the love, nurture and support often absent from their lives.

20. Expectations for the NCF are high. It is the understanding of the Committee that the collecting of personal and historical data, the recording of testimony, and the identification of patterns and trends will be brought together by the Forum and used to inform (via the reporting mechanism) policy and practice, to build a permanent record of life in care, and to enhance public awareness.

21. The Committee welcomes what is envisaged but seeks further detail on how it will work, in particular the influencing of policy and practice (beyond an outline of the reporting process already provided in the Bill and accompanying documents).
INTRODUCTION

Procedure

22. The Victims and Witnesses (Scotland) Bill ("the Bill") was introduced on 6 February 2013. The Bill is accompanied by Explanatory Notes (SP Bill 23–EN), which include a Financial Memorandum, and a Policy Memorandum (SP Bill 23–PM).

23. Michael Matheson MSP, the Minister for Public Health ("the Minister"), is the Minister with responsibility for that part of the Bill concerning the National Confidential Forum ("the Forum" or "the NCF").

24. The Health and Sport Committee ("the Committee") was designated as a secondary committee for the Bill at Stage 1, reporting to the Justice Committee, which in turn will report to the Parliament.

Purpose of the Bill

25. The part of the Bill which the Health and Sport Committee was asked to scrutinise would, if passed, establish the NCF. As stated in the Policy Memorandum—

“The principal policy objective of this part of the Bill is to offer adults placed in institutional care as children acknowledgement of their experience, including abuse and neglect, through the creation of the National Confidential Forum.”

26. The main section of the Bill with regard to the NCF is Section 26, the provisions of which include—

- establishing the Forum (as part of the Mental Welfare Commission);
- setting out the general functions;
- enabling it to produce reports on its work and any recommendations (but not naming participants or institutions);
- outlining the provision of information about sources of assistance and advice;
- conferring protection from defamation to the members and staff of the Forum and participants.

27. Another key section is Schedule 1A – Part 3 – Eligibility to participate in the National Confidential Forum, paragraph 7(2) of which "provides that any person aged 18 or over, who was placed in an establishment providing institutional care, for any length of time and who is no longer in that care, may apply to participate in the Forum."
Scottish Government consultation

28. The Scottish Government’s consultation document on the NCF\(^3\) was issued on 23 July 2012 and the consultation period closed on 12 October 2012. Additionally, events were held in four different locations during August and September 2012 to encourage a more informal input.

29. Individual and smaller group sessions, in Dundee, Glasgow, Oban, Dunoon and Greenock, were also offered to survivors of abuse.

30. Responses were said to “demonstrate the general support which exists for the creation of the NCF and the positive value placed on acknowledgement in contributing to the health and wellbeing of people placed in institutional care as children.”\(^4\)

Policy context

31. In its *Programme for Government 2012-13*, the Scottish Government stated that the creation of the National Confidential Forum was “a central plank of the Government’s Survivor Scotland Strategy which seeks to improve the health and wellbeing of all survivors of abuse in childhood.”\(^5\)

32. Some of the more recent developments and milestones informing the Bill have included—

- A number of inquiries into abuse in specific institutions have taken place during the last two decades, including children’s homes in Edinburgh (1999), Fife (2002) and Ayrshire (2009);

- In 2004, an apology was offered by the then First Minister to those people subjected to abuse and neglect as children in care;

- The launch in 2005 of *SurvivorScotland: a National Strategy for Survivors of Childhood Abuse*;

- Publication in 2007 of the *Historic Abuse Systematic Review* report by Tom Shaw;

- In 2008, Ministers announced the scoping of a Scottish Truth and Reconciliation Forum, subsequently retitled an Acknowledgement and Accountability Forum;

- The announcement by the Scottish Government in 2009 that a pilot confidentiality forum known as Time To Be Heard (“TTBH”) would be established;

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\(^4\) SP Bill 23 – PM

\(^5\) [http://www.scotland.gov.uk/About/Performance/programme-for-government/2012-13/victims-witnesses-bill](http://www.scotland.gov.uk/About/Performance/programme-for-government/2012-13/victims-witnesses-bill)
The Scottish Human Rights Commission’s *A human rights framework for the design and implementation of the proposed “Acknowledgement and Accountability Forum” and other remedies for historic child abuse in Scotland* (“the SHRC Framework”) was published in early 2010;

- In 2010, TTBH was set up and heard from 98 former residents of Quarriers;
- In Care Survivors Service Scotland was instigated by the Scottish Government in 2010;
- *Time To Be Heard: A Pilot Forum (An Independent Report by Tom Shaw, commissioned by the Scottish Government)* was published in 2011;
- Based on the experience of TTBH, the Scottish Government announced, in 2011, its intention to set up a National Confidential Forum.

33. Jack McConnell, making that apology to adult survivors in 2004, told the Parliament—

“I offer a sincere and full apology on behalf of the people of Scotland to those who were subject to such abuse and neglect and who did not receive the level of love, care and support that they deserved, and who have coped with that burden all their lives…

“From today, I hope they can continue to move forward in their lives, certain in the knowledge that we in the Parliament, on behalf of the people of Scotland, recognise that they were wronged and that we will do more to support them in the future than we have ever done in the past.”

34. Looking at the action taken in other jurisdictions, the Scottish Government studied the treatment of adult survivors in Canada, Australia and New Zealand, as well as in Wales and the Republic of Ireland.

35. The Policy Memorandum summarises developments closer to home as—

- In Ireland, between 2001 and 2010, a Confidential Committee was part of the Commission to Inquire into Child Abuse in Ireland;
- The UK Government has no dedicated policy for adult survivors, though two inquiries are underway into alleged abuse in care homes in North Wales in the 1970s and 1980s;
- An Acknowledgement Forum will be part of the Northern Ireland Inquiry into historical institutional childhood abuse.

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7 SP Bill 23 – PM
36. Stories of child abuse, institutional and otherwise, have been high on the UK news agenda; and, in terms of public awareness of the issue, Operation Yewtree and Operation Pallial have received extensive coverage.

Committee consideration

37. The Committee puts on the record its thanks to those who provided evidence to its inquiry into that part of the Bill pertaining to the NCF. Members wish to highlight in particular their appreciation of the contributions from those adult survivors who took part, whether in person or by writing, and for whom the subject of the Bill must carry a powerful emotional resonance.

38. The Committee issued a call for written evidence on 20 February 2013, with a closing date of 9 March 2013. A total of 27 written submissions was received initially in response to the call for evidence, with three late submissions and six supplementary submissions.

39. The Committee’s call for written views sought responses to the following themes—

- The functions and powers of the NCF (as set out in the Bill);
- Status of the NCF – housed as a sub-committee of the Mental Welfare Commission – and its independence;
- Support for participants before, during and after their input;
- Any other aspects of the NCF.

40. The Committee agreed a programme of oral evidence sessions comprising six panels spread over four committee meetings and involving a total of 31 witnesses.

41. Extracts from the minutes of all meetings at which the Bill was considered are attached at Annexe A. Where written submissions were made in support of oral evidence, they are reproduced, together with the extracts from the Official Report of each of the relevant meetings, at Annexe B. All other written submissions are included at Annexe C.

Reports from other committees

42. The Finance Committee notified the Health and Sport Committee on 10 April 2013 that it did not intend to publish a report on the Financial Memorandum of the Bill.

43. The provisions within the Bill for making subordinate legislation were considered by the Subordinate Legislation Committee at its meetings on 26 February and 19 March 2013. Its report to the Health and Sport Committee is attached at Annexe E. That report is discussed in detail later in this report.

8 SP Bill 23 – PM
Background

A National Confidential Forum

44. That part of the Bill relevant to the NCF provides a framework within which it is intended the Forum will operate. Its functions, described in the Policy Memorandum as “new and distinct”, are—

- To receive and listen, in confidence, to adults who were in care and to offer acknowledgement of their experiences;
- To contribute to the prevention of the future abuse of children in institutional care, via proposals to inform policy and practice;
- To contribute to a permanent record of life in care, enhancing public understanding;
- To signpost support, advocacy, advice and information services to participants and their families.9

45. In its scrutiny of the Bill, the Committee has chosen to focus on—

- Functions of the Forum;
- Eligibility criteria for participants;
- Provision of support;
- Issues around confidentiality;
- The status of the NCF (particularly its “operational autonomy”);
- How it reports testimony and other aspects of its work.

46. The following section of the report, the mainstay of the evidence heard by the Committee, addresses the six headings above.

47. It is, however, worth stating that the justice aspect of the discussion around the NCF posed a difficulty for the Committee. On the one hand, the focus of this Committee and its remit must, by definition, be that of health and wellbeing; on the other, a number of witnesses suggested that the absence of an accountability element could itself, for survivors, prove detrimental to their health and wellbeing.

48. Therefore, while the Committee acknowledges that justice matters are outwith its remit, the report does not ignore such points when they are made by witnesses and it is judged that a reasonable link to health matters can be made.

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9 SP Bill 23 — PM
Functions

Non-judgemental acknowledgement

49. The Scottish Government states in its Policy Memorandum that—

“...the NCF adds much to existing remedies, services and responses to persons placed in care as children, including those who have experienced abuse. It does not duplicate any current provision and is, in fact, unique in providing the opportunity of non-judgemental acknowledgement and belief.”\(^\text{10}\)

50. In its consultation document, National Confidential Forum – A Consultation on the creation of a Forum for Adult Survivors of Childhood Abuse in Residential Care, the Scottish Government also said—

“The Forum will be designed to give adults who spent time in residential care as children the opportunity to describe their experience in residential care. The results of the Pilot suggest that this can contribute to their health and wellbeing particularly when the participants are treated with great care and courtesy and have the support they need.”\(^\text{11}\)

The element of accountability

51. The absence of a justice dimension in the functions of the NCF was a major point of discussion for many witnesses.

52. David Whelan of Former Boys And Girls Abused (“FBGA”) told the Committee—

“Our position is that there is a role for a National Confidential Forum, but the proposed forum’s mandate and remit do not go far enough. There will be no remedies, no redress and no effective investigations or inquiries under the model.”\(^\text{12}\)

53. He added that “although the proposed forum has the acknowledgement aspect, the element of accountability is missing.”\(^\text{13}\)

54. Harry Aitken, a former chairman of INCAS, said in a written submission—

“...as a prelude to TTBH in 2008, the Scottish Government conducted a consultation on the basis of “Acknowledgment and Accountability”. The removal of the principle of accountability from the remit of the TTBH Pilot Forum was done without any discussion with survivors, who perceived its removal as hurtful, disappointing and wholly unsatisfactory.”\(^\text{14}\)

55. Helen Holland, a co-petitioner, with Chris Daly, of public petition PE1351, “Time for all to be heard”, said—

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\(^{10}\) SP Bill 23 – PM
\(^{11}\) Scottish Government. National Confidential Forum – A consultation for Adult Survivors of Childhood Abuse in Residential Care.
\(^{14}\) Harry Aitken. Written submission to the Health and Sport Committee.
“...it is regrettable that, 11 years on, we are still talking about the issue, given that a number of survivors have already died, having seen no justice whatsoever. We are talking about child abuse, which is a crime. It is not a health issue, it is a justice issue.”\(^\text{15}\)

**We are still children of the state**

56. Helen Holland expressed concern that the NCF would be a model that “fails”\(^\text{16}\) if people who might have suffered years of abuse, resulting in “major issues with trust”\(^\text{17}\), were expected to benefit from relaying their experience to people they had never met before, for just a few hours—

“That is why I feel that the confidential forum is flawed. As a stand-alone entity, it will not meet the survivors’ needs. If it incorporates the other things – that is, the human rights framework – I think that there is work that can be done there”\(^\text{18}\).

57. Having been campaigning for change for 12 years, Ms Holland made a plea for urgency—

“A number of survivors have died since the start of the process...The state let them down as children. We were children of the state and we are still children of the state, although we are adults now. The people who died were denied the right to have their voice heard. Please do not deny people that right any longer.”\(^\text{19}\)

58. David Whelan said—

“The basis of Time To Be Heard was that people were not entitled to a remedy. Tom Shaw came out clearly and said that it would not result in compensation, reparation, redress or remedy. However, a number of survivors had such expectations.”\(^\text{20}\)

59. He stated the case for a wider approach than the one currently set out in the Bill—

“NCF is a therapeutic model. We believe that there should be a number of elements to the process, with perhaps the NCF sitting at the top and then an investigation and research element. The investigation element should have certain statutory powers, if required, to get people to come to it and to get access to documents, but it should be inquisitorial rather than adversarial.”\(^\text{21}\)

60. Mr Whelan added—

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“Some people might just want to go to the NCF and say, “I have told my story. I have got my support. I am happy.” Some people might want additional elements.”

Where there is knowledge, there must be responsibility

61. Helen Holland suggested that, in the past, when people had not known the full facts about, or extent of, the abuse of children in care, it was possible not to have to take responsibility. That, she said, was no longer the case—

“…where there is knowledge, people need to take on board the responsibility, and that is what we are asking people to do. We are asking the Government to take on board responsibility for the whole issue. If it takes on board only the confidential forum, it will deny the survivors who do not want to go into the therapeutic system the right to justice.”

62. She told the Committee—

“It is just as unhealthy for someone who wants justice to be denied the right to it as it is for someone who wants a therapeutic process to be denied that…Rather than acting in a justifiable way towards one person and in an unjustifiable way towards another, the Government needs to bring the whole lot together.”

The wider strategy

63. Chris Daly, co-petitioner with Helen Holland, said—

“…the NCF is only one remedy. It may be therapeutic and cathartic for some, but the SHRC framework covers all the remedies that have been discussed throughout the years…Although the NCF will be helpful for some, it is important to look at the bigger picture.”

64. That bigger picture was a theme picked up by other witnesses. Jennifer Davidson of Centre for Excellence for Looked After Children in Scotland (“CELCIS”) was asked to what extent the NCF would meet the needs and wishes of survivors—

“…a portion of those needs may well be met by the National Confidential Forum, which is based on Time To Be Heard, but we also need to look at the wider strategy for all the needs of survivors. I suggest that what is proposed is perhaps a narrow way of meeting their needs.”

65. Kathleen Marshall, TTBH Commissioner and former Children’s Commissioner said she that, for some, the lack of a justice component was “an emotive issue”—

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“Many of the people who came to speak to us just wanted to tell their experience; at that point, that was what was important to them. However, that is not to say that, later on, they will not be able to engage with the wider agenda for something more.”

66. Alan Miller provided some background on the SHRC Framework—

“…the Scottish Government asked the Scottish Human Rights Commission some years ago to present a framework for both acknowledgement and accountability. We looked at international human rights law, domestic human rights law and international best practice, and presented a comprehensive framework in which various initiatives could be taken to deal with both acknowledgement and accountability.”

67. He outlined a piece of work called the InterAction, a process being led by SHRC and CELCIS and involving survivors, the Scottish Government, local authorities, religious orders and others, the purpose of which was to explore how justice could be accessed by survivors.

68. Professor Miller said—

“It is also exploring the state’s obligation to carry out proper investigations to learn the lessons, to ensure that there can be no repetition and to ensure that those who should be held to account for serious abuse will be.”

69. He also told the Committee—

“We see the National Confidential Forum as meeting some of the need for satisfaction of some survivors. Possibly – I hope that this will happen – it will have some therapeutic element, although others might contest that. However, it is part of a broader package that needs to be taken forward.”

70. CELCIS’s Moyra Hawthorn spoke of her involvement in the evaluation of TTBH, and being a consultant for the InterAction—

“Feedback from participants was that Time To Be Heard included some very positive components, but people also said that they were seeking a wider range of remedies. Therefore, it is difficult to see the National Confidential Forum in isolation without looking at other remedies such as reparation and access to records. We really need to see the National Confidential Forum within that bigger picture.”

There are people who need the Forum now

71. Kathleen Marshall stated—

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“...while I acknowledge the need for a wider strategy, I would not like the National Confidential Forum to be held up for that...there are people who need the Forum now.”

72. In a written submission to the Committee, the Chief Executive of Sacro reported, based on experience of providing a restorative justice service as part of TTBH, that—

“...survivors of abuse who worked with us frequently described feelings of invisibility, of not having their experiences recognised...By recording and acting as a depository for these stories and histories, the proposed Forum would be an important source of validation for survivors.”

Source of the tension
73. Jennifer Davison of CELCIS talked about the “tension” that was informing views regarding the Forum—

“...it would have made much more sense if a wider strategy had been laid out from the very beginning. We would have been much more comfortable with moving the idea of the Forum if other remedies for justice were also available. Ultimately, the source of the tension is the lack of justice remedies.”

74. SHRC’s Duncan Wilson suggested that the link between the confidential and investigative elements was crucial, contrasting the NCF approach with the one taken in Northern Ireland—

“That is where the anomaly in our process is at its sharpest. Few, if any, equivalent processes around the world have focused solely on a confidential committee without additional elements, such as addressing the limitations legislation on civil litigation...or having an investigations or inquiry model and/or other options such as a reparation fund.”

75. He added that Scotland had not taken some of the other measures that had been used in other countries, notably the inquiry and investigation model that was currently being set up in Northern Ireland or a crime commission such as is being established in Australia.”

76. His colleague, Professor Miller, warned against taking an approach that was too narrow or rigid in what it could offer survivors—

“The system must be adapted so that individual survivors can choose whether they want criminal proceedings to be initiated, whether they want simply a confidential forum in which that does not take place or whether they

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34 Sacro. Written submission to the Health and Sport Committee, V&W012.
want reparation, an apology or civil litigation. The system must be person-centred; it should not be the other way round.”

77. The individual, he suggested, should be able to choose what was best for their needs, concluding that was the tension “in having only one door and not a series of doors from which the survivor can choose in the knowledge of what is on the other side of each door.”

Giving people a voice

78. Alan McCloskey gave the Victim Support Scotland perspective—

“A Forum gives people a voice. For some it will be seen as empowering — that is hugely significant — but there will be others who want to come into the Forum to have their say and it might not be enough for them; there might be something missing, they will feel that they have had their say — but then what? What is next? That is the gap.”

79. Similarly, Gerry Wells of Quarriers told the Committee that while Time To Be Heard and the National Confidential Forum were about acknowledgement, Quarriers recognised that, for many, that did “not go far enough in addressing the trauma of their abuse.”

80. He recommended other care providers should “engage with the process” and remarked that it was “not one to be afraid of.” Richard Crosse of CrossReach/Church of Scotland also highlighted that link but pointed out that perhaps one thing that was missing in the structure as it was presented in the Bill was “the link between the National Confidential Forum and the care providers.”

A range of outcomes

81. Mr Crosse also talked about “a range of outcomes” that were not just about being heard or acknowledged—

“Some survivors might require professional counselling…Others might seek reassurance that the person whom they reported as having harmed them is not in a position to harm others today, and others still might want an investigation into their concerns or referral to the police, if a criminal matter was reported.”

82. He went on to say that while CrossReach/Church of Scotland supported the setting up of the National Confidential Forum, it believed that the links between the Forum and the care providers needed to be further developed “so that survivors feel that their wider range of needs is met.”

83. One view, he suggested, was paramount—

“Survivors will judge the process, the Bill, the Act, and the National Confidential Forum on the personal outcomes for them. Just being heard and acknowledged might be exactly right for some, but others will have needs that must be met, probably by care providers, support groups and others.”

84. In Care Abuse Services (“INCAS”) stated, in written evidence, its agreement with the argument that there was a “deficiency” in thinking behind the NCF and how it could link to care providers.

**The needs of all survivors**

85. Barnardo’s Scotland had participated in the first InterAction meeting and found it a positive experience. Richard Meade told the Committee—

“It is important that we look at that group, its work and the action plan that it is looking to produce as a good way forward, so that all survivors’ needs – not just the needs of the survivors who would be helped by the NCF as it is currently proposed – are met as part of the programme.”

86. Zachari Duncalf of the Care Leavers Association was concerned for the mental health of survivors if access to justice were seen to be side-lined—

“Without redress or access to justice...people have been re-traumatised and the process has affected many of the survivors who have fought long and hard to access those areas. There needs to be clarity about what the National Confidential Forum is and what it is not, what can be offered and what is not being offered”.

87. Who Cares? Scotland took a sanguine view of what the future might hold for the Forum. Duncan Dunlop said—

“We need to look at the Forum as a way of giving a voice to people who have been through our care system....helping them to gain closure. However, this work is also about preventing young people who go through the system in future from going through the same experiences and being scarred as individuals. Over time, the Forum may evolve, grow and develop from primarily being there for the older generation”.

88. Ms Duncalf spoke about the years of campaigning by survivors and the need to get things right from the beginning with the NCF—

“...we must have access to services, to outlets for redress and to all sorts of different things including justice...it must be done well so that it does not
become another element of the re-traumatisation that may happen as part of the process."  

89. The Minister for Public Health, referring to the health benefits of the Forum, said—

“This aspect of the National Confidential Forum stems back to work arising from Tom Shaw’s review of issues to do with abuse in care settings. That highlighted that acknowledgement is a valuable therapeutic tool, and there have been calls for a number of years for a means to be established by which acknowledgement could be provided and recognised, as it has a health and wellbeing benefit.”

90. On the question of a justice component, he told the Committee—

“My colleagues on the justice side have been looking at issues such as the time bar. The consultation on that closed just last month...Although we are talking about a health response to particular issues to do with abuse in care settings, that does not mean that that is it.”

91. The Minister also referred to the InterAction—

“The National Confidential Forum allows us to move on with the health aspect of that. I have no doubt that some of the things that will come from the InterAction will have a justice focus. They can be addressed at that particular time, but that does not preclude our being able to move on with the creation of an acknowledgement Forum.”

92. The Committee notes that the evaluation of the Time To Be Heard pilot indicated the therapeutic value of an acknowledgement forum in giving people the opportunity to be heard, believed and perhaps even to attain a sense of validation in a safe, confidential and non-judgemental setting.

93. It recognises too that, for a number of those from whom it received evidence, the remit of the National Confidential Forum does not go far enough and, amongst those, there is a widespread desire to see the SHRC Framework fully implemented.

94. Justice matters clearly lie outwith the remit of this Committee. However, the Committee received evidence that a lack of remedies, other than acknowledgement, could impact detrimentally on survivors’ health and wellbeing. The Committee therefore draws this point to the attention of the Justice Committee.

95. The Committee notes the “tension” described by several witnesses in their assessment of the NCF, something attributed to the lack of a justice dimension. The Committee also notes the Scottish Human Rights
Commission’s statement it could not identify another initiative in the world that dealt only with acknowledgement and no other elements of remedy, whether inquiry-related, civil-law focused or reparation-based.

96. Clearly, the expectations of survivors must be approached with sensitivity and, although the Committee acknowledges that the NCF can match the requirements of some survivors, it also heard repeated calls for a broader approach that would meet the needs and aspirations of all.

97. The Committee considers that the Scottish Government’s participation in the InterAction process, consultation on the time-bar on civil litigation, work that has been undertaken on restorative justice, and emphasis on the Survivor Strategy are all welcome developments. It is imperative, however, that this momentum is maintained and that all the policy strands be pulled together if the best interests of survivors are to be served.

98. As was highlighted by some witnesses, the links between the NCF and care providers is a matter that has not really been addressed. The Committee suggests this could merit further consideration by the Scottish Government. Evidently, such a connection will not always be helpful, welcome or appropriate - particularly in relation to individual survivors and their vulnerability - but the wider point, in the context of policy learning and prevention of the same mistakes being made in current care settings, could usefully be explored.

Eligibility to participate

A balanced view of life in care

99. The principal criterion to participate in the NCF is the experience of having been placed in institutional care as a child. This covers all forms of institutional care, including secure units and long-stay hospitals. The Bill provides that everyone placed in institutional care is eligible, whether they were placed in that care by the state or via a private arrangement.

100. The Policy Memorandum also states—

“The experiences which the NCF will hear will be all experiences of being in institutional care as a child, including abuse. The scope of the NCF is purposefully not restricted to hearing about experiences of abuse because this would not give a balanced view of life in care.”

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101. On the age criteria, it sets out—

“The Bill provides that the NCF will be open to any person over 18 years of age who has had an experience of being in institutional care as a child. There is no time restriction either in relation to the length of time spent in care or the start and end date of that period of time in care (with the exception that it is not current).”

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55 SP Bill 23 – PM.
56 SP Bill 23 – PM.
102. The discussion of eligibility included age but also related to other types of care, including, most notably, foster care and kinship care.

As a matter of principle
103. Kathleen Marshall, TTBC Commissioner, addressed both the age and care aspects—

“There are specific issues for people under 18 because there should be other routes for them to use to address issues about when they were looked after...We recommended that the Forum should be widely available to people who were in institutional care, education institutions and foster care.”

104. She added—

“Foster care is an area where we have the most to learn. In areas such as education and health institutions, abuse issues have not arisen to the degree that they have arisen in places such as children’s residential homes. As a matter of principle, I would want the Forum to be available as widely as possible.”

105. Ms Marshall suggested that, even if the Bill proceeded without including foster care, it might subsequently be amended by order to add that category because people had “suffered just as much” in that setting. She told the Committee—

“It is sometimes very difficult to tell the difference between a large foster home and a small children’s home because of the number of people there and the training and skill of the foster carers. That division therefore becomes artificial.”

106. SHRC’s Duncan Wilson argued that any form of remedy should be as open and inclusive as possible and that any exclusion ought to be “carefully justified.” He added—

“...the Commission has proposed that consideration be given to opening up the process to others who were indirectly affected – surviving relatives, for example...close relatives of people who are no longer alive – who might have taken their own lives.”

Different settings, shared experiences
107. Moyra Hawthorn of CELCIS explained that, in comparison to other countries, more children experienced foster care in the post-war years, but being “boarded out” was not always a happy experience. CELCIS, she said, had received funding from the Scottish Government to undertake a scoping study on inclusion of those formerly in foster care.

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108. She added—

“We know from some historical accounts in the media going back to the 1940s that children in foster care were abused as well…I would strongly recommend that those who were in foster care be included.”

109. The Care Inspectorate’s Karen Anderson took a similar position—

“…we have noticed a rising trend regarding placements in foster care since 1987, with a decrease in placements in residential care. The important thing in all this is that, although the setting might be different, experiences may be shared. The Care Inspectorate welcomes the proposal to include foster care.”

110. Another witness in favour of including foster care was Duncan Dunlop of Who Cares? Scotland—

“Young people will often have had more than one care placement and do not fit neatly into categories of residential care, foster care, kinship care or looked after at home – they cross the spectrum of those care placements in their care journey or care history, so it could be of use to consider the whole care spectrum.”

111. Graham Bell of Kibble Education Care Centre (“Kibble”) suggested that in dealing with certain foster care issues, “we might well require a different approach from that taken in relation to residential institutions.”

112. In a written submission, Aberlour Child Care Trust argued that the definition of “institutional care” should be expanded to include all forms of residential care experienced by children including secure care, respite care and hospital care. Aberlour believed that it was “essential that experiences of foster care be included in the remit of the Forum.”

A major flaw

113. Zachari Duncalf gave the Care Leavers Association perspective on the exclusion of foster care from the Forum, describing it as “a major flaw that must be addressed.” Asked about the case for extending coverage to kinship care, she said—

“Anybody, including adoptive parents, who has been formally assessed and has been recommended to be a carer for young people should be under scrutiny for that. People who have experienced abuse in those settings, where the individuals concerned had been assessed as being appropriate..."
adults for their care, should be allowed to come forward and to use the National Confidential Forum.”

114. Asked about kinship care, Duncan Wilson pointed to state failure to prevent abuse or protect children from risk, arguing that such failure was “clearly stronger where the state has taken responsibility for placing someone in care.”

115. Tam Baillie, the Children’s Commissioner, echoed the point, arguing that it was important to include all placements that were “in some way engineered by or the responsibility of the state through either state provision or regulatory bodies.”

116. Kathleen Marshall expanded on this point—

“...in the Quarriers pilot the children had not all been placed in care by the state – some had been placed by the families – so sometimes that division can be artificial...There are also issues about private foster care, where children have been placed with people who are not related to them, and foster care where the state’s duty is more at a distance and supervisory in nature, rather than the state actually placing those children.”

117. She again underlined the importance of the legislation being “flexible enough” for other categories to be added.

118. Interestingly, in the realm of public information – by which of course the expectations of survivors may be informed – the Committee received copies of a SurvivorScotland leaflet that included foster care placements and kinship care in its definition of “in care”.

Children in the here and now

119. On the age criterion, Mr Baillie suggested—

“Wherever the line is drawn, there are going to be difficulties. If, as I hope will happen, the average age of young people in care increases to beyond 18, the National Confidential Forum will have to take that into account. Children or young people in care should have access whether the line is drawn at 16 or 18.”

120. He added—

“Saville has been mentioned, and that experience shows us that children do not have the confidence to raise issues and share information...One of the benefits of this discussion should be that we focus on children in the here

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73 SurvivorScotland. *Childhood sexual abuse: Information for survivors, their families and friends*.
and now. I do not suggest that we expand the Forum to cover all age groups, but the principles of it stand.‖

121. Karen Anderson referred to the Care Inspectorate’s written submission asking that the age range be examined. She told the Committee that if the eligibility threshold was to stay at 18, there was a need to “ensure that mechanisms are put in place for individuals between the ages of 16 and 18 so that they have the opportunity to seek support and raise issues about historical abuse.”

122. Tam Baillie clarified that he was not suggesting that the National Confidential Forum should cover all ages. However, he argued that there was a need to look at the Forum’s principles and find ways of “creating confidential space for children who are currently in abusive or traumatising situations.”

123. Duncan Dunlop suggested, on the basis of proposals on voting and other issues, that 16 was “a totally acceptable threshold”. He also put the likely demand from younger people to take part in the Forum into context—

“...They seemed to feel fine talking about leaving care, but it was very difficult for them to address why they had gone into care. That relates to the question of re-traumatisation that was brought up; how to open up to young people the process of addressing the past. As an advocacy organisation, we do not expect many young people to take up that opportunity in the immediate aftermath of leaving the care system.”

Danger of saying we don’t want to hear your voice

124. A broad view of participation was proffered by Victim Support Scotland. Alan McCloskey said allowing people to have their say was the most important thing—

“The commissioners should be given the openness to include people and to listen to what people have to say, regardless of whether they fit the criteria exactly. If we make the process too rigid, we are in danger of saying to somebody, “We don’t want to hear your voice.”

125. Lorna Patterson of In Care Survivors Service Scotland (“ICSSS) said—

“As the Bill stands, a person who is not 18 will not be able to participate in the Forum. However, if they require other support and the trigger for their coming forward was a wish to address other issues, I am sure that the Forum will signpost to an organisation such as the ICSSS.”

126. The suggestion of flexibility was also one made by Jean Urquhart of the Scottish Catholic Safeguarding Service, who feared that young people “with a valuable story to tell” might be missed. She suggested that “it would be good to

have a caveat in exceptional circumstances so that a younger person could be
given the opportunity”. 81

127. Barnardo’s declared the issue to be a complicated one, Richard Meade
telling the Committee—

“…after all, these people might still be in care…and if the age limit were to be
lowered we would need to be careful that adequate, appropriate and proper
support and services were available to the children in question.” 82

128. On the age question, the Minister for Public Health said—

“Part of our work involved looking at the experience in other jurisdictions.
Ireland and Northern Ireland, which are ahead of us on this, set up an age
limit of 18. In both cases, there was no request for anyone under the age of
18 to participate in any inquiry or commission.” 83

129. He went on—

“The focus of the National Confidential Forum is on adult survivors, and 18
was seen as an appropriate limit. Other jurisdictions have gone for a specific
period of time in which an individual had to be in care in order to give
evidence to or participate in a forum. We have chosen not to do that.” 84

The Minister told the Committee that there was a range of other mechanisms
that could be utilised “to pursue issues relating to the management of care of
those who are younger than 18.” 85 He added that if an individual approached
the National Confidential Forum, which, whether or not they were under 18,
was not the appropriate setting for their issues, he would “expect them to be
guided to the most appropriate avenue of support.” 86

130. Pressed on the matter, the Minister stated—

“It will be important to decide whether the Forum is the most appropriate
setting for a 16-year old… I am prepared to consider the issue but we have to
be careful about the evidence base and how the Forum would fit with other
services.” 87

131. Jean Maclellan of the Scottish Government told the Committee—

“…there are many opportunities within the existing system for care leavers at
the 16 and 17-year old stage to have their voices heard. That is part of what

our work on historical abuse aims to do: we aim to learn from the past to inform the present and the future."88

132. Asked about the exclusion of foster and kinship care, the Minister told the Committee—

“If we further widened the approach to include foster care and kinship care, it would then be difficult to explain why we should not include other non-institutional care settings in which abuse may have taken place.”89

133. He added—

“…the acknowledgement forum should be very much focused on historical abuse that took place in institutional settings. To expand the definition could make it more difficult for the Forum to take forward that work. There is also the question whether the National Confidential Forum would be the most appropriate forum for such issues.”90

134. The Minister said that the Scottish Government had commissioned research to examine whether the NCF model would be suitable for those who had experienced abuse in foster care.91 A pragmatic approach, he said, was expected—

“It is not the case that the Forum is banned from having anything to do with foster care as such…I expect the Forum to be pragmatic If, in the course of giving evidence, someone who was in an institutional setting highlighted something that happened during a period of foster care, I would expect the Forum to deal with that”.92

135. The Committee recognises that the focus of the NCF is on historic abuse and the right of adult survivors to be heard. It also appreciates the need for a cut-off to be applied at a specific age and that the Scottish Government gave consideration to ages 16, 18 and 21.

136. The Committee is pleased to hear from the Minister that under-18s approaching the NCF would be signposted to appropriate support services.

137. It is also welcome that the Scottish Government has commissioned CELCIS to carry out a piece of work on the suitability of an acknowledgment forum for people who might have experienced abuse in foster care. The Committee was pleased to hear the Minister’s expectation that a pragmatic approach would be taken by the NCF should foster care be broached by participants in the Forum.

138. The Committee understands that, in relation to kinship care, a cautious approach may be appropriate given the potential legal complexity, the

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departure from policy envisaged, and the shift that the inclusion of kinship care might bring about to the parameters of the NCF’s work.

139. In regard to foster care, however, it was striking how many witnesses told the Committee that they considered this to be a serious omission. Among them was Kathleen Marshall – the TTBH report of which she was a co-author having recommended that foster care be covered. The former Children’s Commissioner suggested that foster care was the setting from which we have “most to learn” and one in which children had “suffered just as much”.

140. Being “boarded out” had not always been a happy experience, the Committee was told, and the Care Inspectorate had seen “a rising trend” with placements in foster care in recent decades, with a corresponding decline in residential placements. Children could be in different settings, it was said, and share the same experience.

141. The Committee notes the argument put by the current Children’s Commissioner, that the Forum should encompass all settings into which children were placed by the state, whether directly or more circuitous means.

142. Given the evidence from a series of witnesses – among them a TTBH Commissioner, CELCIS, ICSSS, the Care Inspectorate, Who Cares? Scotland, Aberlour Child Care Trust, Barnardo’s Scotland, and the Care Leavers Association – the Committee recommends that further consideration be given to including foster care in the eligibility criteria for participation in the NCF.

143. How participation works in practice, regarding demand to access the Forum from those individuals who do not meet the criteria and the supports to which they are then signposted, is something the Committee would expect the Scottish Government to monitor, particularly so in the early days of the NCF’s operation.

Support

To signpost services

144. The Scottish Government’s consultation 2012 had noted that the results of the pilot had suggested that participation in the Forum could contribute to participants’ health and wellbeing particularly when the participants were “treated with great care and courtesy” and had the support they needed.”

145. In this regard, the Bill’s Policy Memorandum sets out the functions of the NCF, including “...to signpost services to participants and their families which can offer support, advocacy, advice and information.”

146. The written submission from the SHRC set out several areas of support that were included in the SHRC Framework—

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94 SP Bill 23 – PM.
• Access to relevant information (for example, files relating to the survivor’s care);

• Psychological support or advocacy;

• State obligation to protect the physical and mental health of participants and NCF staff.  

147. Discussion of the support for participants covered many aspects including funding, longevity, capacity, accessibility, trust, and choice.

Before, during and after
148. David Whelan of FBGA said—

“…people need to have the proper support before, during and after the process. That support is crucial for any [confidential forum] model and will need to be in place.”  

149. Petitioner Chris Daly told the Committee—

“Survivors are suffering now. They have had issues accessing mental health services in Scotland and many survivors are unhelpfully diagnosed with personality disorder. That labelling cancels out the treatment of other conditions that have been diagnosed such as post-traumatic stress disorder, anxiety disorder or depression.”  

150. He spoke positively about the approach in the Republic of Ireland, where survivors of institutional abuse can access money from a body called Towards Healing (funded by the Irish Government, the Roman Catholic Church and other care institutions) with which they can make their choice of specialist trauma therapy—

“They have the choice of where they want to go and that is not time limited. If a person accessed a psychologist through the National Health Service in Scotland, the sessions would be limited to between eight and 12 sessions. In Ireland, the fund for survivors is not time limited”.  

151. Mr Daly highlighted the danger of survivors being re-traumatised if they went through the NCF process without the support they need—

“Survivors have been making this point for years to various committees, including the Public Petitions Committee, which Helen Holland and I were very involved with from 2002 to 2004, when the then First Minister, Jack McConnell, apologised for the abuse in institutions. We have been telling the

95 Scottish Human Rights Commission. Written submission to the Health and Sport Committee, V&W006.

\textbf{An element of euphoria}

152. Helen Holland said—

“When someone first speaks about abuse, there is initially an element of euphoria that they have managed to do so, and they feel better about the whole thing. However, as time goes on, the depression starts to come back, and they begin to question whether they did the right thing by speaking about it. A number of people go back to their doctor and say, “I’m not coping – I went along to the Forum and spoke about what had happened to me, and now I can’t sleep at night,” or they have issues with food or depression.”\footnote{Scottish Parliament Health and Sport Committee. \textit{Official Report, 26 March 2013}, Col 3557.}

153. She was sceptical about the degree of support that could be offered by the NCF—

“If somebody comes forward to speak about what happened to them, they do it with the expectation that there will be something at the end of it…You may argue that it will be possible to direct that person to counselling services, for example. However, survivors have been going round revolving doors for years – probably since they came out of care.”\footnote{Scottish Parliament Health and Sport Committee. \textit{Official Report, 26 March 2013}, Col 3558.}

\textbf{Not handed from professional to professional}

154. David Whelan was asked about support before participating in the Forum. He said—

“The question is how we empower and enable people to take up their rights in the context of the model that we are talking about. The ICSSS could be expanded – I understand that it provides advocacy…FBGA would like an independent, impartial group to provide advocacy as part of the process, so that anyone could go to it for advice, help and support, perhaps through a helpline.”\footnote{Scottish Parliament Health and Sport Committee. \textit{Official Report, 26 March 2013}, Col 3560.}

155. Helen Holland recommended a gradual approach at the beginning—

“…so that a person is allowed to build up a relationship with the person who will be there to represent them…People cannot talk about issues of abuse with a complete stranger…A lot of people carry the shame of being in care.”\footnote{Scottish Parliament Health and Sport Committee. \textit{Official Report, 26 March 2013}, Col 3561.}

156. Of the TTBH Pilot, Gerry Wells of Quarriers told the Committee that there were moving stories from people in their 80s who had talked, “almost for the first
time, about experiences that they had when they were 10, which they had carried with them for such a long time.”\textsuperscript{104}

157. Zachari Duncalf told the Committee—

“...many older care leavers are isolated. They have not told partners, children or friends that they have ever been in care, let alone that they have experienced abuse. They might not have access to services, and some of those who have accessed services have found those experiences to be negative.”\textsuperscript{105}

158. Helen Holland similarly pointed out that a lot of adult survivors had not told even their families about that aspect of their lives—

“They will need long-term support. It is not a case of someone saying, “I’ll come along on the day and hold your hand while you talk about what happened to you.” There needs to be much more support than that.”\textsuperscript{106}

159. Lorna Patterson of ICSSS talked about “that initial relationship” and offering counselling and a degree of advocacy “as a one-stop shop” so that one person could take the participant through the whole process. She noted that was “an option, as well as putting more emphasis on setting the expectations of what can happen before, during and after the process.”\textsuperscript{107}

160. Continuity of support was also encouraged by Who Cares? Scotland’s Duncan Dunlop—

“...whether they are elderly or young they will need a continuous relationship and support before, during and after the process of giving evidence. Such people should not be handed from professional to professional.”\textsuperscript{108}

161. David Whelan said that a number of the participants in TTBH lived outside of Scotland, in North America, Europe and Hong Kong, and that their ability to access services was also something that should be considered.\textsuperscript{109}

A matter of trust
162. Trust was vitally important to survivors, as Alan McCloskey of Victim Support Scotland explained—

“When somebody experienced trauma in residential care, it was in a place that, as a child, they believed they could trust. We are asking people to go back into a Forum and saying, “Trust us.””\textsuperscript{110}

163. Joan Johnson of Health in Mind said—
“For people who were looked after and in care many decades ago, their coping mechanisms will potentially be dismantled by this process...the support that those people need, wherever it comes from, will need to last for a longer period in order to help them to rebuild the structures that enable them to rebuild their lives”.  

164. She also suggested that the option of peer support be explored, given levels of empathy and credibility that professionals would find difficult to offer.

165. Lorna Patterson talked about counselling and advocacy running in parallel, as was the approach with the Irish organisation, Towards Healing. She also outlined how advocacy might cover things such as help with access to records and putting people in touch with other health professionals, organisations, housing advisers etc. She said that a lot had "resulted from those people finding a voice through the consultation process."  

166. In terms of the duration of support, Helen Holland told the Committee—

“I think that support services will need to be in place for people for at least a year afterwards. That might sound totally way out there, but any trauma therapist will confirm that that is not an exaggeration.”

167. Lorna Patterson reported that ICSSS was still working with people who had participated in the Time To Be Heard Pilot, took the view that in relation to long-term trauma, “two years is a more reasonable option.”

A spring in their step

168. Also from the TTBH perspective, Kathleen Marshall echoed the importance of on-going support—

“Our experience was that people went out of the Forum with a spring in their step, which was amazing. I am sure that for most people, the beneficial effects of that would continue, but those who have been through the pilot will be a valuable source of information on the kind, extent and length of support that should continue to be provided.”

169. She added that the survivor “should be able to choose” and that this was “an important aspect.”

170. Choice was also paramount for Helen Holland—

“They should not simply be told, “This is the support that is available to you and that is what you must use.” People need to be empowered to make the decision for themselves as to where they go for that support.”

171. The needs of the participant were the most important thing, said Alan McCloskey—

"Whatever happens must be centred on the person...People will otherwise feel that they are being put through a process – that things will be taken from them....They have to feel that they are in control of the process."\(^\text{118}\)

172. Richard Crosse of CrossReach/Church of Scotland suggested seeking survivors’ views and tailoring services to meet their needs accordingly.\(^\text{119}\)

173. Moyra Hawthorn of CELCIS also supported the person-centred approach, suggesting that there is a need for on-going support for survivors, but “it should be support of their choice, provided at the time of their choice.”\(^\text{120}\)

**Clear briefing**

174. Moyra Hawthorn also suggested that participants should receive clear briefing about the nature of the NCF; two of the people she had interviewed having told her they had misunderstood the term “confidential” and assumed it meant they should keep their attendance at the Forum secret.\(^\text{121}\)

175. Chris Daly told the Committee that poor literacy was a problem for a lot of survivors and that the language used in official papers could be complex and confusing. Advocacy support could help people understand the paperwork. TTBH had produced an easy-read leaflet and he suggested the NCF do the same.\(^\text{122}\)

176. The Mental Welfare Commission’s Donald Lyons argued that speech and language assistance and therapy should be available to ensure maximum participation. Dr Lyons stated that his organisation was “very keen to give people with a learning disability enough support and information to allow them to participate.”\(^\text{123}\)

177. Chris Daly was clear, from his and Helen Holland’s experience of 12 years, that promises of support must be delivered—

“…we have continually been promised that the support will be put in place, but we, who are so close to the issue, have not been given support throughout that time...The survivors might be left feeling just as raw – and possibly even more traumatised by the experience – if they do not get the emotional support that they need.”\(^\text{124}\)

178. From SurvivorScotland, Linda Watters said, of the funding—

“…we have put in place finance for support to be available for survivors who come forward for the National Confidential Forum. A range of organisations already receive funding for different areas under the SurvivorScotland


strategy, which is over and above the money that has been set aside for support as part of the National Confidential Forum.”¹²⁵

**Authorised listeners**

179. The Roman Catholic Church and the Church of Scotland both outlined their independent safeguarding services, or, in the former case “authorised listeners”.¹²⁶

180. Graham Bell of Kibble said—

“…different people wanted quite different things. Some quite understandably wanted nothing to do with their previous care provider, but there appear to be others, who feel a sense of affinity with the organisations in spite of what individual carers may have done.”¹²⁷

181. On the subject of care providers and support, Richard Crosse told the Committee—

“I urge that there be guidance, for example, to help care providers to make the link between the National Confidential Forum and what they can provide in the context of their responsibilities.”¹²⁸

**Training and expertise**

182. Zachari Duncalf was concerned about the training and expertise that would be needed to inform support for survivors—

“A few years ago the Care Leavers Association did a UK scoping exercise of mental health services, individual practitioners, councillors and therapists. We could not find a single person who had had any specific training on young people in care, older care leavers, access to records or historic abuse. That is a massive shortfall.”¹²⁹

183. She explained the problems that adult survivors had encountered with mental health professionals who had not understood the importance of a record or what a children’s home was or other basics of understanding fundamental to working effectively with somebody who had been in care.¹³⁰

184. NHS Education for Scotland stated, in a written submission, that it was “important to consider implications of the Bill for education and workforce development for health and social care staff.”¹³¹

**Needs of all survivors**

185. CELCIS, in its written submission to the Committee, highlighted those groups of survivors for whom specific consideration was likely to be required in respect of their support needs—

¹³¹ NHS Education for Scotland. Written submission to the Health and Sport Committee, V&W011.
• Disabled adults – disabled children having been particularly vulnerable to abuse;
• People with mental health issues;
• Those in prison, hospital, care homes, homeless people, the gypsy traveller community;
• Survivors living abroad;
• Older people – a significant number of the older 75s having experienced care as children;
• Young adults – they may have different support needs.132

The Care Inspectorate’s Jacquie Pepper said that many survivors were already receiving support either through support and advocacy services or through friendships concluding that “those should also be supported through people’s contact with the NCF.”133

186. In regard to capacity, Ms Duncalf argued that “…we need to ask whether we have the capacity not only to support the Forum but to provide that support, advocacy and wide range of services that people need.”134 She added that it was “important that people who have experienced abuse but who do not necessarily want to give a testimony [to the NCF] should also have access to services.”135

187. In its written submission, Children 1st said—

“…there is currently a great shortage of abuse recovery services for children and their families. Children 1st is clear that there are children and families in Scotland who have suffered sexual abuse, whose needs are not being met. Children and adults are often on waiting lists for months, if not years.”136

188. Another written submission, by Harry Aitken, welcomed a “broader discussion” of the implications of the NCF for the availability of support and advocacy services in the country—

“Perhaps the NCF process has created an opportunity to standardise and integrate these services across Scotland so that the quality of service is assured, is cost effective and is flexible enough to meet the needs of all victims/survivors.”137

189. On the experience from TTBH, the Minister for Public Health stated that the Scottish Government had “learned from the pilot that the wraparound support that was provided to participating individuals prior to, during and after proved to be

132 CELCIS. Written submission to the Health and Sport Committee, V&W017.
136 CHILDREN 1st. Written submission to the Health and Sport Committee, V&W026
137 Harry Aitken. Written submission to the Health and Sport Committee.
He added that bespoke services must be provided to reflect individuals’ needs, noting that the Scottish Government was “working with stakeholders to ensure we have that.”\textsuperscript{139}

190. He reflected on the national nature of the NCF and the need to have support wherever survivors happened to be in Scotland—

“We are engaged with more than 80 organisations...in different parts of the country to ensure such arrangements are in place. It is extremely important that, if we are to get the health and wellbeing benefits that come from the acknowledgement of abuse, we ensure that we have the right supports for people.”\textsuperscript{140}

191. Asked about likely demand to participate in the NCF and the capacity of support, the Minister said that about one per cent of those who had been in institutional care would reflect the experience of TTBH and also Ireland and Northern Ireland—

“We are working on the basis that the Forum might be subject to that level of demand...the challenge will be to ensure that the right type of care and support is provided before, during and after the process.”\textsuperscript{141}

192. Jean Maclellan, Head of the Adult Care and Support Division of the Scottish Government, said—

“...we have changed our funding priorities in each of the funding years to accommodate need. We have therefore covered complex mental health, complex trauma, learning disability, minority ethnic services, physical health, remote and rural services, male survivors, survivors in prison and some prevention work.”\textsuperscript{142}

193. The Minister highlighted funding of “more than £6 million” in recent years resourcing the SurvivorScotland strategy and supporting a range of organisations who worked with survivors and reassured the Committee that he intended to ensure that there was sufficient capacity, because “the benefits of the National Confidential Forum would be undermined if that capacity did not exist.”\textsuperscript{143}

194. The Committee welcomes the Minister’s comments regarding wrap-around support, bespoke services, the national picture, and funding priorities. It also welcomes the reassurance that there will be sufficient capacity to meet the needs of those survivors who choose to participate in the NCF.

195. As the Scottish Government recognises, access to counselling, therapeutic support, mental health services and advocacy will be essential if

survivors are to see the benefits in their health and wellbeing from participation in the Forum.

196. The Committee heard that the flip-side to the potential benefits to the health and emotional wellbeing is the risk of re-traumatisation. The resilience and coping mechanisms of participants will invariably be tested by the recounting of their experiences. It is clear then that the appropriate services must be available for all who take part – whether they are older people, young adults, disabled, living outside Scotland, with mental health issues, or whatever their life circumstances.

197. The extent of the knowledge and expertise required of mental health professionals to engage with survivors was a question that arose from some of the evidence. This has a degree of resonance with some recent work the Committee has undertaken on Post-traumatic Stress Disorder. It would be welcome, therefore, if the Scottish Government could elaborate on any plans to further develop or “up-skill” the people who will be working closely in support of survivors, whether those taking part in the NCF or otherwise.

198. The Committee acknowledges the frustrations of people who have heard promises of support in the past and not seen it delivered – survivors left raw from the lack of emotional support and feeling as if they have been passing through “revolving doors” since leaving care. The Committee was also told of the hope that the NCF process might lend itself to a re-examination of services nationally, contributing perhaps to the better integrated provision of quality, cost-effective and flexible services to support all adult survivors of childhood abuse.

199. The person-centred approach being crucial; the need for survivors to have a choice of supports; a one-stop approach to counselling and advocacy; the case for long-term support – up to two years in the reckoning of ICSSS; the merits of the Towards Healing model; the importance of a continuous relationship support-wise throughout the NCF process; exploration of the links between NCF and care providers, and a Church of Scotland call for guidance regarding the responsibilities of the latter – all were pertinent issues drawn from the evidence and pulled together here for the further consideration of the Scottish Government and other interested parties.

200. Given that support is so crucial for the health and wellbeing of those who suffered childhood abuse, the Committee seeks also an undertaking from the Scottish Government that it will ensure the availability of services for those who choose to participate in the Forum – so as to be supported before, during and after taking part – and more widely still to all adult survivors who may require psychological or counselling support.
Confidentiality

To receive and listen in confidence

201. The Policy Memorandum sets out the first of the NCF’s functions as “...to receive and listen, in private and in confidence, to the experience of adults who were placed in institutional care as children”\(^{144}\)

202. Other aspects of confidentiality cover—

- Provision to safeguard the confidentiality of information, including testimony, held by the NCF;
- A general prohibition on the disclosure of information provided to the Forum;
- Such information is exempt from Freedom of Information;
- Protection of participants, members and staff of the NCF from action for defamation, including absolute privilege for participants.\(^{145}\)

203. The document says—

“The rights of both participants in the NCF and persons against whom allegations of abuse are made have been weighed to strike a fair and proportionate balance.”\(^{146}\)

204. Furthermore—

“The Bill makes provision for confidentiality to be breached in specific circumstances, including where a participant makes an allegation that a crime has been perpetrated or is likely to be perpetrated. Efforts will be made by the NCF to support participants to report such allegations directly to the police themselves.”\(^{147}\)

205. The Explanatory Notes elaborate on those circumstances—

“Information must be disclosed to the police 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.”\(^{148}\)

206. Also—

“Paragraph 13(5) enables a member of the Forum to disclose information to the police where an allegation is made by a person who has given testimony that an offence involving the abuse of a child has been committed. Disclosure

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\(^{144}\) SP Bill 23 – PM.
\(^{145}\) SP Bill 23 – PM.
\(^{146}\) SP Bill 23 – PM.
\(^{147}\) SP Bill 23 – PM.
\(^{148}\) SP Bill 23 – EN.
is made to the police in these circumstances where it is, in the opinion of the member of the Forum acting in good faith, in the public interest to do so. 149

207. The preceding two paragraphs give the background to the “must” versus “may” discussion that featured in much of the Committee’s consideration of the theme of confidentiality in the Bill.

Everyone has rights
208. David Whelan of FBGA said—

“Participants will be protected…We have to recognise that everyone has rights, and that includes the accused, the organisations, the institutions, the entities, the church or whatever it might be.” 150

209. Chris Daly, co-petitioner with Helen Holland, touched on the justice element—

“If the Commissioners who sit on the Forum hear evidence of crimes, they have an absolute responsibility to engage the police in the process as well. If someone comes along and it is clear that a crime was committed, and particularly if the Forum sees a pattern, with corroborating testimonies from survivors who were in the same institution at the same time, there will be a responsibility and a duty on the Forum to engage with the police on the matter.” 151

Criminal implications
210. CELCIS encouraged careful scrutiny, Jennifer Davidson recommended that the Committee look closely at the powers that the National Confidential Forum will have “to ensure that they are sufficient to address issues that are raised that have criminal implications.” 152

211. Duncan Wilson of the SHRC said—

“The NCF must also make very clear to people who are considering going to it what expectations they should have if, in the course of giving testimony, they make allegations against an institution or an individual. People should understand what might happen as a result of that. They need to understand that the information may be reported to the police.” 153

212. The Bill, he suggested, left that “a bit too vague and ill-defined.” 154

213. Referring back to the experience of the TTBH pilot, Kathleen Marshall said—

“…our concern was that, if someone’s experience was so far back that people were dead and the institution had disappeared, there was no real possibility of having an investigation. Is reporting that to the police a

149 SP Bill 23 – EN.
disproportionate response if the survivor does not want it to happen? I will not go into that too much…but it is unresolved.”

On the reporting of information to the criminal justice authorities, Donald Lyons of the Mental Welfare Commission stated that the Bill was clear that Forum members have the duty to make that decision. He observed that the Forum would “have to set some sort of threshold for what it reports and when.”

214. Duncan Wilson told the Committee—

“…the responsibility to make the decision might be clear in the Bill, but the discretion to make it is unlimited. Whether in the Bill, in regulations or in the operating procedures, we would certainly look for something a bit clearer than that, which balances the public interest in having a Confidential Forum with the state obligation to ensure the investigation of crimes. Of course, it is in the public interest that there is criminal prosecution of serious child abuse. In the earliest iterations of the procedures around the Time To Be Heard Forum, that appeared to be limited to where there was known to be an ongoing risk to others. However, there may be instances of corroborated testimony of serious abuse, which the public interest would demand – and the public would expect – to be investigated whether or not the named individual had continuing responsibility for the care of children.”

215. The written submission from SHRC stated—

“The Commission notes that consideration of the same question in Northern Ireland was clarified as follows: “statutory framework requires that, where allegations of child abuse come to light, these must be reported immediately to PSNI [Police Service of Northern Ireland] and social services for investigation.”

216. Richard Crosse of CrossReach/Church of Scotland addressed the issue of discretion with regard to historical abuse point, saying “that “may” should perhaps be a “must”.

Loss of control

217. Mr Crosse suggested that survivors might sense the loss of control when a police referral was made—

“To the best of my understanding, the survivor does not have to co-operate if a referral is made to the police…They retain some control in that respect. That is a sensitive and difficult topic for survivors.”

158 SHRC. Written submission to the Health and Sport Committee, V&W006.
218. Jean Urquhart of the Scottish Catholic Safeguarding Service also suggested that it was important for survivors to know that they were not obliged to speak to the police.  

A delicate balance
219. The Care Inspectorate’s Jacquie Pepper told the Committee—

“Provision could be made to allow people to give testimony in a confidential manner and to cover circumstances in which there are current concerns about an immediate risk to a child or a vulnerable adult. We need to balance that with the rights of an individual not to involve the police. It is a delicate balance but it is possible to make such provisions.”  

The preservation of confidentiality will be critical to the success of the Forum. It will be essential to put measures in place for that, to reassure people that the Forum will be confidential."

220. ICSSS in its written submission stated that the fact that many survivors of abuse “had issues with trust and the confidentiality aspect, including exclusions, should be made explicit”.  

In regard to the circumstances of information being passed to the police, Richard Meade of Barnardo’s argued that adequate support was required before, during and after the survivor has given their account, to ensure that they are aware of what is happening and that they get any particular support that is needed."

No surprises
221. Richard Crosse concurred—

“At the outset, survivors who attend the National Confidential Forum should be made aware of the limits of confidentiality, and no surprises should be sprung on them. They should enter into the process knowing what the outcome might be if the information that they provide suggests that a crime has occurred and that others, or they themselves, might still be at risk.”

222. David Whelan of FBGA expressed disquiet about his experience of submitting information to TTBH and it not appearing or being taken forward—

“There was some confusion about the security of people’s testimony, because the pilot was not set up in legislation. My issue is that I gave Time To Be Heard official Quarriers documents that outlined abuse that my sister reported to the organisation, but nowhere in the Time To Be Heard report –

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164 Open Secret/ICSSS. Written submission to the Health and Sport Committee, V&W008.
even if it is anonymised – does it say that a participant in the pilot provided official documents about the organisation. That worries me.”167

223. Furthermore—

“I also provided a court document and there was no reference to that. There was also no reference to the conviction of the person involved. That was an official court document, which I gave in good faith.”168

224. In terms of written and electronic information to be held to the NCF, Dr Lyons was confident about its security—

“We [the Mental Welfare Commission] have so much very sensitive and confidential individual information, which we collect…I am confident that we could assist the Forum in setting up equally secure and confidential information handling. We have information technology security procedures and codes of conduct, and we would expect the Forum to follow those codes of conduct rather than devise one for itself.”169

225. Asked about confidentiality and referrals to the police, the Minister for Public Health said—

“It is fair to say that although the NCF will have discretion, it will not have unlimited discretion. It must report when it believes that evidence that has been presented to it could prevent a further crime from being committed. The discretion that the NCF will have is that when it receives evidence, it will have to consider whether it is in the public interest for that information to be passed on.”170

226. He told the Committee—

“It is about the nature of the acknowledgement forum itself and the participants in it understanding that the circumstances and the nature of the evidence they present will be considered by the Forum Commissioners, who will have scope to determine whether that information has to be passed on to the police.”171

227. The Minister pointed out that, unlike forums in other jurisdictions that had investigative elements, the NCF was to be “an acknowledgement forum in itself”—

“We believe that we have struck the right balance to assure participants that there will be a degree of consideration of the facts and information that they provide, and that the Forum Commissioners will come to a judgement as to whether it is in the public interest for that information to be reported.”172

228. He added—

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“It is about balancing the therapeutic value that can be gained from the Forum with the public interest and public safety. That is why we have not given the Forum unlimited discretion. If there is a risk that further harm could be done or a crime committed, the information must be reported.”\textsuperscript{173}

He concluded that the confidentiality of the Forum was “crucial.”\textsuperscript{174}

229. The Committee recognises that, while confidentiality is the cornerstone of the NCF, a balance must be struck between the right of the individual to give testimony in confidence and the wider public interest.

230. It heard concerns from the SHRC about what was viewed as “unlimited” discretion, from other witnesses the case was made for making that “may” a “must”, and the outcome of similar deliberations in Northern Ireland was highlighted. It heard too, of the experience of TTBH and how one of the Commissioners of the Pilot considered the question “unresolved”. It also heard the Minister underline his view that the NCF had been conferred with discretion but that this was not unlimited.

231. On balance, the Committee considers the confidentiality aspects as set out in the Bill to be sensible, proportionate and intended to weigh the emotional and therapeutic benefits of participation with the public interest and safety, should information come to light that indicates an immediate or current risk.

232. The Committee believes the parameters of confidentiality ought to be set out as clearly as possible. This will certainly be a sensitive subject for survivors but no-one should be expected to take part in the Forum without a proper understanding of the process, including its benefits, outcomes and consequences.

Status

Operational autonomy

233. The Policy Memorandum states that the Mental Welfare Commission shall host the NCF—

“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.”\textsuperscript{175}

234. The Forum is to be a mandatory committee of the MWC, the members of that committee being responsible for the operational discharge of the NCF’s functions.\textsuperscript{176}


\textsuperscript{175} SP Bill 23 – PM.

\textsuperscript{176} SP Bill 23 – PM.
Issues of stigmatisation

235. FBGA’s David Whelan said his organisation did not have a problem with the Forum being placed with the MWC—

“We recognise that many survivors suffer from mental health issues. We also recognise that the commission has done good work. Our initial concern was that people would be stigmatised. I know that society is trying to address issues of stigmatisation in relation to HIV and mental health.”\(^{177}\)

236. Helen Holland said—

“The arrangements could be seen as a stumbling block, because of the stigmatisation. We accept that a lot of survivors have issues with mental health, but many do not…the reason for the proposal needs to be made perfectly clear not just to survivors but to society as a whole.”\(^{178}\)

A good location

237. On the subject of stigmatisation around mental health, Kathleen Marshall said—

“It is about whatever works. If the survivors can live with the arrangement, I think that the rest of us can. I certainly feel quite comfortable that the National Confidential Forum is in a good location.”\(^{179}\)

238. According to Zachari Duncalf—

“…we also need to recognise that care leavers and survivors have had poor and negative experiences with mental health service providers. Some survivors are surviving and indeed striving, yet the issues of abuse are still prevalent in their lives. They might not want to be labelled as being in mental health services.”\(^{180}\)

239. Although the Forum would be a sub-committee of the MWC, Mr Whelan suggested that it was important that survivors understood “that the NCF is independent.”\(^{181}\)

240. Donald Lyons of the MWC took “a positive view” of hosting the Forum, citing shared strategic aims and “a definite synergy”—

“We have governance mechanisms, information systems, support systems and risk management systems that the Forum can use rather than having to develop all those things itself, and they will be appropriate to the work of the Forum, especially in relation to the security and confidentiality of the information that comes to it.”\(^{182}\)

241. He added—

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“Broadly speaking, the way that it works out is that the Mental Welfare Commission will be responsible for ensuring that the Forum is properly governed and managed and that it delivers what it sets out to deliver under the legislation, but the evidence that the Forum collects and the way in which it reports on the evidence will be for the Forum to decide.”

Memorandum of understanding

242. Dr Lyons explained that a memorandum of understanding was being worked on in conjunction with the Scottish Government.184

243. His colleague, Lucy Finn, said good progress was being made in that work—

“...The NCF will be a completely independent organisation within the Commission. I feel confident from the work that we are doing with the SurvivorScotland team that that will be the case.”

244. Dr Lyons said that information going out from the Forum would be “badged” as the Forum and not the MWC.186

245. The SHRC suggested what mattered was the “greatest possible functional independence”. Duncan Wilson told the Committee—

“The memorandum of understanding will therefore be key for ensuring, for example, the Forum’s autonomy to establish its own procedures and...to agree and publish its final report without any need for oversight or approval. Those are headline issues that go to the heart of functional independence.”

246. Moyra Hawthorn of CELCIS emphasised the importance of complete independence from the Scottish Government—

“...we produced the document “Time for Justice”, which makes clear that some survivors want the Forum to have complete independence. Whether the Forum exists within another body or as completely standalone, they wanted there to be no Government representation on its committee and reference groups.”188

247. Barnardo’s Scotland’s Richard Meade said—

“As long as the NCF is operationally independent of the MWC and the Forum’s positioning, branding and presentation to those who will approach it are right, there will be less chance of it being stigmatised because of its association with the MWC.”189

248. The importance of both independence and impartiality was highlighted by Karen Anderson of the Care Inspectorate.  

249. The thinking behind the housing of the NCF was set out by the Minister for Public Health—

“I was conscious of the need to ensure that the body would not compromise the Forum’s role and that it would have, to some degree, a track record in pursuing issues relating to equality of care. In my view, the Mental Welfare Commission is the most natural public body to host the Forum.”

250. On the question of independence, he said—

“Although the Mental Welfare Commission is the legal entity...the Forum will have its own persona; it will have a level of autonomy that will allow it to be identified as a body in its own right while receiving support and expertise from the Commission.”

251. The Minister characterised the MWC’s role as one of support with such day-to-day functions as recording and reporting, record keeping and finance. He added—

“Howeover, the Forum will have the autonomy to undertake its work in the way that is more appropriate, so that those who participate in it will see themselves as participating in the National Confidential Forum rather than in some sub-committee of the Mental Welfare Commission.”

Creating a completely new body would, he said, have taken much longer, adding that the Forum would have its own identity, and that people would "be in no doubt that they are engaging with the National Confidential Forum."

252. The Minister stated that the memorandum of understanding would not be completed until the head of the NCF had been appointed but indicated that he was “happy to undertake to forward that information to the Committee as soon as the work has been completed”.

253. He told the Committee—

“...I am grateful for the way in which the Mental Welfare Commission has gone about taking on its role. From my perspective, it has demonstrated a real willingness to take forward the National Confidential Forum in order to make it as effective as possible and to make it deliver what it is intended to deliver. Given the Commission’s track record, I have every confidence that it will help in that process.”

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254. The Committee recognises that the NCF must have operational autonomy if it is to perform its role effectively and with credibility, especially in the eyes of the survivor community.

255. It is reassured that most of the witnesses were comfortable with what is proposed or, in more positive terms, considered the MWC to be “a good location”. The potential for stigmatisation arising from the mental health tag and how that might put off would-be participants arose, but was generally not seen as problematic, provided its independence could be guaranteed and the NCF was badged in its own right.

256. The memorandum of understanding will be vital in ensuring the Forum can carry out its core work as it sees fit while benefitting from the infrastructure, governance and expertise of the MWC. The Committee welcomes the Minister’s undertaking to forward that information once the document has been finalised.

257. The Committee welcomes the assurance that those survivors who come forward to participate in the Forum can do so with the clear understanding that they are taking part in the NCF as opposed to a sub-committee hosted by the MWC.

Reports

Setting out progress

258. The Policy Memorandum states—

“The Bill makes provision for the production of an Annual Report by the NCF, setting out progress in discharging its function. The Bill will 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.”

259. According to the Scottish Government consultation document on the NCF, “lessons learnt from the past can help to prevent abuse in the future, inform improvements for the health and wellbeing of children in residential care today and protect their rights more effectively in the future.”

Spell out what redaction means

260. There was a good deal of discussion about confidentiality, anonymity, redaction, coding and other aspects of how testimony should be reflected in the NCF’s reports. Mr Whelan said—

 “…any document that is produced for the National Confidential Forum should spell out what redaction means. People who come forward to tell their

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197 SP Bill 23 – PM.
198 Scottish Government. National Confidential Forum – A consultation on the creation of a Forum for Adult Survivors of Childhood Abuse in Residential Care.
experiences expect to pick up the report and say, “Oh – there is my experience.”

261. Petitioner Chris Daly suggested—

“...in other places, a code is used and I asked the people who were working on the Bill to consider the possibility of giving survivors a specific code when they give evidence to the Forum, so that their testimony would be identifiable only to them.”

262. David Whelan added—

“...where people have given similar testimony, their comments could be anonymised by using letters of the alphabet or numbers or some other code. If six survivors have given similar testimony that has been redacted into two paragraphs, perhaps there could be a reference to witnesses A, B, C and so on”.

Anonymity is not confidentiality

263. The SHRC reflected on such comments and pointed out that anonymity was not the same as confidentiality. Duncan Wilson said—

“Although there may be benefits in having a confidential forum, that does not necessarily require anonymity in the testimony at the end of the process. It might be worth considering the approach of the Ryan report in Ireland for example which used coded references to survivors’ testimonies, so that individuals could identify where their experience was directly reflected in the final report.”

264. Kathleen Marshall, TTBH Commissioner, was receptive to the idea of coding—

“Because of the way in which Time To Be Heard was set up...we were always concerned about confidentiality and piecing things together, but...in a Forum that is not a pilot and does not have an end, there will be an opportunity to have more negotiations with the survivors about how their experiences are reported and the extent to which they want them to be reported, and that should be quite simple to do.”

265. The Scottish Catholic Safeguarding Service’s Jean Urquhart agreed—

“It must be very hard for someone who feels that they do not count to take the brave step to speak and then, after they speak, to be unable to find what they said in the report. They would still feel that they did not count. It is important

that...their words are recognised and noted and that they can find them for themselves."\textsuperscript{204}

\textit{Shaping the future of the care system}

266. Jennifer Davidson of CELCIS widened the discussion—

"...generic reports will be far less powerful in respect of the evidence that is provided. The whole range of stakeholders – certainly survivors but also stakeholders who are interested in shaping the future of the care system – will have an interest in what comes out of the Forum for a number of different purposes."\textsuperscript{205} ...it is essential to archive and preserve what has been gathered. That includes survivors coming back later and reviewing the records that they have put to the Forum...Those data are very important. They do not just form a historical record; they are a personal record."\textsuperscript{206}

267. Kathleen Marshall also suggested that archiving and preserving could be a valuable element of the NCF’s work.\textsuperscript{207}

\textit{Learning opportunities}

268. In response to questions about the form of the annual report, the Committee received a variety of responses. Jean Urquhart envisaged an educational element saying, “...we would expect to see learning outcomes...to set out what has been learned, what trends have been identified and what the policy outcomes might be.”\textsuperscript{208}

269. This was a theme taken up by Zachari Duncalf of the Care Leavers Association, who noted that the pilot forum had listened to adult or older care leavers across the generation repeatedly “saying the same thing and sometimes about the same organisation”. She concluded that the proposed National Confidential Forum had “to provide learning opportunities.”\textsuperscript{209}

270. She told the Committee—

“The annual reporting process gives us the ability to see longer-term issues and outcomes around employability, accommodation and mental health, for example. We see those as young people’s issues, but actually they last a lifetime...Reporting on the statistics, the outcomes, the positive elements of care...can really benefit us in the wider scheme of things.”\textsuperscript{210}

\textit{Not cared for or loved}

271. Duncan Dunlop of Who Cares? Scotland wished to focus on today’s children in care—
“...what is still missing for a large number of young people, which is exactly where the reporting mechanism has potential, is that they are not cared for or loved within the system. They are not given access to what they believe are long-term, caring, loving, stable relationships, which are the fundamentals of most family situations.”

272. He told the Committee that it would be “really valuable” to learn about that, because “we have seen that, across the generations, we have not managed to get that right.”

273. Richard Crosse of CrossReach/Church of Scotland favoured outcomes, saying “it would be good if the annual report could say that x number of survivors had contact with their care providers and that the outcomes were, for example, access to records, a period of professional counselling, or just an acknowledgment by the care provider.”

A life in care is much bigger than that

274. Zachari Duncalf said—

“What is lacking in current services and reporting structures is what happens beyond the statistics, outcomes and targeted measures. A life in care and beyond is much bigger than that...this debate brings in the emotional side – the love, care and support that are seriously lacking in our current care system.”

275. She advised caution as regards people’s expectations—

“At the moment young people will speak out because they want to make changes to the care system so that other young people do not suffer in the way that they feel they suffered...We need to be clear that they do not have unrealistic expectations of what they will get out of it.”

276. The Care Inspectorate’s Jacquie Pepper said the regulator was keen to learn from the NCF to inform its reform agenda and inspection methodology.

277. Her colleague Karen Anderson stated that the inspectorate would “certainly take the intelligence about themes and trends and use it to inform the target and focus of our inspection and the way in which the inspection is undertaken.”

278. ICSSS’s written submission suggested that survivor testimonies could be “very powerful” in informing practice and training, increasing public awareness, and breaking down stigma.

279. NSPCC Scotland stated—
“We believe that the learning from the Forum should be utilised by institutions, corporate parents and all other relevant stakeholders to ensure that a children’s rights approach is embedded in their cultures, behaviours and budgetary priorities”.\textsuperscript{219}

280. CELCIS’s written submission was more circumspect—

“There is a clear gap in the function of the NCF “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” and the absence of any detail of how this will be achieved.”\textsuperscript{220}

281. It sought further clarification as to how the Forum would fulfil the aim of identifying patterns and trends of the care experience and making policy and practice recommendations.\textsuperscript{221}

282. Former Chairman of INCAS, Harry Aitken, said, in a written submission, that it hoped that the NCF could contribute to wider learning for society as a whole whereby improving the outcomes of the next generation placed in care in Scotland.”\textsuperscript{222}

283. Aberlour Child Care Trust said of the patterns, trends and lessons that the NCF was expected to identify and report—

“We support this but would suggest that in order for this to have any meaning there must be a duty on Parliament, Scottish Ministers or the Care Inspectorate to consider and act on the recommendation of the Forum.”\textsuperscript{223}

284. The Minister for Public Health told the Committee—

“…it is an operational matter for the head of the Confidential Forum to find a mechanism for recording information that protects people’s anonymity but which also allows them to identify how their evidence is detailed in the Forum’s report. In Ireland, a system was used whereby the evidence that was received was coded, which gave the individuals who gave evidence anonymity but allowed them to trace how their evidence influenced the report.”\textsuperscript{224}

285. People who were abused in care and have perhaps carried the feeling they did “not count” want their testimony to the Forum to matter; the Committee was told that survivors who come forward to participate expect to recognise their testimony in the reports of the NCF. It is acknowledged, as the Minister said, that this is likely an operational matter for the NCF, but the Committee suggests that the coding of testimony as practised in the Irish model (the Ryan report – highlighted by the SHRC) could be explored.

\textsuperscript{219} NSPCC Scotland. Written submission to the Health and Sport Committee, V&W019.
\textsuperscript{220} CELCIS. Written submission to the Health and Sport Committee, V&W017.
\textsuperscript{221} CELCIS. Written submission to the Health and Sport Committee, V&W017.
\textsuperscript{222} Harry Aitken. Written submission to the Health and Sport Committee.
\textsuperscript{223} Aberlour Child Care Trust. Written submission to the Health and Sport Committee, V&W020.
\textsuperscript{224} Scottish Parliament Health and Sport Committee. \textit{Official Report, 23 April 2013, Col 3687}.
The Committee heard that, in addition to the personal and, it is to be hoped, therapeutic value of taking part in the Forum, survivors were often motivated by a desire to contribute to the improvement of the care system for the next generation, in order that others would not have to endure what they did. The question, of course, is how that can be achieved.

Statistics, outcomes, targets – as the Care Leavers Association put it: “A life in care and beyond is much bigger than that”. The CLA, Who Cares? Scotland and other witnesses suggested the big question was how to shape a system that could properly fulfil the role of corporate parent and provide children in care with the love, nurture and support that was so often absent from their lives.

Expectations for the NCF and what it can achieve are high. It is the understanding of the Committee that the collecting of personal and historical data, the recording of testimony, and the identification of patterns and trends will be brought together by the Forum and used to inform (via the reporting mechanism) policy and practice, to build a permanent record of life in care, and to enhance public awareness.

The Committee welcomes what is envisaged but seeks further detail on how it will work, in particular the influencing of policy and practice (beyond an outline of the reporting process already provided in the Bill and accompanying documents).

FINANCIAL IMPLICATIONS OF THE BILL

Background

As required by Standing Orders Rule 9.3.2, the Bill was accompanied by a Financial Memorandum (“FM”).

Standing Orders also require the Committee to consider and report on the FM and, in doing so, to take into account any views submitted by the Finance Committee.

The Finance Committee issued a call for evidence on the Victims and Witnesses (Scotland) Bill’s FM with a deadline of 5 April 2013 for responses. Eight responses were received, the majority of which made no substantive comments on the FM, and these have been published online here: http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/62025.aspx

The Finance Committee chose not to take any oral evidence in relation to the FM or these responses or to give any further scrutiny to this FM. It did not produce a report. The Convener of that Committee agreed that a copy of each response should be forwarded to the Health and Sport Committees for its own consideration.

The FM states—

“The analysis and estimates contained in this memorandum draw on a variety of sources including the Scottish Government consultation on the
295. It also states that the specific financial impact of the Bill provisions relating to
the NCF is “relatively narrow”. There are, however, “a range of costs associated
with establishing and operating the NCF, including support for participants;
staffing, and infrastructure costs.”

296. In terms of demand, the estimate (based on a scoping project undertaken by
CELCIS, the experience of Time To Be Heard, and demand for the Irish
Commission) of people who may wish to participate in the Forum is given as
2,000. It is expected that the Forum would have 10 hearings a week. On that
basis, the expenditure on the NCF is expected to run across several years and two
spending review periods.

297. On the subject of the number of hearings on an annual basis, Dr Lyons of the
Mental Welfare Commission told the Committee—

“I would like to correct something that I said earlier – I got my maths wrong. If
it is eight people a week for 50 weeks, between 400 and 500 people a year
might have the opportunity to give evidence to the Forum. That shows why I
was a complete failure on Countdown.”

298. As regards the impact on the MWC, the FM notes that “…any additional
costs falling to the MWC as a result of hosting the MWC will be funded by the
Scottish Government.”

299. Start-up costs are estimated at £260,000 in 2013-14. The annual recurring
costs thereafter are put at £850,000.

300. The FM states there to be no cost implications from the establishment and
running of the Forum for other bodies, including local authorities, NHS Boards, the
voluntary sector and individuals.

301. Under the heading “other support for participants”, the FM sets out the costs
associated with ICSSS, but points out that these costs do not arise directly from the
Bill—

“In 2010, the Scottish Government provided funding for the creation of a new
service, In Care Survivors Service Scotland (ICSSS), recognising the
importance of a service specifically for adult survivors abused in care as
children. This voluntary sector organisation provides dedicated services for
adults…recognising their specific needs. The Scottish Government

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225 SP Bill 23 – EN.
226 SP Bill 23 – EN.
227 SP Bill 23 – EN.
229 SP Bill 23 – EN.
230 SP Bill 23 – EN.
231 SP Bill 23 – EN.
committed £750,000 of funding (until October 2011) and has recently committed a further £637,000 to ICSSS until 2015.\textsuperscript{232}

302. The Health and Sport Committee heard relatively little comment on the FM in the evidence it received.

303. Petitioner Helen Holland argued that “the economic climate cannot and should not every be used to deny victims justice.”\textsuperscript{233} Open Secret/ICSSS commented, in a written submission, on the cost of psychological support, including that provided by its own service.\textsuperscript{234}

304. The Committee notes the contents of the Financial Memorandum and highlights that the costs associated with the NCF are said to be “relatively narrow” albeit covering the establishment and running of the Forum, its infrastructure and staffing etc.

305. The Committee notes the statement that there are no cost implications for other bodies, including local authorities, NHS Boards, and the voluntary sector.

306. It also notes that the Finance Committee described the written submissions it received as raising little in the way of substantive comment and chose neither to seek further evidence nor to produce a report.

**SUBORDINATE LEGISLATION**

**Background**

*Subordinate Legislation Committee*

307. Under Rule 9.6.2 of Standing Orders, where a bill contains provisions conferring powers to make subordinate legislation, the Subordinate Legislation Committee (“SLC”) must consider and report to the lead committee on those provisions.

308. The SLC reported at some length on section 27(2) with regard to paragraph 7 of new Schedule 1A to the Mental Health (Care and Treatment) (Scotland) Act 2003. The full script can be read here: [http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/61263.aspx](http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/61263.aspx)

309. The brief exchange between the SLC and the Scottish Government is detailed below.

**Section 27(2)**

310. The Committee asked the Scottish Government—

\textsuperscript{232} SP Bill 23 – EN.


\textsuperscript{234} Open Secret/ICSSS. Written submission to the Health and Sport Committee, V&W008.
“In relation to the power contained in section 27(2) (inserting subparagraph (3) of paragraph (7) of schedule 1A to the 2003 Act) whether it is intended that the Scottish Ministers are under a duty to make an order under that subparagraph, or have a discretion to do so. Accordingly, the Scottish Government are asked to consider whether this should be made clearer?"  

311. To which the Scottish Government responded—

“It is confirmed that the intention is that the Scottish Ministers are under a duty to make the order. We consider that the Bill as drafted clearly provides for this as the order is required to give meaning to "institutional care".

“"To be an "eligible person" under paragraph 7(2) of new schedule 1A, a person must have been in "institutional care". In paragraph 7(3) "institutional care" is a care or health service, which meets the conditions in paragraph 7(4) and conforms to what is in the order. If no order is made then there is no description or type of institutional care. The Bill provisions will, therefore, not have effect as there will be no eligible persons.

“Paragraph 7(4) provides that the order under 7(3) "must prescribe a description or type of care or health service which ". It then goes on to set out the parameters within which the order can prescribe a description or type of care or health service.

“It is clear that paragraph 7(4) cannot stand alone without the order to give meaning to "institutional care".

Conclusion

312. The Committee notes the views of the SLC and the response of the Scottish Government. The Committee comments on the eligibility to participate in the Forum in paragraphs 135-143.

EQUALITIES

313. The Scottish Government prepared an equality impact assessment (EQIA) for the Bill, which although described within the document itself as “relatively limited” was considered to be suitably detailed and clear.

314. The document details the background to the Bill including the organisation and facilitation of the National Confidential Forum Reference Group, made up of contributors “from a range of perspectives and interests” and also the establishment of the Survivor Stakeholder Group, chaired independently and providing survivors with “a safe and supportive place” in which to discuss the NCF.

315. The document addresses each of the protected characteristics in turn, some of the points including—

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235 SP Paper 286.
236 SP Paper 286.
237 Scottish Government. Victims and Witnesses (Scotland) Bill EQIA – Results.
238 Scottish Government. Victims and Witnesses (Scotland) Bill EQIA – Results.
• The NCF being grounded in a policy that appreciates the gender dimensions of being placed in care as a child – men and women offered an appropriate and sensitive context in which to recount their experiences;

• The consultation on the NCF highlighting the difficulty women might face in discussing sexual abuse with male members of the Forum and vice versa – gender-sensitive policies and practices will be followed;

• Evidence suggesting men are less likely to disclose abuse and to access support – a supportive and confidential environment will be offered;

• For many older people, this will be the first time they have had the chance to recount their experience – in a safe place with care and support;

• Younger people, feeling the stigma of being in care, offered the chance of acknowledgement of their experience – the more recent experiences of care being of importance to the Forum’s role to inform future law, policy and practice;

• Evidence suggesting that disabled children and young people are at greater risk of abuse – long-stay hospital explicitly included in the remit and people with disabilities will be able to benefit from acknowledgement;

• There being little past or current evidence, if any, of being in care and race – through the NCF people will be able to contribute to building a record of the experience of ethnic minority children in care in Scotland.²³⁹

316. The document states—

“...the general approach of the NCF will ensure that the needs of particular groups and individuals are fully understood and reflected in the policies and practices of the Forum, ensuring the full and equal participation in hearings of the Forum...and the fair and equal realisations by them of the outcome of improved health and wellbeing.”²⁴⁰

317. The Committee heard in its evidence a number of equality issues including—

• The discussion of the age criteria – the stipulation of being 18 or over to participate in the Forum;

• Support for survivors who may have literacy problems – easy read documentation, clear explanation of terminology and other types of support;

²³⁹ Scottish Government. Victims and Witnesses (Scotland) Bill EQIA – Results.
²⁴⁰ Scottish Government. Victims and Witnesses (Scotland) Bill EQIA – Results.
• Making the process of participation as accessible as possible – covering among other factors people with physical disabilities and mental health issues.

318. The Committee welcomes the EQIA and its focus on each of the protected categories. Certainly much of its own evidence chimes with the main points set out in the document.

319. The Committee further welcomes the statement that the Scottish Government will work alongside the NCF and MWF to ensure that the proposals to set up the Forum “are monitored and evaluated on an on-going basis, including the equality dimensions of those proposals.”

OVERALL CONCLUSION

320. In arriving at its overall conclusion, the Committee draws on evidence given to it by survivors of childhood abuse, survivor representative groups, children’s organisations, survivor support bodies, academics, and care providers, as well as those providing a human rights and regulatory perspective.

321. The Committee is mindful of the words of the First Minister nine years ago when he stood up in the Chamber to offer an apology to those adults subjected to physical, sexual or emotional abuse while children in the care of the state: “…we in the Parliament, on behalf of the people of Scotland, recognise that they were wronged and that we will do more to support them in the future than we have ever done in the past.”

322. The expectations of survivors of childhood abuse must be approached with sensitivity and, while the NCF can meet the needs of some people, it is clear that a broader approach is required too. The Committee therefore welcomes the participation of the Scottish Government in the process of InterAction; the time-bar consultation; work undertaken on restorative justice, and the emphasis placed on the Survivor Strategy. That momentum must continue if the best interests of all survivors are to be served.

323. By way of its own contribution to that momentum, the Committee encourages that further consideration be given to matters such as: access to psychological, counselling and advocacy support; the links between the NCF and care providers; inclusion of foster care in the eligibility criteria; training and expertise of mental health professionals, and the role of the Forum in informing policy and practice.

324. Justice matters are outwith the Committee’s remit, but it did hear from witnesses that the lack of remedies, other than acknowledgement, can contribute negatively to people’s health and wellbeing. As one witness put it: “Survivors will judge the process, the Bill, the Act, and the National Confidential Forum on the personal outcomes for them. Just being heard and acknowledged might be exactly right for some, but others will have

241 Scottish Government. Victims and Witnesses (Scotland) Bill EQIA – Results.
needs that must be met, probably by care providers, support groups and others.”

325. The Committee draws the attention of the Justice Committee and the Parliament to the points above, but it recommends that the Bill (accepting that it has scrutinised only that part of the Bill pertaining to the provisions to establish the National Confidential Forum) proceeds to Stage 2.

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ANNEXE A: EXTRACT FROM MINUTES OF THE HEALTH AND SPORT COMMITTEE

10th Meeting, 2013 (Session 4)

Tuesday 26 March 2013

2. **Victims and Witnesses (Scotland) Bill - witness expenses:** The Committee agreed to delegate to the Convener responsibility for arranging for the SPCB to pay, under Rule 12.4.3, any expenses of witnesses in the Victims and Witnesses (Scotland) Bill evidence sessions.

3. **Victims and Witnesses (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

   - David Whelan, Spokesperson, FBGA (Former Boys and Girls Abused in Quarriers Homes);
   - Jim Kane, Committee Member, In Care Abuse Survivors;
   - Helen Holland, PE1351 (Time for All to be Heard), and Chris Daly, PE1351 (Time for All to be Heard), Petitioner.

11th Meeting, 2013 (Session 4)

Tuesday 16 April 2013

3. **Victims and Witnesses (Scotland) Bill:** The Committee took evidence from—

   - Tam Baillie, Scotland’s Commissioner for Children and Young People;
   - Professor Alan Miller, Chair, and Duncan Wilson, Head of Strategy and Legal, Scottish Human Rights Commission;
   - Kathleen Marshall, Former Commissioner on the Time To Be Heard Pilot, Time to be Heard;
   - Jennifer Davidson, Director, and Moyra Hawthorn, Research Lecturer, Centre for Excellence for Looked After Children in Scotland;
   - Donald Lyons, Chief Executive, and Lucy Finn, HR Manager (MWC Project Manager for NCF set-up), Mental Welfare Commission;
   - Lorna Patterson, Project Manager, In Care Survivors Service Scotland;
   - Joan Johnson, Head of Regulated Services, Health in Mind;
Alan McCloskey, Head of Victim and Witness Service, Victim Support Scotland;

Linda Watters, Team Leader, Survivor Scotland;

Louise Carlin, Bill Team Leader – Adult Care and Support (Survivor Scotland), Scottish Government.

12th Meeting, 2013 (Session 4)

Tuesday 23 April 2013

2. **Victims and Witnesses (Scotland) Bill:** The Committee took evidence from—

   Gerry Wells, Head of Service, Quarriers;

   Graham Bell, Chief Executive, Kibble Education and Care Centre;

   Richard Crosse, Crossreach;

   Jean Urquhart, Chair of Authorised Listeners Group, Scottish Catholic Safeguarding Service;

   Richard Meade, Public Affairs Officer, Barnardo's Scotland;

   Duncan Dunlop, Chief Executive, Who Cares? Scotland;

   Zachari Duncalf, Ambassador, Care Leavers Association;

   Jacquie Pepper, Senior Inspector, and Karen Anderson, Director of Strategic Development, Care Inspectorate.

13th Meeting, 2013 (Session 4)

Tuesday 30 April 2013

2. **Victims and Witnesses (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

   Michael Matheson, Minister for Public Health, Jean Maclellan, Head of Adult Care and Support Division, and Rosemary Lindsay, Principal Legal Officer, Food, Health and Community Care, Scottish Government.

15th Meeting, 2013 (Session 4)

Tuesday 14 May 2013

1. **Decision on taking business in private:** The Committee agreed to take its consideration of a draft report on the Victims and Witnesses (Scotland) Bill in...
private. The Committee also agreed to take consideration of a draft report in private at future meetings.

3. **Victims and Witnesses (Scotland) Bill**: The Committee considered a draft report. Various changes were agreed to, and the Committee agreed to consider a revised draft, in private, at its next meeting.

16th Meeting, 2013 (Session 4)

**Tuesday 21 May 2013**

3. **Victims and Witnesses (Scotland) Bill (in private)**: The Committee considered and agreed a draft report to the Justice Committee on the Victims and Witnesses (Scotland) Bill.
ANNEXE B: ORAL EVIDENCE AND ASSOCIATED WRITTEN EVIDENCE

10th Meeting, 2013 (Session 4) Tuesday 26 March 2013

Written Evidence

FBGA (Former Boys and Girls Abused in Quarriers Homes) (13 March 2013)
FBGA (Former Boys and Girls Abused in Quarriers Homes) (19 April 2013)
FBGA (Former Boys and Girls Abused in Quarriers Homes) (21 April 2013)
FBGA (Former Boys and Girls Abused in Quarriers Homes) (22 April 2013)

Oral Evidence

Supplementary Written Evidence

FBGA (Former Boys and Girls Abused in Quarriers Homes) (29 April 2013)

11th Meeting, 2013 (Session 4) Tuesday 16 April 2013

Written Evidence

Scottish Human Rights Commission
Centre for Excellence for Looked After Children in Scotland
In Care Survivors Service Scotland
Victim Support Scotland

Oral Evidence

12th Meeting, 2013 (Session 4) Tuesday 23 April 2013

Written Evidence

Barnardo's Scotland
Who Cares? Scotland
Care Inspectorate

Oral Evidence

Supplementary Written Evidence

Care Leavers Association

13th Meeting, 2013 (Session 4) Tuesday 30 April 2013

Written Evidence

Oral Evidence
ANNEXE C: LIST OF OTHER WRITEN EVIDENCE

Care Inspectorate
FBGA (Former Boys and Girls Abused in Quarriers Homes)
VOX (Voices of Experience)
Highland Violence Against Women Strategy Group
West Lothian CHCP
Scottish Human Rights Commission
NHS Greater Glasgow and Clyde
Open Secret
Scottish Borders Council
Glasgow City Council
NHS Education for Scotland
Sacro: Safeguarding Communities - Reducing Offending
Law Society of Scotland
Dumfries and Galloway Council
Victim Support Scotland
Barnardos Scotland
CELCIS
North Ayrshire Council
NSPCC Scotland
Aberlour Child Care Trust
Angus Council
UNISON Scotland
South Lanarkshire Council
RCPsych in Scotland
Who Cares Scotland
CHILDREN 1ST
Information Commissioners Office
Open Secret/ In Care Survivors Service Scotland
Harry Aitken (former Chair of In Care Abuse Survivors, Scotland) (7 April 2013)
Action for Children
Harry Aitken (former Chair of In Care Abuse Survivors, Scotland) (22 April 2013)
The Care Leavers Association
Victims and Witnesses (Scotland) Bill

Care Inspectorate

Introduction

The Care Inspectorate welcomes the opportunity to submit evidence to inform Stage 1 consideration of the Victims and Witnesses (Scotland) Bill and supports the proposal to establish a National Confidential Forum. The Care Inspectorate is responsible for providing independent assurance about a wide range of social care and social work services in Scotland. We believe that people should experience a better quality of life from accessible, excellent services which are designed and delivered to reflect their individual needs and promote their rights.

Care Inspectorate staff are able to contribute to this call for evidence on the basis of relevant experience in front-line practice, management of services and enquiries.

The functions and powers of the National Confidential Forum (as set out in the Bill)

We agree with the purpose of a National Confidential Forum. The pilot has clearly borne out the hypothesis that giving adults, who had been in institutional care as children, the chance to describe their experiences is of benefit to them. Of particular note is the finding that taking part in the forum led to improvements in their health and wellbeing.

The confidential forum will also provide important information about the past experiences of adults placed in institutional care as children. Hearing directly from adults who have spent time in institutional settings will provide a rich source of information which will inform improvements in the future.

We are pleased that eligibility to provide testimony to the forum will be extended to all people who were previously in residential care or health settings. We believe that this will convey an important message that all experiences, including positive testimonies, will be heard. The pilot has clearly demonstrated the benefits for survivors of abuse. Enquiries have found that people who consider their past experience to be positive can feel that their histories are being questioned or diminished by the subsequent discovery of abuse. The proposals allow all those who wish to relate their experiences to do so.

We believe that the eligibility criteria should be broad enough to ensure that people who have been cared for in the following institutions are able to provide testimony:

- residential schools, including hostels and boarding accommodation
- residential educational provision for children with a disability
- care homes for children
• institutions providing short-term or regular respite care
• residential health care for medical (including life-limiting conditions) or mental health needs
• secure accommodation

We note the intention to exclude eligibility to participate in the forum to people who receive a service in a private dwelling. As foster care may not be considered an institutional care setting this could exclude people who have been placed in foster care as children. The provision of alternative family care through foster carers is organised through bodies which may meet the definition set out in Part 3 section 7 (4) of the Bill but the care itself takes place in a private dwelling. The Care Inspectorate would suggest that consideration should be given to extending inclusion in the forum to adults who have been placed in foster care as children. If people who wish to give testimony about experiences in foster care are to be excluded, we would suggest that the forum makes this clear to those who make contact and signposts people to where they can go to get support and advice.

Consideration should also be given to extending the definition of ‘eligible’ to include those who are 16 years and over, given the specific legal status of such persons in Scotland.

Status of the National Confidential Forum and its independence

We agree that the forum should operate independently from government. This communicates independence and impartiality, both of which are likely to be vital to making sure all those people who want to take part feel confident to do so.

We note the proposal to set up the forum under the auspices of the Mental Welfare Commission. We consider the Commission to have the necessary independence and professional expertise to host this forum. We assume that the Commission will require additional resources for this new remit. We would however recommend that the forum should have an identity and purpose which is quite distinct from the wider role of the Commission. Many of those who come forward will have experienced emotional distress. We do not anticipate however that all people wishing to have their testimony heard will necessarily have experienced mental ill health or have a learning disability. Some people may be discouraged from taking part if the quite separate function of the forum is not made explicit.

Support for participants before, during and after their input

The confidential nature of the forum should assist participants to feel safe in taking part. The process should be the same for all participants, while taking account of their individual needs. It is not so obvious what the benefits would be for those who had good experiences but it would communicate a sense of equality and that all histories were respected and heard. Some adults will have had mixed experiences and this may make it easier for them to come forward and be heard. Some participants may find they are only able to make
sense of their experiences in the process of being heard. To have the same process for all participants will encourage many more people to come forward. This should enable more people to benefit from the listening process and more information to be gained which will inform improvements in institutional care.

It is essential that support is provided in preparation for the hearing, throughout the hearing, directly afterwards (for example, in signposting participants to advocacy and advice services) and also in the longer term. A good range of high quality and accessible support services should be available to the forum in order to allow some degree of choice to those taking part. The forum should have information readily to hand of what services are available throughout the country.

Other relevant aspects of the National Confidential Forum

If the safeguards already mentioned above are put in place there should not be any barriers which prevent people who are eligible to take part in the forum from participating.

Annette Bruton
Chief Executive
Care Inspectorate

28 March 2013
Victims and Witnesses (Scotland) Bill

Former Boys and Girls Abused of Quarriers Homes (FBGA)

Background

To-date eight former employees of Quarriers Homes have been convicted in the Scottish Criminal Courts of abusing children placed in their care. These criminal cases relate to the 50s, 60s and 70s. Many former residents made allegations of being abused sexually and physically.

Time To Be Heard

Time To Be Heard (TTBH) was the pilot to test out the feasibility of introducing the National Confidential Forum. Despite the fact that there had been no prior proper and full consultation with former residents of Quarriers who the pilot was intended for, FBGA gave it our full support despite our initial reservations. Ninety-eight former residents of Quarriers came forward to participate in “Time To Be Heard” including myself and FBGA highlighted TTBH on our website and we encouraged other former residents to contact TTBH.

Victims-Survivors were treated with respect and many had an opportunity to recount their experiences. There were appropriate safeguards. However, there were concerns relating to the protocols concerning storage and retention of victims-survivors testimonies. The mix of the expertise of the chair and commissioners was well balanced and they were sensitive to the needs of those who participated in TTBH.

Feedback was generally perceived to be initially positive however a major concern and complaint of TTBH by participants was that there was no redress or remedies or reparation package-scheme available. There was no closure or resolution to their issues. Despite many participants having previously reported allegations to the Police and been through the Scottish Criminal and Civil Courts processes. Many participants felt disappointed and let down by the limited remit and mandate as their needs and expectations were not met nor addressed in TTBH.

Victims-survivors seeking redress, remedies and reparation issues were not addressed or highlighted nor their views expressed by any of the TTBH Commissioners who had operational responsibility for TTBH nor in any TTBH reports published.

The "Restorative Justice" model added to TTBH without any prior consultation was not widely supported and we believe that this restorative justice model is not appropriate for this particular group of vulnerable adults.

FBGA appreciated and welcomed Quarriers Charity and there Trustees support of TTBH despite our initial reservations.
Survivor Scotland Strategy

Despite the Scottish Parliament debating these issues in 2004. The core issues remain unresolved for victims-survivors and the outstanding issues have dragged on for far too long without any closure or resolution whatsoever. There has also not been a range of remedies or redress or resolutions with beneficial outcomes for those directly affected by this abuse.

There have been some positive steps taken within the Survivor Scotland Strategy such as the setting up of the support service ICSSS which FBGA campaigned for. There have also been various data collection projects, research, some development funding for innovative new projects. Development of care pathways.

FBGA participated on the Survivor Scotland subgroup in 2005 which resulted in The ICSSS service being set-up. FBGA have referred many former residents from a number of past institutions to the service for help and support over the years. A recent National Confidential reference and Survivor Stakeholder group set-up has ensured a wider more inclusive representation of a broad spectrum of victims-survivors in the processes of engagement this time round.

The functions and powers of the National Confidential Forum (as set out in the Bill)

We have liaised with Scottish Officials (Louise Carling) the Bill Team Leader for the SurvivorScotland Team who has been very helpful and kindly addressed FBGA’s queries regarding the Bill.

Status of the National Confidential Forum – housed as a sub-committee of the Mental Welfare Commission – and its independence

As we understand it the Mental Welfare Commission (MWC) will retain overall responsibility for the National Confidential Forum (NCF) functions, but the Forum itself will discharge day-to-day functions. The MWC will provide support to enable the NCF to discharge its functions (to hold hearings and produce reports). The head of the NCF will be accountable to the MWC (Commission).

The specific mechanism for setting up NCF within the context of the Commission is the creation of a committee of the Commission to be known as NCF. The NCF will have a distinct identity within the Commission structure. We understand from the correspondence we have received that the NCF will not operate as a “usual committee” but rather operate as the NCF.

We would want to be assured by the Scottish Government of “NCF’s” operational independence and its governance in this particular structure. Especially in relation to obtaining, the holding and storage of confidential data pertaining to victims-survivors testimonies and personal details.
We also believe that it is important for the NCF Chair to have operational autonomy and retain certain powers to carry out their Independent role effectively and as they determine. Within the NCF perimeters and structures as laid out within the Bill but with freedom to make decisions. As issues may arise which have not been considered or previously encountered.

We understand from Louise Carling, more specific arrangements for the hosting of the NCF within the Commission will be set out in an agreement and will provide more detail as to how the NCF will be able to discharge its functions with as much operational autonomy as possible. We would expect due consideration to be given to All who wish to submit a testimony, but this in our view is an operational matter for NCF commissioners.

Concerns regarding false allegations by a number of the parties need to be addressed. FBGA are seeking a fair and robust process for all taking into consideration the "Kaufman Canada 2002" report recommendations. The Rights of All require to be upheld in the processes.

The MWF Commission should have in place an independent and impartial complaints procedure clearly set-out regarding NCF.

**Support for participants before, during and after their input**

Support is important and we would expect to see a range of mechanisms for participating such as taking personal accounts through hearings, teleconferencing and telephone interviews and email - mail facilities.

Support services should be appropriate to the needs of individual participants and seamless. Companion support is also invaluable for participants. Boundaries need to be clearly defined to participants including that the Panel members will not be offering on-going support. Support with travel expenses is required.

In TTBH counselling and other support was offered and this was provided by ICSSS (In Care Survivor Scotland Service). Participants found this help and the support invaluable.

Our concerns are that some victims-survivors require long term support that includes on-going home support and other forms of support services including intensive counselling support. Abuse and trauma support by suitably qualified health professionals such as (psychiatrists and psychologists).

FBGA would like to see a signposting of support and other services for victims-survivors who participate in NCF including for those who live outside Scotland. A conjoined and seamless approach to providing seamless support services before, during and afterwards.

Also there has to be recognition that some victims-survivors may wish to choose their own local support services but may require assistance to find local services. Especially participants who do not live in Scotland. It is
important that all participants who come forward are supported regardless of their location. Independent Advocacy support is also very important to empower and enable potential participants to make informed choices.

Any other aspects of the NCF.

The consultation for NCF was in our view appropriately managed and inclusive of a broad spectrum of victims-survivors in events that were enabling and safe. We would like to thank Survivor Scotland team for arranging these events and providing support to enable victims-survivors to contribute and participate in the NCF consultation.

Confidentiality

The confidentiality of participants and safeguarding of their testimony is important for participants if they are to have confidence in the NCF to enable them to come forward and explain their individual experience whether good or bad.

We recognise that there will be limits to confidentiality such as in the reporting to the police any allegations and where a legal duty exists to do so. Where there is a material risk of harm to children or adults-for example, where an alleged abuser identified at the Forum continues to work with children or adults-we understand the police will be informed.

The question for this Committee to consider, is will a confidentiality model on its own establish the full facts and the truth? Will this confidential model identify any systemic failures including possibly by the State?

Chair and Commissioners

It important that the NCF similarly have the relevant personnel with expertise and background to focus and respond effectively to the particular experiences, and the particular implications of those experiences, of people placed in institutional forms of care as children. FBGA are in broad agreement with (point 72) in the NCF analysis document. FBGA are awaiting confirmation as to whether there will be victims-survivors representation on the selection panel referred to in the Bill.

Retraumatisation

A major concern regarding NCF for FBGA is the potential of retraumatisation of victims-survivors who have had to revisit past abusive experiences in various processes without resolution or closure and how this abuse continues to impact on victims-survivors health and wellbeing.

Many Quarriers victims-survivors have given numerous testimonies to the Police, The Scottish Criminal Courts, Civil Court processes, TTBH and to Dr Janet Boakes, a psychiatrist with a special interest in the subject of false memory syndrome who was commissioned by the Defenders in the Court and Civil proceedings.
Revisiting past abusive events over and over again significantly affects the victims-survivors emotional and mental health wellbeing and compounds the original harm and damage inflicted. This includes victims-survivors who are considered “resilient” or with ordinary fortitude. Many victims-survivors who participated in TTBH reported having to seek additional psychiatric counselling and additional support afterwards once the realisation of their testimony they had given impacted on them.

So it is vitally important to have extensive support services in place before, during and afterwards and ensure that suitably qualified health professionals in abuse and trauma are in place and available. In addition to the ICSSS counselling support service.

**Aggregation and Redaction of participants testimonies**

Concerns remain about the aggregation of victims-survivors testimonies from different institutions and the potential for false allegations resulting from this practice. Whereby participants testimonies may be erroneously attributed to the wrong individual and institution.

Also will participants testimonies be identifiable in subsequent reports published and compiled, by those individuals providing such testimonies or will these testimonies be unduly redacted and disseminated in any final report on the pretext of confidentiality.

Many victims-survivors went public after TTBH and in other jurisdictions following the conclusion of confidential models and expressed frustration and disappointment that they could not identify their testimony in the said reports.

Each institution, organisation and entity had its own management, culture and structure. Institutions, Organisations and entities identified by participants as abusive regimes should have a factual history each addressed separately in any and all reports compiled, by NCF Chair and Commissioners.

We recognise also that there may be issues relating to the behaviour of former residents and others.

We see no legitimate reason why individuals convicted in the Scottish Criminal Courts of abusing children in care and in institutions and identified by participants. Why they should not be highlighted and identified in any and all NCF reports published and compiled.

**Publicising the NCF**

A multifaceted international and local media campaign may be required recognising that many former residents no longer reside in Scotland. Information packs concerning NCF should be non-jargon and set out clearly the processes that participants will engage in without any ambiguity. Including
the fact that victims-survivors testimonies will be redacted for confidentiality reasons. To enable potential applicants to make fully informed choices.

**THE SHRC Recommendations and Framework**

The Scottish Government stated in the analysis NCF consultation document that it recognises that the establishment of the National Confidential Forum is part of a suite of responses to people placed in care as children, including survivors of abuse. (Point 42).

We would ask the Scottish Government and The Scottish Parliament to now take this opportunity of constructive engagement by all the parties in the SHRC Interaction. To take immediate steps to address the outstanding issues to enhance and widen the legislation NCF Bill 2013 to include other elements of redress, remedies and reparation which meets the needs and expectations of the Scottish victims-survivors affected by these abuse issues.

FBGA and other victims-survivors are seeking the full implementation of the Scottish Human Rights Commission recommendations and framework relating to these historical abuse issues affecting Scotland.

FBGA have put forward concrete and equitable proposals in all the processes we have engaged in to-date including the recent Interaction and Timebar consultation, proposals for resolving these historical abuse issues equitably and in a non-adversarial way.

Other countries using best practice have addressed similar historical abuse issues to the benefit of their victims-survivors and society as a whole. By initiating processes that are cost effective, not adversarial but which have addressed the issues. While delivering positive outcomes which were beneficial for their victims-survivors without inflicting further harm or trauma on those abused.

We would now kindly request that The Scottish Government, The Scottish Parliament and all others face up to their collective responsibilities in these matters, and that this committee gives serious consideration to establishing a Scottish model of remedies, redress, and a reparation scheme within the NCF legislation. While ensuring the “Rights of All” are upheld in any processes.

**David Whelan**  
**Spokesperson**  
**FBGA (Former Boys and Girls Abused in Quarriers Homes)**

**Biography**

David Whelan is a former resident of Quarriers Homes. Following court proceedings in 2002 his abuser at Quarriers was convicted. He has been FBGA victims-survivors campaign group spokesperson since 2003/4; Participated on Survivor Scotland subgroup in 2005; FBGA contributed to the Tom Shaw review.
David participated regarding TTBH. He is a National Confidential Forum and InterAction Review group member in 2012/3. He is also the author of "No More Silence", published by Harper Collins in 2010, and a committee member of "Care Leavers Voice" UK Parliament.

Appendix
Letter to David Whelan

Issues concerning survivors’ narrative accounts to historical inquiry committees and those given within a therapeutic context.

Narrative Accounts to historical enquiry committees.

Where accounts are given to enquiries that do not have the strict parameters of the conduct of such accounts i.e., purpose, breadth and intention; survivors can find disappointing clashes of what they would have hoped such an enquiry to cover and any remedial effect that such an enquiry would have in terms of reaching effective compensation.

This mismatch of what is hoped for by survivors and that which is actually delivered by such enquiries is often the source of retraumatization, distress, confusion and a general feeling of not wishing to engage in further disclosures and narrations which have proven so fruitless in the past.

It would not be surprising to find real disappointment, hostility and distress by those survivors who in good faith have given their account with a wish for restorative outcomes that would truly recognize the trauma they have faced. Similarly with the wish by survivors that these restorative outcomes would also recognize those traumas which are ongoing with the consequential need of compensatory action; compensatory action which makes provision for survivors lives, so that they can effectively redress these trauma through further therapeutic means.

In some instances this will mean compensation which allows for them to usefully and credibly get back on their feet from such trauma which have been so disabling to their social personal and work lives. A future aspect of enquiry would need to be quite clear in its delineation of purpose, breadth and outcomes in terms of compensation and restorative actions.

Therapeutic Contexts

The marked differences of therapeutic contexts is that within this environment the survivor is immediately a credible client and has the right to be believed and accepted without any value judgements. This can differ markedly from the sometimes litigious digressions and reception of an account to an historical enquiry committee. This does once again demonstrate the nature and purpose of such an historical enquiry and can greatly affect the safety and security of survivors in giving their accounts. At the beginning of therapeutic narrations, it is made quite evident what the basic concept, purpose and
process of the therapeutic narration will be about. In this way confusion about intent and purpose is obviously reduced. Survivors can know their accounts are held in respect and esteem which lessens the tyranny, confusion and disappointment a survivor will feel where this is not made clear from the start. Given the above I would conclude the evident necessity of designing an historical survivor’s enquiry according to purpose.

I would believe that an enquiry which has some of, if not all, the framework of an enquiry that respects the therapeutic condition as above would mitigate against any prospect of survivors feeling further abused, turned over and used for purposes that are out of their control and purposes that never in the first instance intended to respect or honour their accounts.

Dr Peter McParlin
C.Psychol., Fellow of the British Psychological Society

29 November 2010
Victims and Witnesses (Scotland) Bill

VOX (Voices of Experience)

As a former lecturer in English and Communications at the University of the Highlands and Islands, North Highland College campus, I must state that I find the continuing practice of challenging both victims and witnesses in such an outdated, confrontational manner incomprehensible in the twenty-first century. Basic communications demonstrates that, even when the family is gathered around the dinner table, we are more likely to get into an argument with the person sitting opposite us. Conversely, the person seated diagonally opposite us does not generate such hostility. We have learned, in a variety of face-to-face situations, to avoid intimidating or antagonising interviewees, simply by rearranging the furniture slightly, so that we meet them at an angle.

I believe that the Scottish Parliament should be proud to have incorporated a non-confrontational architecture into the assembly, thus avoiding the “yah boo” politics of Westminster. Likewise, the time-wasting procedure of counting the ayes and the nays has been superseded by procedures more in line with living in the digital age. Most professions have moved with the times, and abandoned the trappings designed to give the wearer an air of authority. Certainly, caps and gowns are less likely to be worn by teachers nowadays. The only profession to hang on to such paraphernalia is the judiciary. Presumably, this is designed to instil fear into the criminal fraternity (which, of course, it no longer does). However, this “theatre” does, paradoxically, intimidate victims and witnesses, who are already scared by the prospect of seeing the perpetrators of crimes against them in the dock. Add to this the interminable waiting to be called, postponements of proceedings, and lack of preparation about what to expect, and we have a recipe for a disastrous experience.

I believe it could be helpful for both victims and witnesses to undergo some kind of “rehearsal” for the eventual “performance”. For it is very much like a theatrical event, with adrenalin playing a similar part to that it does in the actor: too much and he or she goes into panic mode; too little and the performance is unconvincing. Returning to teaching analogies, this is very much like preparing for an examination. The student needs to know his facts, of course, but if the examination takes place on unfamiliar territory, this can be sufficiently off-putting to seriously ruin the student’s chances of doing well. Where teachers are aware that change of venue is imminent, a visit to reconnoitre the new premises can help students to acclimatise themselves to the changed conditions. Similarly, a visit to the law courts – and how many law-abiding citizens have any idea what these look like, except, vicariously from legal dramas and television series – would surely help avoid the shock of entering such an awe-inspiring institution for the very first time? Equally, more attention to adequate rehearsal of their roles beforehand might ensure a better performance by the victims and witnesses with less likelihood to say the wrong thing and ending
up in contempt of court or drying up and failing to provide the necessary evidence.

The recent case of the music teacher (Michael Brewer) from Chethams, the prestigious music college in Manchester, who was eventually found guilty of sexual crimes, provides us with an example of the traumatic ramifications (suicide) many years after the actual crime when a victim's (Frances Andrade) integrity is challenged by the perpetrator's defence team. It is hardly surprising that so few victims are prepared to give evidence in rape cases when the consequences for them are the equivalent of yet another rape – this time a psychological one. Admittedly, there are very occasionally cases where claims of rape are brought maliciously by females, but this does not license the character-assassination of perfectly innocent victims.

John Sawkins
Member-Director
VOX (Voices of Experience)

3 April 2013
Victims and Witnesses (Scotland) Bill

Highland Violence Against Women Strategy Group

Statutory members in the partnership addressing Violence Against Women in Highland are NHS Highland, The Highland Council, the Crown Office and Procurator Fiscal Service and the Police. These members work in collaboration with a number of voluntary organisations on this issue, including Caithness & Sutherland Women’s Aid, Lochaber Women’s Aid, Inverness Women’s Aid, Ross-shire Women’s Aid, Victim Support, Witness Service, Rape and Abuse Line and Children 1st.

The Functions and the Powers of the National Confidential Forum (NCF)

We would agree with the functions of the NCF as outlined in the Policy Memorandum accompanying the Bill. We believe that allowing individuals time and a place to have their experiences of institutional care listened to and acknowledged can have a powerful impact.

We welcome that the NCF will provide a confidential space, but would assume that this could not be absolute. If further adults or children were at risk by those providing care, child protection (and, potentially, adult support and protection) guidelines would have to be followed. This would need to be carefully explained to those using the NCF in advance of them disclosing their experiences. This would result in the individual remaining in control of their information and help them to choose what they will share with the Forum. This aspect of confidentiality is not clear within the Policy Memorandum to the Bill and needs clarity in order to provide those at a Forum with the necessary information in advance of their attendance. Currently, the Bill reads that if a person discloses abuse and it is likely that the perpetrator is still at large then they will be supported to go to the police. We would not recommend this action as it removes the focus away from the person disclosing at the Forum.

We believe that much can be learned from those with both negative and positive experiences of care and that can be translated into current policy and practice. We welcome this function of the NCF.

Signposting people into support services is a key element of the Forum. We do question, however, if this support can be provided categorically across Scotland. People who have experiences of institutional care live across the country and not just in the areas with the higher concentrations of institutions in the past. Whilst helpline and email support increases opportunities for access to support, the value of a face to face service cannot be ignored.

Status of the NCF and its independence

We support the Mental Welfare Commission as the host of the NCF. This will provide the NCF with the appropriate levels of autonomy.
Support for Participants before and after their input

It must be recognised that it may be difficult for people to reveal their experiences to the NCF, even though they may have strong desires to do so. Support must be provided before the Forum in order to prepare people for the experience and to help them identify what they would like to say. After care is vital as being at the Forum may bring up memories that have not been fully processed.

There may be impact on other services after people have attended the NCF. In particular, services for survivors of child sexual abuse (including Rape Crisis) may find an increase in demand for support.

As previously mentioned, the ways in which the support will be provided must be carefully thought out and provided in a range of ways, i.e. helplines, face-to-face, etc.

Gillian Gunn
Training & Development Manager
Violence Against Women

2 April 2013
Victims and Witnesses (Scotland) Bill

West Lothian Community Health and Care Partnerships

Background

The Health and Sport Committee is launching a call for written evidence in order to inform its Stage 1 consideration of the Victims and Witnesses (Scotland) Bill.

The Justice Committee is leading on consideration of the Bill as a whole but the Health and Sport Committee has been designated as a secondary committee to scrutinise the part of the Bill relating to the establishment of a National Confidential Forum (“NCF”), which is to be set up under the auspices of the Mental Welfare Commission. The Health and Sport Committee will report to the Justice Committee, which will in turn report to the Parliament on the general principles of the Bill.

The Policy Memorandum accompanying the Bill states: “The principal policy objective of this part of the Bill is to offer adults placed in institutional care as children acknowledgement of their experience, including abuse and neglect, through the creation of the National Confidential Forum (NCF). The value of such recognition, in terms of improved health and wellbeing, was evident in the experience of the Pilot Forum, ‘Time to be Heard’ on which the NCF is firmly based.”

As set out in the Memorandum, the NCF’s functions are:

- To receive and listen, in confidence, to adults who were in care and to offer acknowledgement of their experiences;
- To contribute to the prevention of the future abuse of children in institutional care, via proposals to inform policy and practice;
- To contribute to a permanent record of life in care, enhancing public understanding;
- To signpost support, advocacy, advice and information services to participants and their families.

The key proposals in the Bill relating to the NCF are:

- The functions of the NCF;
- Its scope;
- How information held by the NCF will be treated by a general duty of confidentiality;
- The arrangements for the NCF to be hosted by the Mental Welfare Commission and safeguarding of its “operational autonomy”.

Nick Clater (Lead Officer – Adult Protection (Multi-agency Liaison)) and Jane Ridgway (Lead Officer Child Protection) have collated this paper for consideration.
The functions and powers of the NCF (as set out in the Bill)

The proposed functions and powers of the NCF appear to be entirely proportionate and reasonable. It is noted that the preservation of the anonymity of participants, establishments and other persons should be maintained. We believe that this is entirely appropriate.

Status of the NCF – housed as a sub-committee of the Mental Welfare Commission – and its independence

It is acknowledged that the housing of the NCF under the auspices of the Mental Welfare Commission is more suitable than any possible alternatives. For example, we do not believe that the NCF could be housed as a sub-committee of the Care Inspectorate due to the possible conflicts of interest that could arise as well as the negative perceptions some participants will have of residential care.

Support for participants before, during and after their input

We had some concerns that the Bill does not set out clearly or in sufficient detail what support would be available for participants either before, during or after their input. We would like to have seen some reference made to counselling or de-briefing support for participants as well as some mention of advocacy. The absence of this is a concern and, in our view, requires to be addressed.

Any other aspects of the NCF

We did have some discussion regarding the definition in the Bill of a child being 16 and 17 years old. However, it was not clear what implications, if any, this would have for the operation of the NCF.

Nick Clater & Jane Ridgway
Lead Officers for Adult and Child Protection
West Lothian Community Health and Care Partnerships
West Lothian Council

2 April 2013
Victims and Witnesses (Scotland) Bill
The Scottish Human Rights Commission

1. Introduction

The Scottish Human Rights Commission (the Commission) welcomes the opportunity to contribute to the Health and Sport Committee’s Stage 1 consideration of the Victims and Witnesses (Scotland) Bill on a National Confidential Forum for survivors of childhood abuse (NCF). As the Committee may be aware the Commission has been engaged in promoting a human rights based approach to justice for survivors of abuse since 2009.¹

As the Commission outlined in the Human Rights Framework to address historic child abuse in 2010,² survivors of serious ill-treatment, such as physical or sexual abuse or serious neglect, which may amount to inhuman or degrading treatment or punishment have a right to an effective remedy, including access to justice and reparation (including as appropriate satisfaction, rehabilitation, restitution, adequate compensation and guarantees of non-repetition).³ Depending on the nature of the perpetrator and the gravity of the harm the state also has an obligation to ensure effective official investigations or an alternative form of investigation sufficient at least to identify any state responsibility and systemic failures — that is to identify not only what happened (the “right to the truth”) but why it happened (to ensure guarantees of non-repetition).

The Commission continues to pursue the implementation of the full range of recommendations which it made in the Human Rights Framework. These include elements of accountability as well as acknowledgement. In this context we welcome the commitment by the Minister for Public Health, on behalf of the Government, to engage with the process of human rights InterActions which is currently underway with the support of the Centre for Excellence in Looked After Children in Scotland (CELCIS).⁴

The first InterAction meeting on 28 February 2013 brought together survivors of historic child abuse, Scottish Government Minister Michael Matheson and officials, and representatives of local authorities, institutions which provided residential child care, workers associations, foster care organisations, the Bishops Conference, the Conference of the Religious, and a number of

¹ For an overview of the Commission’s work in this area see: http://www.scottishhumanrights.com/ourwork/care/adultprotection
³ See SHRC and Susan Kemp, A REVIEW OF INTERNATIONAL HUMAN RIGHTS LAW RELEVANT TO THE PROPOSED AKNOWLEDGEMENT & ACCOUNTABILITY FORUM FOR ADULT SURVIVORS OF CHILDHOOD ABUSE, February 2010 (hereafter legal paper).
⁴ For more information see www.shrcinteraction.org
religious orders. The meeting agreed a platform for further negotiations in areas related to:

- empowerment of survivors to access justice, including support services;
- experience sharing between institutions and public bodies on steps which they can take to respond through remedies such as apologies and compensation;
- acknowledgement of harm such as through effective apologies, and
- accountability of all of those who held responsibilities for the care of children and learning lessons for current and future child care practice.

2. Functions and Powers

The Commission considers that a confidential committee which enables survivors to recount their experience and have them acknowledged and recorded by an official or public body may be an element of satisfaction for some survivors, and as such an element of a broader package of effective remedies. The Commission has consistently reiterated its view that such a confidential forum should operate alongside a range of other options for justice and remedies for survivors.

When Scottish Ministers first announced their plans to hold a form of truth commission on historic child abuse, they indicated that it would “establish the facts”. If the NCF is to achieve that aim it will require some powers of investigation. Similarly, the Government consultation document listed learning lessons to prevent abuse in the future and protect rights more effectively in the future under “purposes of the NCF”. These aims would be more effectively served by a mechanism which was capable of identifying not only what happened but why. That would require powers sufficient to inquire into the operation of prevention and protection regimes at the time.

The Commission notes that Northern Ireland recently established a Historical Institutional Abuse Inquiry which includes an Acknowledgement Forum and an Inquiry Panel. The legislation which established the inquiry include powers to require production of evidence. The Terms of Reference in that process make clear that it is the Inquiry Panel which will make recommendations and

6 As the Minister stated at the time "I am pleased to inform Parliament that we have been actively scoping the adaptation of the principles of a truth and reconciliation model. We are committed to that. We are considering good practice examples for establishing a forum to give survivors the chance to speak about their experiences and to help them come to terms with the past. That will provide an invaluable opportunity to establish the facts, learn from the suffering and use the experience to help us protect and provide for children in the future.” Adam Ingram MSP, Minister for Children and Early Years, Official Report of the Scottish Parliament, 7 February 2008, http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-08/sor0207-02.htm
7 Consultation document, para 16.
8 www.hiainquiry.org
9 Section 9, Inquiry into Historical Institutional Abuse Act (Northern Ireland) 2013.
findings to “guard against future abuse” including on “findings of institutional or state failings”. The Inquiry is intended to be inquisitorial in nature, rather than adversarial.

3. Status and independence
The Commission has previously expressed the view that the aims of the NCF would be most effectively achieved by a body established solely for that purpose.

Noting that the Mental Welfare Commission has been designated the host body the Commission recommends that everyone involved seek the greatest possible functional independence.

4. Support for participants
In the Human Rights Framework the Commission identified a range of forms of support required to enable survivors and others to participate in such a Forum. These include:

- access of survivors to relevant information related to their care (e.g. addressing barriers faced by survivors in accessing their files).
- psychological support, support workers or advocacy support before and after participants provide testimony, mechanisms and materials to support involvement, capacity to provide testimony by video link.
- Research also suggests support will be needed for current and former staff of institutions.
- The State has the obligation to protect the physical and mental health of those participating in (or cooperating with) the NCF, as well as the NCF staff and third parties affected by its work, including through taking steps to protect their mental health and protection from attacks on

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10 Historical Institutional Abuse Inquiry for Northern Ireland, Terms of Reference, 18 October 2012.
11 Ibid.
14 Ibid.
15 E.g. Truth and Reconciliation Canada uses a “memory book” to support survivors to make statements. The book provides accessible information on context, the role of the TRC, consent forms and prompt questions.
16 Duncalf et al, Time for “Justice”, Research to inform the development of a human rights framework for the design and implementation of an ‘Acknowledgement and Accountability Forum’ on historic abuse of children in Scotland, Care Leavers Association and Scottish Institute for Residential Child Care. (Hereafter research report), December 2009, p 33, 44.
18 Experience from Ireland, shared during the preparation of this framework suggests that, far from therapeutic, the experience of recalling historic abuse, even in a confidential forum, may have a deleterious impact on survivors’ mental health which in some cases may endure over many months or more. The right to the highest attainable standard of physical and mental health is guaranteed in Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). To comply with that right, the state must take immediate steps to respect, protect and fulfil (achieve progressively the full realisation of) the right to health.
life, physical or mental integrity, by private individuals. This may also require training for staff in preparation for exposure to distressing information and situations, and protection against intimidation or reprisals.

5. Any other aspect of the NCF

a. Duty to investigate

The Commission considers that the discretion afforded to members of the NCF to report credible allegations of criminal ill-treatment is too broad. The Commission notes that consideration of the same question in Northern Ireland was clarified as follows: "statutory framework requires that, where allegations of child abuse come to light, these must be reported immediately to PSNI and social services for investigation." 

b. Eligibility

The Commission is unconvinced at the blanket exclusion of anyone under 18 from accessing the Forum and sees nothing in the explanatory notes or policy memorandum to justify such a restriction.

International best practice suggests that the NCF should be open to some categories of persons who were indirectly affected by historic abuse such as relatives, including where survivors have died or are incapacitated. The NCF and other remedies may also be available to others whose rights may have been violated, in some circumstances (for example former staff whose due process and privacy rights may have been violated, and relatives of either).

Duncan Wilson
Head of Strategy and Legal
Scottish Human Rights Commission

3 April 2013


Articles 2, 3 and 8 of the ECHR and ICCPR art 7, UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Article 16.

UN Set of principles to combat impunity, UN Doc. E/CN.4/2005/102/Add.1, Principle 32.

Victims and Witnesses (Scotland) Bill, Schedule 1A, Part 6, clause 13 (4)-(6).


Victims and Witnesses (Scotland) Bill, Schedule 1A, Part 3, clause 7(2).

The majority of respondents to the Scottish Government consultation supported the possibility for family members to be involved in the Forum. Others suggested this should be on a case by case basis and that survivors should retain the choice.

Other national human rights institutions developing similar frameworks have also recommended extension of remedies to family members and even communities and descendents. See Australian Human Rights and Equal Opportunities Commission, Bringing them home: national inquiry into the separation of Aboriginal and Torres Strait Islander children and their families, 1997, recommendation 4.
Victims and Witnesses (Scotland) Bill

NHS Greater Glasgow and Clyde

1. The functions and powers of the National Confidential Forum

NHS Greater Glasgow and Clyde welcomes the proposal to establish a National Confidential Forum as set out in the Victims and Witnesses Scotland Bill. The Pilot Forum Time to be Heard (2011) produced significant evidence that such a Forum is largely experienced as a valuable opportunity for validation of abusive and neglectful experiences in institutional care and an opportunity for closure. While the Bill rightly proposes the confidentiality of those giving evidence, it is felt that the limits to confidentiality outlined are also essential to ensure the protection of children currently in care.

2. Status of the NCF – housed as a sub-committee of the Mental Welfare Commission – and its independence

It is important that the NCF is seen as independent of the government as participants may wish to describe historical abuse or neglect in government funded or run institutions. We support the proposal to house the NCF as a sub-committee of the Mental Welfare Commission.

3. Support for participants before, during and after their input

It is thought that the support model described in the Time to be Heard report provides an excellent model of the type of support required and the type of venue required for the NCF. The consistent presence of a support staff member to guide the person through the process of the hearing and also to phone them up a few days later to confirm they were well and to check if they required any support or assistance is a model of good practice. A private, non-institutional and comfortable setting to give testimony is also important. The fact that, in the Pilot study, the Commissioners were experts in the area of child abuse and neglect, would have also contributed to a containing and validating experience for the participants and it would be hoped that the NCF could appoint similarly qualified commissioners. The support of In Care Survivors Scotland with their confidential phone line, leaflet and signposting to services as required is a useful model. It is noted that only 10% of participants in the pilot study required professional intervention, although it is recognised that the majority of these participants had personal support and this may not always be the case for others in the future.

NHSGG&C services for adult survivors of childhood abuse and neglect with mental health problems

Many individuals who have experienced childhood abuse and neglect in institutional care will suffer poor mental and emotional health. Some will go on to develop substance misuse problems as a way of coping. As a result many survivors of institutional abuse are likely to already be users of a range of health services. However, there is evidence that the abuse if not always
disclosed or addressed as part of the treatment and care process and the source of the individual’s poor health may not be identified or addressed.

Like other health boards NHSGG&C has been working to introduce a programme of routine enquiry of gender based violence within its addiction and mental health services.

To help ensure that survivors who have the courage to participate in the NCF and access the support they need to assist their recovery, the Scottish Government should take steps to

- Ensure that all sexual health, mental health and addiction services are robust in meeting their responsibilities to identify and support survivors of abuse within a reasonable timeframe as set out in CEL 2008 (Gender Based Violence)
- Ensure that health services are equipped and resourced to respond effectively to trauma related psychological and psychiatric problems resulting from childhood abuse and neglect.

As noted above, it may only be a minority of participants who need or wish professional help following giving testimony. NHSGG&C has a wide range of mental health services ranging from primary care mental health teams through Community mental health teams to a specialist Trauma service which provides psychological intervention to survivors with complex psychological problems related to past trauma. The spread of specialist Trauma provision is currently unevenly spread across GG&C and this is likely to be the case across Scotland.

Anne Hawkins
Director, Glasgow City CHP
NHS Greater Glasgow and Clyde

3 April 2013
Victims and Witnesses (Scotland) Bill

Open Secret/ In Care Survivors Service Scotland

Introduction

The In Care Survivor Service Scotland (ICSSS) supported a number of clients through the previous Time to be Heard forum. Clients were all told about ICSSS in the publicity materials sent to them and they were able to choose whether to access support from the service. Our learning from the impact on the survivors we worked with has informed our response to this call for evidence.

The functions and powers of the NCF (as set out in the Bill)

1. to receive and listen, in private and in confidence, to the experiences of adults who were placed in institutional care as children, including experiences of abuse, and to offer acknowledgement of those experiences;

This will be a very therapeutic process for many survivors as many have expressed that they would like to have some sense of closure and acknowledgement of what they experienced in childhood. However it should be recognised that to talk about abuse in particular is very difficult even as part of a counselling process and to talk to the forum may be intimidating. For many survivors they are left with a feeling of shame, particularly where the abuse was sexual and they could be left with feelings that are difficult to cope with. This can be addressed with the appropriate support as explored later in this document.

2. to contribute to the prevention of the abuse of children placed in institutional care in the future by making proposals to inform policy and practice, based on experiences recounted in hearings of the NCF;

This is an aspect that survivors say is very important to them. The ICSSS service user group had this as one of their main action points. We feel that this is a very important role of the forum and testimonies can be very powerful informing practice or providing training.

3. 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;

Again this aspect is very important to survivors. They express to us as workers that it is very important to increase public knowledge about the issues they have faced particularly in breaking down the stigma that many face. There should be clarity about what records are kept, by whom and how they are stored as this is very important to survivors.
4. to signpost services to participants and their families which can offer support, advocacy, advice and information.

This will be covered in more detail under Support for Participants but this is perhaps the most important aspect of the process due to the potential of risk to survivors with regard to their ongoing wellbeing. This should be more than signposting and should be an integral part of the process.

Eligibility to participate

ICSSS work with survivors who have been placed in a number of care setting including foster and kinship care and we feel that it is important that those survivors also have the opportunity to participate.

Confidentiality

Safeguarding of confidentiality will be an important aspect of the forum. Many survivors of abuse have issues with trust and the confidentiality aspect, including exclusions should be made explicit when materials giving information on the forum are distributed.

It is important that any children are protected from harm and therefore confidentiality should be breached where there is the risk of current abuse. This should be made clear to participants from the outset as we would inform our clients in therapy. Another area where confidentiality should be breached is if becomes apparent that a participant of the forum is at risk of harming themselves or others.

Status of the NCF – housed as a sub-committee of the Mental Welfare Commission – and its independence

The independence of this body should be made explicit to participants due to issues of trust highlighted above. It should be made clear that there is no presumption of mental health issues as not all participants will have experienced mental health problems and they may feel that there is a presumption that they have. However we feel that this is a sensible option.

Support for participants before, during and after their input

We feel that this is a crucial part of the forum operation. We found through Time to be Heard that clients who had been through the process found that while it was something they really felt compelled to be part of that it brought up feelings that were hard to cope with. Many survivors of abuse suffer from severe anxiety and find formal processes very difficult to engage with.

We feel that the Confidential Forum should go further than Time to be Heard. At that time the packs highlighted the services of ICSSS and the onus was on the participant to make contact. A more formalised process of support on offer
would be less intimidating for participants than having to also contact an organisation they were unaware of. Participants could be asked at first point of contact if they require additional support. At that point an ICSSS worker could contact them to explore what support may be necessary. They would also talk through what will happen at the forum. When a therapeutic relationship is established the worker would then attend the forum with them to offer support to go through the process. For those participants who have not accessed the support previously a worker could be available on the day to provide support if necessary. At the forum participants could be asked by the team if they feel they require ongoing support and an ICSSS worker could then make contact. The lesson from TTBH was that people thought they didn’t need support and it wasn’t until afterwards, sometimes weeks afterwards, that the effects of it came to light and they felt traumatised. At all stages the work would be evaluated.

We feel that ICSSS are the best placed organisation to offer this support. Staff are professionally trained and qualified as therapists or advocates and all have substantial experience of working with survivors of abuse in care. They receive regular supervision and continuous professional development training. They are also skilled at offering counselling and advocacy from the same worker. In our focus groups this was an area identified as very important as survivors did not want to engage with different workers. There are no other services experienced in this specialist work. We receive a large number of referrals from psychologists and psychiatrists who recognise the specialisation that ICSSS can provide.

**Advocacy**

There was some discussion at the Health and Sport Committee on 26th March about employing an independent advocacy service to support participants. This is something that many of our clients have said that they do not want. They have given us many examples of accessing advocacy services that do not understand their specific needs have increased levels of anxiety and not met their needs.

“The advocacy service is crucial for many reasons – firstly the fact that I can have access to a counsellor to help me do the advocacy work means there is **already a full understanding of my mental health issues and needs**. Secondly, the counselling and advocacy works together so I only have one worker, instead of being passed around. You must remember that being passed around is a feeling I was used to in care.”

“Not having to open up to another person is a good thing – you transfer your knowledge of me from counselling into advocacy so you minimise my trauma by not having to repeat my experiences.”

*ICSSS Focus Groups*
For advocacy out with Scotland, ICSSS have been experienced in delivering this. One volunteer is arranging access to records for a home in Selkirk where the person now lives in Spain and there are many other examples.

**Support for Forum Staff**

Many ICSSS staff are also professionally qualified supervisors and they would be well placed to provide professional debriefing and support.

**Any other aspects of the NCF**

**Budget**

There was discussion at the Health and Sport Committee on 26th March that participants should be given the opportunity to have funding to pay for their own choice of support e.g. to pay a psychologist or psychiatrist. This would be a very high cost option and very difficult to monitor. On a unit cost basis ICSSS offer a very low cost service with very specialist skills. Work is likely to be long term so the associated costs for support would be likely to exceed the amounts identified in the budget allocation. On a basis of £45 per hour for an average of 24 sessions for 100 participants this cost would be £108,000. This is half of the cost of the full ICSSS service.

ICSSS have had our budgets cut for this three year funding period due to less funding being available therefore there would be a cost implication of ICSSS providing support. However costs would be within the budget levels.

**Why ICSSS for Support**

“Too many of us have been stigmatised for our behaviour brought about by trauma symptoms, making it difficult to receive help in Health and Statutory services. ICSSS build relationships based on their knowledge of trauma.”

“Coming into the organisation I feel scared and nervous but I at least have the reassurance that the workers will know where I am coming from. This is not the case in the NHS or generic services.”

“It is not appropriate to signpost us to other agencies. Here’s an example. You shut down ICSSS and the Helpline and signpost me to Samaritans or Breathing Space. I used them before I came to ICSSS. I don’t want to slag off other organisations who do great work, but to demonstrate the point, these help lines were not helpful to me for years because they are generic. ICSSS is specialised and it works.”

*ICSSS Focus Groups*

In conclusion ICSSS feel that the plans for the confidential forum processes have been well thought out and will be of benefit to survivors. However we feel that it is crucial that the appropriate support is provided.
Janine Rennie  
Chief Executive Open Secret  
Lorna Patterson  
Project Manager ICSSS  

3 April 2013
Victims and Witnesses (Scotland) Bill

Scottish Borders Council

1. The functions and powers of the NCF (as set out in the Bill)

Scottish Borders Council Social Work Department welcomes this proposal to give voice to adult survivors of childhood abuse within care settings and the opportunity it gives for current care practice to learn from and benefit by the evidence of its participants. Scottish Borders Council Social Work Department fully supports measures to encourage best practice within its care provision to help avoid repetitions of unacceptable practices in institutional care under its control.

It is hoped the NCF will enhance public understanding of abuse within institutional care settings and the lifelong impact on the children affected. Scottish Borders Council Social Work Department is committed to furthering public recognition of practices in the past which should never have been tolerated and which must never be allowed to happen again; and of the ways in which young lives, which should have been protected within care settings, were blighted.

We also need to ensure that people who are currently within the system, or may be within the system in the future, have access to such a structure of assistance. Furthermore, we support the proposal that the scope of the NCF is broadened to include other care settings, such as foster care.

2. Status of the NCF – housed as a sub-committee of the Mental Welfare Commission – and its independence

Scottish Borders Council Social Work Department acknowledges the MWC as an appropriate body to host the NCF, and recognises the benefits of utilising its existing structures.

It is vital that the NCF is able to offer a confidential and non-judgemental forum allowing participants the opportunity to give testimony out with a court environment. Some concerns have been raised that the link with the MWC may portray a negative image for some participants; however this should be overcome if the NCF is properly distinguished as a separate forum. It is hoped victims and witnesses would not be put off entirely.

3. Support for participants before, during and after their input

Scottish Borders Council Social Work Department recognises the opportunities given through the establishment of the NCF to properly acknowledge and validate the evidence of victims and witnesses and to learn from the evidence of survivors of, and witnesses to, such abuses.
Scottish Borders Council Social Work Department welcomes the function of the NCF to provide suitable support, advocacy and information services to victims, witnesses and their families, and believes this will be of invaluable help to assist with their recovery.

4. Any other aspects of the NCF

No further comments.

Andrew Lowe
Chief Social Work Officer
Scottish Borders Council

4 April 2013
Victims and Witnesses (Scotland) Bill  

Glasgow City Council

General Comment

Glasgow City Council Social Work Services welcomes the proposal to establish a National Confidential Forum (NCF) to give adult survivors abused in residential care as children an opportunity to be heard. Within Glasgow we have a specific service for childhood/adult victims of sexual abuse and have experience of working with adult survivors who were abused while in the care of the local authority/other child care organisations. Previously one senior officer was responsible for co-ordinating all historical abuse allegations. Both the work of the project and senior officer has highlighted to professionals the need for survivors of childhood institutional abuse to be heard, for their experiences to be validated and for the necessary support services to be in place to support such victims.

In response to the key areas to be considered, Glasgow would wish to make the following comments:

Status of the NCF housed as a sub-committee of the Mental Welfare Commission

In responding to this issue in the consultation document, Glasgow recognised the importance of locating such a Forum out with statutory bodies as many victims would not feel comfortable or would be willing to engage with such bodies. We were unclear at that time where such a Forum could or should be located and note the proposal for the Forum to be located within the Mental Welfare Commission. The Mental Welfare Commission may be seen to be independent of statutory bodies such as social work, police etc, but for some there may be a stigma attached to the Forum sitting within the mental health arena.

Overall Glasgow would agree that there is a need for the Forum to sit outwith Scottish Government and statutory services and the Mental Welfare Commission may be an appropriate body. Any such body requires to be able to work independently and be able to raise issues of concern, share learning and good practice. Central to this process is the need for victim’s experiences to be validated and that patterns and trends are identified and recommendations made which will support better informed practice which prevent future abuse.

Functions and Powers of NCF

The functions and powers are defined predominately in Sect 26 of the Bill which puts the victim at the centre of the process and we would strongly agree that victim’s accounts should be treated sensitively and in confidence.
By building up a picture of individual victim experiences the NCF should be a stronger position to identify key learning and to make recommendations which will support professional practice and accountability and prevent further abuse occurring in the future.

**Support for Participants**

We highlighted in our initial response that it was important to ensure that victims are properly supported during any contact with the NCF and that support services will require to be enhanced to ensure that victims are not left inadequately supported. In many instances, support will require to be available after the adult has participated in the Forum. If support is not available this could lead to victims feeling re-victimised and isolated with their experiences and this would be counter to what the NCF would be wishing to achieve.

We note in Part 6 provision is made for information to be shared with the police or in court proceedings (civil or criminal) where it is considered that an individual may be committing an offence against a child and can be identified. While it is crucial that victims feel safe and that their information will be held confidentially, it is important that information is shared where there are future risks to children or adults.

**Conclusion**

Glasgow City Council welcomes the Bill and the proposal to establish a National Confidential Forum. The Council has experience of working with adults who have been victims of abuse whilst in local authority care, and workers have been witness to the impact such behaviour has had on individuals. It is crucial that any Forum is fully supported by victim services who can support adults through the whole process.

**Moira McKinnon**
Principal Officer (Child Protection)
Glasgow City Council Social Work Services

4 April 2013
Victims and Witnesses (Scotland) Bill

NHS Education for Scotland

This response is submitted on behalf of NHS Education for Scotland (NES) and for your information:-

1. NHS Education for Scotland (NES) is a special health board responsible for supporting NHS frontline services delivered to the people of Scotland through education, training and workforce development. The work of NES helps to ensure that services are safe, effective and patient centred through a well trained workforce.

2. NES welcomes the opportunity to contribute evidence to the Scottish Government on this important Bill.

3. NES works closely with the Scottish Government Health Directorates, NHS Boards, UK Regulatory bodies, Scottish Funding Council, Scottish Colleges and Universities. In addition, key partners include the Scottish Social Services Council; Scottish Funding Council and increasingly other public sector organisations such as well as third sector organisations.

4. More specifically we support the development staff in key areas of mental health, psychological trauma and child health and child protection

5. In response to Bill we would like to make the following statements:

   • We welcome the establishment of the National Confidential Forum (NCF).
   • It would be appropriate to establish the NCF as a sub-committee of the Mental Welfare Commission (MWC). The MWC is independent of government and also has considerable experience with people who are vulnerable or require additional support.
   • It is important to consider implications of the Bill for education and workforce development in for health and social care staff. NES is well placed to provide such support to the workforce who may be required to participate in the NCF.
   • NES will monitor the education/development implications arising from the passage of this Bill

Dr Stuart Cable
Assistant Director of Educational Development
NHS Education for Scotland

4 April 2013
Victims and Witnesses (Scotland) Bill

Sacro's

Sacro’s experience in providing a restorative justice service as part of the Time To Be Heard initiative suggest that the creation of a National Confidential Forum would be a positive development. In particular, survivors of abuse who worked with us frequently described feelings of invisibility, of not having their experiences recognised, and of not having the importance of their history and experience validated. By recording and acting as a depository for these stories and histories, the proposed forum would be an important source of validation of survivors.

It is important that the forum has a clear identity and avoids being too closely associated with another body. However, it seems unlikely that staffing levels would be such for a stand-alone body to provide good value for money. Therefore, the option to establish the forum as a separate unit within the MWC seems the most practical one.

The perception of independence by those coming into contact with the Forum is crucially important, not least because many survivors hold strong views that the Government and its agencies failed to protect their interests in the past. Independence would assist the forum in being perceived as having a genuine aspiration to record and reflect the experiences of survivors.

Participants should have the opportunity to access a restorative justice process, such as that provided within Time To Be Heard. This would provide the potential for them to receive an apology from the responsible agency, to assist in ensuring that similar abuse does not recur, and to register with the agency the personal impact of the historic abuse.

Given the traumatic experience of many survivors of abuse it is likely that some will be reluctant to revisit painful memories. The support of organisations such as the Care Survivors Service Scotland would be useful in supporting people both when considering whether to participate and during the process itself.

Access to appropriate support and counselling services should be an integral part of the process, and participants should be able to access this before and after their engagement with the Forum.

Tom Halpin
Chief Executive
Sacro

8 April 2013
Victims and Witnesses (Scotland) Bill

The Law Society of Scotland

Introduction

The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

The Mental Health and Disability sub-committee (the committee) has considered the Health and Sport Committee’s call for written evidence on the Scottish Government’s Victims and Witnesses (Scotland) Bill and has the following comments to make in relation to sections 26 and 27, which provides for the establishment and functions of a National Confidential Forum (NCF).

It should be noted that the Society’s Criminal Law Committee has responded separately to the call for evidence issued by the Justice Committee and which relates to all sections of the Bill other than sections 26 and 27.

General Comments

The committee is supportive of the policy intent behind the proposals as set out in sections 26 and 27, and the overall objective of the Bill. However, the committee does have further observations and comments for consideration by the Health and Sport Committee.

1. The committee suggests that the functions of the NCF be very clearly specified and defined, as those persons who participate in providing their testimony may be vulnerable adults who have experienced abuse in institutional care as a child.

2. It is the committee’s understanding that the broad function of the NCF is to act as an acknowledgment forum (section 4ZB(b)) and not as a reparatory forum. There would be benefit to ensuring this is clear, either in the Act or in the Explanatory Notes to the Act.

3. The general functions of the NCF are specified at section 4ZB. The committee note that these do not include the duty to make a disclosure to a constable in the circumstances described at Part 6 paragraph 13(4) or the discretion to make a disclosure in those circumstances set out in paragraph 13(5). There are a range of other provisions in relation to disclosure in Part 6. However, those specified in relation to disclosures to constables should, in the committee’s opinion, appear in the section which specifies the general functions of the NCF, either as a specific function to make disclosures in those circumstances set out in Part 6 or by importing the terms of paragraphs 13(4) and (5).
4. The committee believe that the parameters and limits on “confidentiality” will be an essential ingredient of the NCF, particularly as it is specified that one of the general functions is to provide means for “persons…to describe in confidence…” It is crucial therefore that any duties or discretion on the NCF to make a disclosure are reflected clearly under the NCF functions.

5. The committee note that the NCF has a duty to submit its annual report to the Scottish Ministers (part 5(12)). Section 4ZB(c) places a duty on the NCF to identify patterns etc and to make recommendations about policy and practice etc and to prepare reports on the testimony it receives and its recommendation in relation to them (section 4ZB(d)). However, it is not specified to whom they are to report. The committee suggests that this needs to be clearly set out.

6. The NCF Head must account to the [Mental Welfare] Commission for the carrying out of the NCF functions (section 4ZC(2)), however, the Commission must delegate the NCF functions to the NCF. It is unclear to whom the NCF will report or make recommendations. The accountability structure needs to be clearly and unambiguously set out.

7. The committee note that section 4ZB(e) refers to information about advice and assistance available to persons giving, or proposing to give testimony. This is a broad provision and the committee hope this is intended to encompass health support. The committee envisages much work will have to be done to ensure the NCF Head, those members and employees of the NCF are clear on their range of responsibilities in this respect. The committee suggests that this is expanded upon in the Explanatory Notes which will accompany the Act.

Brian Simpson
Law Reform Officer
The Law Society of Scotland

8 April 2013
Victims and Witnesses (Scotland) Bill

Dumfries and Galloway Council

The inclusion in the Victims and Witnesses (Scotland) Bill of a National Confidential Forum is a significant step forward for victims who have been subject to abuse while living in statutory care. This acknowledges the valuable contribution that ex-residents have to make and gives a confidential forum in which to share their story in an open and acknowledging environment. This legislation is clear and sets out the functions of the NCF. The governance arrangements which are in place appear to be robust and transparent. The creation in statute of the NCF will give ex-residents the following:

- the right to tell their story
- acknowledgement that their past abuses are being taken seriously
- clear governance arrangements in place for reporting these
- protected environment in which to tell their story
- shared responsibility for further action to be taken if risks are still identified to be present
- public acknowledgement by Government that this is a serious and important matter for the people of Scotland

The payment of expenses is an important aspect of this Bill which will enable rather than prevent ex-residents attending panels. The fact that there is financial provision for a support person to attend is essential in ensuring that ex-residents are fully supported before, during and after participation at a session of the NCF.

Many ex-residents will never have told their story and the Bill, by acknowledging this, is frank in setting out that not everyone’s experience of statutory care has been a positive one.

The Bill does not address the issue of time bar or compensation, which are outstanding matters for many ex-residents who have come forward but the NCF can be seen as a significant step forward in the healing journey of those who have been abused as children while in statutory care settings.

**John Alexander**
**Director of Social Work**
**Dumfries and Galloway Council**

8 April 2013
Victims and Witnesses (Scotland) Bill

Victim Support Scotland

Victim Support Scotland welcomes the opportunity to provide written evidence to the Health and Sport Committee on the establishment of the National Confidential Forum as part of its Stage 1 consideration of the Victims and Witnesses (Scotland) Bill.

Victim Support Scotland is the largest third sector organisation in Scotland that provides practical and emotional support to victims, witnesses and persons affected by crime in Scotland. Annually, we offer support to around 180,000 victims and witnesses through our community based Victim Services which operates in every Local Authority area and our Court based Witness Service which operates in all Sheriff and High Courts in Scotland.

Victim Support Scotland supports the creation and overall purpose of a National Confidential Forum in offering adults placed in institutional care as children acknowledgement of their experience, including any of abuse and neglect. Importantly, this will enable participants to have their voices heard as well their experiences validated and acknowledged, which can contribute to their overall health and wellbeing.

Confidentiality

To ensure that National Confidential Forum is effective and meets the needs of participants, it is important that the Forum respects the confidentiality and anonymity of participants and complies with data protection legislation. This is especially important in relation to the reports that will be produced for Ministers providing a record of participants’ experiences.

To ensure this is effective, it is crucial that participants are fully informed at the outset of what will be involved in the process. In particular, participants must be fully informed about any limits to confidentiality and what actions, if any, will be taken by the Forum should participant’s disclose information or make accusations about incidents (or against individual or institutions) that could constitute a crime.

Support for participants

Victim Support Scotland strongly believes that participants should have access to support before, during and after hearings. Participants need to be appropriately supported throughout the process and treated with respect, sensitivity and compassion. Provision should be made for participants to pull out of the process at any time, and they should be informed of this at the outset.

Furthermore, the staff of the National Confidential Forum should ideally consist of people with sufficient training, skills and understanding to support and meet the needs of survivors of childhood abuse.
It is a massive and hugely courageous step for someone to describe their experience of childhood abuse in such an open, albeit confidential, forum. The process may awaken extremely painful memories and emotions such as shame, guilt, self-blame, fear, stigma, inability to trust etc. For some individuals, this will be especially difficult if they may never have previously discussed their experience or received any help or support.

It is important that participants have the option of who supports them throughout the process. We are very supportive of the proposal that participants can, if they wish, bring a family member or friend to support them, or someone from an external support service, such as Victim Support Scotland.

It is essential that the process, and all those working within it, adopt a person-centred approach, with all actions and decisions made in the interests of the participant. Crucially, such an approach should include:

• keeping individuals informed and involved in the process;
• allowing participants to express any concerns and to have these addressed;
• supporters and staff of the National Confidential Forum being attuned to the suitability or readiness of participants to take part in hearings;
• ensuring participants have adequate support in place to meet their needs and limit the risk of re-traumatisation.

Victim Support Scotland suggests that the following provisions should be available to facilitate participation:

• degree of flexibility/options regarding the manner and venue in which participants are heard (e.g. face-to-face, in their own home, via telephone or video link, written letter or email)
• information given in a manner which is most suitable to and easily understood by participants, taking account of, for instance, any literacy issues etc
• the application process is straightforward and easily understood
• participants are given assurances that their privacy and confidentiality will be respected and maintained
• participants can choose the gender of their support person.

There needs to be clear communication and referral links between the Forum and other agencies and support services. This is essential to ensure that those who need or want it, can receive additional support throughout the process and beyond. This will be important in ensuring that any justice-related issues that might arise are appropriately considered and addressed.

**Dorothy Cassidy**  
Policy Officer  
Victim Support Scotland  

9 April 2013
Victims and Witnesses Bill

Barnardo's Scotland

Barnardo's Scotland supports and welcomes the introduction of the Victims and Witnesses Bill to the Scottish Parliament and appreciates the opportunity to respond to the Stage One consultation.

This response refers to sections 25-26 on the National Confidential Forum. We have developed a separate response for sections 1-25, which we have submitted to the Justice Committee.

In principle Barnardo's Scotland supports the creation of a National Confidential Forum.

This is an extremely sensitive area and it is crucial that the issues associated with the NCF are debated in an appropriate tone of understanding.

**The functions and powers of the NCF (as set out in the Bill);**

Barnardo's Scotland supports the establishment of the NCF and we agree with the functions that have been listed on the face of the Bill. We believe that for some survivors the Forum as established will be helpful and therapeutic.

However, we are concerned that the mandate and remit of the Forum does not go far enough. There have been calls from the Scottish Human Rights Commission (SHRC) and survivor groups for the Forum to look at and have power for remedies, redress, effective investigations and inquiries, as well as the power to award compensation. Barnardo's Scotland supports these views and agrees with these organisations that the element of accountability is missing from the proposals.

The Scottish Government needs to consider how it will balance the therapeutic model of the NCF with the need for justice by many survivors.

There should be no restriction on the types of institution in which people were placed, with regards to those who can speak to the forum and agree with the extension of the cope of the NCF from the Time To Be Heard (TTBH) pilot. However we also believe that the NCF should include those who have been cared for in foster care. There has been historical abuse within foster care and as such those that have experienced such abuse should be able to participate in the NCF.

We support the position of the SHRC that as well as survivors that some consideration should be given to opening the NCF to others who were indirectly affected, based on proximity and proportionality and to others whose rights may be affected such as former staff.
Status of the NCF – housed as a sub-committee of the Mental Welfare Commission – and its independence;

Barnardo’s Scotland agrees with the proposals for the NCF to be housed as a sub-committee of the MWC and for it to be as operationally independent as possible.

Support for participants before, during and after their input

Barnardo’s Scotland believes that there needs to be comprehensive support to enable survivors to participate in the forum – whether that is psychological support, alternative means of testifying e.g. video links, welfare, advocacy support or other necessary support. There is a need to protect the wellbeing of those participating in the forum many of whom may still be very vulnerable people. Any support that is offered should also be made available for the long term and not just the short term.

At present there is no accounting for this in the proposed legislation and nothing set out in the accompanying policy memorandum to suggest that such support will be available.

Any other aspects of the NCF

Barnardo’s Scotland supports the SHRC framework and all its recommendations and believes that the Scottish Government needs to consider an approach that satisfies all those recommendations.

Richard Meade
Public Affairs Officer
Barnardo’s Scotland

9 April 2013
Victims and Witnesses (Scotland) Bill

Centre for Excellence for Looked after Children in Scotland

Introduction

CELCIS welcomes the opportunity to respond to the Health and Sport Committee’s Call for evidence to inform Stage One of the Victims and Witnesses (Scotland) Bill. Our response focuses on the establishment of the National Confidential Forum (NCF). We appreciate the further opportunity to provide oral evidence to the committee on Tuesday 16 April 2013.

CELCIS is the Centre for Excellence for Looked after Children in Scotland based at the University of Strathclyde. Together with partners, we are working to improve the lives of all looked after children in Scotland. Established in 2011, CELCIS has been committed to further improving the outcomes and opportunities for looked after children through a collaborative and facilitative approach that is focused on having the maximum positive impact on their lives.

The work of Professor Andrew Kendrick, Jennifer Davidson and Moyra Hawthorn at CELCIS, in collaboration with others, has generated considerable expertise to inform the proposed National Confidential Forum. As highlighted in our response to the Scottish Government’s consultation on the creation of a National Confidential Forum, CELCIS welcomes the National Confidential Forum as an opportunity for adult survivors of abuse in care to give testimony of their experiences.1

Key Messages

Omission of those in foster care

Following consultation, we welcome the extension of the NCF to include long stay secure hospitals and secure units. However, the omission of foster care from the eligibility to participate in the forum remains a cause for concern. The evidence highlights that many adults may have experienced abuse and poor standards of care in foster care.2 In the Swedish Inquiry into abuse in care, the majority of those who gave testimony had been abused in foster care.3

While we acknowledge that the National Confidential Forum is not only concerned with historic abuse, this evidence suggests that it is important that the National Confidential Forum should be open to adults who spent time in foster care as children. A Scottish Government funded study is currently underway to gather the views of adults previously in foster care as children on

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1 CELCIS (2012) Written Response to the Creation of a National Confidential Forum
the appropriateness of the model of an acknowledgement forum. The findings of this study should inform the development of NCF. We have identified other types of establishments which should be considered such as education hostels, youth justice provision, and evacuation centres. We must also remember that adults may have been placed as children in adult institutions, hospitals, prisons, Public Assistance Institutions.

**Balance of Care Experiences**

Time to Be Heard was established to hear the experiences of adults who had experienced care in Quarriers and ‘especially abusive experiences’. This, then, sets the framework for the Shaw’s recommendation of a differentiated approach to those who regard themselves as survivors and those who do not.

Some participants in the Time to Be Heard pilot 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 welcome the fact that the National Confidential Forum will hear testimony of positive experiences of care as well as any abuse experienced. However, 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.

**Archiving of Data**

We agree that the National Confidential Forum should produce reports which will provide a record of participants’ experiences in care, and we acknowledge that limits will be required on information in the public domain in order to ensure anonymity and confidentiality. However, we believe that there is too much discretion and ambiguity in the wording of the bill about what may be recorded and in what format. We believe that careful consideration should be given at an early stage to the preservation and archiving of participants’ contributions to the Forum and in the variety of media in which it is captured (audio, transcripts, etc.). Similarly, consideration should be given to the preservation and archiving of all documents related to the National Confidential Forum. Discussion should take place with relevant stakeholders to consider how the maximum benefit can be gained from the wealth of information that the Forum will provide. There is a clear gap in the function of the NCF ‘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 and the absence of any detail of how this will be achieved in the Bill. We strongly recommend that greater consideration is given to the archiving of data and respect for participants to retrieve personal testimonies to the NCF at a later date.

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6 Victims and Witnesses (Scotland) Bill Explanatory notes, Point 176.
Response to Key Aspects of the Bill

1. The Functions and Powers of NCF

The National Confidential Forum provides one important measure through which survivors may choose to recount their experiences and be acknowledged in a confidential setting. As the Time to Be Heard pilot forum evidenced, the Forum cannot be viewed in isolation from the wider issues of acknowledgement and accountability, reparation and redress, and justice. The Time to Be Heard report and the evaluation of the process identified how participants in the forum did not see it as a panacea, and were explicit in their demands for accountability in the response to historic abuse. We endorse the response of the Scottish Human Rights Commission and the development of Scotland’s National Action Plan for Human Rights to include access to justice and right to effective remedy for historical child abuse.7

It is important that Scottish Government and other stakeholders accept that the National Confidential Forum is only one element of the response to the injustice of historic abuse, and will raise further expectations and demands for justice.

Further clarification is needed to address a core function of NCF ‘to identify any patterns and trends in the experiences of persons placed in institutional care as children and to make recommendations about policy and practice which NCF considers will improve institutional care’(4ZB (c)(d)).

2. The Status of NCF

The issues to be considered by the National Confidential Forum are highly sensitive and it is therefore important that the Forum is seen to be as independent as possible, not only from Scottish Government, but also from any other public body and, ideally, it would be a free-standing organisation. We do not consider that it would be beneficial for the Forum to be integrated into another public body. If the Forum needs to be linked to another public body, it is important that its independence is recognised by it being a separate unit. It will also be important that clear and transparent governance arrangements are in place to underline the Forum’s independence.

3. Support for Participants

Participants in the evaluation of the Time to Be Heard pilot were extremely positive about the process of the pilot and the support that they received. We think that the support mechanisms put in place for Time to Be Heard should be used as a model for the National Confidential Forum, and that additional suggestions identified through the experience of the pilot should be put in place. A number of these are detailed in the Time to Be Heard report. We would welcome greater consideration of support in the proposed Bill

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identifying the range of support needed to participate in the forum at all stages and more specifically, open access to support for an extended period of time after participating in the forum.

Specific areas to consider are:

- Disabled children in care have been particularly vulnerable to abuse, and a range of supports will need to be put in place to support them to come forward and give testimony. The Committee should consider how this group of adults are actively informed and supported to participate in the NCF with recognition of their range of communication needs.
- People with mental health issues will also need particular support, especially those whose mental health issues are related to their experience in care and/or their experience of abuse.
- Specific measures of support will also need to be put in place for those who are in prison, hospital or care homes, for homeless people, and for the gypsy and traveller community.
- Consideration will need to be given to those living abroad, particularly those who went abroad as child migrants.
- Support needs of older people, as we know that a significant number of adults over the age of 75 will have experienced care as children.
- There should be consideration of young adults participating in the National Confidential Forum that may have different support needs. There should be assurance that participation in this process will not have any negative consequences for an individual accessing care leaver support.

4. Further comments

The Scottish Government should also consider what definition of ‘adult’ will be used and the implications this will have on the participation of young adults in the National Confidential Forum. Under the Adult Support and Protection (Scotland) Act 2007, an adult is defined as aged 16 years or older. The proposed Bill indicates the age of 18. It is feasible that an adult who participates in the National Confidential Forum may still be under the care of the state. Under the proposed Children and Young People (Scotland) Bill, a duty to support care leavers would extend to the age of 25. Therefore, there could be ambiguity about the eligibility of some young adults; for example, they may now be in a foster care placement. In these circumstances, there are additional considerations for their support to participate in the process where sensitive handling of confidential data. Present safeguarding concerns will need to be addressed.

Professor Andrew Kendrick
Jennifer Davidson
Moyra Hawthorn
CELCIS
University of Strathclyde

9 April 2013
Victims and Witnesses (Scotland) Bill

North Ayrshire Council

National Confidential Forum

North Ayrshire Council supports the policy objectives of this part of the bill to offer adults placed in institutional care as children acknowledgement of their experience, including abuse and neglect, through the creation of the National Confidential Forum (NCF).

The functions set out for the NCF appear to be appropriate and fit for purpose.

The location of the NCF as a sub-committee of the Mental Welfare Commission in order to ensure independence in our opinion is an appropriate one.

We feel that it is crucial that supports are offered to participants, before, during and after their input as highlighted in the pilot forum “Time to be Heard”.

North Ayrshire Council

9 April 2013
NSPCC Scotland welcomes the establishment of a National Confidential Forum to support adults placed in residential care as children, and the proposed focus on the acknowledgment of their experience including abuse and neglect. We believe that providing a confidential space for people who have been placed in residential care as children could be beneficial to their overall health and wellbeing. However, we seek assurance from the Government that the lessons learned through the Forum can and will contribute to the reduction, and eventual elimination, of child abuse in residential care settings in Scotland now and in the future.

About NSPCC Scotland

The NSPCC aims to end cruelty to children. Our vision is of a society where all children are loved, valued and able to fulfil their potential. We are working with partners to introduce new child protection services to help some of the most vulnerable and at-risk children in Scotland. We are testing the very best intervention models from around the world, alongside our universal services such as ChildLine, and the NSPCC Helpline. Based on the learning from all our services we seek to achieve cultural, social and political change — influencing legislation, policy, practice, attitudes and behaviours so that all children in Scotland have the best protection from cruelty.

NSPCC Scotland response

The functions and powers of the National Confidential Forum (as set out in the Bill)

The core work of the Forum will be with adults, therefore there are issues pertaining to functions and powers on which we have no recommendations as we do not provide direct services in this area and therefore have no first-hand experience or evidence base to draw on. However, we are keen to establish the ways in which the proposed Forum can help children who currently reside in a residential care setting in Scotland, or who have been in residential care but are now in another care setting or have left care. For example, it is not clear from the current proposals what mechanisms will be put in place to support children who have been abused and who remain within in residential care. Also, we seek clarification on the position of young people aged 16 – 18 in this process as the proposals currently dictate that survivors will only be eligible to participate in the NCF if they are aged 18 and over.

NSPCC Scotland believes that the NCF should be one strand of a range of measures to achieve remedies for childhood abuse. It is essential that existing
links between the Forum and the criminal justice system are maintained under clearly defined positions as, at present, it is not clear how the NCF will deal with new criminal allegations which come to light in the NCF. Also further detail is required to set out what mechanisms will be implemented to ensure that the NCF proceedings do not do anything to compromise any future criminal investigations. It is of paramount importance that the NCF is not seen as a substitute for criminal proceedings.

Status of the National Confidential Forum – housed as a sub-committee – and its independence

NSPCC Scotland recognises the value in the NCF having its own identity and independence as this could go some way to ensuring that there are no conflicts of interest and, therefore, that the needs of participants remain the priority of the Forum at all times. We support the view taken by the Centre for Excellence for Looked after Children in Scotland, that, if the Forum needs to be linked to another public body, then it is crucial that its independence is recognised by it being a separate unit. It will also be important that clear and transparent governance arrangements are in place to underline the Forum’s independence.

Support for participants before, during and after their input

NSPCC Scotland believes that providing support for participants before, during and after their input to the NCF is of the utmost importance. A suite of therapeutic support services should be made available which can be tailored to the individual needs of participants. Access to counseling, advocacy, mental health services, and support from clinical psychologists, where required, may go some way to ameliorating any post-traumatic stressors that could potentially arise following this type of disclosure.

However, if participants are parents, or have caring responsibilities for children, it is vital that any service offered addresses, not only the adult’s trauma, but also considers their client as a parent. This may require specific intervention which focuses on the parent-child relationship, supporting the parent to fulfil their parenting role and ensuring that children get the help they need.

Also, we would welcome clarification on how it is envisaged that people with learning disabilities, including those with complex communication needs, will be supported to engage with the NCF.

Any other aspects of the National Confidential Forum

NSPCC Scotland would welcome the establishment of a similar Forum to ensure that children and young people who currently reside in institutional or other care settings, or are the responsibility of corporate parents, are listened to and their views and experiences are acknowledged and acted upon. However, we have
some concern that constricting local authority budgets may impact negatively on the availability of support services for children who are part of the ‘Looked After’ system in Scotland today.

Recent discussions with front line practitioners suggest that accessibility to support services for looked-after children varies across care settings and localities. For example, children’s rights officers, in some local authorities, have indicated that they are now prevented from promoting their service due to lack of capacity. Although able to access children in residential care relatively easily, it would appear that they have very little, if any, contact with children who are looked after at home. NSPCC Scotland believes that more could and should be done to meaningfully engage, consult with and involve children and young people who are currently looked-after in Scotland, particularly those children who are looked after out with the residential care setting.

Conclusion

NSPCC Scotland welcomes the Scottish Government’s commitment to seek the views and experiences of adult survivors of childhood abuse through the establishment of a National Confidential Forum. We recognise the clear benefits to participants of acknowledgment and the potential value of the Forum in informing future policy and practice. However, it is vital that the Forum does not reduce focus, or absorb resource, which would otherwise benefit children and young people who currently reside in the looked-after system in Scotland. We believe that the learning from the Forum should be utilised by institutions, corporate parents and all other relevant stakeholders to ensure that a children’s rights approach is embedded in their cultures, behaviours and budgetary priorities now and in the future.

Joanne Smith
Public Affairs Officer
NSPCC Scotland

9 April 2013
Victims and Witnesses (Scotland) Bill

Aberlour Child Care Trust

Introduction:

Aberlour is Scotland’s largest Children’s charity. We have been delivering high quality residential care to some of the country’s most vulnerable looked after children since the establishment of the Aberlour orphanage in 1875. Since that time, our provision of care to looked after children has evolved and adapted to include a portfolio of small family unit residential care homes, fostering services and support for kinship carers. We warmly welcome the establishment of a national confidential forum and hope to play an active part in its establishment and are very happy to contribute to the work of this committee as it considers the specific details as to how the forum will operate.

We would welcome the opportunity to engage with the committee further on this matter, through further written or oral evidence as necessary. Please find our initial views on the outline proposals below.

Providing a means for adults placed in institutional care as children to describe in confidence experiences of that care, including abuse;

We broadly support this aim but suggest that it not solely be limited to adults who have left the care system. Whilst Children who are in care have means of raising concerns about their welfare in terms of the care they are currently receiving, there could be circumstances where a child has been moved between care homes and after a period of time, realises that the practice adopted in a previous home was in some way wrong or flawed. They should have the opportunity to make representations to the Forum in such a situation.

Additionally we believe scope of care settings covered by this aim is too narrow. We feel the term ‘institutional care’ should be expanded to include all forms of residential care experienced by children, be that secure care, respite care and hospital care. We believe that it is essential that experiences of foster care be included in the remit of the Forum.

Acknowledging testimony at NCF hearings or by written or other means;

We support this aim, but would also suggest that the committee considers the need for a meaningful feedback process whereby, once testimony is offered that the individual who provided testimony is kept informed as to how their testimony has been used and any resultant action that may have been precipitated by it. This must of course only cover relevant information to that individual and the testimony they have offered.

Protecting the testimony of people who participate in the NCF from the threat of defamation and disclosure;

We wholeheartedly support this aim.
Setting out arrangements for the NCF to be hosted by the Mental Welfare Commission, while safeguarding the operational autonomy of both;

We would ask if any consideration had been given to hosting the NCF in an organisation entirely independent of Government such as ‘who cares?’. We don’t have a significant issue with the NCF being housed by the Mental Welfare Commission, but would suggest that it be done in a way so that the nomenclature not act as a stigmatic barrier to people bringing forward testimony. It is conceivable that a person might decide against offering testimony if they thought it was going to cast doubt over their mental health/welfare. A stand-alone website and marketing materials would be required.

Full independence from government or parliament is absolutely essential in order to allow potential investigation of systemic malpractice or flaws in policy.

Identifying any patterns and trends in the experiences of adults placed in institutional care as children, and making recommendations about policy and practice which the NCF considers will improve institutional care.

We support this but would suggest that in order for this to have any meaning there must be a duty on parliament, Scottish Ministers or the care inspectorate to consider and act on the recommendations of the Forum.

Alex Cole-Hamilton
Head of Policy
Aberlour Child Care Trust

9 April 2013
Victims and Witnesses (Scotland) Bill

Angus Council

1. The functions and powers of the NCF (as set out in the Bill)

Angus Council supports the functions of the National Confidential Forum as set out in the Bill in relation to the hearing and acknowledgement of abuse while in care as a child.

We support the function of prevention of future abuse in care by informing policy and practice.

We consider that it will be helpful to adult victims to have an official record of the events that happened while in care. It is not considered a matter that will necessarily aid public understanding.

Signposting to sources of support is considered crucial, as although for some adults it will hopefully lead to improved mental wellbeing for others the reliving of experiences that are traumatic may lead to deterioration in their mental health.

We support the duty to inform the police of any information necessary to prevent the abuse of a child. We consider that another function should be inserted under Part 6 of the Act to alert agencies of any alleged abuse that took place in a care home run by that agency and where no civil or criminal proceedings are being pursued. The local authority where the care home is or was located should also be informed. This is to allow those agencies to take such action as required to prevent future abuse. This would be of particular importance where the abuse took place in more recent times.

2. Status of the NCF – housed as a sub-committee of the Mental Welfare Commission – and its independence

We support the establishment of an independent body. The link with the Mental Welfare Commission is not well understood.

3. Support for participants before, during and after their input

We consider this to be an extremely important element considering that part of the aim of setting up the Forum is to improve the mental wellbeing of participants then access to support at all stages of the disclosure must be available. For those who experience post-traumatic stress specialist help should be made available.

The type of wrap-around-support modelled by The Time to be Heard (TTBH) pilot forum before, during and after hearings should also be in place for the NCF. Such supports were seen as a prerequisite to participation. After care support however will be extremely important. For many adult survivors who feel able to come forward and make their experiences known; it may bring back traumatic memories of the abuse. Access to counselling and support services will be vital to ensure participants are not left feeling more vulnerable.
4. Any other aspects of the NCF

Angus Council contributed to the consultation on the creation of a National Confidential Forum and fully supported this. The opportunity for adult survivors to describe their experiences and have their views listened to can only help to inform improvements; not only for the health, safety and wellbeing of children and young people who are currently in institutional care but also children in the future who require this type of care

Tim Armstrong
Senior Manager
Social Work and Health
Angus Council

9 April 2013
Victims and Witnesses (Scotland) Bill

UNISON Scotland

Introduction
UNISON is Scotland’s largest trade union representing approximately 160,000 members working in the public sector. UNISON Scotland represents over 25,000 workers employed in social work services throughout Scotland, with many members employed in the residential care sector, social workers, social care staff, welfare rights workers, and others administrating and supporting the social work teams, as well as over 60,000 members in the NHS.

UNISON Scotland welcomes the opportunity to respond to the Call for Evidence on the Victims and Witnesses (Scotland) Bill, issued by the Health and Sport Committee.

General Comments
UNISON Scotland broadly welcomes the two main policy areas in the Bill, both the reforms to the justice system relating to victims and witnesses and to the establishment of a National Confidential Forum (NCF) for adults placed in institutional care as children.

We appreciate that the policy relating to reforms to the justice system for victims and witnesses is being dealt with by the Justice Committee, nevertheless, we would echo the comments in the evidence that has been submitted to that Committee by the Scottish Children’s Reporters Association that the reforms should be extended to children and vulnerable witnesses involved in the Children’s Hearing System proceedings.

With regard to the introduction of a National Confidential Forum, UNISON feels that this is a positive step to allow adult victims of abuse in their childhood some form of recognition of their experiences at a later date. The long term effects of abuse in childhood are well documented and recognised and a forum such as is proposed in the Bill is long overdue.

We also support the proposed functions of the NCF which aim to contribute to the prevention of future abuse of children in institutional care; enhancing public understanding of the experiences of children in care, by creating a permanent record of life in care and to signpost support, advocacy, advice and information services to participants and their families in the future.

We are supportive of the decision to house the NCF under the auspices of the Mental Welfare Commission as we believe it will have the necessary expertise to support adults coming to terms with their childhood abuse. Other establishments, such as the Care Inspectorate would not be suitable vehicles, as conflicts of interest could arise and the Care Inspectorate could induce negative aspects of the participants’ previous experiences of residential care.
We are concerned, however, that the Bill does not set out in sufficient clarify or detail what kind of support would be available for participants, either before, during or after their involvement with the Forum. We believe some reference to counselling or debriefing support as well as assistance with advocacy should have been made. We would wish this to be addressed during the passage of the Bill.

Specific Aspects of the Bill

UNISON Scotland believes that the functions as set out in the memorandum are comprehensive and should contribute to the support and wellbeing of any participants who may contact the forum. We believe it will also help build a body of evidence to ensure recommendations can be made for the improvement of residential child care in the future. We wholeheartedly agree that the identity of any participants in the forum must be kept confidential.

As stated above, we believe that the status of the NCF, housed as a sub-Committee of the Mental Welfare Commission is suitable for its purpose. We would expect that the Forum would be independent of the other functions of the Mental Welfare Commission.

We do not feel that the Bill sets out the specific support that would be available to participants, e.g. counselling, psychiatric assessment, etc., all of which could be needed to enable the participants to fully express and acknowledge the extent of their suffering during any periods of abuse and so enable their recovery.

We are unsure how potential participants will be made aware of the services provided by the Forum to enable them to make contact and give their testimony.

In addition, we would wish clarity on how any allegations against particular establishments or members of staff in those establishments would be dealt with.

Diane Anderson
Information Development Officer
Mike Kirby
Scottish Secretary
UNISON Scotland

9 April 2013
Victims and Witnesses (Scotland) Bill

South Lanarkshire Council

The proposal to create a duty on relevant justice organisations to set clear standards of service for victims and witnesses.
The current proposal in the Bill for the creation of minimum standards and the resultant publication of these standards does not include certain statutory bodies and any voluntary or third sector organisations. If the requirement could be extended to include any organisation who mainly or substantially provides a service to the victims and witnesses this would encourage a more seamless service for victims and witnesses. It would also allow for the services provided by a range of agencies to be compared and would hopefully result in an overall improvement in the services provided to victims and witnesses.

It is considered that one such minimum standard should be the publication and promotion of a complaints procedure.

The proposal to give victims and witnesses a right to certain information about their case.
This is a welcome proposal which will alleviate some of the frustration felt by some victims and witnesses. Further clarification of the circumstances when a qualifying person need not comply with a requesters submission as detailed in Subsection 4 of Paragraph 3, is needed. Overall though this is a very welcome development.

The proposal to give vulnerable witnesses a right to access certain special measures when giving evidence.
The widening of the definition of vulnerable witness and the extension of special measures to include victims and witnesses in relation to domestic abuse, trafficking and sexual offences is a very welcome development which will offer protection to a particularly vulnerable group of victims.

It is noted that the proposals in the Bill includes an ‘opt out’ clause for vulnerable witnesses who do not wish to be subject to special measures; again this is a very welcome development.

The proposal to require the Court to consider compensation to victims in certain cases.
In principal this is a positive development, which will reinforce the link between an offence being committed and a victim being acknowledged and compensated. Compensation orders are recognised as being an effective option for Courts to use. This proposal will hopefully increase their use and re-establish their role within the disposals available to Courts.

The proposal to introduce a victim surcharge and restitution orders, so that offenders contribute to the cost of supporting victims.
The introduction of a victim surcharge is a welcome development, which will assist in appropriate compensation being made to victims.
The proposal for restitution orders currently only applies to offences made under the Police and Fire Reform Act 2012; it is our view that the scope of restitution orders should be expanded to include any worker undertaking duties in the course of public service as defined by the Emergency Workers (Scotland) Act 2005.

Human rights implications arising from the victims and witnesses provisions in the Bill.
There were no concerns regarding human rights arising from the Bill.

Call for Evidence National Confidential Forum (NCF)

The functions and powers of the NCF (as set out in the Bill)
The proposals for the creation of the National Confidential Forum are welcome and provide an important opportunity to recognise and acknowledge the experience of people who have been in care, particularly those who had negative experiences.

Status of the NCF – housed as a sub-committee of the Mental Welfare Commission – and its independence.
It is important that Forum is seen by those acting as contributors as being independent of government and of organisations involved in providing residential care. The current proposals achieve that.

Support for participants before, during and after their input.
The arrangements make good provision for receiving testimony from people who may be in distress. The exemptions from defamation give a clear signal that full and honest testimony is welcome.

Other Aspects of the NCF
The reporting provision made in the Bill seems limited and perhaps consideration could be given to providing institutional care providers with greater insight into the findings of the forum.

Harry Stevenson
Executive Director
South Lanarkshire Council

9 April 2013
Victims and Witnesses (Scotland) Bill

The Royal College of Psychiatrists in Scotland

The Royal College of Psychiatrists is the leading medical authority on mental health in the United Kingdom and is the professional and educational organisation for doctors specialising in psychiatry.

The Royal College of Psychiatrists in Scotland welcomes the opportunity to submit written evidence to the Health Committee on this Bill.

Q1 in view of short time of follow up of those involved in the original pilot – two to three weeks and with only 65 responses out of 98 - we would have a worry about potential re-traumatisation from this process. We are not convinced that it has been proved in this document to have been an unequivocal success.

However we think it is good to listen to experience in order to learn lessons.

Q4 yes all adults who were in residential care as children should be given the opportunity to participate - we can learn from what went well as well as what went badly.

Q6 all of the categories listed should be included - presumably the state has responsibility for all of these institutions?

Q7 it is not clear who is present to support those undergoing this process and what training they have but we would argue this is potentially difficult and delicate work and supporters would need to be carefully identified and trained as well as debriefed.

Q8 We believe the issue of confidentiality is a really tricky area. There is mention that members of the NCF could potentially be sued but it is not clear from the document who by – this needs to be clarified.

In any case if the NCF do not follow usual rules around confidentiality there is the possibility of a dynamic of collusion and secrecy - mirroring the original dynamics in the institutions and we believe this a dangerous precedent to set.

Karen Addie
Policy Manager
Royal College of Psychiatrists in Scotland

9 April 2013
Victim and Witnesses (Scotland) Bill

Who Cares? Scotland

Who Cares? Scotland welcomes the creation of a National Confidential Forum, which will hear the voices and acknowledge the experiences of adults placed in institutional care as children. Who Cares? Scotland works with children and young people up to the age of 25 years with experience of care. In preparation for formulating our response we have worked with a focus group of young people – all care leavers. Their experiences and perspectives have informed our organisational response.

Functions and Powers of National Confidential Forum

As a children’s rights organisation, we believe there is real value in there being a protected space where those placed in institutional care as children are able to recount their experiences. We were not clear from the bill if institutional care included foster care. Our recommendation would be that it should, as the quality of care in such settings can be as variable as in other placement types, and is likely to offer fewer options for “telling”.

Overall the functions and powers of the National Confidential Forum seem to be well balanced, although our focus group felt that for them, there was a clear distinction between what experiences should be passed on to the police in terms of abuse, and what they felt they could say to the NCF that would be useful in shaping future practice and policy. We have included 3 short case studies as examples of possible testimony which might be useful in this context.

As most of the young people we work with have recent care experience, and are aged 25 or younger, it is likely that where historical abuse was being described to us, that we would signpost young people in the first instance to police or social work services. This would definitely be the case should young people be making allegations against existing workers / agencies, as we would be concerned that there may be live child protection issues to be managed.

It was felt that there was a need for clarity – prior to testimony being provided by participants - on when, and what type of information would be passed on to police. It was felt that lack of clarity in this area could be a barrier for the participation of some, or a shock for others if information was passed on in a way that they felt unprepared for.

Status of NCF

Who Cares? Scotland is satisfied with the independence of the NCF, housed as a sub-committee of the Mental Welfare Commission.
Support for Participants

Appropriate support – which may vary from person to person – will be crucial for participants before, during and after giving testimony.

Before. Participants should have access to a suitably equipped individual (independent advocate or other type of independent supporter) who fully understands the process of giving testimony and also the potential implications of giving testimony. This may include legal remedies available to NCF and the subsequent implications for participants; it may also include an understanding and an ability to prepare the participant for any social, emotional and health impact that may come from providing testimony. Supporters should have the knowledge and experience to offer holistic, legal, practical and emotional support throughout the process. (In addition the participant should be able to have a family member or friend alongside them for emotional support as well as a more independent supporter if wanted.

During. As above, participants should be able to be supported by whoever they choose, however they should be able to receive consistency of support i.e to have the same person with them at all stages of the process. It is often very difficult for people to speak about their experiences, and there shouldn’t have to be any repetition of their story unless they want to tell it. Also need to think about where people will give testimony, and how they will get there and then back home. Don’t want really distressed people having to get themselves home via public transport.

After. Our focus group of young people were keen to know if participants would receive a written copy of their testimony once given. Also, to know if there would be any follow up information forwarded to participants about how their information has been used?

Case studies: to evidence need

As mentioned earlier, young people wanted to give some direct examples of situations they had encountered during their time in residential care, and which they felt may be able to improve future policy and practice.

Situation 1

Aged 11

‘I was placed in a 9 bedded residential house, along with 10 other young people. That same day a number of young people displayed challenging behaviour towards residential workers, being verbally abusive towards them. Behaviour escalated during the day with young people becoming increasingly verbally abusive. A young person called a member of staff a “f******g cow”. After being called names several times the member of staff replied

“no wonder your mum is dead, you’re a little ar***ole”.


The young person lost control of his behaviour and began damaging the
worker’s car, in a flood of tears and rage, he didn’t stop until the police and fire
service came. As a result of this incident the young person was separated
from his younger sister who was also in the residential house. To my
knowledge the young person ended up in secure care and I don’t know where
he went after that. The young person had only been accommodated in a
residential house because his mum had died and no other family members
were able to look after him or his younger sister. Also they were waiting for a
foster placement to become available.

No one ever asked the young people if they knew why the happened that day,
although all the kids were talking about what was said. The staff member
moved shortly after and the residential house closed down 6 months later’.

**Situation 2**

**Aged 12.**
‘There were only two members of staff on shift that night. One was new and
the other had been there for a number of years. A young person refused to go
their room. The experienced member of staff said

“If you don’t go, I will take you there”.

The young person refused, and it resulted in the member of staff grabbing him
by the hair and physically taking him to his room. This was seen by other
young people and the new member of staff. When it was raised by a young
person to the new staff member, she replied

“I know what happened and it was wrong, but what can I do?”

To my knowledge both workers still practice in residential childcare and both
are now seniors.

**Situation 3**

**Aged 13.**
Residential homes usually consist of a hierarchy. In this one it was an older
girl who was loud, aggressive and violent. She had been making comments
about young people’s families saying that they were

“junkies, alkys and smack heads”.

When a young person raised this with a member of staff the worker said

“next time she does that and I am on shift just leather her”

implying that the young person should assault the older girl. The young
person asked “what will happen to me?” the staff member replied “you will
be ok, the police won’t get called” so the next time the girl said the things
and the worker was on, the young person did as he had been told and physically assaulted her. The girl said that she wanted to press charges but none were ever pressed. Subsequently the girl made allegations against that same member of staff who instructed the other young person to assault them, this resulted in an investigation to which I am not aware of the outcome, however, the girl was eventually moved.

Liz Ray
Regional Manager
Who Cares? Scotland

10 April 2013
Victims and Witnesses Bill

CHILDREN 1ST

CHILDREN 1ST has not engaged in discussions about proposals for a National Confidential Forum (NCF) until now. This was partly because of how it was initially commissioned, and partly because of the restricted nature of its scope in dealing only with adults who were in ‘institutional care’ as children.

CHILDREN 1ST has nearly 130 years of experience as the Royal Society (RSSPCC). When it was set up, before local authority social work departments were formed, the RSSPCC employed inspectors to investigate child abuse and neglect reported by the public. The abuse and neglect reported to the inspectors took place in a wide variety of settings, including, among others, alternative family based care, now known as kinship care, and residential care. We have also in the past been responsible for the running of residential units across Scotland.

When new legislation gave responsibility for investigating child abuse to local authority social work departments in 1968, the role of RSSPCC changed. As CHILDREN 1ST we still keep archive records, held at Glasgow Caledonian University, of all the work we undertook as RSSPCC. We understand that when people contact us to find their records they are trying to make sense of their life history, a task which we very much wish to help them with, and which is by no means always a negative experience for them. We have never been approached by an individual who feels they were abused while in the care of one of our own residential units, but we recognise that this could happen, and we welcome the opportunity the NCF could offer these individuals to explore what happened.

CHILDREN 1ST has 46 local services and four national services across Scotland. We run two survivors groups in Moray and Scottish Borders for women who were abused as children, many of whom have already been in contact with our other services for a range of reasons. We work closely with many local authorities as well as working in partnership with other organisations. All our services are child centred. The children, young people and families we support are key partners in all aspects of our work.

• The functions and powers of the NCF (as set out in the Bill);

CHILDREN 1ST welcomes proposals for a National Confidential Forum (NCF). We particularly welcome proposals to create a safe, confidential space in which people can talk about their experiences. We know from the children we work with that children are often unable to talk about abuse at the time for fear of the consequences disclosing this information may lead to. A forum that is truly confidential may, if well-staffed, encourage and enable those who have experienced abuse as children to talk about their experiences, which in turn should lead to changes in policy and practice, improving life for future generations.
We note, however, that NCF will only be available to those who were in ‘institutional care’ during childhood. It is CHILDREN 1ST’s belief that Scotland would benefit from a National Confidential Forum available to all adult survivors of child abuse. In order to gain a realistic understanding of the scope of child abuse which has taken place historically, we need to know what has happened across the country. This includes adults who were in residential care as children, as well as those who were looked after by foster carers, kinship carers, or indeed, their own parents. We know that the vast majority of children in Scotland are cared for within their own families, and that child abuse can and does happen to anyone. In order to plan and implement changes to policy and practice in this area, we must build a picture of child abuse across the country, not just for a minority of children.

We know that the children who are currently in residential care make up a very small proportion of children in care overall. In the future, this proportion could be even smaller, as more children become looked after in alternative forms of care. CHILDREN 1ST feels that in order to future-proof the NCF, it must be available to all adult survivors of child abuse. This would prevent the NCF from needing to be completely reworked in the future when it is found that very few people are eligible to give testimony and therefore it is not able to achieve its aims.

CHILDREN 1ST would also like to see a National Confidential Forum which allows everyone, including children, to voice their experiences. It is very important that children are given the opportunity to provide testimony to the Forum, particularly where they have already moved on from the care setting in which they feel they were abused or not given appropriate care, in which situation they may not otherwise have the opportunity to raise their concerns. We believe it is vital that the NCF should be available for all who have been abused as children, regardless of age; it is not appropriate or acceptable for a child to have to wait several years to reach the age at which their testimony becomes valid.

We support the role of the NCF to identify patterns and trends, and to make recommendations about policy and practice. We do, however, feel that in order for this to be meaningful there must be a duty placed on the appropriate organisations to consider and act on the recommendations of the forum. We also feel very strongly that the NCF should have powers to initiate enquiries.

- **Status of the NCF – housed as a sub-committee of the Mental Welfare Commission – and its independence;**

CHILDREN 1ST believes that housing the NCF within the Mental Welfare Commission could create a stigma that makes it difficult for people to come forward to give testimony. Those who have experienced abuse should not be made to feel that this is a mental health issue; they are coming to the NCF for a range of reasons and should be encouraged to do so without feeling that this could cast doubt over their mental welfare.
As the Human Rights Commission was involved in the original Time To Be Heard work, and continues to have a role, we feel it would be entirely appropriate for the NCF to continue to sit within the Human Rights Commission.

- **Support for participants before, during and after their input;**

CHILDREN 1ST works with many families who have been impacted by abuse. Last year alone, CHILDREN 1ST worked with 1881 people, 204 of whom said they had experienced or been impacted by sexual abuse; 59 were adults, the rest were children. We think this number is probably much higher, because of the number of people who don’t feel able to tell anyone.

Often the way we are treated as children can affect the way we feel as adults, and it can be hard to change this. Adults who were sexually abused as children can feel negatively about themselves. Survivors of childhood abuse who provide testimony to the NCF may find this a cathartic experience that helps them to move on. There will be others, however, who may find the experience re-traumatising, or that it raises thoughts and feelings they need to explore outwith the forum. It is, therefore, very important that full consultation regarding the types of support offered to those applying to testify to the forum.

In Scotland there is currently a great shortage of abuse recovery services for children and their families. CHILDREN 1ST is clear that there are children and families in Scotland who have suffered from sexual abuse, whose needs are not being met. Children and adults are often on waiting lists for months, if not years. More needs to be done to help people recover from sexual abuse and harm.

_Annie Taylor_
_Policy and Information Officer_
_CHILDREN 1ST_

9 April 2013
Victims & Witnesses (Scotland) Bill

Information Commissioner’s Office

The ICO’s mission is to uphold information rights in the public interest, promoting openness by public bodies and data privacy for individuals.

The ICO is the UK’s independent public authority set up to uphold information rights. We do this by promoting good practice, ruling on complaints providing information to individuals and organisations and taking appropriate action where the law is broken.

The ICO enforces and oversees the Data Protection Act and the Privacy and Electronic Communication Regulations, as well as the UK Freedom of Information Act and the UK Environmental Information Regulations, both of which apply to reserved matters in Scotland.

1. Introduction

The Information Commissioner’s Office (ICO) welcomes the opportunity to respond to the consultation by the Health and Sport Committee of the Scottish Parliament on S26 and S27 of the Victims and Witnesses (Scotland) Bill. These sections relate specifically to the creation of a National Confidential Forum (the Forum, NCF) for adult survivors of childhood abuse while in care. As the ICO is responsible for the regulation and enforcement of the Data Protection Act 1998 (DPA), our response will be limited to those aspects of the proposals which relate to the processing of personal data.

2. Data Protection and the National Confidential Forum

Through S26 of the Victims and Witnesses Bill, the Mental Health Act (MHA) will be amended to require the Mental Health Welfare Commission to establish the National Confidential Forum (MHA, s4ZA) with general functions of providing a means through which persons who had been placed in care as children can describe their experiences during their period in care and, drawing upon such evidence (4ZB (a),(b)), then identify patterns and trends emerging from it and make recommendations about good practice (4ZB(c)). The NCF will also prepare reports on the testimony and consequent recommendations (4ZB(d)) as well as providing information about advice and assistance available to people giving or proposing to give testimony (4ZB(e)). As such, the NCF will be processing substantial volumes of personal data, some of which – for example, information relating to the physical and mental health of the person who had been in care or allegations of criminal offences undertaken by staff of the care home - will be defined as sensitive personal data.

The ICO welcomes the emphasis placed on preserving the anonymity of participants in the NCF, of establishments providing the care and of any other persons as outlined in s4ZB(d) of the proposed amendment to the MHA. This
is made more explicit within the proposal for Part 4 of Schedule 1A where, in paragraph 9(2), the NCF must take steps to anonymise information as soon as is reasonably practical after receiving it. Paragraph 11(2) of Part 5 of this Schedule also requires that reports prepared by the NCF must not include information which could lead to the identification of individuals or institutions.

In this regard, please note that the ICO has produced a Code of Practice on Anonymisation which gives guidance on appropriate techniques for anonymisation of data and which also considers issues surrounding the re-identification of individuals from sets of information.

The ICO also welcomes the obligation on the NCF to provide advice and assistance to persons offering testimony (4ZB(e)). Principle 1 of the DPA requires that processing of data be fair and lawful and individuals participating in the NCF should be informed about the procedures to be adopted by the Forum; the obligation placed upon the NCF to provide advice and assistance will help ensure compliance with this Principle. From the perspective of data protection, participants should be made aware that their testimonies normally will be confidential and anonymised but that some disclosure may be necessary under strictly limited circumstances. The ICO has produced guidance on the production of Privacy Notices which may assist in the development of advice to participants.

Part 6 of Schedule 1 of the proposed amendment to the MHA gives further emphasis to the need to protect confidentiality through the creation of a statutory bar to the disclosure of information provided to the NCF which is not already in the public domain unless otherwise exempted. Whilst any breach of the statutory bar may be an offence under S55 of the DPA, consideration should be given to creating a separate offence under the MHA. This may provide further reassurance to participants that the information they provide to the NCF is being treated appropriately.

The ICO would be pleased to work with Mental Welfare Commission and/or the National Confidential Forum to ensure that the policies and procedures for the protection of the personal information recorded by the Forum are robust and accord with our guidance on relevant aspects of the handling of personal data. However, in any event, we would recommend that consideration is given to the application of the Scottish Government’s Identity Management and Privacy Principles and that a Privacy Impact Assessment is undertaken prior to the establishment of the forum in order assess the privacy risks to individuals arising from their participation.

Finally, the DPA requires that all data controllers are notified with the ICO for inclusion on the public register in which the purposes for processing of personal data is formally recorded. The NCF will either come under the umbrella of the Mental Welfare Commission’s notification or be a data controller in its own right. In any event, it is recommended that clarification is sought from the ICO Notifications helpline on 0303 123 1113 to ensure that the purposes for processing are properly recorded and, thereby, lawful.
Ken Macdonald
Assistant Commissioner (Scotland & Northern Ireland)
Information Commissioner’s Office

12 April 2012
Victims and Witnesses (Scotland) Bill

Former Boys and Girls Abused in Quarriers Homes

FBGA
With regards to any proposed pre-entry, initial briefing sessions for participants. For those participants contacting NCF, we believe this may have to involve some form of a sensitive and un-intrusive risk assessment-assessing any health or other issues that a participant may have prior to actually participating in the National Confidential Forum (NCF).

Duty to report credible criminal allegations of child abuse by NCF Commissioners and others.

We are concerned by comments made by the former TTBH commissioner regarding the discretion and threshold to report credible criminals child abuse allegations made by participants to TTBH and the example they gave regarding deceased individuals and organisations no longer operating.

No matter the age or grouping whether it be young people or former residents/victims-survivors regardless there is a moral and legal imperative to report any credible criminal allegations of child abuse to the Police.

Even if individuals are deceased we believe that all credible criminal allegations should be reported, it is for the police to determine any course of action or otherwise. We also understand today more how such abusers operate and in some cases have networks that involve others.

Some abusers were connected in a voluntary capacity with their former employers-organisations after their employment had ended.

Allegations taken forward by the police we would expect the victims to be fully supported explained and informed of what it entails, kept fully updated and informed as to progress or otherwise in all individual cases.

There is a discretion in the Bill for NCF Commissioners to report allegations of child abuse—we would want this to be a statutory right as it is currently is for any public body.

This is ill defined as it currently stands in the Bill. This matter has to weigh up and balance the public interest and the state obligation to investigate which clearly it is, in relation to credible child abuse allegations.

The duty to report credible criminal allegations of child abuse to the authorities, reported to the NCF Commissioners by participants or anyone associated with the operational and governance of the NCF, as currently defined in the Victims and Witness Scotland Bill is too vague.

We welcome and support the Scottish Human Rights Commissions comments regarding this important matter.
We would recommend that there is a Statutory duty placed on the NCF and those who will operate the NCF including NCF Commissioners and NCF employees to report ALL credible criminal child abuse allegations reported by participants to the police.

This statutory duty should extend also to the Mental Welfare Commission who will have ultimate responsibility for the National Confidential Forum.

Eligibility to participate in NCF
We welcome comments made by the former TTBH Commissioner and in particular the SHRC (Duncan Wilson,s comments) " in principle a process like this should be open indeed adapted to include everyone" and any departure from that should be carefully justified.

As FBGA stated in our written submission we would expect due consideration to be given to All who wish to submit a testimony to the NCF. We welcome the additional scoping work announced by the Survivor Scotland regarding foster care.

It must also be appreciated and considered by NCF and the Commissioners, that some close relatives including siblings placed in care together, some may be deceased yet others siblings or relatives are still alive who were direct or indirect witnesses to abuse perpetrated on those deceased. It is vital that the NCF hears testimonies from others including family members directly affected by these issues.

It is important that those with learning difficulties, in-firmed or elderly and are eligible are prioritised in any NCF process while avoiding any discrimination, equitable polices should be implemented and in place.

Counselling and Advocacy
We welcome comments made by the Survivor Scotland team representative, Linda Watters regarding choice of services for victims-survivors in the forthcoming NCF processes.

We appreciate and recognise as the In Care Survivor Scotland Service, Lorna Patterson said in evidence, that for some survivors they may wish a one stop service which includes counselling and some form of advocacy. We would wish this to continue and be enhanced.

Other victims-survivors have also expressed to FBGA and others that they will wish to seek their own independent and impartial counselling support and advice-advocacy service.

Counselling and Advocacy as the committee will appreciate are two very different specialities governed by their appropriate bodies. With different skills, qualifications and separate training required for both specialities for those who engage in such areas of work.
Advocacy as defined by the Scottish Independent Advocacy Alliance. [http://www.siaa.org.uk/](http://www.siaa.org.uk/)

The Scottish Independent Advocacy Alliance receives funding from the Scottish Government.

With its own set of principles and standards for undertaking Independent Advocacy, see link


Principle 3:
"Independent advocacy is as free as it can be from conflicts of interest" and the associated standards:

3.1: “Independent advocacy cannot be controlled by a service provider”;
3.2: “Independent advocacy and promoting independent advocacy are the only things that independent advocacy organisations do”;
3.3: "Independent advocacy looks out for and minimises conflicts of interest”.

We would wish to ensure that those participants who wish to engage with the NCF are offered choice of services, whereby they can make fully informed decisions and we welcome comments made by Louise Carling, bill team leader and Linda Watters of Survivor Scotland regarding this matter.

Advocacy should be independent and impartial avoiding conflicts of interests and not provided by service providers as recommended by the Scottish Independent Advocacy Alliance.

Also some participants to the NCF may have a statutory right to Advocacy such as those with mental health and learning difficulties, this was just one of the reasons why we addressed independent and impartial advocacy in our evidence session.

Archiving of testimonies and data protection issues

Archiving of individuals testimonies who participate in NCF these testimonies-records should be treated as health or care testimonies-records and archived accordingly and as a historical record.

We understand from the National Archives of Scotland that there is precedence for archiving records which relates to Crofters testimonies who suffered serious ill treatment. (we hope to provide the committee with the specific details in due course).

Destroying all the evidence given to TTBH was a great loss and also had a detrimental impact on the health and wellbeing of those who participated in Time To Be Heard on hearing this.
Proposed Memorandum of Understanding between the Parties

We welcome the Mental Welfare Commission (Donald Lyons) comments and commitments to engage going forward with victims-survivors directly affected by these issues in relation to the setting up of the National Confidential Forum being proposed.

We would like to see the MOU agreement have input by the various parties including victims-survivors representation to help shape and form the proposals between the parties on the issues directly pertaining to the victims-survivors. In addition this MOU may require independent scrutiny by others.

Also the MWC comments regarding the badging of the NCF and its operational independence and its governance in this particular structure is appreciated.

We welcome also Donald Lyons of the MWC comments regarding the following. "the Mental Welfare Commissions strategic aims in relation to individuals wellbeing and enhancing individuals rights"

We would like all the processes to be person centred while placing participants needs and expectations at the centre of all the decision making processes.

We would wish to ensure that there is complete clarity for participants about the processes they will engage in without any ambiguity. That any information packs produced for NCF spell out clearly the processes information is non-jargon and easy read formats while setting out the processes with clarity, to enable participants to make fully informed choices.

Interim and Final Reports compiled by NCF and its Commissioners

We welcome comments by the former TTBH Commissioners and the SHRC regarding the codifying of participants testimonies as recommended by previous witnesses who were victims-survivors. The Ryan report as highlighted by the Scottish Human Rights Commission is a good example where codes were used in reports.

We also welcome comments by CELCIS, we would welcome further input into this particular important issue with the other parties. To help clarify issues relating to the compiling and publicising of such NCF reports, how and to what extent participants testimonies are presented/published/referenced/anonymised etc.).

National Confidential Forum (NCF)

There is a role for the NCF however currently the proposal is but one element and we would like the Scottish Health and Sport and Justice committees to consider and include other elements of investigations, redress, justice and remedies in the proposed legislation.
The role of the NCF to identify patterns and trends, and to make recommendations about policy and practice. We feel very strongly that the NCF should have powers to investigate and initiate enquiries.

For this to bring any real benefits to participants and society as a whole it would be more meaningful if there was a duty placed on the appropriate, institutions and organisations to consider and act decisively on the recommendations of the forum.

While addressing comprehensively the issues that victims - survivors have in conjunction with the other parties while address and meeting all the needs and expectations of those who suffered ill treatment.

Health Committee
We welcome comments made by the Children,s Commissioner in relation to the Powers, Purpose and Functions of the current NCF including deficits in the processes relating to the lack of justice, investigation, reparation, redress and remedies.

In addition to comments made by CELCIS and the Scottish Human Rights Commission regarding a one door process currently with no choices or other options of redress, justice nor remedies. This continues to be a source of real tension between those directly affected by these issues and those parties with collective responsibilities of addressing the outstanding issues including the State.

If this is about addressing the health and wellbeing of those who suffered ill treatment in the past Scottish care system. Witnesses directly affected by these issues and others have provided strong evidence to the Health and Sports Committee regarding the deficits in the current proposals in relation to (Victims and Witness Bill Scotland) regarding the proposed National Confidential Forum, legislation.

We would kindly request that the Health and Sports and Justice committees to now take this opportunity to address those deficits.

We would like to thank the Scottish Health and Sports Committee clerks, members and the Convenor, Duncan McNeil for their time, thoughtful and valuable insight into these matters, while scrutinising these issues.

Jennie Bristow
Secretary
Former Boys and Girls Abused in Quarriers Homes

19 April 2013
Victims and Witnesses (Scotland) Bill

Former Boys and Girls Abused in Quarriers Homes

We would wish the relevant Scottish Health & Sport and Justice committees overseeing these issues to give serious consideration to the following in their deliberations and oversight.

"Inquiry into Historical Institutional Abuse (Northern Ireland) Act 2013"

As an example of a best practice model and legislation in dealing with some of these historical abuse issues such as Acknowledgement and Investigation models running parallel in one process. These are the Northern Ireland processes which we referred to briefly in our oral evidence.

Regarding the FBGA quote used by Scottish Officials in the SPICE briefing report page 24, we wish to clarify this was our groups response specifically to the NCF consultation questionnaire.

FBGA have always made our position clear in all our dealings with Scottish Officials as we previously stated there is a role for a confidential model, but this is only one element which may be satisfactory for some and may have a therapeutic benefit if it meets the expectations and needs of those it is intended for.

FBGA members and other Scottish victims-survivors are seeking equitable resolutions that includes other elements of justice, redress, reparation and remedies.

This Northern Ireland legislation was recently enacted in 2013 which includes an acknowledgement forum model and separately an investigation model in the same legislation but operating as two separate models, running parallel alongside each other oversee by a Former High Court Judge, Sir Anthony Hart.

We note also one of the commissioners for the Northern Ireland process is the former Chair of Time To Be Heard, Tom Shaw, has given his support to these particular models in these processes.

Please see details of the relevant Northern Ireland legislation and terms of reference.

"Inquiry into Historical Institutional Abuse (Northern Ireland) Act 2013"

http://www.legislation.gov.uk/ni/2013/2/enacted

Terms of Reference for this particular process detailing the acknowledgement forum and the Inquiry-investigation part of the historical institutional abuse (Northern Ireland) processes within the same legislation operating parallel alongside each other.

http://www.hiainquiry.org/index/documentation/terms-of-reference.htm

Joanne, would you kindly also ensure that this is circulated to the Justice Committee Convenor and the committee members and clarify that for FBGA.
Jennie Bristow  
Secretary  
Former Boys and Girls Abused in Quarriers Homes  

22 April 2013
Support for Participants

The number of participants mentioned was around 500 per annum. It was suggested that those participants have a choice of support. While we acknowledge the suggestion from Health in Mind that participants should have a choice of choosing their current support agency there will be many who do not have any current support in place. Costs of a private counsellor are around £45 per hour. For 500 participants having therapy for a year that would equate to £1,170,000. This is the cost of a private counsellor a psychiatrist or psychologist will be significantly higher in unit cost. The amount set aside in the budget is £60,000 per annum.

If this support has also to have the addition of independent advocacy from another agency that would have additional costs in setting up the advocacy service, training the staff in issues for survivors who have been abused in care and service running costs as this service would need to have specialist skills. Forth Valley Advocacy costs £345,000 to run per annum but this support would need to be Scotland wide.

We are concerned that the issue of support for participants in being discussed in an aspirational way with no structured discussion about how this will actually work in practice or how it will be funded. As this is an extremely important part of the process to avoid risk of further harm we feel that it should be carefully considered.

The In Care Survivor Service Scotland have put forward our own service as a suggestion as staff are already specialised in the areas of counselling and advocacy for care survivors, we have a Scotland wide presence and costs of additional hours to support the process would be minimal as the structures are already in place. Our unit cost is substantially lower than private work.

Our service would also enable a structured approach before, during and after the process.

ICSSS was established as the current services for survivors of abuse in care did not meet their needs and this was further emphasised by the external evaluation of the service conducted by Napier University. ICSSS have worked with over 750 survivors of abuse in care and have dealt with many more on our helpline and we feel the views being presented to the committee are not representative of the views of the vast majority of survivors.
Foster care
ICSSS and CELCIS will be further consulting on this area but survivors we work with who have been placed in foster care have expressed a need to have a forum to bring their experiences to and it is likely that the consultation process will reflect this.

Janine Rennie
Chief Executive Open Secret

24 April 2013
FBGA gave evidence to the Health and Sports committee on the 25/03/2013.

Following oral evidence statements made by Louise Carling, bill team leader for Survivor Scotland Team and Linda Watters, Survivor Scotland at the Health and Sports committee on the 16th April 2013, regarding the following,

Re: National Confidential Forum choice of services for victims-survivors, including participants choosing their own independent counselling and advocacy services.

1, What total costs have been specifically allocated and set aside in the NCF budget to enable participants to NCF to choose their own counselling and advocacy service?

2, How will participants to the NCF be able to access such independent counselling and Advocacy funds?

3, What organisation will be responsible for distributing and managing such counselling and advocacy funds requests from NCF participants?

4, How many counselling and advocacy sessions will an NCF participant who wishes to choose their own services be allocated and estimated cost per session?

Jennie Bristow
Secretary,
FBGA- Former Boys and Girls Abused in Quarriers Homes

21 April 2013
Victims and Witnesses (Scotland) Bill

Former Boys and Girls Abused in Quarriers Homes

Regarding In Care Survivors Scotland Service comments re; support mechanisms. If we take the TTBH report figures on page four as an example-
Of those who participated, in TTBH, it was as follows:
69% still live in Scotland, 18% live in England or Wales and 13% live outside the United Kingdom in Canada, the USA, Hong Kong, Australia, Germany, Italy and France.

Clearly it was impossible and totally impractical for those 31% participants to access the ICSSS for their one to one counsellor and counselling provision. These participants accessed services including local counselling within the community which was easily accessible. Some paid out of their own pockets for some personal counselling. It is also very important to have continuity of support and victims-survivors already have some well established relationships concerning their support mechanisms including accessing the ICSSS service.

ICSSS have stated they are concerned that the issue of support for participants is being discussed in an aspirational way with no structured discussion about how this will actually work in practice or how it will be funded.

This statement by ICSSS fails to recognise that many victims-survivors including INCAS and FBGA have had structured and constructive discussions in various settings, forums over the years and recently in the Interaction and on the National Reference group. FBGA have put forward fully considered and comprehensive plans & proposals forward to all the consultations and the Interaction. FBGA also participated on the Survivor Scotland subgroup many years ago regarding the setting up of the ICSSS service.

The figure quoted by ICSSS for 500 participants having therapy for a year that equates to £1,170,000. When measured against TTBH costs, participant numbers and outcomes. We do not anticipate that there will be anything like 500 participants accessing the NCF who will seek personal, direct funding for their own counselling and other service needs. Presenting such numbers and financial figures in this way appears to be seeking to convey the wrong impression and in our view is somewhat misleading.

Given that a number of diverse services including counselling and independent advocacy services are already operating and funded by the Survivor Scotland strategy and the Scottish Government, then these services could be utilised to provide a wide choice of services in the NCF. While addressing any gaps for those who may not be able to access such services due to location or for other valid reasons.

FBGA as we have stated would wish the processes to be cost effective, while delivering an aspirational and ambitious, choice of high quality counselling,
independent advocacy and other services which directly benefits victims-survivors before, during and after who may participate in the NCF.

Various options are worth exploring including the Towards Healing model and the choice of services that could be made available in the NCF including any potential costs, the economic viability and effectiveness of such proposals. Quarriers former chief executive also indicated some time ago to FBGA that they may be prepared to assist with some counselling costs for some former residents.

It is wholly appropriate for FBGA and others to raise these issues at this stage of the bill with the committee and others responsible for the policy to enable the various parties to give further scrutiny and consideration to all the issues and the reasonable expectations of victims-survivors.

Recent commitments by Survivor Scotland representatives to the Health and Sports committee to provide a choice of services in the NCF is welcomed.

Quarriers

The confidentiality agreement that participants were asked to sign at the beginning of the SACRO RJ process, we now learn from Quarriers representative through this committee was not legally binding. Yet this was not made clear to those who participated in RJ process or wished to participate.

This raises other issues was it a form of deception as some participants had raised serious concerns about this confidentiality agreement with SACRO including some who subsequently dropped out of the RJ process. It again raises serious concerns about the clarity of such processes from the outset without any ambiguity before victims-survivors actually engage in such processes in the future.

Both the TTBH and the RJ processes were voluntary for former Quarriers residents. The disparity in numbers between those who engaged with the TTBH and RJ processes reflects the deep anxiety and serious concerns individuals had regarding the SACRO RJ process.

We welcome statements made by Quarrier regarding built in therapy and psychological support in NCF. Also that it is a must in relation to reporting credible child abuse allegations made by participants to NCF to be passed to the Police. Again we believe this should be a clearly defined legal duty within the bill.

SACRO Restorative Justice

SACRO RJ was initially only for those residing in Scotland, only after FBGA raised issues was it opened to other residents residing outside of Scotland. Again demonstrating clear discrimination and policy that appears to be made
on the hoof!! With no regard or respect for victims-survivors directly affected by these issues and there real needs or expectations.

According to the SACRO report commissioned by themselves. 15 individuals initially followed up information provided to them via TTBH regarding the RJ process. Six participants dropped out in the very early stages and then subsequently more participants dropped out, a total of (11). Only 4 participants out of the 98 who had originally taken part in TTBH had some form of beneficial outcome.

The RJ process did not have the support of participants nor a sufficient wide range of remedies and redress to deal with participants particular needs and expectations in line with the SHRC recommendations and framework.

Please see link to SACRO RJ Final report. This evaluation was written by the SACRO organisation with no independent oversight, input or scrutiny. Given this we take this report by the organisation at face value.


In the words of SACRO "Sacro’s Restorative Justice Service for 'Time To Be Heard' is an innovative and, as far as we are aware, unique application of Restorative Justice principles. we are not aware of previous similar initiatives to work with survivors of residential abuse and the organisation responsible”.

Proposing that extremely vulnerable adults many with severe mental health issues may have to represent themselves in meetings with the Chief Executive of the organisation negotiate and navigate their own resolution in such a process was clearly inappropriate. While putting individuals at further risk and in harm’s way. Some victim-survivors simply do not have the capacity to represent their own issues in such situations and are open to further exploitation and abuse by a system, institutions and the State that has already let them down badly.

To develop and test such a RJ pilot while hoping to gain invaluable experience in this way regarding the SACRO RJ Pilot is also morally indefensible, as we previously stated victim-survivors are not guinea pigs for some experimentation.

In addition serious concerns were raised about the RJ process by FBGA and INCAS to SACRO. Some participants also made verbal and formal complaints of RJ directly to SACRO.

Catholic Church and Church of Scotland

We welcome comments regarding support for participants before, during and afterwards concerning NCF made by both churches. As Jean says giving testimony can contain risks for the wellbeing of participants.
Richards’s comments regarding duty to report any child abuse allegations reported to NCF must be a must is welcome, we agree with his comment that police are best placed to decide best course of action.

Regarding comments how the institutions, the churches and others will address the needs and expectations of those who suffered ill treatment and there is a deficiency in the current NCF structure relating to this and links to care providers.

Clearly victims-survivors have a wide range of needs and expectations no matter how well meaning. There are serious risks if institutions, the churches and others do not have the capabilities or the resources for addressing all the needs and expectations of individuals.

Then more harm can be done than good if processes do not have clarity, purpose, breath, intention and broad remit, as expectations are simply raised that cannot be met as demonstrated in the RJ process.

This mismatch of what is hoped for by victims-survivors and that which is actually delivered by processes, organisations, institutions and the churches is often the source of traumatization, distress, confusion and a general feeling of not wishing to engage in further disclosures and narrations which have proven so fruitless in the past.

The institutions and the churches may be currently limited in what they can do. If they do not or cannot meet the full range of needs and expectations of those seeking individuals redress, remedies, reparation and justice in line with the SHRC Framework and Recommendations.

However we welcome comments regarding the possible links between NCF and care providers, churches and institutions. We hope to explore possibilities further in discussions in the Interaction on what could or may be addressed and advanced collectively in this area by organisations, institutions and churches with a direct interest in the outcomes.

Barnardos

Barnardo's Scotland supports the establishment of the NCF and they agree with the functions that have been listed on the face of the Bill. They believe that for some survivors the Forum as established will be helpful and therapeutic.

However, Barnardos are concerned that the mandate and remit of the Forum does not go far enough. There have been calls from the Scottish Human Rights Commission (SHRC) and survivor groups for the Forum to look at and have power for remedies, redress, effective investigations and inquiries, as well as the power to award compensation. Barnardo's Scotland supports these views and agrees with these organisations that the element of accountability is missing from the proposals.
The Scottish Government needs to consider how it will balance the therapeutic model of the NCF with the need for justice by many survivors. Barnardos comments and contribution to the committee are welcome.

Care Leavers Association

We welcome the valuable contribution from the CLA who have experience of dealing with former residents in various settings, there comments, written evidence relating to the Scottish situation and there support of those Scottish former residents who gave oral evidence on the 25/03/2013.

We agree with the CLA that accountability and justice elements are still missing and that the NCF lacks other elements of redress, remedies and justice and that this continues to have a detrimental long lasting impact and effect on the health and wellbeing of many former residents who suffered ill treatment.

Who Cares Scotland

Regarding options and wide choices of support services being available and accessible for all those who will participate in the NCF we agree with this statement

It is appreciated that this organisation has an interest in those cared for in today’s Scottish care system gave an insight into the ongoing issues faced by the population in care currently and recently. Failing those in care down the generations has had a detrimental impact on former residents' health and wellbeing long term.

We also recognise that many former residents have had very positive experiences in care and strived after leaving care and made great contributions to society including many of those who suffered ill treatment. It would be our hope that the NCF can contribute to wider learning for society as a whole whereby improving the outcomes of the next generation placed in care in Scotland.

Care Inspectorate

There has been a systemic failure in the past Scottish Care System and we are deeply concerned about the comments by Who Cares Scotland concerning some aspects of the current care system and the continuing lack of opportunities and positive outcomes for many in care today

In relation to comments made regarding learning lessons and feeding these back into the care system to improve current provision. We agree provided that participants accounts are reflected accurately and referenced in the interim and final reports and are not unduly redacted, sanitised versions aimed at minimising the issues and there potential impact on the current care system and care practitioners.
We welcome comments about there being the right support at the right time and that it is tailored to individual participants needs including a choice of services being available.

The regulation of the current care system should also hold providers, institutions, care homes and individuals who manage such institutions corporately accountable in law for any neglect, abuse or mistreatment of residents that takes place in future. As they are proposing to do in rest of the UK.

Kibble

With regards comments made regarding police investigations not well conducted that clearly is an issue for the Scottish Justice system and any evidence of this should be passed on to relevant authorities. In relation to Quarriers we believe that the police investigations were impartial, well conducted, victims and accused were treated fairly and appropriately. However we believe that more support and information would have been helpful to victims throughout their engagement with the Scottish Justice criminal system, issues that are now being addressed in the bill.

As we understand it there are specialist police officers assigned to various police inquiries with specialist skills and knowledge as occurred regarding operation Orbona relating to Quarriers inquiry.

Justice is also best served when Justice serves all the people, victims and the accused impartially and with fairness. This is made much more difficult for the victims of such crimes when those convicted continue to deny there heinous crimes. As has occurred regarding former care workers convicted in the Scottish criminal courts who still claim they are innocent.

Justice is ill served when those convicted, the institutions, the churches and others engage in tactics to discredit and undermine the victims-survivors. All the while they are not addressing the real issues affecting the victims to the benefit of those victims-survivors abused in the past Scottish care system.

Many former residents of Quarriers still have strong feelings and connections to the name of Quarriers in part due to its set-up and for many it was their home for many many years.

FBGA

If participants are made fully aware at the outset and understand fully the processes of NCF and that any credible allegations made will be passed on to the Police. This may serve the wider interests of Justice and may offer additional protections to those accused. A number of victims-survivors in FBGA have said that this may actually help prevent false allegations being made.
FBGA can clearly demonstrate that as an organisation we have supported initiatives such as ICSSS, Time To Be Heard and the current Interaction and National Reference Group, welcoming constructive engagement and dialogue as this hopefully avoids and reduces the risk and potential for harm or damage, hurt and disappointment being inflicted on an already vulnerable group of adults.

FBGA do not criticise unless we feel compelled to do so and it was with reluctance that we could not support the SACRO RJ process in its current format. The low outcomes and very negative feedback by participants concerning RJ demonstrate that decision was the correct one taken by FBGA.

We clearly have a duty to represent the best interests of those we represent and the wider victims-survivors aspirations by being constructive, transparent and genuine in any discussions and engagement with others, which we strive to do.

Likewise we speak out about these issues faced by former residents to hopefully help prevent such abuse occurring on this scale again and for the next generation of children placed in care to hopefully have better outcomes for those in Scottish care system and when they leave care now and in the future.

Again we would like to thank everyone who has given evidence to the committee.

Jennie Bristow
Secretary,
FBGA- Former Boys and Girls Abused in Quarriers Homes

29 April 2013
Victims & Witnesses (Scotland) Bill

Harry Aitken (former Chair of In Care Abuse Survivors, Scotland)

1. Eligibility to participate in NCF
The letter to the Health and Sport Committee from the Minister, Michael Mathieson, attempts to explain the Scottish Government rationale for not including in the NCF, young people in the age group 16-17. However, it is worth noting that any child, who may have experienced in care abuse, and had left care under the age of 13 years, would be out with the current 3 years prescribed by the “Time Bar” law before their 16th birthday. On that basis, it seems fair to include them in the NCF from the age of 16; otherwise they could be subjected to the same “Time Bar” restrictions that many adult survivors have suffered for many years. It would also indicate that the Justice system would not have learned anything from the current survivors’ experiences.

It would be interesting to know if anyone had actually asked the young people of 16/17 years, the youngsters who had been under kinship care and those who had been in foster care, whether or not they would like to be participants in the NCF. If no one has asked them, perhaps it would be wise to do so, just in case it causes problems in the future. After all, these groups must also be allowed to exercise their rights, and the oft times quoted mantra we hear in Scotland is - “the victims/survivors’ needs must always be at the centre of any decision making process”.

This issue raises another matter which has been of continuing concern to survivors, viz, that any child, currently, and in the future, placed in the Scottish care system, should get the benefit of any learning to be had from these many justice issues, and that every child should be fully informed of all of their rights, prior to leaving the care system, so that they too do not suffer the injustice of an inequitable “Time Bar” law.

2. NCF participant testimonies
It is particularly important that participant testimonies be stringently dealt with under the relevant laws of data management and archiving and that the necessary control procedures with regard to access are at all times strictly adhered to. A necessary feature of these procedures should also take account of the situation that could arise if, for any valid reason, a participant is unable to complete their testimony at one session, or if they would like to make amendments or deletions, they should be permitted to return and do so.

Also, it would help if they were given a transcript of their testimony for that purpose and to keep as a record. Furthermore, as the TTBH report did not record that some participants had submitted legal documents to the TTBH Forum, this copy of their transcript would act as evidence that these documents had been submitted.
It would be helpful if all of these procedures were presented in an easy read format and included in the preparatory literature given to all intending participants in advance of them taking part in the NCF.

3. Reports to the Police by NCF Commissioners
It is a matter of concern that the Commissioners in the TTBH Pilot Forum chose to use their discretion on the basis of age, perpetrators being deceased or care homes no longer operating.

To obviate this happening again, it would be wiser to tighten up the Victims and Witness Scotland Bill by making this a statutory requirement. This will bring clarity to the Victims and Witnesses Scotland Bill and will eliminate any possible doubt in the minds of the NCF Commissioners and the participants.

All testimonies given at the NCF which include allegations of child abuse should not be left to the discretion of the NCF Commissioners to report, but should be automatically referred to the police. Only then should it be for the Police to deal appropriately with these allegations - not for the NCF Commissioners to have any reporting discretion.

Furthermore, in the event that an allegation of child abuse is false, the participant should be fully informed at that point, what action the Commissioners intend to pursue. If the allegation is false, that advice given within the hearing, would give the participant an opportunity to retract the allegation, with no damage to themselves or the alleged perpetrator. Also, it should be made clear to participants that they have the right not to talk to the Police, if they so choose.

As has been shown by the Savile case in England, all incidences of child abuse reported to the Police was valuable intelligence. It served to gather an overall picture of the scale and scope of child abuse during that period and gave the Police grounds to broaden their investigations into the alleged behaviour of other child abusers.

An added requirement of child abusers being named at the NCF, and subsequently referred to the Police, is that the specialist Police investigation teams should be given appropriate training in the handling of these types of cases. This could help to eliminate the all too familiar experience by survivors whose cases are made to fit the system, rather than the system adapting to suit them.

4. Support and Advocacy
It should be a matter of course that any vulnerable participant in the NCF, displaying the effects of historic child abuse, should be entitled to appropriate support measures to protect them against re-traumatisation throughout the whole process – for however long that support is needed – and that they should be allowed to choose the provider of that support and advocacy. At that point, any support should be customised to the needs of the individual, depending on their circumstances.
Broader discussions of the implications of the NCF have highlighted a more acute concern that the support and advocacy services currently available in Scotland, appear to be of a fragmented nature. This is creating the potential for conflicting advice, and the uncertainty that participants may not know where these services are located, or who best to engage.

Perhaps the NCF process has created an opportunity to standardise and integrate these services across Scotland so that the quality of service is assured, is cost effective and is flexible enough to meet the needs of all victims/survivors.

Harry Aitken  
(former Chair of In Care Abuse Survivors, Scotland)

22 April 2013
Victims & Witnesses (Scotland) Bill

Harry Aitken (former Chair of In Care Abuse Survivors, Scotland)

1. Introduction
It seems right and proper that, while making comment or observation on any initiative designed to advance the cause of victims/survivors, a fair and balanced view should be taken.

Survivors of historical in care child abuse have readily acknowledged that many children placed in various Scottish care settings had a very happy, supportive and loving experience. They were the lucky ones!

The survivors also recognised that this was due to the dedication of many caring, committed staff who unselfishly gave of their time, their energy and their life’s work to the encouragement, nurturing and development of the many children in their care.

However, there is a substantial, well documented bank of evidence, gathered over many years, confirming that thousands of Scottish children placed in care had a very unhappy, abusive and traumatic experience. These innocent, vulnerable children suffered all forms of abuse at the hands of evil, exploitative staff who were allowed, with impunity, to perpetrate such abuse.

Failings by care home managers and staff, the Local Authorities, Social Work Departments, the Police, the judicial system, the Church, the Education Authorities and the Scottish Government, allowed a culture of fear and abuse to permeate the Scottish child care system without, apparently, doing anything about it. Instead, they abandoned these children to face on their own, a life of horrific, debilitating torment.

Children who reported abuse were either not believed or branded as liars and as a result, suffered further punishment. Their human rights were violated! They did not get justice! The trauma of such maltreatment was carried with them throughout their time in care and into their adulthood. Many still live with the consequences of that traumatic experience. And still they have not had justice!

2. National Confidential Forum – Responses to Explanatory Notes
Here are some responses to the items in the Victims and Witnesses (Scotland) Bill which may be worthy of consideration, or may be used to contribute to a more detailed discussion.

Analysis of the Time to Be Heard (TTBH) Pilot Forum done by Strathclyde University showed that some adults who were placed in institutional care as children found the participation in TTBH a cathartic and therapeutic experience.
However, it has been reported by some participants in the TTBH Forum that, after giving testimony, and once the state of elation or euphoria had subsided, they felt a void in their lives because nothing more productive had happened to improve their lives. They were no closer to obtaining access to justice, redress or reparation. In fact, they questioned the efficacy of the TTBH process and as a result they felt re-traumatised by the experience and wished they had not taken part.

What the analysis of the TTBH process also showed was that, before any future roll-out of a National Confidential Forum is undertaken, there are significant improvements required to be made to the process and that participants should be given certain assurances.

2.1 Section 26 – 4ZA – National Confidential Forum
• (67) - National Confidential Forum as part of the Mental Welfare Commission (MWC) for Scotland.
  
  • No rationale for this choice was given.
  
  • However, if complete confidentiality and independence of the MWC is maintained throughout the existence of the NCF, there is unlikely to be any further issue for participants.

2.2 Section 26 – 4ZB – General functions of NCF
• (71) It is a continuing source of great concern that, despite the majority of respondents to the NCF consultation process stating that adults placed in foster care should also be allowed to give testimony to the NCF, this has not been included in the Bill. (see Schedule 1A – Part 3 (108) below )

  • Many children placed in Foster Care under the aegis of local Social Work Departments also suffered horrific abuse and their human rights were violated at that time. Foster parents were located, selected and paid by the Social Services (i.e. the public purse), and the residence became similar to the cottage home system used by Quarriers. By disallowing them access to the NCF, this constitutes re-traumatisation and another violation of their rights – a course of action which will surely store-up problems for the Scottish Government in the future.

  • (73) Despite the two main Scottish survivor groups submission’s (FBGA & INCAS) to the NCF consultation process giving valid and sound practical reasons that the names of care institutions should be recorded, this has been denied and no explanation given as to why.

  • (74) It is absolutely imperative that any advice given to a participant during a Hearing should be validated, accurate, current and in a form that is easily understood. It is also essential that anyone delivering that advice is competent to do so.
2.3 Section 26 – 4ZC – Carrying out NCF functions
  • (76) It is essential that the NCF Head is fully conversant with the full range of advice that may be sought by or given to a participant during a Hearing.

2.4 Section 26 – 4ZD - Further modifications in relation to NCF
  • (84) With regards to the proposed records management plan to further safeguard the confidentiality of testimony, INCAS suggested that a random number be given to a participant, to be used to record a participant’s testimony and to make reference to that participant’s testimony in the final NCF report.

  • This will ensure that a participant will be able to recognise their testimony in the final report – something which did not happen in the TTBH report and was a source of concern.

Schedule 1A – Part 1 – NCF Membership selection panel
  • (91) & (92) it would be of real benefit to victims/survivors if they were represented on the NCF Membership selection panel. This would be consistent with the approach that puts survivors at the centre of the process and would be consistent with the recommendations of the Christie Commission.

  • Giving testimony to the TTBH Forum was a major milestone in the life of many survivors and for some, proved to be filled with apprehension. If, for example, a representative of FBGA & INCAS was included in the Membership selection panel, they would be in a much better position to allay in advance, some of the natural fears likely to be felt by prospective participants.

Schedule 1A – Part 3 - Eligibility to participate in the National Confidential Forum
  • (108) specific types of care and health services which meet the conditions set out in paragraph 7(4) not including services provided at premises used mainly or wholly as a private dwelling. This excludes the supervision of children at home, foster care and kinship care from the scope of the Forum.

  • Children placed in foster care with strangers were under the care of the local Social Services and by extension, the Nation State of Scotland. This is a situation distinctly different from being at home or under kinship care with family members. It therefore seems invidious to deny them the right to give testimony at the NCF.

  • The CELCIS, (2012) scoping project concluded that 480,000 people were in care as children between 1930 and 2005 and, of these, 320,000 are likely to be alive today. This spans residential, foster care and community placements. Drawing on the Commission in Ireland experience, they expect that only up to 2,000 people will wish to take part in the NCF. This represents 0.6% of the 320,000 and ignores the
many that were in foster care. This can be viewed as further discrimination against and abuse of, those who were in foster care.

Schedule 1A – Part 4 - Conduct of Hearings
• (111) Analysis of the TTBH Pilot Forum highlighted the embarrassment felt by some participants who found it very difficult to give testimony in the presence of a member of the opposite sex.

• To obviate this problem and since there is scope in the Bill to have more than 3 members on the NCF Panel, it would be useful to have a total of 4 members – 2 of each sex. Hearings could then be mutually arranged to take account of a participant’s preferences. This would ensure that participants were comfortable with the Panel and were more likely to raise any matter of a very sensitive nature.

Schedule 1A – Part 4 - Recording of testimony
• (115) see 2.4 Section 26 – 4ZD (76) above

Schedule 1A – Part 4 - Payment of expenses
• (116) FBGA & INCAS have requested that participants, who may be less well-off, be paid their reasonable out of pocket expenses on the day of their participation at the NCF. This would prevent the possibility of a long delay before their expenses are reimbursed.

Schedule 1A – Part 6 - Confidentiality - Prohibition on disclosure
(127) Paragraph 13(6) provides that a court may order the disclosure of information held by the Forum for the purposes of legal proceedings, whether civil or criminal (including for the purposes of the investigation of any offence or suspected offence); if it is satisfied that such disclosure is necessary in the interests of justice.

• Survivors of historical child abuse, during the NCF Consultation process, included asked in their submission that they be given details of all such reports made to the Police by the Forum.

• These details to include:
  o How many reports were made to the Police by the Forum?
  o How many investigations were conducted by the Police?
  o How many prosecutions were brought by the Police? and
  o How many prosecutions were successful?

• Survivors believe that this is necessary in the interests of justice, and that it would be convincing evidence that justice was being seen to be done. This matter is of prime importance, since survivors were not given any information of such actions having been taken by the TTBH Pilot Forum.
3. Other Relevant Matters

a. Timescale – many survivors have been campaigning and promoting the cause of victims of historical abuse for 14 years. During that time, they have given an account of their childhood experiences to Social Services, the NHS, Psychiatrists, Psychologists, Researchers, Lawyers, the TTBH Pilot Forum and the SACRO – Restorative Justice process. Each exposure to any of these agencies created more re-traumatisation and disappointment. Their hopes were dashed when they realised that, after all that time, they were still no closer to obtaining justice, redress, reparation or closure.

b. NCF Operational Independence – participants would require assurances that the NCF, the Head and the Panel members would have full autonomy and all necessary powers sufficient for them to effectively carry out their duties without hindrance, especially with regards to security and confidentiality of testimonies or other sensitive information. It would also be a requirement that the NCF be allowed the freedom to be flexible and to adapt their procedures as the need arises.

c. Support Mechanisms – it is hope that these will be readily available and sufficient to the participants’ needs. This to include qualified support, family support and signposting to ongoing support. The CELCIS, (2011) evaluation report of the TTBH Pilot forum recorded that, in 22 of the hearings Panel members were traumatised by the given testimony. It is therefore particularly important, that adequate and qualified support be made available to all members of the NCF Panel for as long as is necessary.

d. Re-traumatisation - referring back to what has been written in item a. above; this is a very serious issue for survivors of historical in care child abuse. It was again evident during the recent NCF consultation meetings in Edinburgh and Glasgow. As a result, survivors proposed to the Scottish Government, that preparatory sessions on how to cope with re-traumatisation should be presented by qualified professionals in convenient locations and should be made available to all those disposed to participate in the NCF. No concrete arrangements for these sessions have so far materialised.

e. The Element of Choice - by adopting the Confidential Committee approach, survivors feel that they are not being allowed to choose the Investigative Committee approach, and are being denied access to what may be, for some, a better option and will be the most likely way to get at the truth of historical in care child abuse. This, yet again, raises the question of victim/survivor human rights being violated.

f. Accountability – as a prelude to TTBH in 2009, the Scottish Government conducted a consultation on the basis of “Acknowledgement and Accountability”. The removal of the principle of Accountability from the remit of the TTBH Pilot Forum was done without any discussion with survivors, who perceived its removal as hurtful, disappointing and wholly
unsatisfactory. It is still a matter of concern that the NCF still does not address this issue and makes no link to the possibility of an Inquiry as a significant step towards obtaining justice for historical abuse survivors.

g. Disclosure of Information – Since the collection of data from the NCF will form the basis of a public historical record of the Scottish Care System, and since each care institution was different, there should be no problem with the NCF producing an accurate and coherent statistical analysis of that data in a meaningful format. Names and locations of Scottish care institutions are already in the public domain; therefore, it would not be a breach of confidentiality for these names to be recorded in any public report. It would mean a great deal to participants of the NCF (and their families), that their care institution was represented at the NCF.

h. Restorative Justice – this model proved to be completely inappropriate for historical abuse victims/survivors. There was a small minority uptake by those who attended the TTBH Pilot Forum. It was badly run; it was selective of the recommendations in the Consultation report; the SACRO facilitators had no previous experience of dealing with survivors of historical child abuse; in most cases it re-traumatised the participants; it raised false hopes; there were confidentiality clause issues; there were issues with the attempted apology; there was no justice as an outcome; and there was no coherent plan for the restoration of the child abusers.

i. SHRC Framework – further to what has been written at item a. above; for the vast majority of victims/survivors, the ultimate objective is for the SHRC Framework to be fully implemented and for the current laws to be amended so that victims/survivors can get access to justice. Only then will they feel their human rights have been properly upheld.

Harry Aitken
(former Chair of In Care Abuse Survivors, Scotland)

7 April 2013
We are very supportive of the Bill and other actions taken to support survivors of institutional abuse. Great strides have been taken by yourselves in what is a difficult area, and I’m sure this is to the benefit of survivors in Scotland.

Action for Children has already met with representatives of those developing the National Confidential Forum, and attended one of the forum days. As an organisation we have not had a significant number of allegations of institutional abuse in Scotland. However our experience suggests that a flexible service is needed as not all survivors have the same needs or interests. As an organisation we do ensure that all former service users have support in accessing their records, and have ensured that we have an efficient system to retain and access these. Again our experience is that these records can be invaluable to those who are been in care and as such need to be kept and accessed in a professional and sensitive manner.

As an organisation we will continue to support this process and would be interested in the progress of the Bill and the development of the forum. Please feel free to contact me at any time if you have further questions you might want to ask.

I look forward to hearing about the development of the scheme.

Shaun Kelly
Head of Safeguarding
Action for Children

18 April 2013
Victims & Witnesses (Scotland) Bill

The Care Leavers Association

The following briefing notes have been drafted for Zachari Duncalf, prior to her appearance on behalf of the CLA before the Scottish Government’s Health and Sport Committee on Tuesday 23rd April. The notes are based on my reading of the minutes of the Health and Sport Committee meeting of 26th March and in accordance with the current CLA policy on abuse in the care system.

The CLA has long experience of addressing the abuse issue on behalf of adult care leavers in a variety of contexts within the UK. We also have many members who have experienced abuse within the care system. Further, we have, for over a decade, also discussed abuse issues with many other adult care leavers who are not members and in a variety of contexts. Bearing in mind that we have much less expertise on the Scottish situation than those who presented evidence to the committee on 26th March 2013, we would add the following:

- Our agreement with David Whelan, Helen Holland and Chris Daly on the inadequacies of the Confidential Forum model with respect to providing justice for adults who were abused when in care as children.

- Our agreement with their comments on the inadequacies of the existing support arrangements and Helen Holland’s call for the more generous Irish support model to be followed. In particular, the points made by Helen Holland about the length of time, and levels of support, needed by some people to deal with the aftermath of abuse accord with our own extensive experience of the deep impact of past abuse on some members and other adult care leavers.

- Likewise, we agree with the points made by Helen Holland, Chris Daly and David Whelan about the need for support during the process of giving evidence to the Confidential Forum. As they note, this can be a difficult experience for some people and they may need access to sensitive and expert support.

- We agree with Helen Holland’s criticism of the evaluation process for the Pilot Forum. Evaluation two weeks after giving evidence is a weak – in our view, invalid – basis for assessing the impact of any process of this kind on such an emotionally-charged issue.

- We agree with the point put by those speaking on behalf of abuse survivors regarding the need to be able to identify one’s evidence in the finished report. This speaks to the fact that giving evidence in this context is, for those giving it, fundamentally different to the normal process of giving evidence to government committees. It is always highly personal. Government bodies should therefore respond differently in the use of such evidence. They should also provide
personal evidence transcripts, i.e. their own transcripts, to all those who participate.

- As per our longstanding CLA policy on abuse in the care system, any legal time bars should be removed in relation to child abuse cases.

Jim Goddard
Chair
The Care Leavers Association

23 April 2013
I am very pleased that the Health and Support Committee is taking the lead in relation to the provisions in the Victims and Witnesses (Scotland) Bill (the Bill) to establish the National Confidential Forum (the NCF). This reflects the proposed aim of the NCF that it enhance the health and wellbeing of people placed in institutional care as children, including survivors of abuse and neglect. I believe the confidential form of acknowledgment which the NCF is designed to provide will be of great benefit to people placed in institutional care as children and their families.

I understand that in the informal briefing on the NCF, and the SurvivorScotland Strategy, delivered by officials on 26 March 2013 to the Committee, a member asked about the proposed age threshold for participation in the NCF set out in the Bill. I thought you might find it useful to for me to set out our rationale for proposing that this threshold be set at eighteen years of age.

As you will be aware, the scope of eligibility to participate in the NCF as provided for in the Bill is very expansive. This is to enable maximum participation. It is intended that anyone who has a past experience of being placed in institutional care as a child in Scotland, at any time and for any period of time, will be able to apply to participate in the NCF. An age threshold is considered prudent as those experiences are not to be current. I am sure you will appreciate that the NCF would not be an appropriate mechanism to address the experiences, including of abuse and neglect, of people currently in institutional care.
The options we considered for making provision for an age threshold for participation in the NCF in the Bill were sixteen, eighteen or twenty one years of age. It was considered that a threshold of eighteen years of age was the most reasonable and appropriate option, given that the NCF will only be able to hear experiences which are not current. It is more likely that persons aged eighteen years and over, as opposed to sixteen years and over, will have left institutional care and have historic (ie not current) experiences of that care. On the other hand, it was considered that twenty one years of age was too high a threshold and might lead, even inadvertently, to the exclusion of persons who have recently left care.

We have considered the equality and human rights implications of setting an age threshold at eighteen years and over. This is considered to be reasonable and proportionate, with objective justifications for such.

You may also be interested to know that an age threshold of eighteen years of age was operated by the Confidential Committee in Ireland and is now being used by the Acknowledgement Forum in Northern Ireland.

I hope you find this of use as the Committee considers the provisions in the Bill to establish the NCF. However, please do not hesitate to come back to me if you wish further clarification.

Michael Matheson
Victims and Witnesses (Scotland) Bill: Stage 1

10:10

The Convener: Under agenda item 2, I ask the committee to delegate to me responsibility for arranging for the Scottish Parliamentary Corporate Body to pay, under rule 12.4.3 of standing orders, any expenses of witnesses in the Victims and Witnesses (Scotland) Bill evidence sessions. Does the committee agree to that?

Members indicated agreement.

The Convener: Item 3 is our first evidence session on the bill. I welcome on the committee's behalf our guests David Whelan, spokesperson for Former Boys and Girls Abused in Quarriers homes; Jim Kane, committee member, In Care Abuse Survivors; and Helen Holland and Chris Daly, the petitioners who lodged PE1351, on time for all to be heard.

Thank you all for your attendance. We will do our best to conduct the session in as relaxed a way as possible, although that can be difficult round the table.

Dr Richard Simpson (Mid Scotland and Fife) (Lab): I will start by taking us back a bit. When I was a justice minister, I attended a cross-party group that Marilyn Livingstone ran. That was 11 years ago and since then, there has been progress with the strategy, the time to be heard pilot forum and, now, the proposed national confidential forum.

I invite our witnesses to say whether they feel that the move to put such matters into legislation is the correct next step, whether that is the way in which we should progress and whether they are comfortable with the forum's format, with the fact that it will be under the Mental Welfare Commission for Scotland, with the definition of institutional care and with the eligibility to participate at the age of 18.

David Whelan (Former Boys and Girls Abused in Quarriers Homes): Thank you for inviting us to give evidence. Our position is that there is a role for a national confidential forum, but the proposed forum's mandate and remit do not go far enough. There will be no remedies, no redress and no effective investigations or inquiries under the model.

Chris Daly (Petitioner): I back up what David Whelan just said about the national confidential forum. The Scottish Government asked the Scottish Human Rights Commission to draft a remedies framework for survivors of institutional child abuse in Scotland. The SHRC came up with
a framework, which included something like the national confidential forum.

However, In Care Abuse Survivors and I feel that, although the proposed forum has the acknowledgement aspect, the element of accountability is missing. The forum does not consider the element of justice. Indeed, Tom Shaw made no recommendations about access to justice in his report on the time to be heard pilot. A number of remedies are key to the way forward. I agree that the proposed forum is helpful in some ways, but there are other remedies, which the SHRC addresses in its framework.

The Convener: I ask Helen Holland and Jim Kane whether they wish to add anything, although they should not feel compelled to do so.

10:15

Helen Holland (Petitioner): I would just like to say that it is regrettable that, 11 years on, we are still talking about the issue, given that a number of survivors have already died, having seen no justice whatsoever. We are talking about child abuse, which is a crime. It is not a health issue; it is a justice issue.

We have children who were denied justice because they were in care and did not have a voice. Those same people are now coming forward and giving themselves a voice—they have found the courage to come out and speak about what happened to them while they were in care. They deserve the same right to access to justice as anybody else has.

I will read a quote from Ireland, where the justice minister said:

“The persons who committed these dreadful crimes—no matter when they happened—will continue to be pursued. They must come to know that there is no hiding place. That justice—even where it may have been delayed—will not be denied.”

People in Scotland need to hear that, too. We need to hear that justice will not be denied to the survivors of abuse in care.

Dr Simpson: That is an interesting and understandable viewpoint. The confidential forum will separate things out in that it will provide an opportunity for a confidential hearing, which might be sufficient for some, although clearly it will not be for others.

Is the restorative justice approach that Sacro has piloted helpful? There is also the current consultation on the time bar, which I know has always been a vexed issue for some who have been abused. Do you have any comments on those elements?

David Whelan: As a group of survivors, we do not believe that the restorative justice model is appropriate for vulnerable adults who have been abused by the system. I have had an initial experience with restorative justice, and I think that it is immoral to ask survivors to resolve their issues independently. These people are extremely vulnerable. Some people who are not capable and who have mental health issues were put in a process of restorative justice in which they were supposed to engage with the organisation and resolve their issues.

That model is just not appropriate for this group of vulnerable adults, for a number of reasons. Some people had to wait for responses, although I appreciate that a process had to be gone through to understand things. Some people had to sign confidentiality clauses at the beginning, so they were denied rights at the beginning of the process. They engaged with the process, but they had to sign that agreement and so could not speak about it. That seems inherently wrong. A number of the people whom we represent came out of that process more damaged than they were when they went in, and their issues were not resolved, so that is not the way forward.

Generally speaking, survivors are not criminals—we are victims of crimes that were perpetrated on us when most of us were children.

Chris Daly: I back up some of David Whelan’s points. I believe that Sacro is involved in supporting prisoners in the Scottish Prison Service. I do not see how, from within that setting, it has the expertise to deal with victims of abuse.

Another point about the restorative justice pilot that went along with the time to be heard forum is that, as David Whelan said, individuals went along to the institution of Quarriers with no support. Some survivors went along on their own to where the abuse took place—into the lion’s den—to speak to the chief executive officer of Quarriers.

David Whelan: It is commendable that Quarriers wanted to engage, and we welcome that. We are looking for a non-adversarial process to resolve the issues. Chris Daly is right. At the end, individuals were meeting the chief executive if they got to that process. However, we need to look at the numbers who went into the restorative justice process and the outcomes at the end. How many people had an outcome that was beneficial to them? I think that it was four, plus perhaps one person at the end. That tells us that the model is not appropriate.

When we were involved in time to be heard, we were given a pamphlet, which I have brought along today. The booklet does not mention restorative justice. We went in for one thing—time to be heard—and we came out the other end with
restorative justice being suggested to us. We have never been consulted on it, yet that is the key to all this. The key to helping to resolve the issues is to involve the survivors. That process has begun, and begun comprehensively, with the Scottish Human Rights Commission interaction process, in which we are now all engaged, along with the other parties. The survivors support the Scottish Human Rights Commission recommendations and the framework, and we have engaged in the first interaction.

There is clearly a willingness on our side. Even after all these years of things not happening, there is a willingness on our side to engage constructively. However, as Helen Holland said, people have died, people are becoming more vulnerable and people are being more traumatised by the delays.

Chris Daly: Can I ask Helen Holland to speak about the Irish situation and the counselling support that is provided in Ireland, which we do not have here?

Helen Holland: I will speak about that, but I want to say something else first. With regard to restorative justice, Sacro was asked, “Have you dealt with this type of thing before?” It was honest in its answer, which was no. It did not have the expertise to deal with the issue, in all fairness to it.

David Whelan is absolutely right. Less than 1 per cent of the survivors took on board and accepted the restorative justice element as it stood. I do not think that enough work was put in to start with to ensure that it would be helpful for the survivors and that it would be a healthy option. It certainly has not been a healthy option. Anybody that I know who went through that process has come out of it worse off. I speak to some of them, and they cry every single time that I speak to them. They say, “I wish I had never done it. All that I did was open a can of worms. I can’t get the lid back on now. How do I get back to sleep at night? How do I start doing this?”

As far as I am concerned, the confidential forum model fails because it asks people to come forward, speak about their experience and then walk out of the door. People cannot do that. They cannot suffer 10 years of abuse or 10 years of torture and then come forward and speak about it in one afternoon to people whom they have never met before and do not know. The model asks people to come forward and speak to the commissioners—or whoever is appointed to do the work—about their experiences, but people will not know them.

Because they were in the care of the system, most survivors who have been in care have major issues with trust. How can they come forward and speak about intimate details of abuse with people whom they do not know, do not trust and will never see again? They will not know what the expectations are, whether they will get any justice at the end or even whether the issues will be taken on board and taken back to the institutions. We know that that is not what has happened. That is not what the process is about.

That is why I feel that the confidential forum is flawed. As a stand-alone entity, it will not meet the survivors’ needs. If it incorporates the other things—that is, the human rights framework—I think that there is work that can be done there, and it can be progressively taken forward. It needs to be done quickly, although I hesitate to say that, because it has taken 12 years to date.

A number of survivors have died since the start of the process, which breaks my heart. I was aware that there were eight terminally ill people when the time to be heard process took place. I was on the advisory board for the process with Tom Shaw and I asked whether the terminally ill people and the elderly could be brought into the group of people who were giving evidence. I was initially told that they could be but, at the very end, I was told no. Those terminally ill people could have taken part only if they had been in Quarriers. I understand now that that was because Quarriers was meeting part of the bill, so it makes sense.

Only two years have passed and, of those eight people, only one survives. It is an absolute disgrace that the country that we live in allows that to happen. Such people have the right to have their voices heard. The state let them down as children. We were children of the state and we are still children of the state, although we are adults now. The people who died were denied the right to have their voices heard. Please do not deny people that right any longer. Too many have died during the process.

The Convener: The committee has been asked to scrutinise one element of the bill. We are not the main committee and we are not dealing with the justice issues.

Earlier, we met the bill team, which has worked on the issue for a considerable time. The witnesses might know some of that team. The Government contends that the confidential forums are a health measure rather than a justice measure. The committee is trying to evaluate the proposal, which is why it is interesting to hear the witnesses say that, in some cases, the proposed measure might damage someone’s health and not help them at all. We need to get some clarity and opinions about that.

We have also heard from the people who have developed the policy that they have based their work on the pilot and its success. We need to hear a view on that.
We are dealing with a situation in which many people will be affected in different ways. I am only testing the idea. If the witnesses tell me that I am wrong, I will be happy to hear it. I am trying to encourage a discussion that will help me and my colleagues.

For some people, the forum will be successful: it will help their health and wellbeing. This is a difficult job. We are looking at one element of the bill as a health measure, and other colleagues will scrutinise the bill on the basis of whether justice can be achieved or helped to progress more effectively.

**David Whelan:** In the time to be heard pilot, 100-plus people came forward and 98 were heard. That demonstrates that there is a role for the confidential forum model, and it was therapeutic. However, people need to have the proper support before, during and after the process. That support is crucial for any model and will need to be in place.

I do not want to labour the point, but I have an issue with the confidential forum model, and it comes from my experience. My experience with time to be heard was a bit mixed. There was some confusion about the security of people’s testimony, because the pilot was not set up in legislation. My issue is that I gave time to be heard official Quarriers documents that outlined abuse that my sister reported to the organisation, but nowhere in the time to be heard report—even if it is anonymised—does it say that a participant in the pilot provided official documents about the organisation. That worries me. That is an issue with the confidential forum model.

I also provided a court document and there was no reference to that. There was also no reference to the conviction of the person involved. That was an official court document, which I gave in good faith. I was not asking to be identified, but that is my worry about the confidential forum model.

**The Convener:** Do you think that the bill and the process of scrutinising it might address some of your issues?

10:30

**David Whelan:** Yes, I think so. If the forum is set up in legislation, there is more scrutiny of the issues that we are raising. As we said in our submission, we have been in touch with the bill team leader, Louise Carlin, who was very helpful and gave us appropriate information. Those were initial inquiries and I am sure that we will have more inquiries as the bill progresses.

Participants will be protected—if that is the right word to use—in the legislation. We have to recognise that everyone has rights, and that includes the accused, the organisations, the institutions, the entities, the church or whatever it might be. They will have rights in any model that is progressed and FBGA expects those rights to be upheld.

**Chris Daly:** On the health aspect, if a confidential forum is to be rolled out, Tom Shaw recommends that the survivors are given adequate support before, during and after the process. Survivors are suffering now. They have had issues accessing mental health services in Scotland and many survivors are unhelpfully diagnosed with personality disorder. That labelling cancels out the treatment of other conditions that have been diagnosed such as post-traumatic stress disorder, anxiety disorder or depression. In Scotland, unlike England, personality disorder is not treated and it is difficult for survivors who have that label of personality disorder to access mental health services.

In Ireland, there is a very positive process for survivors to get psychological help. There is a fund for survivors of institutional abuse, who can access money from the keepers of the fund that will go directly to the therapist. Perhaps Helen Holland will know the name of the fund and the organisation that runs it. Survivors have a choice in Ireland and the money is there for them to pay for their choice of specialist trauma therapy. They have the choice of where they want to go and that is not time limited. If a person accessed a psychologist through the national health service in Scotland, the sessions would be limited to between eight and 12 sessions. In Ireland, the fund for survivors is not time limited and the survivor can choose where they want to go for specialist trauma therapy.

Survivors have been making this point for years to various committees, including the Public Petitions Committee, which Helen Holland and I were very involved with from 2002 to 2004, when the then First Minister, Jack McConnell, apologised for the abuse in institutions. We have been telling the Parliament and the Government that survivors need psychological help now. If survivors go through the national confidential forum process without having the support and therapy that they need—and have needed for a long number of years—here and now, it will retraumatise them.

**Helen Holland:** I think that the Government would say that it put in place that support by putting an amount of money into the in care survivors service Scotland.

However, as I said, survivors have major trust issues. Whether we like it or not, the state is primarily responsible for children in care, and those children were abused while they were in care. A lot of adults chose not to go down the
route of asking the ICSSS to come along with them during the process, and that is their prerogative.

With regard to the report on the success of the whole procedure, the committee has to understand that the evaluation papers were produced two weeks after the survivors spoke. Some of the survivors had never spoken before about what had happened to them, as Tom Shaw admits in his report.

When someone first speaks about abuse, there is initially an element of euphoria that they have managed to do so, and they feel better about the whole thing. However, as time goes on, the depression starts to come back, and they begin to question whether they did the right thing by speaking about it. A number of people go back to their doctor and say, “I’m not coping—I went along to the forum and spoke about what had happened to me, and now I can’t sleep at night,” or they have issues with food or depression.

An evaluation paper that is produced two weeks after the event is, in my opinion, not fit for purpose, because it is not a true reflection of how successful the whole process was. I say that with all due respect, as I know that the forum was a learning process for the Scottish Government, but there are many examples out there that could have been examined and called on.

The organisation that Chris Daly mentioned is called Towards Healing. When the Irish Government put in a sum of money, the Catholic Church chose to do the same, and every institution in Ireland then put a lump sum of money into the pot. The organisation was set up so that someone could phone—whether or not they had been through the process in Ireland—and say, “Look, I was brought up in care and I was abused.” The organisation would ask, “What home were you in?” and the person would be able to tell them. They might be asked who the abuser was, but they would not have to answer that question at that time.

If someone says that they are struggling and feel that they require some type of counselling, the organisation will, nine times out of 10, agree to 80 sessions—not eight—which equates to a year and a half, and the sessions can be continued if necessary. The individual is given a number—that might sound strange, but a lot of people would prefer to use a number rather than their name as it provides them with anonymity and they are not labelled as psychiatric cases. We might as well be honest about the fact that a lot of survivors have issues with that.

When the person goes for their counselling session, the counsellor contacts the organisation, which provides the funding for that individual. The funding is then taken from the lump sum that came from the institution in question. The system seems to be working—it is obviously working, because it has been going for years. You can look it up on a computer and you will see the details for yourselves.

Around 42 different institutions in Ireland have put something into the organisation’s pot. If that system works in Ireland, there is no reason why it cannot work here in Scotland with all the different children’s homes and institutions, especially as this is the bigger country. That is just one example of the type of thing that Ireland is doing for people who have been through the process.

To look at it from a health point of view, I, personally, do not want to go along for a one-afternoon counselling session. As a stand-alone entity, that is what the confidential forum would become. I would not then want the information that I had provided to that counsellor or commissioner—whatever we want to call them—to be destroyed two weeks after everybody has given their evidence, which is what happened with time to be heard.

If somebody comes forward to speak about what happened to them, they do it with the expectation that there will be something at the end of it, but that is not the case with the confidential forum as a stand-alone entity. You may argue that it will be possible to direct that person to counselling services, for example. However, survivors have been going round revolving doors for years—probably since they came out of care.

The Convener: What was the expectation then?

David Whelan: Do you mean in time to be heard?

The Convener: Yes. Did you think that it would lead to something else? What did people who participated in it expect? To go back to what I said earlier, would there be different expectations?

David Whelan: A number of survivors had expectations. I suppose that it was a pilot. We are not guinea pigs, so one has to question why pilots were set up in the first place, but I understand the reasons why.

Sorry—what did you ask again?

The Convener: When people participated in the time to be heard pilot, what were their expectations? It is our reference point—the Government tells us that, because the pilot was successful, it has developed a certain policy from it. Was it not explained to people who participated in it what would happen?

David Whelan: I think that it was explained to them. It is obviously in the document—
The Convener: What was your experience?

David Whelan: The basis of time to be heard was that people were not entitled to a remedy. Tom Shaw came out clearly and said that it would not result in compensation, reparation, redress or remedy. However, a number of survivors had such expectations. We must recognise that people have been through the criminal court procedures in Scotland, so there was an expectation that we would engage with the process, others would understand a bit more and a remedy would be offered.

We have proposed a way forward to a number of Government departments and the SHRC. There are five elements, but I want to concentrate on the model of the confidential forum. We have a number of questions about the actual model, particularly about the chairman’s role. Normally, in such a set-up, the chairman is able to go back to the minister to ask for amendments in the terms of reference. Is that included in the bill? So that would be one question we would want to ask about the bill.

As for recommendations in relation to changes in practice and law, are those in the bill? That is what needs to come out of the model for things to change and for good practice to continue or happen in future.

There needs to be an issue about the desirability of people seeking remedies through the bill. How will that be addressed?

Mark McDonald (North East Scotland) (SNP): Thank you for coming to give evidence today. You have spoken about appropriate support before, during and after appearing at the forum. I note that one of the things that you mention in your evidence is independent advocacy. I will frame my questions around that element. My experience from other areas, which are not related to victims of abuse, is that there tend to be three categories: people who are confident and comfortable with advocating for themselves; people who require independent advocacy; and people who want an advocate who might not fall within the traditional definition of independent advocacy.

I am interested in hearing whether you think that part of the support that would be given in advance of a person’s participation would be about finding out whether they required advocacy. Also, how might advocacy be defined in the bill? An individual might want a family member to be their advocate, but such support might not come within the definition in the legislation, which might relate to traditional advocacy services.

10:45

David Whelan: As you said, some people are quite capable of putting their point across, but others are vulnerable and cannot do so. We think that people should be empowered and enabled to take up their rights, whatever those rights are. Some vulnerable witnesses will not even know that they have rights to justice and to remedies.

The question is how we empower and enable people to take up their rights in the context of the model that we are talking about. The ICSSS could be expanded—I understand that it provides advocacy. I think that FBGA would like an independent, impartial group to provide advocacy as part of the process, so that anyone could go to it for advice, help and support, perhaps through a helpline.

There is obviously a need for a health advocacy service that people can access. It could be ICSSS or another service that a person could access independently.

The committee should recognise that many people who took part in time to be heard have left Scotland. In FBGA we have people from Canada, the United States of America, Germany and Hong Kong who took part in time to be heard. With all due respect, we provided the advocacy. The committee might want to consider enabling survivors groups to provide a certain amount of advocacy or part of the service. That is something for the committee to consider. We certainly want advocacy to be independent and impartial.

Helen Holland: As part of preparing people to go through the process, something will need to be in place that can make clear that independent advocacy is available. We are talking about the Victims and Witnesses (Scotland) Bill. A victim whose case is going through court has access to victim support services, which can talk the person through the process, talk about their choices and let them make the decisions for themselves.

There are vulnerable adults among abuse survivors, but many people do not necessarily need advocacy in the—sorry, let me rephrase that. There are a lot of people who have been abused who have not even told their families or partners and have real issues with telling anyone. I think that those people will need independent advocacy. They will need long-term support. It is not a case of someone saying, “I’ll come along on the day and hold your hand while you talk about what happened to you.” There needs to be much more support than that.

Who provides that support is debateable. As you said, some people might want a family member, but others might choose to go along by themselves because they carry the shame and guilt of what happened to them. It might be that
the whole process should be dealt with much more gently before someone gets to the stage of giving evidence to the forum’s commissioners—or whoever it will be—so that a person is allowed to build up a relationship with the person who will be there to represent them. A lot of people who went along to the previous forum had probably never even met the person or had maybe met them once or twice before the event. People cannot talk about issues of abuse with a complete stranger. I think that Tom Shaw mentioned in his report that many people had not even told their spouses or families about it. A lot of people carry the shame of being in care. That should not be the case, but it is. Children in care are stigmatised to this day. We need to look at that.

Mark McDonald: I absolutely agree with that point about stigmatisation. The Parliament has looked at that in other areas.

Mr Whelan said that he would like a national advocacy forum or something similar. In each area, a number of organisations provide advocacy on a range of issues and individuals in those organisations have particular specialisms. Are you seeking some kind of joining-up-the-dots approach so that individuals know where they can go to access the advocacy that is available?

David Whelan: It has to be seamless. The ICSSS provides certain services, including advocacy. However, many of the people who will be participants in the national confidential forum will not live in Scotland and they will want to access a point where they can get advice and support. FBGA believes that the ICSSS has worked well. It is helpful and people can get support if that is what they want from the organisation. Perhaps the committee could consider an advocacy agency or giving an advocacy agent direct funding to provide the advocacy for the national confidential forum.

That might be a way forward. Again, we would like such a service to be independent and impartial, although we understand that it will have to be funded by the Scottish Government. That could be a way forward for people to be enabled and empowered to take up their rights. If we have that and we tell people about their rights and how they can take them up, people will exercise those rights and they will expect to come out of the NCF with those rights addressed.

Chris Daly: There is a practical side to the advocacy that David Whelan speaks of. A good number of survivors have poor literacy skills, but the documents that they receive—whether it is letters from their lawyer relating to issues such as civil litigation or Government papers that go to survivors on the time to be heard forum and the confidential forum—often use complex and complicated language. If advocacy support is to be provided before the forum, the survivors should be taken through all the complicated wording. It might also be good to have an easy-read version. A booklet was produced for the time to be heard forum, and if a similar booklet is to be produced for the national confidential forum, it should not be in complex language, or an easy-read version should be available. It would certainly be a role for any advocacy service that supports survivors to elucidate areas of complexity in the forms or papers when someone accesses the confidential forum.

David Whelan: Chris Daly is right to raise those issues. We have said that any document that is produced for the national confidential forum should spell out what redaction means. People who come forward to tell their experience expect to pick up the report and say, “Oh—there’s my experience.” However, although there will be a selection of experiences, some of which might be similar, not every survivor will be able to identify their experience. That has been an issue with confidential models in Ireland and other places. Survivors have not been able to identify their testimony in the confidential model.

It is important that that is explained. As Chris Daly said, that should be done in non-jargon and in an easy-read format. It should be set out what the terms “redaction” and “anonymised” mean, because some survivors might not quite understand that. People might pick up the report and say, “My name’s not here,” or, “Why am I not in this?” They might not be able to see their testimony.

Chris Daly: The consultation for the NCF involved events in various places, and I attended one in Glasgow. When we discussed that matter, I raised the issue of how a person’s testimony is identified to them and only them in the finished document. I said that, in other places, a code is used and I asked the people who were working on the bill to consider the possibility of giving survivors a specific code when they give evidence to the forum, so that their testimony would be identifiable only to them. The code would be destroyed after they give their testimony, but they would have a copy of the code and so could recognise it in the finished report.

The Convener: That is slightly different from other things that we have heard. We have heard that the priority for people setting up the forum is to provide a confidential and safe opportunity for people to share their experience. We hope to get some benefits at that level from people being able to put their stories on record. In some sense, they should feel better for it. Are you saying that, for some people, we should allow a wider sharing of their story in an anonymised way?

Chris Daly: No.
The Convener: Maybe I picked you up wrongly.

David Whelan: My point is that people will give a wider story but, by the time that it is redacted and anonymised, they cannot identify that story. That has been a concern for survivors.

The Convener: I understand. They do not want to be identified. They have got their story out but, once it is anonymised or whatever, does it help to—

Chris Daly: It helps for them to see their testimony in the report.

The Convener: Right. I am trying to understand.

Chris Daly: The people who gave evidence to the time to be heard forum, for example, said afterwards that they thought that they would be able to recognise their testimony in the report. One person said about Quarriers:

“I have nothing bad to say about the place. The house parents were kind, food was good and plentiful.”

A few people might have said something similar, but that person wants to know whether that is their testimony. If, as I suggested, there was a code that was specific to that person’s testimony and that is included in the document, they can recognise their testimony in it. That is an issue for survivors—they want to recognise their testimony in anything that is produced afterwards.

11:00

David Whelan: In a sense, as Chris Daly has said, given the important point that the national confidential forum will aggregate the testimony of survivors from a number of institutions, people will want to be able to identify what they have said and where it relates to. Of course we understand the legal reasons why the testimony is redacted and so on, but, without wanting to repeat myself, I think that if that is explained to people, they will understand the process that they will engage in.

Jim Kane (In Care Abuse Survivors): As you will have noticed, I have not spoken much, because Chris Daly and Helen Holland have more experience than me on the issue.

I have in front of me the statement that I gave to Mr Tom Shaw. When I read through the survivor statements in Tom Shaw’s report, I could find no identification of any of the survivors or victims—whatever you want to call them. Three of the paragraphs in his report come from my statement. I know that because I know what is in my statement and I can identify those paragraphs as mine. However, as David Whelan and Chris Daly have said, other survivors will look at the report and ask why they are not identified. They will want to know.

In reading the statements in Tom Shaw’s report—it may be that I am wrong on this—I would count every paragraph as being the statement of a different individual. As I see it, that is a flaw. He has taken three paragraphs from my statement, but anyone would count them as being the statements of three people rather than of one person.

David Whelan: As Chris Daly said, perhaps where people have given similar testimony, their comments could be anonymised by using letters of the alphabet or numbers or some other code. If six survivors have given similar testimony that has been redacted into two paragraphs, perhaps there could be a reference to witnesses A, B, C and so on or perhaps they could be numbered.

The Convener: I get the point that how the testimonies are reported and presented is important to people who have pushed themselves through the process. If they are to get to the point where they feel some benefit from participating, there needs to be a recognition that they need to be supported through the process, including on the day of the hearing, and consideration needs to be given to how their testimony is subsequently shared. I think that we get some of those points.

Gil Paterson (Clydebank and Milngavie) (SNP): I should put on the public record the fact that I am a board member of Rape Crisis Scotland. My experience tells me that, for victims and survivors, health and justice issues are closely intertwined. Equally, as I am sure everyone here is aware, the fact that health and justice services operate so separately from each other presents a problem for people. There is no doubt about that.

Given that someone who comes forward may in the first instance be helped by disclosure, I wonder whether the forum should include someone who knows what other steps are available to someone in this situation. Perhaps one answer would be for the forum to have on hand a board member with justice expertise, who could explain some of the issues about the journey—which, I understand, might not always be good—for the person. That might provide some food for thought. Would that work?

David Whelan: If a person is moving into other areas of justice, that would be helpful, I think. If there are other elements of the process, it might be helpful for a person with justice experience to sit in on one of those. As we understand it, the NCF is a therapeutic model. We believe that there should be a number of elements to the process, with perhaps the NCF sitting at the top and then an investigation and research element. The investigation element should have certain statutory powers, if required, to get people to come to it and to get access to documents, but it should be inquisitorial rather than adversarial.
Different people might want to go to different elements of the process. Some people might just want to go to the NCF and say, “I have told my story, I have got my support, I am happy.” Some people might want additional elements, so that at the end of the process or at some other point the issues for that individual are addressed. That is what we envisage.

There is good practice out there. There are some very good elements in the bill that has just been enacted in Northern Ireland. The southern Ireland process was good in some respects but from our point of view it was very adversarial and costly and we do not believe that a Scottish model needs to be that way. We are very clear that the issues could be resolved in a non-adversarial way.

I know that cost will play on the minds of members of this committee and the Justice Committee, and it is not helpful when media organisations come out with figures such as the £500 million that the BBC quoted on its recent programme “Scotland’s Forgotten Children”; it is not helpful for politicians in making decisions and it is certainly not helpful to the victim survivors because we do not see that as the cost. We think that matters could be resolved cost effectively, and when I say cost effectively, I mean with the benefits going directly to the victim survivors and not to lawyers or other third parties.

Helen Holland: I think that complications are coming in because we are considering the confidential forum as a sole entity. Ireland had two things on-going at the same time; it had a justice forum and a confidential forum running in parallel. We have to remember and take on board the fact that many survivors will not want to go down the confidential forum route simply because they do not want a therapeutic session; many survivors simply want justice. What has been said is important: if we lump the whole thing into one forum—regardless of what forum that is—we must incorporate the other issues such as justice, reparation and compensation. That is the biggest difficulty.

In Scotland, the Government has looked at what happened in Ireland and has picked out one element of the whole process, which is the confidential forum—and, by the way, it is also the cheapest element—and is expecting it to work for survivors in Scotland. However, to me, it is just not going to work. It is not fair on the survivors in Scotland to expect them to take part in a therapeutic process, because that is not what survivors are looking for.

I absolutely, 100 per cent accept that some people may want to come along and say that they were in such and such a place for such and such a time and their experience was pretty good. That is absolutely brilliant, as a lot of the institutions cannot move forward because the issue has not been dealt with properly and appropriately. That is not the survivors’ fault, but we respect the fact that the institutions want to move forward as well.

I do not want to bring down the church; that was never my intention in coming forward. The reason why I came forward was so that people knew that it was true that abuse did take place in these places and because we need to accept that. Before, people hid behind the fact that they did not have the knowledge that abuse had taken place.

I absolutely accept that when there is ignorance, people do not need to take responsibility. However, when there is knowledge, people need to take on board the responsibility, and that is what we are asking people to do. We are asking the Government to take on board responsibility for the whole issue. If it takes on board only the confidential forum, it will deny the survivors who do not want to go into the therapeutic system the right to justice, and that forms quite a large part of the issue.

You are being asked to look at the issue from the point of view of the health, including mental health, issues. It is just as unhealthy for someone who wants justice to be denied the right to it as it is for someone who wants a therapeutic process to be denied that, but people are getting the right to that. Rather than acting in a justifiable way towards one person and in an unjustifiable way towards another, the Government needs to bring the whole lot together and take it forward as a complete package.

David Whelan: I agree with something that Helen Holland said. Speaking personally, why would I want to keep going into forums just to tell my experience? I have been through a court of law and my case has been determined. The cases of other people who were in Quarriers have been determined, as have some cases involving the Catholic Church. We want to find closure and we want to go and get on with our lives. We have always recognised the good work that Quarriers has done, both in the past and today. However, the issues have not been addressed.

Chris Daly: A justice issue comes up in relation to the NCF. If the commissioners who sit on the forum hear evidence of crimes, they have an absolute responsibility to engage the police in the process as well. If someone comes along and it is clear that a crime was committed, and particularly if the forum sees a pattern, with corroborating testimonies from survivors who were in the same institution at the same time, there will be a responsibility and a duty on the forum to engage with the police on the matter. At the end of the forum, we should have information on the numbers of cases that went to the police, the
outcomes and how many prosecutions there were. We need those sorts of statistics.

**Gil Paterson:** That is where I was coming from. If, inadvertently, there is corroboration and two pieces of a jigsaw fit together, there would be an expectation that authorities would—

**David Whelan:** That occurred in the time to be heard pilot.

**Gil Paterson:** Yes. I would have thought that.

I am perfectly aware that, for the individuals who come forward, different forms of closure will take place at different times. I also understand what Helen Holland said.

If the advice is to move the case on to another part of the system—for instance, if someone is interested in a justice remedy—I think that the plan is that they will be signposted. I might be wrong—it might just be the area I work in—but knowing how many people are seeking justice for what has happened in their lives, I wonder whether it would help a particular individual if at a particular point they were able to get some on-the-spot expertise in the forum.

11:15

**Chris Daly:** Yes. Are you suggesting that being an expert in justice should be part of the commissioners’ make-up?

**Gil Paterson:** It might give some traction or help by giving people an explanation at a particular point in time.

**David Whelan:** That would be helpful. With those coming forward for the first time, that kind of expertise might be needed to decide certain legal issues in testimony. I could see a role for someone with justice experience on the commissions.

People talk about the standards of the time and say that things were different then. However, even when judged by the standards of the time, many victim survivors were victims of serious ill treatment according to the meaning of article 3 of the European convention on human rights. Organisations or people might say that things were different at the time, but we are talking about ill treatment that should not have been acceptable at any time.

**Chris Daly:** People should have been guided by the various children’s acts over the decades, which actually make it clear that what people were doing in these institutions was criminal at the time. As for the excuse that times were different, that there was corporal punishment in schools and so on, we are not talking about that level of chastisement or treatment of children—the belt at school, for example; we are talking about a totally different degree of physical and emotional abuse.

The laws that were in place to protect children, such as the various children’s acts and, as David Whelan mentioned, the ECHR, actually cover the protection of children in these institutions at the very time about which people now say, “Well, it was different back then.” People gave their kids a skelp on the bottom and kids could get the leather belt in school, but we are talking about a totally different level of physical abuse, emotional abuse and, for some in these institutions, sexual abuse. You cannot say that because things were different at the time, such treatment was acceptable. Those were not the norms—it is not the norm to treat children in such a way—but a lot of the time people make the excuse that it was a different era, a different decade and so on.

**Helen Holland:** Going back to Mr Paterson’s question about signposting people for access to justice, I think that one of our biggest problems is the way in which Scotland’s justice system is set up. Some of the survivors who were abused while in care are now 70 or even 80 years old. The problem with the criminal courts is that the evidence has gone and the problem with the civil courts is the time bar, which was initially set up to deal with accidents at work and did not cover child abuse and the amount of time that it might take for a child to be able to speak about it. We all know—there is plenty of evidence out there—that it takes a number of years before individuals start to speak about the abuse that they suffered, for whatever reason.

The only other avenue that is available is the Criminal Injuries Compensation Authority, but that applies to people only from 1964 onwards. A lot of the survivors are from pre-1964, so their avenues to justice in the system are zilch at the moment. Something needs to be done in the bill to address that. Even if somebody from a justice department was on the forum, they would be limited in where they could signpost survivors to go purely for justice.

**David Whelan:** I understand that no legal aid is available for cases. Legal aid was withdrawn and cases that were in the Court of Session could not proceed, because a number of them were funded by legal aid.

**The Convener:** We take Helen Holland’s point about the difficulty. A related point is how the bill was allocated to the committee. There is a bit of debate about whether the Justice Committee should have covered the whole bill.

We are waiting to hear from the minister so, unless Gil Paterson has a pressing question—

**Gil Paterson:** I have a question on legal aid.

**The Convener:** I am trying to steer people away from debating—
**Gil Paterson:** From discussing justice issues—okay.

**The Convener:** I reassure the witnesses that everything that they have said today is on the record and that we will consider it in producing our report to the lead committee. However, I am being careful to ensure that we do not make you more confused than you need to be, because of the legal aid issues, the complexities and the uncertainties of access to justice and the legal process. We know that that process is expensive and that its outcome is uncertain.

The committee was allocated the bill on the basis of the therapeutic health outcomes, but we absolutely take the witnesses’ point. In the evidence session, committee members—including me, probably—have drifted into wider areas, as have the witnesses. We understand that and we hope that we have not confused the witnesses too much.

I ask for last questions now, because our session with the minister was due to start a couple of minutes ago. There are two bids for questions.

**Nanette Milne (North East Scotland) (Con):** I will follow on from some of what has been said about the mixture of health and justice aspects. What is your general feeling about the proposal for the forum to be a committee of the Mental Welfare Commission?

**David Whelan:** We recognise that many survivors suffer from mental health issues. We also recognise that the commission has done good work. Our initial concern was that people would be stigmatised. I know that society is trying to address issues of stigmatisation in relation to HIV and mental health. FBGA does not have a major issue with the proposal.

**Helen Holland:** The arrangement could be seen as a stumbling block, because of the stigmatisation. We accept that a lot of survivors have issues with mental health, but many do not. Many survivors have gone on to become well-adjusted members of society. I would not like them not to come forward just because of that arrangement.

I understand that the forum must go somewhere. As it is being dealt with as a health issue rather than a justice issue, the proposal makes sense, rather than incorporating yet another title and putting the forum under another body. However, the reason for the proposal needs to be made perfectly clear not just to survivors but to society as a whole.

**Nanette Milne:** That is interesting. My feeling from reading the papers is that it probably makes as much sense to put the forum under the Mental Welfare Commission as it would to put it anywhere else.

**Chris Daly:** I think that now but, at first, I wondered why the decision was made. When David Whelan, Helen Holland, Jim Kane and I talked it through before we came into the meeting, we concluded that it was not too much of an issue, but there is an issue about whether people will feel stigmatised by the forum being overseen by the Mental Welfare Commission. Is that the right term?

**Nanette Milne:** I think that the phrase “hosted by” is used.

**Chris Daly:** Yes—“hosted by”. The proposal is not a real issue, but it might cause a problem for some, because of the stigmatisation.

**David Whelan:** I think that it is important that the NCF is independent and is set up as such, even though it will be a sub-committee of the Mental Welfare Commission. It is important that survivors understand that the NCF is independent. I presume that all the media stuff will just talk about the national confidential forum.

**Helen Holland:** The issue is about education, including education of the media, so that people understand that, although the forum may come within the Mental Welfare Commission’s remit, that does not necessarily mean that all survivors have mental health issues. However, some of those survivors who have mental issues have had very negative experiences of the mental health sector. That is why I said that the remit might cause problems for some people. Nevertheless, if the matter is explained properly and in a way that people understand, I think that the proposal will be accepted.

**Nanette Milne:** It is helpful to have that on the record. I very much appreciate the evidence that you have given today, which I have found extremely interesting.

**Aileen McLeod (South Scotland) (SNP):** The questions that I was keen to ask, both about the Mental Welfare Commission and about support services, have already been answered. I am quite keen on ensuring that there are support services for abuse survivors after they have given evidence to the national confidential forum. Obviously, it can be a trauma to give evidence about an experience that has been extremely painful, so people will need to deal with the aftermath of that. The people involved will not be able simply to go in, give their evidence and then leave, as they will need to deal with the aftermath of that as well. We need to ensure that there are support services in place to help people to deal with that.

**Helen Holland:** Realistically, I think that support services will need to be in place for people for at
least a year afterwards. That might sound totally way out there, but any trauma therapist will confirm that that is not an exaggeration. I think that we need to look at the issue properly. We cannot just say that we will provide services until such time as we send along the people who will report back to the Government on whether the forum has been successful. The provision of support is a realistic expectation from survivors who will go through that trauma.

Giving evidence will be traumatic and will open doors that people thought they had closed a long time ago, so I do not think that it is unrealistic to expect there to be specific support that the survivors themselves are happy with. They should not simply be told, “This is the support that is available to you and that is what you must use.” People need to be empowered to make the decision for themselves as to where they go for that support. That is an important element.

Chris Daly: On support, if the Government says that there will be support before, during and afterwards, it should not make empty promises. That support is needed throughout.

Helen Holland and I have been coming to the Parliament and engaging with the Scottish Government for 12 years. We have spoken about the support that is needed for survivors and we have continually been promised that the support will be put in place, but we, who are so close to the issue, have not been given support throughout that time. The Government should not make empty promises about giving people support before, during and after giving evidence to such a forum. The survivors might be left feeling just as raw—and possibly even more traumatised by the experience—if they do not get the emotional support that they need.

David Whelan: I think that it is important to have health professionals available and in place. If it has been identified that someone needs access to a psychologist or psychiatrist in addition to counselling, it is important that that is followed through and that the support is seamless. If someone lives out of location—that is, outside of Scotland—it is important that the services link up and ask whether the person is getting the support. If it is identified that someone has real issues in giving testimony, the person should be able to come back and say, for example, “Look, I need support. Where can I get that support in Birmingham?” We need health professionals such as psychologists and psychiatrists to be involved to help people with traumatic issues.

The Convener: I see that no other members have questions. I thank the witnesses for being with us this morning. We certainly got a lot out of the session: many issues came out in the answers, although not because we planned it that way. The insightful evidence that we have heard about the concerns and sensitivities surrounding the issues will be useful to us.

Do the witnesses wish to mention anything that has not been covered this morning? I do not want any of you to leave and say that a particular aspect was never mentioned. It is like leaving an interview: you go away and say, “I wish I’d said ...”. You have the opportunity to say something now. If you have a quick discussion when you leave the room, we will be happy to hear any additional comments—if you email them to the clerks, we will take them into consideration.

I ask you to take note of the committee’s other evidence sessions on the subject, although I am sure that you will do so anyway. Please see yourselves as participating in an on-going evidence session: if you strongly agree or disagree with any of the other evidence that you hear or wish to provide a perspective on or a context for it alongside your own written and oral evidence, feel free to communicate your thoughts informally to the clerks.

Chris Daly: I just want to say that the NCF is only one remedy. It may be therapeutic and cathartic for some, but the SHRC framework covers all the remedies that have been discussed throughout the years, including the justice aspects such as reparation and so on. Although the NCF will be helpful for some, it is important to look at the bigger picture.

The issues are complex and relate to areas such as health and justice. The SHRC framework of remedies for institutional child abuse in Scotland is pretty concise and covers all the remedies rather than just one element.

David Whelan: The issues are not insurmountable, as other countries have demonstrated through good practice and without necessarily having to change their time-bar laws. I raised some issues relating to the time to be heard forum, and I am happy for the commissioners to have the opportunity to comment on those, because that is only fair.

Helen Holland: I wrote one thing down on the train on the way here, and I would kick myself if I never said it. The economic climate cannot and should not ever be used to deny victims justice. I leave you with that comment.
Victims and Witnesses (Scotland) Bill: Stage 1

09:48

The Convener: Item 3 is an evidence session on the Victims and Witnesses (Scotland) Bill. This is our second evidence session on the bill. As is normal at round-table events, I ask everyone to introduce themselves.

I am the member of the Scottish Parliament for Greenock and Inverclyde and the convener of the Health and Sport Committee.

Tam Baillie (Scotland's Commissioner for Children and Young People): Good morning. I am Scotland's Commissioner for Children and Young People.

Bob Doris (Glasgow) (SNP): Good morning. I am an MSP for Glasgow and the committee's deputy convener.

Professor Alan Miller (Scottish Human Rights Commission): Good morning. I am the chair of the Scottish Human Rights Commission.


Kathleen Marshall (Time to be Heard): Good morning. I was one of the commissioners on the time to be heard pilot.

Gil Paterson (Clydebank and Milngavie) (SNP): Good morning. I am the member for Clydebank and Milngavie.

Mark McDonald (North East Scotland) (SNP): I am a member for North East Scotland.

Jennifer Davidson (Centre for Excellence for Looked After Children in Scotland): I am the director of CELCIS.

David Torrance (Kirkcaldy) (SNP): I am the member for the Kirkcaldy constituency.

Moyra Hawthorn (Centre for Excellence for Looked After Children in Scotland): I am a researcher at CELCIS.

Nanette Milne (North East Scotland) (Con): I am a member for North East Scotland.

Dr Donald Lyons (Mental Welfare Commission for Scotland): I am chief executive of the Mental Welfare Commission for Scotland.

Aileen McLeod (South Scotland) (SNP): I am a member for South Scotland.

Lucy Finn (Mental Welfare Commission for Scotland): I am the human resources manager at the Mental Welfare Commission for Scotland and the interim project manager for setting up the national confidential forum under the commission.

The Convener: Thank you for that. I welcome you all. As is usual in these sessions, we will do our best to do more listening than asking questions. Bob Doris will ask the first question.

Bob Doris: As you all know, the committee has been tasked with looking at the detail in the bill on the national confidential forum, which is based on the time to be heard pilot in 2010. Do you believe that that is a good basis for the national confidential forum? To what extent can the forum meet the needs and wishes of victims of abuse?

The Convener: Who would like to pick that up?

Jennifer Davidson: I am happy to jump in. The question is really important. Although I appreciate that the role of the Health and Sport Committee is to consider the national confidential forum, the wider purpose for Scotland of all those who have a role to play is to ensure that survivors' needs are met. I would say that a portion of those needs may well be met by the national confidential forum, which is based on time to be heard, but we also need to look at the wider strategy for all the needs of survivors. I suggest that what is proposed is perhaps a narrow way of meeting their needs. There might need to be a more effective strategy that addresses all their needs before we move forward on a national confidential forum.

Kathleen Marshall: Based on my experience of being part of the time to be heard pilot, I would say that it certainly seemed to be a positive experience for most of the people who attended. Like Jennifer Davidson and many of the witnesses who spoke at your previous session on the bill, I am aware that there is a wider agenda and that for some people the lack of a justice component is a health and wellbeing issue because being denied justice is, to them, an emotional issue.

On the basis of the experience that we had with time to be heard, it is difficult to gauge how much that other justice issue will become prominent, because most of the people we heard had never been involved in any of the discussions about justice. They were at a different part of the timescale in terms of coming to terms with what happened to them and identifying what they wanted to happen next. A lot of the survivors groups have been involved for a long time and have reached the stage where they are able to reflect more and look to the more challenging justice aspects.

Many of the people who came to speak to us just wanted to tell their experiences; at that point, that was what was important to them. However, that is not to say that, later on, they will not be able to engage with the wider agenda for something...
more. The wider agenda is important for many people, and it may be important for more people than we can say at present on the basis of the stage that they were at when they came to speak to us.

**Professor Miller:** I echo what Jennifer Davidson and Kathleen Marshall have said. As members of the committee might know from some of the papers that you have before you, the Scottish Government asked the Scottish Human Rights Commission some years ago to present a framework for both acknowledgement and accountability. We looked at international human rights law, domestic human rights law and international best practice, and presented a comprehensive framework in which various initiatives could be taken to deal with both acknowledgement and accountability.

As members might know, an interaction process is under way that is jointly led by the commission and CELCIS, involving survivors, the Government, local authorities, religious orders, the bishops conference and so on. It is exploring other means of providing access to justice and redress for the survivors. It is also exploring the state’s obligation to carry out proper investigations to learn the lessons, to ensure that there can be no repetition and to ensure that those who should be held to account for serious abuse will be.

We see the national confidential forum as meeting some of the need for satisfaction of some survivors. Possibly—I hope that this will happen—it will have some therapeutic element, although others might contest that. However, it is part of a broader package that needs to be taken forward.

**Moyra Hawthorn:** I was involved in the evaluation of the time to be heard pilot to which Kathleen Marshall referred, and I am one of the principal consultants in the interaction to which Alan Miller referred. Feedback from participants was that time to be heard included some very positive components, but people also said that they were seeking a wider range of remedies. Therefore, it is difficult to see the national confidential forum in isolation without looking at the other remedies, such as reparation and access to records. We really need to see the national confidential forum within that bigger picture. That was part of the feedback.

**Bob Doris:** I thank people for acknowledging the need for that wider strategy, but they will appreciate that we are scrutinising a very specific part of the bill. The committee is not attempting to ignore the wider strategy, but we have a duty to scrutinise the details in the bill.

In our evidence session before the recess, one issue that was raised was that those who benefited from the time to be heard pilot may have started to address issues that they had not dealt with for many years, for which they might need on-going therapeutic or counselling support on a long-term basis. It is probably fair to say that our previous witnesses were not sure how long term that counselling support might be. What are the needs of those who want to engage with the national confidentiality forum? Should the state or authority ensure that there is a long-term commitment to providing counselling and therapy? As we heard before Easter, that support might be needed not just for a number of weeks but for a number of months or perhaps even years. Do people have any views on that?

**Kathleen Marshall:** First, while I acknowledge the need for a wider strategy, I would not like the national confidential forum to be held up for that. The wider strategy may take a long time, and there are people who need the forum now.

I take the point about the need for on-going support. The availability of support was an issue that we were very aware of in the time to be heard pilot, although support was made available from In Care Survivors Service Scotland. It is important that the support continues. We had evaluations and feedback but the pilot was time limited, so it would be really valuable if, when the national confidential forum is set up, it is made clear that those who were involved in the time to be heard pilot are not barred from coming forward again. Those people may not have had the opportunity to come back to reinforce or to add more information to what they said previously.

Also, those people may be a valuable source of information on what their experience was afterwards. As the previous witnesses who gave evidence to the committee mentioned, there may be an initial euphoria when people get something off their chest that they have held on to for so long without telling anyone. Our experience was that people went out of the forum with a spring in their step, which was amazing. I am sure that for most people the beneficial effects of that would continue, but those who have been through the pilot will be a valuable source of information on the kind, extent and length of support that should continue to be provided. I would certainly support what the witnesses at the committee’s previous evidence session said about the need for on-going support, which the survivor should be able to choose. That is an important aspect.

**Moyra Hawthorn:** I want to back that up. Some of those who came forward to time to be heard had never previously recognised their experience as abusive. Some had gone through their lives without ever telling the rest of the family about their experience. When they came to time to be heard, they left with a spring in their step, as Kathleen Marshall said.
However, subsequent events such as the evidence coming out of the Savile inquiry can bring up those experiences again. Items in the media can flag things up. Also, as life moves on and people have life-changing events, those experiences can come up.

It is about access to on-going counselling and support of people’s choice. Reference has been made to In Care Survivors Service Scotland, which is a superb service. However, survivors have told me that they want to be able to choose the counselling approach that they would like. There is a need for on-going support for survivors, but it should be support of their choice, provided at the time of their choice.

10:00

Tam Baillie: Providing on-going support for people who have been through the kind of experiences that will be the focus of the national confidential forum will take as long as it takes, and we have to make sure that support is available for as long as it takes. We can draw a parallel with the situation for children who have been through abusive or traumatising experiences. We would not put a time bar on the length of time for which those children received support and assistance. We are dealing with human beings who in many instances have bottled up their experience and have not had the confidence to share it. The approach should be that we provide support for as long as it takes.

The Convener: Does anyone else wish to come in?

Bob Doris: I might come back in later, but I just want to thank the witnesses for putting that on the record, because it is important.

The Convener: Okay, thanks.

Nanette Milne: I want to follow up the point about those who are eligible to take part in the forum. Kathleen Marshall said that people who have taken part in the pilot should not be barred from coming into the process, but people under 18 are barred and people in foster care are barred. What are the witnesses’ views on that?

Kathleen Marshall: There are specific issues for people aged under 18 because there should be other routes for them to use to address issues about when they were looked after. I do not have an issue with their being barred from the national confidential forum, although I have not heard anyone make an argument for their being included and I would be prepared to listen to such arguments.

We recommended that the forum should be widely available to people who were in institutional care, education institutions and foster care. As you work through the decades, you will encounter situations where people period in and out of institutional care and foster care. If the forum can listen to some parts of a survivor’s experience but not other parts, that could be slightly tricky. Foster care is an area where we have the most to learn. In areas such as education and health institutions, abuse issues have not arisen to the degree that they have arisen in places such as children’s residential homes. As a matter of principle, I would want the forum to be available as widely as possible.

I see that the bill does not talk about education institutions. I am not sure to what extent they would come into the category of care services or how many of them would be excluded by the bill. The bill also seems to exclude foster care. I would like it to be possible to include that at some point. I know that the bill can be amended by order subject to the affirmative procedure. Even if the bill did not start off including foster care and all the other categories, it should be possible to include them later because people have suffered just as much in those areas. It is sometimes very difficult to tell the difference between a large foster home and a small children’s home because of the number of people there and the training and skill of the foster carers. That division therefore becomes artificial. If anyone aged over 18 is eligible, divisions between categories of care become more difficult to sustain.

The Convener: Does Duncan Wilson want to respond to that?

Duncan Wilson: On the point about people aged under 18, I very much echo what Kathleen Marshall said. The SHRC noted that although we are looking for an explanation for that, we have not seen one in the explanatory notes or the policy memorandum. In principle, any process of justice and remedy should be open and should include everyone. Any departure from that should be carefully justified, so there should be a reasonable justification for the blanket exclusion of anyone under the age of 18. I note that the Care Inspectorate suggests in its written evidence that consideration be given to including over-16s, given their special status in our law.

Further, in the human rights framework and in our written submission, the commission has proposed that consideration be given to opening up the process to others who were indirectly affected—surviving relatives, for example. There could be benefit in opening up the process to others who were not directly affected but were strongly indirectly affected. That would certainly accord with international human rights standards.

The Convener: What do you mean by “indirectly affected”? Are you talking about parents?
Duncan Wilson: Some examples could be close relatives of people who are no longer alive—who might have taken their own lives, for example, following the process—or who are unable to participate directly for other reasons.

The Convener: Okay. Does anyone else want to respond to Nanette Milne’s question?

Moyra Hawthorn: I back up what both Duncan Wilson and Kathleen Marshall said about over-16s, but I particularly want to make a point about foster care. In Scotland, we are in a different position. We sometimes look to Ireland and Canada, but Scotland is quite unusual in that historically a higher percentage of our children were placed in foster care. Although the Clyde report back in 1946 recommended foster care, a number of children were boarded out, as it was known—they went to some of the crofting communities and were used as cheap labour. Although people might perceive foster care as a positive experience, it has not always been that, as we know from historians such as Lynn Abrams.

At CELCIS, Professor Kendrick and I have received some funding to work in partnership with the In Care Survivors Service to do a scoping study on including those who were in foster care. We started that just a couple of weeks ago, but our strong feeling is that they should be included. We know from some historical accounts in the media going back to the 1940s that children in foster care were abused as well. We know about that from both historians and the media. I would strongly recommend that those who were in foster care be included.

Nanette Milne: Should more informal care such as kinship care be included as well? I would be interested to hear your views on that.

Moyra Hawthorn: Do you want to pick that up, Duncan?

Duncan Wilson: There can be value in a process such as this for anyone who has survived abuse, but there is also a distinction in relation to state responsibility where the state has placed someone in care. One of the drivers for a process of acknowledgement and accountability should be that it can look at where the state has failed to prevent abuse or to protect children from a real risk of abuse that it knew of or ought to have known of. That is clearly stronger where the state has taken responsibility for placing someone in care.

Tam Baillie: I have two points. First, I think that what is proposed is too restrictive in relation to residential care, for all the reasons that have been mentioned. It is important to include all placements that are in some way engineered by or the responsibility of the state through either state provision or regulatory bodies. There has been written evidence to the effect that the scope should be much wider.

On the age issue, there will be anomalies regardless of where the line is drawn. There are particular anomalies in our legislation regarding 16 and 17-year-olds in that they are sometimes regarded as adults and sometimes as children. Wherever the line is drawn, there are going to be difficulties. If, as I hope will happen, the average age of young people in care increases to beyond 18, the national confidential forum will have to take that into account. Children or young people in care should have access whether the line is drawn at 16 or 18.

A bigger point, however, is that we have children who do not have the confidence to come forward and are unable, for whatever reason, to say, “Here are my experiences.” In setting up the NCF there should be a debate that asks what we should do about children right now—children under the age of 18 right the way down.

Savile has been mentioned, and that experience shows us that children do not have the confidence to raise issues and share information. That is happening right now. One of the benefits of this discussion should be that we focus on children in the here and now. I do not suggest that we expand the forum to cover all age groups, but the principles of it stand and we should attend to children right now. Regardless of how well our child protection systems operate, they miss children who do not have the confidence to come forward. We should use the opportunity now to home in on that.

The Convener: Does anyone else from the panel want to respond?

Kathleen Marshall: First of all, I echo what Tam Baillie said. We should reflect on what is happening with children today and how the NCF will help them to recount what is happening to them.

I want to go back to children who are placed in care by the state. Interestingly, in the Quarriers pilot the children had not all been placed in care by the state—some had been placed by their families—so sometimes that division can be artificial. In more recent decades, when we had the idea of voluntary care, some children would have been classed as being in care on a voluntary basis whereas in fact it was not necessarily completely voluntary but was to do with trying not to make it compulsory, or something that was done in partnership with parents and so on. I would not want the business about care being provided by the state to exclude people from involvement in the forum.

There will be some grey areas. Kinship care, which has been mentioned, is a very interesting
area because although it is now emerging as a category in law, it has really been seen as involving the extended family. There is a question about how far we go into the family side—I do not have an answer to that.

There are also issues about private foster care, where children have been placed with people who are not related to them, and foster care where the state’s duty is more at a distance and supervisory in nature, rather than the state actually placing those children. I do not have a clear answer on those issues but we should explore them. It is important that the act that comes out of the parliamentary process is flexible enough to be able to extend the NCF process to those other categories when we have had a chance to think things through, so that no one will be permanently excluded from it.

The Convener: Gil Paterson, is your question—

Gil Paterson: It is on eligibility. That is fine.

Gil Paterson: One of the Government’s reasons for picking the age of 18 is that there might be current issues with people presently in an institution. I suspect that such issues might be deemed criminal, so anomalies might arise as it would not be appropriate for the NCF to be engaged with those people. It is likely that a child over 18 would be out of the institution and therefore less likely to be involved in a current case. What does the panel think?

Tam Baillie: There are two points in that. We currently have children or young people who are looked after beyond the age of 18—children with disabilities, for example. We have ambitions in Scotland to be better at taking care of children who are in care and not encouraging them to leave too early. In fact, a bill that will be published later this week will propose that support is offered to young people up to the age of 25.

I think that the direction of travel should be that young people are maintained within care establishments for longer. Even a bar at 18 will have to address that if we are to realise the ambition of ensuring that we treat our young people in care more like young people who are leaving home. Young people are now not leaving home until they are in their mid-20s, but most of our young people leave care aged 16 or 17, and, quite rightly, we have ambitions to increase the age at which young people leave care. In its framing, the bill will have to address that issue, regardless of where it draws the line in relation to age.

Jennifer Davidson: I concur with Tam Baillie. I want to go back to Gil Paterson’s question because I think that it raises some serious issues around the forum’s role in relation to acts that may be criminal. I recommend that the committee look closely at the powers that the national confidential forum will have to ensure that they are sufficient to address issues that are raised that have criminal implications.

The Convener: The committee received this morning a letter from the Minister for Public Health, Michael Matheson. I have asked the clerks to get copies of it so that you can be provided with it. The letter relates to the evidence session at our previous meeting and the issue of eligibility to participate in the NCF. It is difficult to summarise the letter—as I said, I have sent for copies—but it seems to point out that eligibility is for anyone with past rather than current experience of being in care. The minister states:

“An age threshold is considered prudent as those experiences are not to be current. I am sure you will appreciate that the NCF would not be an appropriate mechanism to address the experiences, including of abuse and neglect, of people currently in institutional care.”

I invite writers’ responses to that. I have sent for copies of the letter, so if anyone needs to return to this issue before the meeting finishes, I will be happy for them to do that.

Kathleen Marshall: The 16 to 18 issue is interesting. The duties for child protection, passing on information and so on tend to apply to children up to the age of 16, but in many ways they are creeping up to apply to those aged 18. We therefore do not want to have a gap for 16 and 17-year-olds.

One of the issues that struck me was whether we can promise under-16s in particular a national confidential forum. If under-16s came to the forum, there would be more issues about passing on information and doing something with it, and more moral and legal imperatives to do that than we would have with adults. In a sense, we would therefore be misleading children and young people by inviting them to relate their experiences to a national confidential forum—if that is what we are calling it—when we know that we will not be able to keep that information confidential. Such issues would be highlighted.

There must be a mechanism to encourage young people who are currently in the care system or who have been in it more recently to speak freely about their experiences. However, I am not sure that that should be the same mechanism that we are calling a confidential forum for adults, although I am willing to debate that point.
For most of the people to whom we spoke, there was less likelihood—because Quarrriers stopped its residential care component in the 1980s—of people being identified as abusers who are currently in contact with children. However, for those aged over 18, we are more likely to find issues that we will have to take forward and report. Such issues are heightened for those who are currently children and legally regarded as so, whom we have a duty to protect. That is my thinking about whether the NCF is the right forum for them, or whether there should be something else that performs a similar function but for which there may be different expectations.

**The Convener:** You referred to “something else”—does Tam Baillie have a view?

**Tam Baillie:** That is why I said earlier that I was not suggesting that the national confidential forum should cover all ages. However, we must look at its principles and we must find ways of creating confidential space for children who are currently in abusive or traumatising situations. There is a public debate to be had about how we address that for children in the here and now.

In response to the point about young people in care settings not getting access to the national confidential forum, that issue will have to be addressed by the Government, which after all has other policies that encourage young people to stay in care for longer. As I have said, it does not matter whether the line is drawn at 16 or 18, because we are still looking at young people staying in supportive care settings for longer periods. That will have to be addressed.

**Mark McDonald:** We discussed with the first panel of witnesses support services for those attending the NCF and, when the role of advocacy came up, I suggested that advocacy can be defined in a number of different ways. There is the statutory definition, which covers advocacy organisations; there are people who can be empowered to self-advocate; and there are others who want a trusted individual to advocate on their behalf but for whom that might not fit a legislative definition of advocacy. What is the panel’s view of the bill’s provisions on supporting those who attend the NCF? Are there any ways in which they might be improved or modified?

**Dr Lyons:** You make a good point. The bill, of course, is only part of the story, because the forum will put in place arrangements to ensure that those who give evidence get not only an initial briefing session, initial support and an initial understanding of what they are coming along to do, but support afterwards. Individuals with that responsibility have been built into the proposals for the forum, but all the other options that you mention will be absolutely open to anyone who gives evidence. However, we should also bear in mind that people who are identified as having a mental health problem—not just those who are subject to compulsory measures—have an absolute right to independent advocacy under the Mental Health (Care and Treatment) (Scotland) Act 2003.

**Mark McDonald:** I have a follow-up question, but does anyone else wish to comment on that issue?

**Moyra Hawthorn:** I want to make a point of clarification about advocacy that emerged in time to be heard. As Donny Lyons suggested, there is a need to prepare and brief people thoroughly beforehand to ensure that they are very clear about what is going on. For example, two out of the six people whom I interviewed had misinterpreted the term “confidential forum” as meaning that they would have to keep their attendance at the forum confidential and were not aware that they could take a family member with them.

Secondly, extending the forum to people with learning difficulties who have been in long-stay hospitals will require substantial preparation, because they might well be non-verbal or have communication difficulties.

**Dr Lyons:** I absolutely agree. Speech and language therapy and assistance should be available for people in that situation, and the forum will consider all those issues to enable maximum participation. After all, if you do not do that, you will be in danger of indirectly discriminating against some people. Our organisation is very keen to give people with a learning disability enough support and information to allow them to participate.

**Jennifer Davidson:** Given the ways in which those people might or might not be communicating, we also need to think about how information on the forum will reach them. That is a key point in providing support and facilitating access to the forum.

**Mark McDonald:** My follow-up question was about how we identify those who require that level of support. As Donny Lyons suggested, some people already have a statutory right to advocacy but there will be others whose needs lie outwith that. However, I am relatively confident that you are saying that there are enough safeguards in place in the preliminary interview, briefings and so on to allow that need to be identified at an early stage so that, when people arrive at the NCF, the support that they require will have been identified and provided.

**Dr Lyons:** That is very much the intention.

**Mark McDonald:** Thank you.

**Aileen McLeod:** I want to raise another issue that came up in our previous evidence session.
The bill provides for the national confidential forum to be set up as a mandatory committee of the Mental Welfare Commission for Scotland. I would be interested to hear the witnesses’ views on the proposal for the forum to be housed within the commission. More specifically, I ask Lucy Finn and Donald Lyons from the commission, who are sitting on either side of me, to comment on how it plans to ensure the forum’s independence given that it will be housed within a public body.

**Dr Lyons:** I will start, and then hand over to Lucy Finn.

I was interested to read in the evidence that you took in your previous session a comment that you might just as well put the forum within the Mental Welfare Commission as anywhere else. We do not see it that way. We take a positive view of why the commission should host the forum. The overall strategic aims of the commission relate to enhancing individuals’ wellbeing and rights, and that is very much in line with the strategic aims of the forum. There is a definite synergy there.

The work that the commission does in general uses the individual’s experience both to support that individual and to tell a story on the basis of a collection of experiences, so that is familiar territory to us. We understand what that involves and what the benefits and some of the risks are in that, so we are well placed to take on the forum. We have governance mechanisms, information systems, support systems and risk management systems that the forum can use rather than having to develop all those things itself, and they will be appropriate to the work of the forum, especially in relation to the security and confidentiality of the information that comes to it.

I also point out—Lucy Finn will perhaps expand on this, as she has been doing the initial project management—that the forum’s work will be entirely separate from the rest of the Mental Welfare Commission’s work. Existing commission staff will not have any responsibility for or contact with what happens in the forum, which will sit very separately. It will have its own information system, which the commission will design and build for it, but to which the rest of the commission staff will not have access.

Hanging said that, it is important to point out what the bill actually says. It gives the functions of the forum to the Mental Welfare Commission, which will then delegate those functions to the forum as a sub-committee. It will be for the forum as a sub-committee to exercise those functions, but the commission will have a responsibility to ensure that they are exercised properly. Broadly speaking, the way that it works out is that the Mental Welfare Commission will be responsible for ensuring that the forum is properly governed and managed and that it delivers what it sets out to deliver under the legislation, but the evidence that the forum collects and the way in which it reports on the evidence will be for the forum to decide.

We are working out the mechanics of that in a memorandum of understanding with the Scottish Government. I am confident that the initial discussions are going well in that regard, but it is an on-going process.

**Lucy Finn:** I feel confident that we can establish the forum as separate, independent and away from the commission. I am working closely with the SurvivorScotland team in the Scottish Government and we are working on all those issues and ensuring that we understand all the various issues of staffing, confidentiality and information systems. Those systems will be completely separate, so commission staff will have no access to NCF information and vice versa.

There will be no crossover, as we see it. The NCF will be a completely independent organisation within the commission. I feel confident from the work that we are doing with the SurvivorScotland team that that will be the case.

**The Convener:** The question of stigmatisation and barriers, for yourselves and for others, was also raised. Do you have any comments on that?

**Dr Lyons:** The intention is that the national confidential forum will not carry a Mental Welfare Commission badge. The forum will have a lot to do with the mental health and wellbeing of survivors, but when information goes out from the national confidential forum it will be identified as being from the NCF only and not from the NCF and the Mental Welfare Commission. We certainly want to do all that we can to destigmatisate mental health issues, but some people may find it offputting to see mental welfare being referred to up front. We are comfortable with that as a way forward in dealing with the issue.

10:30

**The Convener:** I want to get further responses to Aileen McLeod’s initial question. Do witnesses have views on that question and the response from the Mental Welfare Commission?

**Kathleen Marshall:** I think that having the NCF hosted by a bigger organisation is helpful, aware as I am that the governance issues would be a huge burden for a small outfit like the NCF. However, I appreciate everything that has been said about keeping it separate.

The witnesses at the committee’s previous evidence session had some concerns about the question of stigmatisation, but they thought that it could be dealt with. It is about whatever works. If the survivors can live with the arrangement, I think that the rest of us can. I certainly feel quite
comfortable that the national confidential forum is in a good location.

The Convener: Is that the view of others? Do no issues arise for you?

Moyra Hawthorn: I would listen to the survivors on that one. The concerns that I have heard—I must be honest and say that they were from professionals rather than survivors—were about the possibility of stigmatisation and about confidentiality. Those points were raised with reference to emails, mailing and telephone calls, and the view is that they should show that the NCF is entirely a separate body. People do not necessarily regard their experiences as having impacted on their mental health. They just want to talk through them because something happened that should not have happened. They do not see it as a medical or mental health issue, so the point is to distance the NCF from that aspect.

Dr Lyons: I emphasise what I said earlier: the very clear intention is that the NCF will not be badged in a public-facing way. It will be important to have an ongoing dialogue with survivors to ensure that they have confidence in that and that the hosting arrangements are in line with that.

I like to think that probably nobody does information security like we do. We have so much very sensitive and confidential individual information, which we collect through people phoning us for advice and sending us letters and emails. I am very confident that we could assist the forum in setting up equally secure and confidential information handling. We have information technology security policies and codes of conduct, and we would expect the forum to follow those codes of conduct rather than devise one for itself. Again, that is a good example of why the Mental Welfare Commission in particular is a good host for the NCF.

Duncan Wilson: From our side, the main point is the same one that we made in the human rights framework on this issue in 2010 and which was picked up in the final preparations for the time to be heard forum: it is about the body having the greatest possible functional independence, particularly from Government. The memorandum of understanding will therefore be key for ensuring, for example, the forum’s autonomy to establish its own procedures and the clear autonomy of the forum and its chair to agree and publish its final report without any need for oversight or approval. Those are the headline issues that go to the heart of functional independence.

Moyra Hawthorn: Let me make one additional point. As part of our support in drawing up the human rights framework, we produced the document “Time for Justice”, which makes clear that some survivors want the forum to have complete independence. Whether the forum exists within another body or as completely standalone, they wanted there to be no Government representation on its committees and reference groups. The survivors made that point in 2010 about the forum being a standalone body with complete independence from Government.

Dr Lyons: As I perhaps should have said earlier, another reason why the Mental Welfare Commission was chosen to host the national confidential forum is the commission’s independence from Government. The minister was keen for the forum to be hosted by an organisation that is not only independent but visibly independent. The commission has not been afraid—and this remains the case—to give some uncomfortable messages to Government when we have had to do so.

The Convener: Before I give Aileen McLeod the opportunity to ask another question, I think that Gil Paterson has a follow-up question.

Gil Paterson: My question may have been answered, but I want to push the issue a bit further from a slightly different direction.

Knowing that people’s approach to the NCF could be the first step to recovery on what may be a long journey, I wonder whether the witnesses around the table who are not from the commission are comfortable that the commission’s involvement will not be a barrier to people walking through the door. Is everyone sufficiently comfortable that we can make the NCF work in the way that has been suggested?

Tam Baillie: It is always tempting to go for maximum independence, but given that the similar experience of a small independent public body needs to be balanced against the responsibilities that independence would bring, I think that it makes sense for the NCF to be hosted by another public body.

Regarding the badging or appearance of the national confidential forum, I am reassured by what has been said. There will appear to be a national confidential forum, which in the background will get all the assistance from that independent public body. I might reiterate the call that Donny Lyons made for the rehabilitation of the word “mental”, but this is not the way to do that, as the national confidential forum will look like an independent body.

The Convener: I have a couple of questions on that independence. Will the forum be funded from within the commission’s existing budget, or will it come with additional moneys for setting up and designing the processes and ensuring that the appropriate support is made available for people entering the system?
Lucy Finn: An additional budget will be given for the NCF.

The Convener: Has that been agreed?

Lucy Finn: Yes.

The Convener: Can that budget meet all your aspirations about supporting people through the process, about language and about the other issues that we have heard about?

Dr Lyons: Some matters will need to be tested out. We have an agreed budget for the start-up costs and an on-going running budget on the basis of what we anticipate the need might be. However, we will need to review that as time goes on.

The Convener: Who will sit on the forum? What will be the mechanism or process to ensure that the members of the forum are seen to be independent?

Lucy Finn: The head of the forum and its members will be public appointments. The staffing will be provided through the commission.

The Convener: How many staff do you envisage?

Lucy Finn: There will be a budget for the head of the forum and, initially, probably two members. The staffing has yet to be decided, but there will probably be three or four staff at the initial stage. After that, it depends. I guess that take-up—the number of people who will come forward—is a bit unknown, and that will determine how many staff will be required. At the moment, we think that there will be three or four support staff as well as the head of the forum and the members.

The Convener: What do you expect take-up will be in the first and second year? Do you think that the demand will then rise? I presume that you have some notion or estimation of how many people will avail themselves of the process and that you have projected budgets and staffing levels from that.

Lucy Finn: We have not done that; SurvivorScotland made projections and based the budget on them. That did not come from the commission.

The Convener: Right, but what is the expected take-up?

Dr Lyons: I cannot recall, offhand—Louise Carlin, who is sitting at the back, probably knows better than I do. We will probably have four evidence sessions a week when the forum is fully up and running, from my recollection. That would mean that there were 200 sessions a year, or just short of that, given holidays and so on, with probably two or three people giving evidence at each session, so in the region of 1,000 to 2,000 people a year could give evidence to the forum.

The issue is more complex, because it will be about how we prioritise people who want to give evidence to the forum. When people hear that the forum is up and running, there might be quite a demand for it. We will have to consider whether to operate on an age basis or a geographical basis, for example. All those things still have to be worked through.

The Convener: Those are big numbers, and you are talking about a committee that meets perhaps three times a week—this committee knows about the strain that that puts on people. I am surprised by the numbers, which are significant.

Moyra Hawthorn: Professor Kendrick and I were commissioned by the Scottish Government to do a scoping exercise for the national confidential forum. We extrapolated from the Irish scenario, and I think that in Ireland less than half of 1 per cent of people who had been through care came to the confidential forum. I think that we reckoned, very crudely, that in Scotland we might be talking about 1,500 people coming through the forum—I am trying to remember the figure.

Dr Lyons: I think that it was a bit higher than that. From recollection, I think that it might have been 2,000 or 3,000, but I do not have the figures with me.

Moyra Hawthorn: As I said, the exercise was purely academic and involved working out the number of people involved from 1930 to now, who is still alive and what percentage might come through.

The Convener: That is not something that we need to resolve today—my question was not a trick question. We can discuss take-up with the minister, because it raises issues to do with access, delays and so on. Will people have to wait to give evidence? Will the forum meet in a central place or will it be available in different places? A range of questions can be asked.

Professor Miller: I want to make an additional point about how the bill might be amended to make it clearer and to assist the Mental Welfare Commission in housing the national confidential forum. The MWC is a public body, and like all public bodies it has obligations under the Human Rights Act 1998, in that if it receives credible allegations of criminal conduct it has a duty to refer them to the appropriate authorities—that is, the police. As the bill is drafted, it gives discretion to the members of the NCF in that regard—they “may” choose to do that—whereas members of the forum in Northern Ireland “must” do that, because it is recognised that the forum is a public authority and has obligations in that regard.

In the context of the relationship between the NCF and the Mental Welfare Commission, the bill...
could make it easier for the commission to ensure that it and the NCF act in accordance with their obligations to report credible allegations of serious harm and abuse to children. The NCF must also make very clear to people who are considering going to it what expectations they should have if, in the course of giving their testimony, they make allegations against an institution or an individual. People should understand what might happen as a result of that. They need to understand that the information may be reported to the police, which will change the character of their experience.

There is a need for as much clarity as possible for the NCF, for the Mental Welfare Commission and, most important, for those survivors who want to come to the NCF. The bill leaves that a bit too vague and ill defined. Therefore, the expectations might not be matched by what actually happens to survivors.

10:45

**The Convener:** I was going to return to this point. Jennifer Davidson alluded to some of the powers, and you moved on to that point, Alan. Are you happy with the discussion, Aileen? Did you wish to follow up on any of the aspects that stemmed from your original question?

**Aileen McLeod:** I am happy.

**The Convener:** Alan Miller has taken us on to slightly different territory, which aligns with some of the evidence that we heard at our previous evidence session, at a different level, which I am sure today’s witnesses have read. Confidentiality, powers and the possibility of prosecution were discussed. At another level, people were angered by the fact that the evidence that they had brought to the forum was not communicated at the end of the story. That represents the battle. On one side is the confidentiality that may encourage people to get into the process. At the other end, people might be concerned that they could become involved in a criminal prosecution, or that too vague of what they said might appear in public or on a website at a later date. That is a difficult balance, and you can perhaps help the committee to understand the matter and come to a view.

Is there any response or reaction to what Alan Miller has said, to what I have just said or to what previous witnesses have said? Jennifer, you alluded to this point earlier in relation to powers. Do you wish to comment further?

**Jennifer Davidson:** I do have some comments, although I saw that Kathleen Marshall wanted to speak.

**The Convener:** I was just trying to spread the discussion around.

**Jennifer Davidson:** A tension undoubtedly exists within the forum. I apologise to the committee for labouring this point but it would have made much more sense if a wider strategy had been laid out from the very beginning. We would have been much more comfortable with moving to the idea of the forum if other remedies for justice were also available. Ultimately, the source of the tension is the lack of justice remedies. Because of that, the timing is unfortunate, because the risk is that people’s expectations of what the forum will achieve will be raised given the gap in other remedies.

In that context, how data are held will be really important. That is not just about powers, but about the parameters of the forum. What are they? I will make a couple of comments on that. First, the bill contains a commitment to ensuring that a permanent record is kept and that public access is provided to information. Reference is made to the NCF producing reports. I suggest that generic reports will be far less powerful in respect of the evidence that is provided. The whole range of stakeholders—certainly survivors but also stakeholders who are interested in shaping the future of the care system—will have an interest in what comes out of the forum for a number of different purposes. I suggest that, before there is even agreement on how the forum progresses, stakeholders come together to inform what the data need to look like and how the powers are formed.

Secondly, it is essential to archive and preserve what has been gathered. That includes survivors coming back later and reviewing the records that they have put to the forum, which is an important opportunity. I recognise that establishing the forum in legislation is an important step towards creating more safeguards around the data. Those data are very important. They do not just form a historical record; they are a personal record.

I feel that I have not necessarily got to the nub of what you were looking for, which is on the forum’s powers. Ultimately, those powers need to be seen in the context of wider legal remedies. Without that, there will be big risks for the forum in future.

**The Convener:** No, it was helpful to broaden that out.

**Duncan Wilson:** I will make two important but distinct points. The first concerns the previous evidence-taking session. I am sure that the committee was struck, as I was, by the discussion about anonymity, which is not the same as confidentiality.

Although there may be benefits in having a confidential forum, that does not necessarily require anonymity in the testimony at the end of
the process. It might be worth considering the approach of the Ryan report in Ireland, for example, which used coded references to survivors’ testimonies, so that individuals could identify where their experience was directly reflected in the final report.

My main point builds on the discussion about the limits of confidentiality and the duty to investigate or pass credible information related to criminal activity to the investigating authorities. There may be some debate about that. I note that, from page 100 onwards, the time to be heard report refers to the question and the points that we raised about it.

That is an important issue that the Parliament must ensure it has fully considered before the bill is enacted. One of the reasons why we refer explicitly in our written evidence to the process of finalising the equivalent bill in Northern Ireland is that the same question arose, advice was sought and the answer that was given was quite clear, and was quoted in the Northern Ireland Assembly Official Report. It was that the "statutory framework requires that, where allegations of child abuse come to light, these must be reported immediately to PSNI"—[Official Report, Northern Ireland Assembly, 20 November 2012].—

that is, the Police Service of Northern Ireland.

In the final stages of reviewing the evidence that we gathered and finalising the human rights framework, we hosted a round table with representatives of similar processes in different countries, including Ireland. At that meeting, it was made clear that the interaction between the confidential committee and the investigations committee in Ireland was key to addressing the issue.

That is where the anomaly in our process is at its sharpest. Few, if any, equivalent processes around the world have focused solely on a confidential committee without additional elements, such as addressing the limitations legislation on civil litigation—although we have a separate, Government-led consultation on that in Scotland, it may or may not address time bars for survivors of historic child abuse—or having an investigations or inquiry model and/or other options such as a reparations fund.

As it stands, the time bar effectively blocks access to civil justice for survivors of historic child abuse in Scotland; criminal injuries compensation is available only to those whose experience occurred after 1964 and was criminal, which might not extend to serious neglect; there is no national reparations fund; and Scotland has not taken some of the other measures that have been used in other countries, notably the inquiry and investigation model that is being set up right now in Northern Ireland or a crime commission such as the one that is being set up this year in Australia.

Scotland has an unusual process and it becomes most challenging in relation to the limits of confidentiality. We note and put on the table the point that other countries have addressed that in different ways. We note that Scotland has an unusually difficult challenge in that it has not adopted the other measures that other countries have used. We encourage the Parliament and the Government to seek further clarification of the nature of the responsibilities, and indeed the Mental Welfare Commission should be mindful of them in negotiating with Government.

The Convener: It is difficult for us, being the secondary committee. We are focusing on the health outcomes, but there is another committee—the lead committee—working on the bill as well.

Kathleen Marshall: Like Duncan Wilson, I think that we should draw your attention to pages 101 and 102 of the time to be heard report. The Scottish Human Rights Commission has had quite a lot of discussions about the duty to report when it reaches a certain level. I suppose that our concern was that, if someone’s experience was so far back that people were dead and the institution had disappeared, there was no real possibility of having an investigation. Is reporting that to the police a disproportionate response if the survivor does not want it to happen? I will not go into that too much because we have set out the issue, but it is unresolved.

We did not have to face that because, where there were cases in relation to which we felt that reports should be made to the police, we spoke to the survivors involved and the reports were taken forward with their consent, so we never had to make that decision, but it is still a live issue as I see it.

There is a different issue, which is about how individuals’ experiences are reported. There is no reason why there could not be a coding system. Because of the way in which time to be heard was set up, without any statutory support, we were always concerned about confidentiality and piecing things together, but I would think that, in a forum that is not a pilot and does not have an end, there will be an opportunity to have more negotiation with the survivors about how their experiences are reported and the extent to which they want them to be reported, and that should be quite simple to do.

Some people told us that they did not want to be quoted, or that they did not want to be quoted without negotiation. However, the point about coding is a lesson taken from people’s comments on the report, and I do not think that it should be too difficult to do.
Another issue is archiving and preserving. We had to destroy everything because we had no protection. People were offered the opportunity to come back and review their testimony, but nobody actually did that. Only one person came back to give us a second session of testimony. Personally, I felt that that was a loss. I would have liked to be able to preserve that, but we could not do that in the context within which we were operating. That could be an important element.

Dr Lyons: I remind the committee that another section in the bill states that the forum will have a separate records management policy, and it will have to comply with data protection legislation, under which people can keep data for only as long as it is necessary to keep it. There might be an issue about whether it could be archived or not. We will have to look at that when the forum develops a policy.

On the disclosure of information to criminal justice, I point out that that responsibility falls on forum members. The bill is clear that forum members have the duty to make that decision. The forum will have to set some sort of threshold for what it reports and when. The commission, as the body to which the forum is accountable, will have to be comfortable that the forum has appropriate procedures in place for doing that, but it will not be for the commission as such to decide whether information should or should not be passed on to criminal justice agencies.

That is fairly clear in the bill but, again, we will set it out, emphasise it more and work through the details of how the mechanics will work in a memorandum of understanding.

The Convener: Duncan, do you want to respond?

11:00

Duncan Wilson: I agree that the responsibility to make that decision might be clear in the bill, but the discretion to make it is unlimited. Whether in the bill, in regulations or in the operating procedures, we would certainly look for something a bit clearer than that, which balances the public interest in having a confidential committee with the state obligation to ensure the investigation of crimes. Of course, it is in the public interest that there is criminal prosecution of serious child abuse. In the earliest iterations of the procedures around the time to be heard forum, that appeared to be limited to where there was known to be an on-going risk to others. However, there may be instances of corroborated testimony of serious abuse, which the public interest would demand—and the public would expect—to be investigated whether or not the named individual had continuing responsibility for the care of children.

The Convener: We have come to the end of our time, but Tam Baille and Gil Paterson want to say something.

Tam Baille: This brings us back to the starting point, which is the purpose and functions that will be fulfilled by the national confidential forum. We have heard strong evidence about the need for acknowledgement being satisfied but not the need for redress, investigation or reparation. It is entirely competent for the Health and Sport Committee to comment on that, as it is about the health and wellbeing of the people for whom the national confidential forum is being set up. As we heard earlier, in many instances people are looking for acknowledgement and to have their story heard, and they will be satisfied with that. However, the committee has also heard strong evidence that that does not go far enough for an unknown number of people—I suspect that it might be a lot more than you have heard from so far. I think that it is entirely competent for the committee to comment on the purpose and functions that will be fulfilled by the national confidential forum and the deficits in our current approach.

Gil Paterson: I am trying to reflect on the position of an individual who might want to walk in the door but does not do so because they feel that whatever they say will be passed on to the authorities so that criminal action can be taken, and that is not what they want. My understanding of Scots law is that there would need to be a complaint unless other evidence were produced. Maybe the Government would strike the right balance if it had people who would hear evidence and could then signpost and give advice to individuals about what they should do and how that would impact on them instead of saying prescriptively that the information will be passed on to the criminal justice service. I wonder whether anyone would like to comment on that.

Dr Lyons: I understand that; it is a risk that is attached to the forum. The forum will have to ensure that it has risk procedures in place so that the people who come along are properly briefed. If there is a suggestion that the information that they provide may be shared with the criminal justice service, before an individual goes into the forum, they need to know when and under what circumstances that might happen. That must be set out at the outset.

I would like to correct something that I said earlier—I got my maths wrong. If it is eight people a week for 50 weeks, between 400 and 500 people a year might have the opportunity to give evidence to the forum. That shows why I was a complete failure on "Countdown". [Laughter.]

Duncan Wilson: I would like to give a brief answer to Gil Paterson's direct question. As the time to be heard report notes, we suggested that
the practice that the United Nations convention against torture requires should be considered, which is that a formal complaint needs to be considered, which is that a formal complaint needs to be made. If a report is made to a public body of a credible allegation of serious ill treatment, that triggers the duty to respond on behalf of the public authority under the Human Rights Act 1998 and according to international standards. Of course, that would require clarifying to people before they went into the forum when that would happen, so that they would be aware of exactly what they were doing.

**Professor Miller:** I recognise Gil Paterson’s concern, which echoes what Jennifer Davidson said. We must ensure that we no longer force individuals to try to find a way of fitting into the system. The system must be adapted so that individual survivors can choose whether they want criminal proceedings to be initiated, whether they want simply a confidential forum in which that does not take place or whether they want reparation, an apology or civil litigation. The system must be person centred; it should not be the other way round, with the person finding it difficult to know what is going to happen because the way in which they can access anything that might meet their needs is unclear or that is not one of a range of options that is designed to suit what they want. That is the tension that we have in having only one door and not a series of doors from which the survivor can choose in the knowledge of what is on the other side of each door.

**The Convener:** I thank the witnesses for their written evidence and the evidence that they have provided this morning. I encourage you to recognise that this is an on-going process. Just as you read last week’s evidence and expressed opinions on that, if you read further evidence that is given at future sessions that you strongly agree or disagree with, we ask you to continue to participate in the process by contacting the clerks. If there are any issues that you have not been able to raise today but that you feel are important, or if any issues arise out of future sessions, please continue to communicate with the committee through the inquiry process. On behalf of the committee, I thank you all for the evidence that you have provided this morning.

I suspend the meeting while the table is cleared for our next panel of witnesses.
Earlier we asked about the number of people expected to take up the forum. Discussion may flow from that about how we support people—we will take the issues back to front. Has work been done on how many people we expect to present to the forum?

**Linda Watters:** In preparation for the consultation we looked at the number of people who came forward for the Irish commission, both in relation to the investigation and the confidential committee. Based on those numbers, we expect about 2,000 people to come forward. We have done some work to investigate how many people were in care through a number of years, and that work has supported our estimate of the number coming forward.

11:15

**The Convener:** I suppose that we are creating a demand and an expectation. How will that be managed in relation to resources? There was some confidence that the resources that are in place will meet the demand, but the other issue is supporting people through the process—the pre-hearing support, for example—when some people will be vulnerable and have communication difficulties. Some of those issues were raised as well.

**Linda Watters:** For the time to be heard pilot we had support in place for the people who came forward before, during and after they came to the hearings. Lorna Patterson’s organisation—In Care Survivors Service Scotland—was part of that.

We had discussions as part of the consultation and at consultation events on what kind of support survivors would like. There was a range of suggestions: some people support one organisation, but the majority of people want to be able to choose their own support.

On the finances, we have put in place finance for support to be available for survivors who come forward for the national confidential forum. A range of organisations already receive funding for different areas under the SurvivorScotland strategy, which is over and above the money that has been set aside for support as part of the national confidential forum.

**The Convener:** Does anyone else have any other comments?

**Lorna Patterson:** As Linda Watters said, In Care Survivors Service Scotland was one of the organisations that supported people during the pilot. Going forward and picking up the lessons that have been learned, we feel that it is important to talk to survivors or people who want to go through the consultation before they do so. That is because people in our service told us that when they went into the consultation they expected to feel relief and to be listened to. Those people said that they experienced those things but did not anticipate the trauma effects that could come after the consultation.

What we saw is that some people felt almost euphoric—I think that that was discussed in one of the committee’s first evidence sessions. People felt that the experience was great and had made a difference—they felt really positive—but then several months later the trauma effects were triggered. Not everybody experienced that, but some people did. It is therefore right to have a choice of support services and it is important that people go in with some informal support from counsellors to let them know what might happen and to set some expectations of the different range of feelings that can happen.

We found that, by the point that people were going into the consultation, we had started to build a relationship—and we know that trust is very difficult for some survivors. We have that initial relationship and people told us in forums that it is important to offer the counselling and some level of advocacy as a one-stop shop in one organisation, partly because of the trust issue but partly because they have started to build a relationship and so the counsellor can offer the advocacy at the same time. In that way, they do not have to manage relationships with multiple people; they can have one person through the whole process. That is an option, as well as putting more emphasis on setting the expectations of what can happen before, during and after the process.

I noticed that in the earlier evidence session there was a suggestion that people would need counselling support for about a year after the consultation. Our experience is that support is needed for at least two years. We are still working with people who participated in the time to be heard pilot, and we think that, when we are looking at long-term trauma, two years is a more reasonable option.

**The Convener:** Are there any other views on that?

**Louise Carlin:** To add to what Linda Watters said, we heard very loudly and clearly in the consultation on the NCF, which has informed discussions with the Mental Welfare Commission in developing the memorandum of understanding, that people want a choice.

As Linda Watters said, what we did as best we could, in advance of the forum being up and running, was to look at anticipated demand based on other fora and then at the average costs, if you like, of people going through the time to be heard pilot. Within that, we hope that we have set a
provisional budget that is flexible and that allows people choice.

We should bear in mind that not everyone coming forward to the forum will have experienced abuse or neglect—20 per cent of people who came forward to time to be heard had wholly positive experiences of Quarriers. We will hear a spectrum of experiences and I imagine that there will be a spectrum of needs, from a desire for support, information and advocacy through to no requirement for support, information and advocacy. We have had to shape the budget and the MOU at this stage to enable that degree of flexibility when the forum is up and running.

Joan Johnson: Although I was not involved in time to be heard, we in Health in Mind work with a lot of people who have been looked after and in care who have experiences of serious trauma. Some people coming forward to the forum may want to use the support that is already in place for them because it will be provided by people whom they trust and with whom they already have a good relationship. We need to take account of the fact that the forum might lead to an additional demand on the resources of other agencies.

It is an excellent opportunity, but I think that it is true of us all that people often do not anticipate the outcome of something that has a positive feel at the start. For people who were looked after and in care many decades ago, their coping mechanisms will potentially be dismantled by this process. Therefore, I agree that the support that those people need, wherever it comes from, will need to last for a longer period in order to help them to rebuild the structures that enable them to continue with their lives in a positive way, which we hope they will have been doing until then.

Alan McCloskey: We see the forum as an effective remedy for some people but not all. It is one of a range of options that need to be available for people.

Trust—and the development of trust—was mentioned earlier. When somebody experienced trauma in residential care, it was in a place that, as a child, they believed they could trust. We are asking people to go back into a forum and saying, “Trust us.” The issue of the confidentiality of the forum—what may or may not be disclosed—is hugely significant for people and may deter some of them from coming forward.

We have heard that 2,000 people a year may come forward. It may be more than that; we do not know. Many people who have experienced trauma and neglect may not want to tell anybody and may never have told anybody about their experience.

A forum gives people a voice. For some it will be seen as empowering—that is hugely significant—but there will be others who want to come into the forum to have their say and it might not be enough for them; there might be something missing, such as access to justice. Whatever is missing, they will feel that they have had their say—but then what? What is next? That is the gap.

Mark McDonald: I want to pick up on the theme that I raised earlier about the support services that are available. Witnesses in the first evidence session wanted some form of advocacy to be built into the process. I raised the point that advocacy can be defined in different ways. There are independent advocacy services, and there are people who would be considered a trusted individual, such as a family member or friend. People also need to be given the power to self-advocate if they wish to do so.

The view was raised in the previous evidence session that the pre-brief that will take place in advance of a person’s appearance before the national confidential forum ought to help to identify their needs. That should take care of everything, although some will have a statutory right to advocacy under legislation. What is this panel’s view? Are you confident that the pre-brief would capture all the needs of people and the kind of support that they will need when they appear before the national confidential forum?

Joan Johnson: One aspect of our work that is having a major impact is peer support and peer mentoring, in which somebody with a similar—not the same—experience but who has moved on in their thinking and their life goes through training and supports another person. Somebody who is an in-care survivor supporting another in-care survivor has a credibility that can be difficult for professionals to offer if they have not had that life experience. I would like to see peer support considered as an option. I do not know whether that has been discussed already, but we know that people using our services really value the fact that the person helping them has been shaped by similar experiences.

Lorna Patterson: I believe that it is a matter of having a choice of services. The last round of witness input mentioned independent advocacy. I do not disagree with that concept, but if there is going to be a choice we also need to think about organisations that can offer advocacy that joins up the different needs.

The Irish organisation Towards Healing has set up counselling and advocacy services that run alongside each other, which is what survivors tell us that they need. I understand that not everybody will be a survivor, but those who are survivors of in-care abuse tell us that they would prefer a one-stop advocacy and counselling support service. As Joan Johnson suggests, service user and peer groups can then help to give survivors a sense of community.
We anticipate that the types of advocacy might include help with access to records; looking at records can be a traumatic but also therapeutic and positive process. The people we have worked with during the consultation have wanted to meet other organisations and health professionals, general practitioners and housing advisers. A lot has resulted from those people finding a voice through the consultation process.

That is the type of advocacy we are talking about. We find sometimes that advocacy agencies refer back to us because it is very difficult for some people to separate their advocacy needs from their therapeutic needs. That is why there needs to be a choice.

**Alan McCloskey:** The question was about the needs of the participants. Whatever happens must be centred on the person for the process to be truly effective. People will otherwise feel that they are being put through a process—that things will be taken from them and they will come out the other side. People’s needs change; they might feel particular wants or needs at a particular time. They have to feel that they are in control of the process. If they are not in control and things are being done to them, individually and collectively there are risks associated with that. That issue has to be catered for.

**Louise Carlin:** That is why the Government took great care with the consultation: to ensure that we heard the range of views, particularly on the issue of support, before, during and after the forum, of people who may consider participating in the forum, including survivors.

**Linda Watters:** Coming back to Alan McCloskey’s point, it is clear that the needs of the person going to the forum are what is important.

A lot of the services that we currently fund are around particular needs. For example, one service that we have funded in the past few years concerns male survivors, because they felt that they needed a different type of service because some of their issues were different from those of female survivors. In the past few years, we have also been working with Roshni to set up the ethnic survivors forum because the voices of survivors from ethnic minority backgrounds were not being heard. It is quite important that we continue the person-centred approach that Alan McCloskey mentioned.

**Bob Doris:** When we discussed with the first panel the criteria for taking part in the national confidential forum, it was suggested that there would be some people who qualified because they had a period in residential care but the abuse that they suffered took place in a foster setting as well. In theory, the national confidential forum would enable them to talk about abuse that took place in a residential care setting but not in a foster care setting. That is one group of people whose experiences meet only some of the criteria. Another group might be those who went through a number of foster care settings as looked-after children. The national confidential forum would not be open to them. What are people’s thoughts on the eligibility criteria?

**Louise Carlin:** The bill makes provision for institutional care. It might seem to be a bit of a pedantic difference, but institutional care is broader than residential care or care that is being provided on a residential basis. It is anticipated that the national confidential forum will be much broader than the time to be heard forum and will encompass more areas than just residential care, including long-stay hospital provision and, potentially, other forms of provision.

On the issue of trying to dissect people’s experiences in the way that you suggest, I hope that—as was the case with the time to be heard forum—when the national confidential forum is up and running the commissioners will take a pragmatic approach and will not tell people that they can deal only with experiences that happened in a particular institution rather than in foster care. The focus of the forum will largely be on people’s experience of care, but that does not necessarily exclude other experiences, including abuse at home. People will speak about the experiences that they have lived through. As with the time to be heard forum, I do not imagine that the commissioners will take a prescriptive approach to what people can and cannot say but will encourage people to talk about what they want to
talk about and what they feel is important. I hope that the bill—which I hope will become an act—will not lead to commissioners taking a strict view.

Joan Johnson: Residential care used to be much more the norm than it is currently. Children are placed in a range of family options now. Over the decades that I have been involved in social care and social work, there has been a drive away from residential care. As you heard in the previous discussion, that will mean that different issues might well be raised in terms of key identifiable people.

If a young person is placed in a family situation and they then report abuse, there is a clear line to one or two people as opposed to a residential unit, where there are multiple potential abusers. The provision potentially raises a lot of issues but it is important because coming into care can mean coming into all sorts of different care situations. Some people could feel really excluded if their care situation was not one that we looked at, so I welcome the provision.

Alan McCloskey: I echo Louise Carlin’s comments about hoping that the scope is not so narrow that it forces people to be either in or out because of wherever they happen to be. The commissioners should be given the openness to include people and to listen to what people have to say, regardless of whether they fit the criteria exactly. If we make the process too rigid, we are in danger of saying to somebody, “We don’t want to hear your voice.” We have to allow people to have their say and to have their voice heard. That is the most important thing.

Louise Carlin: It is fair to say that provision in the bill is expansive around eligibility—it was intended to be—so there is a focus on institutional care in a broad sense. It includes people who were placed in any form of that care at any time or for any length of time, so there is no prescription around when someone was placed in care or around how long they were there—it tries to be a wide approach.

As the policy memorandum sets out, the focus on institutional care is to reflect an evolution from time to be heard. We know that the acknowledgement forum works for people placed in particular forms of care and that there are, particularly historically, distinct aspects of the forms of institutional care that are in addition to any abuse or neglect that may have been experienced. The starting point is about the context within which people were placed in care, not the fact of abuse or neglect. That is important to bear in mind.

Having said that, we are not necessarily saying that this model would not be of benefit to other people, so—as we said in the previous evidence session—we are funding CELCIS and others to look at the area of foster care and to consider whether this model might work for people placed in foster care. There is a recognition that children move between different types of care—that is not unusual. We are exploring that area, but we do not want to leap into something when we do not have a lot of evidence to say whether it works. With time to be heard, we have evidence that it works for people who were placed in institutional care as children.

Lorna Patterson: As regards eligibility and support, we need to think about people in Scotland but we are also supporting people elsewhere. For example, we support someone who is currently living in Spain but who was abused in Scotland. We are doing remote advocacy for that person, and there are several people in England as well.

We need to be clear about eligibility—to state the obvious, someone does not have to be living in Scotland to participate. We need to think about what to do about offering support to people who are not currently living in Scotland, such in as the example that I just gave, whether it is therapeutic support or advocacy support. Helplines attached to that support will be important as well.

The Convener: The other eligibility issue was about the age at which people could access the forum. We have settled on 18. There was a discussion earlier about that and about changing legislation and encouraging people to be in a care setting for a longer time. That is something that needs to be addressed. Somebody aged 17 cannot use this system. Does anyone have a view on eligibility in terms of age? I take it from the silence that there are no strong views about it.

Louise Carlin: As you mentioned, you have already had a letter from the minister on the matter. All that I would add, as the person who instructed the bill, is that there are different options regarding age, as Tam Baillie pointed out—and he is well placed to comment. We considered those different options—for thresholds of 16, 18, 21 and 25. The law currently makes provision for children becoming adults at different ages in different contexts. We thought that someone would be more likely to be in care if they were under 18, and that their experience would be current. We want to enable the forum to focus on previous experiences. Someone will be more likely to have a past experience of care if they are over 18.

The aim was to balance the resources and focus of the NCF, taking into account who was most likely to come forward. In that regard, most of the consultation responses were more concerned with the older age group and people’s ability to access the forum before they die—or their inability to participate. That came up in the time to be heard pilot. It will be for the commissioners to
determine priorities and how maximum access to the forum can be facilitated for people of all ages.

The Convener: Why are we having a bill? I am starting to ask that question. We will have the bill, but the extent of powers, the flexibility of age thresholds and other things will be left to the commissioners. Why are we not dealing with those issues through the bill?

Louise Carlin: We are. There is provision for age, eligibility and lots of other things in the bill. The main reason for having primary legislation is that it is required to enable the protections to be put in place for the participants and for the commissioners in order for the functions of the forum to be fulfilled. As Kathleen Marshall pointed out in the previous evidence session, time to be heard was set up on an informal basis. It is possible that significant risks are involved.

One of the main recommendations set out clearly in the “Time To Be Heard” report is that any future forum must be based on primary legislation. Like all bill teams, we have judged what should go in the eventual legislation and what can be left for operational agreements, for example with the Mental Welfare Commission. As you can see from the bill, the forum’s functions are set out, as are the eligibility criteria. There is a new duty of confidentiality. There are a number of provisions that we strongly feel should be set out in primary legislation, so that people are absolutely clear about them and so that we can give participants protections, including absolute protection against the threat of action for defamation, which would not be possible without primary legislation.

The Convener: If, as the person leading the Government bill team, you feel that the provisions could and should be extended to cover fostering or whatever, is it not important to set that out in the bill and to make it clear that the commissioners have the right to extend the measures beyond residential care? As many witnesses have said, the people concerned should be able to avail themselves of the remedies under the bill and elsewhere, and they should not be excluded because of the nature of the care that they found themselves in or because of their age. Are those things not fundamental?

Louise Carlin: The Government has taken a decision to define eligibility to participate in the forum in a particular way, with a focus on institutional care. That is based on evidence of what works and on the views that were gathered from many consultations before the consultation that we did on the national confidential forum. A decision was made about that. There is to be an expansion from residential care and from the scope of the time to be heard forum.

We heard a minority of views in relation to foster care and calls to fund a bit of work to explore that. We did not get a lot of feedback from participants indicating a demand for the type of model that we are discussing for foster care. Nonetheless, some views have been expressed to that effect, and we want to explore that point. A range of other views has also been expressed. We took a decision to make provision in the bill on the basis of evidence about what works.
model that we know works for people who, as children, were placed in institutional care, and that focus will include not only those who have been abused but those who had positive or indeed mixed experiences.

**Bob Doris:** The more I let some of the evidence sink in, the more content I am that there will be a protocol in place to ensure that someone who seeks the national confidential forum’s support is not told, “You’re not eligible—go away,” but is signposted sensitively to other support agencies and procedures.

As for those who were abused in a foster care setting, I recall that the national confidential forum emerged from a pilot project that specifically looked at institutional care, and I would welcome it if, after today, we could get some more information about what is happening in foster care settings so that we can examine those concerns. However, I think that we need to be led by the evidence instead of simply saying that provisions in that respect must be included in the bill.

Flexibility is a key term and has been mentioned on many occasions. Going back to the bill—after all, our job is to scrutinise its specific provisions—I note that the national confidential forum will be able to decide the nature and dynamic of testimony sessions, how they will be set up and how they will be reported. Obviously, confidentiality and anonymity need to be guaranteed, but I think that the commissioners will have a huge amount of flexibility in taking all that forward. Are the witnesses, who are scrutinising the procedures, content that the bill provides the right degree of flexibility about how evidence sessions will look and be reported? Does the bill strike the right balance in that regard?

I see that no one wants to respond—I do love silence in a committee. We need to ask such questions and I can only assume that if you had concerns you would express them. When we report on the bill, convener, we will be able to say that concerns about the issue did not emerge in this part of the meeting. We have to give each part of the bill a health check, as it were, as part of our scrutiny. I raised the issue, and witnesses had the opportunity to respond if they had concerns.

**Drew Smith:** We are putting in place a system through which we want to respect individuals and their circumstances, while applying age eligibility rules that exclude groups of people. It has been suggested that there might be issues for young people who remain in care, but what about young people for whom the abuse and the relationship with care is historical? A person of 16 or 17 who suffered abuse in care when they were much younger might want to resolve some of the issues and take advantage of the process.

Bob Doris talked about flexibility. What support is available for such people? What signposting would happen? Can anyone say what would happen to a young person in such a situation, other than someone saying, “You need to wait two years before we can deal with you”? The young person might be starting work or thinking about becoming a parent—there might be a range of reasons why they would rather resolve the issue at that point. Why should we prevent them from doing that?

**Lorna Patterson:** If the limit is set at 18 and a 17-year-old is ready to talk about their experience for the first time, I imagine that they will be signposted to other organisations, including In Care Survivors Service Scotland—I am not here to promote the service, but we work with people who are 16 and over. Other agencies work with people under 16. We work specifically with people who were abused in care settings, including fostering, adoption and kinship settings.

As the bill stands, a person who is not 18 will not be able to participate in the forum. However, if they require other support and the trigger for their coming forward was a wish to address other issues, I am sure that the forum will signpost to an organisation such as the ICSSS.

**Linda Watters:** We currently fund organisations that provide services for younger people. For example, in the past couple of months we provided funding to an organisation that deals with young people and homelessness and to an organisation that deals with issues to do with drugs and alcohol. The SurvivorScotland strategy has been published and there is a website, which was set up by survivors in 2005 and is owned by them, on which we list organisations that provide services. As Lorna Patterson said, there are organisations that can support people who are under 18.

**The Convener:** Such organisations also provide support to people who are over 18. Are you suggesting that the support that you provide is a substitute for participation in the national confidential forum? It could be said that adults do not need a forum, because you provide support. However, the forum is not intended to work in that way. It is about engaging with and challenging the authority that allowed the abuse to happen. People will go to the forum to get a weight off their shoulders and inform the authorities what happened, and they will expect some acknowledgment or apology as a result of the process.

**Linda Watters:** I was not suggesting that what other organisations provide is a substitute. The question was about whether young people would be just turned away or referred elsewhere for
support. That is why I talked about other organisations.

**Drew Smith:** I agree that, in those situations, the forum would provide nothing additional but merely try to assist people who have nowhere else to go. That would be the situation currently for the group of people who will not be able to benefit under the bill. Therefore, my simple question about the eligibility requirements is this: why do we not just say, “if you are currently being looked after, you cannot use this process because there are other facilities available to you to discuss such matters and to raise your concerns”? Why do we not do that rather than specify an age? That sort of eligibility requirement would not be a difficult thing to do.

**Louise Carlin:** I do not know that I can add to what I have already said. The idea was to use the opportunity of primary legislation to be clear about eligibility. As I have said, in looking at an age threshold, we looked at different options and we chose 18 because it is more likely that at that point people’s experience of care will be in the past. That is the focus of the national confidential forum. Mostly, that is articulated at the other end of the spectrum in historical abuse from decades previously. However, we wanted to ensure that younger people could have access to the forum. For that reason, we discounted setting the threshold at 21 and set it at 18. Rather than look at the issue from a perspective asking, “Why not 16?”, we looked at the option of setting it at 21, but we thought that that might exclude younger people with more recent experiences of care. Our judgment call was that the threshold should be set at 18.

**Gil Paterson:** On that point, I note that the confidential committee in Ireland set its age limit at 18. Is there any evidence about that from Ireland, or is it too early to see the impact? Could the forum in Northern Ireland perhaps provide guidance on why it picked 18?

**Louise Carlin:** I do not know the specific reasons why that threshold was chosen. We have liaised closely with our Northern Ireland colleagues as they have taken their legislation through and set up their acknowledgement forum. It is probably reasonable to assume that their reasons were similar to ours. I think that the confidential committee in Ireland also had an age threshold of 18.

**Gil Paterson:** Is it too early to ask for evidence about that from Northern Ireland and from Ireland? Would that be asking too much, given that those are recent happenings?

**Louise Carlin:** I think so, yes. There is a lot of evidence from the experience of the different elements of the commission in Ireland. That was one of the main jurisdictions from which we drew experience to inform our approach in Scotland.

**Mark McDonald:** I think that Gil Paterson’s point was whether the experience in the Republic of Ireland could provide evidence about the exclusion of 16 and 17-year-olds. Is there any evidence on that issue that our committee could consider as part of our consideration of the bill? Has the Government seen any evidence from the Republic of Ireland on the exclusion of 16 and 17-year-olds? I do not ask for an answer on that today, but perhaps Louise Carlin could come back to the committee on that. It might be beneficial if we could find out whether there are any examples of that.

**Louise Carlin:** We are not aware of any such evidence, but we can certainly go away and look at that again if that is helpful to the committee.

**The Convener:** Does Nanette Milne have a final question?

**Nanette Milne:** No.

**The Convener:** Are there any other questions from committee members?

Do the witnesses have any issues that they want to leave us with that have not been brought out in our questioning? I am not putting people on the spot, but if people have any message in their head that they want to leave us with, they should feel free to say so. If, as often happens, on the bus going home you think, “I wish that I had said that,” there is still the opportunity—although not necessarily in this forum, as that is not always easy—to tell us. If, on reflection, you want to come back to us about something, feel free to email the committee clerks. Indeed, we also ask you to take note of our previous and future evidence sessions. If you have strong views in support of what has been said or if you have concerns about what has been said, please feel free to communicate those to us. We will take those into account in our final conclusions before we report.

If committee members have no further questions and if the witnesses have nothing further to place on record, I thank the witnesses for their attendance and for the evidence that they have provided. We look forward to hearing from you throughout the process.

12:00

\*Meeting suspended.*
The Convener: Agenda item 2 is our third evidence session on the Victims and Witnesses (Scotland) Bill. As the session will be in round-table format, I start by asking people to introduce themselves. I am the MSP for Greenock and Inverclyde and I am the committee’s convener.

Gerry Wells (Quarriers): I am the head of service for adult disability services at Quarriers.

Bob Doris (Glasgow) (SNP): I am an MSP for Glasgow and I am deputy convener of the committee.

Graham Bell (Kibble Education and Care Centre): I am chief executive of Kibble.

Richard Crosse (CrossReach and Church of Scotland): I am the head of safeguarding for the Church of Scotland. I am representing the Church of Scotland and CrossReach.

Jean Urquhart (Scottish Catholic Safeguarding Service): I chair the Catholic church’s authorised listeners group. I am here to speak on the bill.

Drew Smith (Glasgow) (Lab): I am an MSP for Glasgow.

Gil Paterson (Clydebank and Milngavie) (SNP): I am the member for Clydebank and Milngavie.

Mark McDonald (North East Scotland) (SNP): I am an MSP for North East Scotland.

Richard Meade (Barnardo’s Scotland): I am public affairs officer for Barnardo’s Scotland.

David Torrance (Kirkcaldy) (SNP): I am the MSP for the Kirkcaldy constituency.

Nanette Milne (North East Scotland) (Con): I am an MSP for North East Scotland.

Aileen McLeod (South Scotland) (SNP): I am an MSP for South Scotland.

The Convener: As people might have observed in our previous evidence sessions, we will start with the general context of the work that has been put in, with the involvement of various parties, during the consultation on the bill. Do people believe that the work that has been put in gives us a good context for going forward? Does anyone want to take up that general question?

Jean Urquhart: It is good to be part of the process, and it is good to be here today. We have come a long way. Following the questions in the consultation that were formulated to inform the
legislation on the national confidential forum, we now have the bill, which is being considered at stage 1.

When I read the papers on the bill, I was struck by how it provides all the bare bones on which the national confidential forum will depend. It is very thorough. The bare bones contain a lot of the detail that might be expected: they cover what the national confidential forum is; how it will function; its membership; its procedures; eligibility to take part; and recording, reporting and disclosing. We would expect all that, as all those things are necessary.

However, it is not evident how those bare bones will be clothed in the language of care for the participants who engage in the process. When people decide to take part in speaking of childhood trauma experienced in care, it is an important experience for them. However, that experience also contains risks for their wellbeing, if support is not in place when they really need it. If the required support is provided at key points throughout the process of preparing for and giving testimony as well as afterwards, that could help to make a huge difference and would make a difficult adult experience worth while in the long term. Otherwise, the experience could be damaging once again.

The Convener: Does anyone else have comments?

Gerry Wells: This might be an opportunity for me to say a little about how Quarriers has been involved to date and to introduce why we feel that we have been invited here.

Quarriers was a major mainstream children’s home provider until the early 1980s. From its inception in the late 19th century as the Orphan Homes of Scotland until the shift in childcare policy that resulted in the closure of long-term institutional care, some 30,000 children went through its care in Quarriers Village. Quarriers still has the records available from the earliest days plus annual reports from that time.

In the early 2000s, there were a number of successful prosecutions of former employees of Quarriers, following allegations of abuse that the police investigated. Quarriers is now a very different provider, but there was a clear recognition that there had been historical abuses and a commitment was given to assist in every way possible those who had been victims. Quarriers agreed to play its part in furthering learning to prevent repetitions.

For some time, Quarriers had invested in providing a genealogy and aftercare service for those who wanted to see the records of their time in care and/or to make sense of previous family connections or disconnections. Inquiries to the records service provided us with the recent addresses of former residents. Therefore, when we were approached by the Scottish Government to co-operate with the pilot acknowledgement forum, we realised that we could help to ensure that the chair, Tom Shaw, had direct access to potential interested parties through our database of recent contacts by former residents. In that way, we were able to forward a standard letter of invitation from Tom Shaw to some 400 people.

Quarriers is not party to information about who responded to those letters, but I understand that a goodly number of the 98 people who took part in the time to be heard forum had heard of it through that channel. From the report “Time To Be Heard: A Pilot Forum”, we understand that many found the opportunity offered to them helpful. That appears to be backed by the evaluation report, which was prepared by the Scottish institute for residential child care. Quarriers received some letters of appreciation from people for helping to inform them about that opportunity.

Quarriers was also pleased to participate in a pilot restorative justice process that was offered as an option to all time to be heard participants. That pilot was delivered by Sacro. Fifteen participants made contact with Sacro, and that led to some four or five concluding the process with a restorative meeting with the chief executive of Quarriers.

Time to be heard and the national confidential forum are about acknowledgement, but Quarriers also recognises that, for many, that does not go far enough in addressing the trauma of their abuse. That is really where we are up to at the moment. The message from Quarriers to other providers of childcare is that we need to engage with the process, which is not one to be afraid of.

The Convener: I have a follow-up question. From the involvement that Quarriers had in the initial pilot, what benefits and challenges did you face as an organisation? Others might also want to comment on that. What benefits or challenges were there in that process?

Gerry Wells: In the initial stages, there was a degree of anxiety about opening ourselves up to interrogation, in some ways. However, we learned that a foundation of the process was its totally confidential nature and—we learned this strongly—that the process put the individual at its heart. It should be about the needs of only the person who has been abused in the past. Once we understood that clearly, it was easy for our board of trustees to agree to participate in the forum.

The Convener: Do the other witnesses have views on the process and whether it offers a good grounding from which to proceed with the bill?
Gráham Bell: I am from Kibble, which dates back to 1857 and is based in Paisley. Miss Kibble, the daughter of a wealthy textile entrepreneur in the town, was worried about young people in prison. She established what was initially a farm school, which later became an industrial school and then an approved school. Today the organisation is much wider, but we still have a significant number of residential places.

Given our long history, we expected some comeback from the various initiatives that had been undertaken, but we are not aware of any at all, even though many people who were youngsters in Kibble’s care and who have come back to us have talked about there being a tough regime in the past. We find ourselves stuck in a position in which we want to be open and transparent about our past and are committed to being involved wherever we can be—we broadcast the name quite widely; it is an unusual name, which has certainly stuck in the minds of people who were youngsters in Kibble’s care—but in which we simply have had no one come forward to us.

That makes us slightly hesitant about commenting on what other organisations have done. We have not gone through the same process, despite our long history. From our contact with people who were residents and pupils, I can say that for many people, the fact of having been in care of any kind is particularly shameful. Whether or not there was abuse, people are reticent about talking about what went on. That remains very difficult for many people. The issues are obviously interwoven with feelings about their families and so on. We feel as though we are taking a bystander view on the issue, in a sense, but we are ready to respond should anything come out.

Richard Crosse: I am representing the Church of Scotland. I am head of safeguarding, which covers child and adult protection for the church.

We recognise that harm and abuse, including childhood abuse, can happen in any setting, including faith communities. For the past two years, the Church of Scotland has ensured that, if people come forward because they have had harmful experiences while in the church’s care, we are more receptive, and we have policies and procedures in place to ensure that people are heard and their experiences acknowledged.

10:00

When looking at the paperwork for today’s meeting, I noticed that survivors have a range of needs, which are not just about being heard or acknowledged. I see that many survivors groups say that they have other needs and expect other and maybe better outcomes. As I said, those outcomes are not just about being heard or acknowledged; they include such things as wanting an apology or acknowledgement from the care provider and access to written records from the time when people were in care.

Some survivors might require professional counselling, as might some close family members who have been affected by the reported abuse. Others might seek reassurance that the person whom they reported as having harmed them is not in a position to harm others today, and others still might want an investigation into their concerns or referral to the police, if a criminal matter was reported. There is a range of outcomes. Perhaps the one thing that is missing in the structure as it is presented in the bill is the link between the national confidential forum and the care providers.

Certainly, the Church of Scotland expects that some people might be referred to the church after having been to the national confidential forum. We feel that we are in a good position to respond to the needs, by which I mean that there will be named people in the church whom people can contact. We see it as very important that people have an opportunity to determine their needs and wishes. In that respect, like the Catholic church in Scotland, we have in place something called a safeguarding listener service. Through that service, which is independent of the church, someone can meet in confidence with an independent person, who can help them to decide what they want and what their needs are.

The Church of Scotland is well placed at present. We support the setting up of the national confidential forum, but we believe that the links between the forum and the care providers need to be further developed so that survivors feel that their wider range of needs is met.

Survivors will judge the process, the bill, the act and the national confidential forum on the personal outcomes for them. Just being heard and acknowledged might be exactly right for some, but others will have needs that must be met, probably by care providers, support groups and others. If they feel that those needs are not met and are left hanging without follow-through, having been acknowledged at the forum, the structure may be deficient. There needs to be commitment from the care providers.

Richard Meade: We agree with a lot of what has been said today and in previous evidence sessions. We certainly support the NCF and believe that it would be a great therapeutic help to some survivors. However, we also agree with the Scottish Human Rights Commission and lots of other organisations that some of the proposals do not necessarily go far enough.
We participated in the first interaction, which was organised by the SHRC and the centre for excellence for looked after children in Scotland, and we believe that what came out of that meeting was a lot of positive steps forward that will help all survivors. It is important that we look to that group, its work and the action plan that it is looking to produce as a good way forward, so that all survivors’ needs—not just the needs of the survivors who would be helped by the NCF as it is currently proposed—are met as part of the programme.

Jean Urquhart: I will echo something that Richard Crosse said about having safeguarding listeners in place. In the Catholic church we call them something different—authorised listeners—but the process is the same: listeners are in place throughout Scotland and it is a bit like the national confidential forum. People can come forward and there will be someone placed in their diocese to listen to them and signpost them to where they might need help after that. Listeners would try to help people with counselling or whatever their need is.

There are a lot of things in place that are not largely known yet. Like the Church of Scotland, we have put a lot of safeguarding people and procedures in place. They are not widely known about, but they are there and they are very strong, and I hope that they will make our whole community—and our whole country—safer.

Gil Paterson: The suggestion has been made that the bill should have an obligation for the national confidential forum to refer any criminal activities automatically, no matter what. What are the panel’s views on that?

Gerry Wells: I agree with that. As has been said in evidence at previous meetings, confidentiality goes so far, but it is never possible to give a full guarantee of confidentiality when it is suggested that there is evidence that people, in particular children, might still be getting put at risk—possibly because someone who is still working with children has been named.

Richard Crosse: I noticed that, in part 6 of proposed new schedule 1A to the Mental Health (Care and Treatment) (Scotland) Act 2003, which the bill will insert, paragraph 13(4) says that the national confidential forum “must disclose” information to prevent a crime from occurring if its members feel as a result of information that has been disclosed that somebody else is at risk. Paragraph 13(5), in relation to historical abuse, says that the NCF “may disclose” information relating to a suspected crime from the past. That “may” should perhaps be a “must”.

Survivors feel that they lose control once a police referral is made and the police become involved. It is important to remember that others might still be at risk from an individual, even if they are reported to have harmed a child decades ago. They could be working in different settings and roles and not necessarily in paid employment.

To the best of my understanding, the survivor does not have to co-operate if a referral is made to the police. Their information makes very good intelligence for the police, but the survivor will not be badgered by the police—nobody will phone them up or come round to get a statement from them. They retain some control in that respect. That is a sensitive and difficult topic for survivors.

There is also the public interest. Generally, if a report is given to us at the Church of Scotland that somebody might be a risk to others and we suspect that a crime—past or present—has occurred, the presumption is to share that information with the police. The police, and sometimes social workers, are best placed to determine whether there has been a crime and whether others are at risk. That judgment is sometimes not best made by the Church of Scotland’s safeguarding service, and it is probably not best made by the national confidential forum either.

That “may disclose” in paragraph 13(5) of proposed new schedule 1A should perhaps be “must disclose” instead. I note, however, that the issue is contentious.

Richard Meade: I agree with what has been said, but it brings up another important element: the support that is provided to survivors who could give their accounts. If that information might be referred on to the police or others, adequate support is required before, during and after the survivor has given their account, to ensure that they are fully aware of what is happening and that they get any particular support that is needed. If they need particular mental health or therapeutic support, they should get that support as part of the process. That is crucial.

Graham Bell: In our view, the police would have to be involved. One lesson that has been drawn from investigations is that they have often not been well conducted—for the accused and the victims. Special training needs to be given to the police involved. As for other types of investigation, we would expect some specialist inquiries to be held. That is essential if justice is to be seen to be done for everyone.

Richard Crosse: I just want to build on a point from Barnardo’s. At the outset, survivors who attend the national confidential forum should be made aware of the limits of confidentiality, and no surprises should be sprung on them. They should enter into the process knowing what the outcome might be if the information that they provide
suggests that a crime has occurred and that others, or they themselves, might still be at risk.

There should be openness and transparency. As well as something being given verbally on confidentiality and its limits, there should be something in writing. I agree about the support that a person needs before they enter into the process. All those issues should be made as clear as possible.

**Gil Paterson:** Further to that point, we recognise that many people find it difficult to engage and that starting the process is the hardest step. If there was a definitive statement that referrals to the police would be automatic for historical incidents, my view and that of others would be that some people would be unlikely to take that first step.

What are the witnesses’ views on the use of the word “may”? Will that prevent folk from participating or stop them after they have engaged, when they are advised of the consequences of a complaint being made and followed through? Does the use of the word “may” strike the right balance? Based on your expertise and experience, should the “may” turn into “must”?

**The Convener:** Does Mr Wells want to comment on that?

**Gerry Wells:** I was not going to comment on that specifically but, in some ways, other safeguarding responsibilities that are on us almost lead to the fact that the word has to be “must”. That is because of legislation that we and local authorities need to work to.

I say for the committee’s interest that, as a result of the time to be heard forum, Tom Shaw passed on to the police a number of names that were disclosed by participants in the process. A lot of the issues were about very historical abuse, so I am not sure whether much will necessarily come from that, but Tom Shaw certainly felt an obligation to pass on names to the police.

**The Convener:** Does anyone else want to follow up Gil Paterson’s point about the use of “may” or “must” and whether the provision could become a barrier? People will perhaps enter into the process because it is not a legal one. It will be in confidence and will not be in public or in the papers or the courts. Is there a contradiction in our feeling that the need to prevent people from perpetuating such trauma and abuse should overcome the needs of those who want to speak about the issue for the first time, put something on the record and have their trauma acknowledged? Is that a big issue?

**Jean Urquhart:** It is helpful for people to come forward and tell their story, but I know that trying to ensure that such abuse does not happen to anyone else is high on the agenda. That is one thing that people say, and it can sway people in making decisions on passing information elsewhere.

However, it is important for participants to know that that does not mean that they have to speak to the police. They have the right not to do that. If information is passed on, they still have the right not to speak to the police.

**The Convener:** The message that we have had from previous panels and, I think, again today is that, when the person at the centre enters the process, they should fully understand its limitations and extent. That is the key point. Who would provide that support? How do we ensure that such support would be provided to the approximately 1,000 people who—as I think we heard last week—could be involved? Who would be the best people to provide that support? Where are they?

**Richard Crosse:** The well-established and well-regarded survivors organisations in Scotland would perhaps be well placed to assist with that process. The starting point is probably to get views from survivors on—and assess—their needs and the type of support that they want, and tailor a service to meet those needs.

The process is a new initiative and it is great, but we do not have any experience from similar schemes to go on. Survivors organisations, in conjunction with some major care providers, could perhaps tailor a support service for the people who are entering the process in order to meet their needs.

As I said, I think that the police are best placed to make a judgment about criminality and risk—whether others are at risk of harm from an individual. Despite the fact I have been working in social work for 33 years, and for the church for seven years, that is still my firm belief.

**The Convener:** We are discussing whether that would be a barrier to an individual. Presumably, people could go to the police at any time—they could go to the police tomorrow; they do not need a confidential forum to do so. Although some criminal investigations flowed from the pilot, I thought I heard the witnesses say that, for the majority of people, an acknowledgement of their trauma and their experience was enough.

**Gerry Wells:** That was in Tom Shaw’s report and in the evaluation—to which I referred earlier—by the Scottish institute for residential child care. Quarriers itself did not meet those individuals, because we were not part of the time to be heard process in that way, so I cannot speak for them.
am speaking about what I have read in the report and in the evaluation.

Graham Bell: It was clear from some of the people who have already given evidence that there is no single answer. In fact, the evidence from most people seemed to suggest that different people wanted quite different things. Some quite understandably wanted nothing to do with their previous care provider, but there appear to be others who feel a sense of affinity with the organisation in spite of what individual carers may have done.

It is difficult to give a definitive answer, but I think that it is important to have a raft of ways for people to go, and not just in relation to historical abuse. It would be naive to think that everything is in the dim and distant past. We still have residential care and thousands of children in foster care, and the way in which we conduct business now sends out messages to youngsters who have been more recently—or are currently—in care. A range of ways to respond is important to people.

Nanette Milne: I am interested in hearing the panel's views on the eligibility criteria that the bill sets out, particularly in relation to age—that the person should be 18 or above—and the definition of "institutional care", which specifically excludes the foster care that Graham Bell just mentioned.

The Convener: That is a good question on the scope of the bill with regard to age. Perhaps Jean Urquhart would like to comment.

Jean Urquhart: No doubt the national confidential forum reference group's long and wide-ranging discussion about age eligibility will be reported, but what came out of it was the fear that people with a valuable story to tell—for example, the 16 and 17-year-olds who are just out of care—could be missed. When we debated the issue, I wondered whether there could be an exceptional circumstances caveat. The group kind of agreed that it would be exceptional for a 16 or 17-year-old just coming out of care to talk about these matters—they might not want to know anything or even speak to anyone about them—but it would be good to have a caveat in exceptional circumstances so that a younger person could be given the opportunity to speak to the forum. If we are all about plugging gaps, that would certainly be one to think about.

Richard Meade: We agree that consideration should be given to the under-18s. The matter is not only complicated—after all, these people might still be in care—but challenging, and if the age limit were to be lowered we would need to be careful that adequate, appropriate and proper support and services were available to the children in question.

As far as other institutions are concerned, we agree that the bill should cover foster care. Indeed, we think that it should cover instances where the state has played a role in placing someone in institutional care.

Graham Bell: I understand why the bill is about institutional care. The messages that we send out are important and, speaking as a former foster carer and as an adoptive parent, I think that given the sheer scale of the numbers of youngsters involved it would be naive to think that everything is in the past. How the bill is constructed will be important in establishing the openness and transparency that we will want things to be dealt with in future. However, in dealing with certain foster care issues, we might well require a different approach from that taken in relation to residential institutions.

Gerry Wells: We do not have a particular view on the issue of lowering the age of eligibility. In some ways, it is a bit of a technical issue about the definition of a child. The key thing is that, no matter who the person is or how old they are, they know that they have somewhere to go and someone to speak to.

As for whether the bill should cover foster care, I have to say that I do not fully understand the argument against its inclusion. I am not sure, but it might have to do with the many different kinds of foster care arrangements, or it might have to do with issues of definition. Nevertheless, I fully agree that there is the potential for harm or abuse to take place in all settings and the key message is that people should feel that they have someone to talk to or that there is help available and that they should not feel cowed in coming forward.

Richard Crosse: I agree with Jean Urquhart that provision should be made for 16 and 17-year-olds. I note that one of the NCF’s general functions is to identify any patterns or trends in the experiences of those placed in institutional care and to make policy and practice recommendations. Even if only a handful of 16 or 17-year-olds had something to say about their experience in residential care, that would still be data about patterns, trends and changes to policy that might be required, which would otherwise be lost. It does not seem a terribly good idea to suggest that they come back when they are 18. That said, I can see why the Scottish Government wants to regularise the definition of a child; after all, various pieces of legislation define children as being up to 18, up to 16 and so on.

Nanette Milne: Does anyone think that the scope should be extended to kinship care?

Gerry Wells: I said that there are different kinds of foster care, and kinship care is one that I was
thinking about. I do not know where the boundary should be.

The Convener: Are there any other responses on kinship care?

Richard Crosse: Can someone remind me of the definition of kinship care?

Nanette Milne: I do not know what the formal definition is, but I presume that it involves people being cared for by relatives.

The Convener: Bob Doris will help with the definition.

Bob Doris: The Children and Young People (Scotland) Bill, which is, of course, currently going through the Scottish Parliament, reviews the matter, but there are two definitions. A child can have a permanence order or can be a looked-after child who is placed with a family member. There is also a range of informal kinship care arrangements involving social work placements in which the state technically does not have a looking-after, corporate parent role. I hope that that helps with the definitions, but I am afraid that it does not make things less complex.

Richard Crosse: In that context, I wonder whether the key is who has placed the child in the family setting and what measures they have taken to ensure that that setting is and continues to be safe. That might be a pointer to who may have some responsibility if things go wrong or become harmful.

The Convener: As Bob Doris mentioned, there are complexities in relation to the scope of the legislation and challenges for those who are drafting it.

I want to conclude our discussion on confidentiality. Many of those who are in the process recognise that anonymity is important, but when the reports from the pilot were produced, people were angry and frustrated that their evidence had not been reflected. That process was therefore less than satisfactory. Are there any thoughts on that?

The other suggested barrier is that, whether we like it or not, there is a stigma around mental health. The Victims and Witnesses (Scotland) Bill proposes to house the forum with the Mental Welfare Commission for Scotland. Are there any views on that being a barrier?

Gerry Wells: On the observations by people who took part in time to be heard that they could not identify their testimony in a report, I do not know whether that was deliberate or a matter of editing. Some 98 people were seen. If people wish to recognise their testimony so that they can ensure that the report truly reflects what they said, and if that could be built into the process, that would be appropriate.

On housing the forum with the Mental Welfare Commission for Scotland, I share the concern that people have expressed that there is potential for there to be stigma associated with the mental health side of things. Participants may not feel that they want to be associated with that.

I understand that the Scottish Government must think carefully about the most practical way of taking things forward, and using the Mental Welfare Commission for Scotland may be the most pragmatic response. The commission has good standing and is recognised as being independent. It would be a matter of the message round about that so that people understand that the NCF is totally independent.

10:30

Richard Meade: On anonymity, it must be made clear at the outset to those who participate what they can expect, how the process will work and what the outcome will be. That is crucial to ensuring that, at the end of the process, the survivors who participate feel that they got what they needed out of it.

As long as the NCF is operationally independent of the MWC and the forum’s positioning, branding and presentation to those who will approach it are right, there will be less chance of it being stigmatised because of its association with the MWC.

Jean Urquhart: I know how important it is for people, once they have made the decision to speak, to feel that they have been heard. One way that they know that they have been heard is if they recognise some of their words in the report. I guess that it might be impossible to have every word that everyone said in a report, but the suggestion was made at the reference group meeting that a code known only to the person who spoke could be used to signify to them that certain words were their contribution.

It must be very hard for someone who feels that they do not count to take the brave step to speak and then, after they speak, to be unable to find what they said in the report. They would still feel that they did not count. It is important that, somewhere along the line, their words are recognised and noted and that they can find them for themselves.

Graham Bell: I understand some of the concern about the matter being seen as a mental health problem. Survivors see themselves as being stigmatised by having been in care and then having been abused. A strong feeling has come through from them that that stigmatisation
continues because of the link that people make with mental health. We can try to be as professional about it as we like, but the moment that we put it in that bracket, people will feel like that. I am not sure that I have an alternative, but I understand perfectly well why people are concerned about that.

**The Convener:** We have a couple of questions about the annual report of the national confidential forum, for which the bill makes provision. Graham Bell suggested that the annual report could help to raise awareness, be a preventative tool and bring wider acknowledgement, and I think that it was Richard Crosse who referred to the current situation and asked what recommendations can be made as a result of the acknowledgement of problems.

What should the annual report look like? As well as acknowledging some of the testimony, should it recognise trends and experience? Should it make recommendations about policy and practice as a result of what the national confidential forum has heard? How do the witnesses see the annual report playing into the overall, wider issue of people’s experience?

**Graham Bell:** Its most important task is to keep the matter on the public agenda, as part of creating the sense that it is no longer hidden. That is its fundamental value, but it also needs to be clear about what is being done to assist and support survivors.

**Jean Urquhart:** I was just thinking that, if this were education, we would expect to see learning outcomes. We should expect the annual report to set out what has been learned, what trends have been identified and what the policy outcomes might be. That would certainly be useful.

**Richard Crosse:** Survivors and survivors organisations will look at annual reports to see what the outcomes are. Given that the term “outcomes” is just jargon for how needs have been met, I think that it would be good if the annual report could say that X number of survivors had contact with their care providers and that the outcomes were, for example, access to records, a period of professional counselling or just an acknowledgement by the care provider. Those are the measures that I think survivors and survivors groups would look for.

**Gerry Wells:** The annual report must, year on year, add to our knowledge of the issues that people have faced and are facing. It is also worth considering building into the process some periodic and independent evaluation to ensure that we can be confident that the forum is achieving what it sets out to achieve.

**Richard Meade:** The outcomes issue is really important and, if presented in the right way, the annual report could be useful in encouraging others to come forward and give their own accounts. After all, they would be able to see that the system works and that their contribution would serve a purpose. We should also ensure that any document comes in a friendly format that helps to encourage people, is put where they can find and read it and lets them think about coming forward themselves.

**The Convener:** I have a final question to cover the range of issues that we are examining. We have already talked about support for people entering the process and have heard evidence that people can feel tremendous relief and euphoria in getting a weight off their shoulders that they have not told anyone about. However, does anyone have any thoughts on the question of aftercare and the provision of support not just prior to but after the hearing in order to deal with any consequences that might arise?

**Gerry Wells:** I can perhaps say a little bit about the experience of Quarriers and highlight an issue that has not been discussed. Built into time to be heard was an entirely voluntary restorative justice pilot that was delivered by Sacro and which people could opt into if they wanted to take a closer look at the matter. Essentially, people met trained Sacro counsellors to explore the issues further and discuss what they might be looking for in going to the next stage of restorative justice. My understanding of the pilot’s outcomes comes purely from Sacro’s evaluation report, but of the 98 people involved in time to be heard 15 opted to have a further look at whether they wanted to pursue that route, a number that was considered to be higher than might have been experienced in other restorative justice programmes.

Of those people, I think that only four or five moved to the stage of having a one-to-one meeting with the representative—the chief executive—of Quarriers, in that setting, to talk again about their experience and look for some acknowledgement from the organisation.

I understand, certainly from the evaluation, that people who went through the whole process found it helpful. I also understand from other evidence that a number of people felt that the process was flawed and so did not opt to go through it. Part of the concern was that a kind of confidentiality clause was built into the process, although it was not and could not be legally binding.

I think that the four or five people who went through to the final stage got some added relief from doing so—some added closure, if we want to use that word. Providers could think about offering such an option, as part of a range of ways of offering assistance.
Gil Paterson: Did the process reawaken issues for individuals, or did it enable them to find services that they had not known existed? Was work done on that? Are we creating a problem or are we solving one by doing what we are doing? That is the conundrum.

Gerry Wells: The same question could be addressed to the whole time to be heard process. I think that for one or two people, it reawakened things. Clearly that was part of the point, in some ways: the idea was to give people the opportunity to talk—in some instances for the first time. There are some moving stories in the report from people in their 80s who talked, almost for the first time, about experiences that they had when they were 10, which they had carried with them for such a long time.

There is potential for reawakening and there is potential for people not to cope with that reawakening. That is why the support that we have talked about is so important. The time to be heard team included people who provided support throughout the process, and I believe that they were able to help to signpost people at a later stage.

There is always the potential for the reawakening to be damaging for some people. That raises questions about individual resilience, which has been talked about, and about how some people manage to come out of a trauma better able to cope with life than others do. Access to therapy and psychological support must be built into the process.

Richard Crosse: Gerry Wells’s point about the need to build in support is probably where there is currently a weakness in the system—that takes us back to the point that was made earlier. That is why I urge that there be guidance, for example, to help care providers to make the link between the national confidential forum and what they can provide in the context of their responsibilities. I talked about the Church of Scotland’s safeguarding service. That is just part of a response procedure that we have put in place to help people to identify their needs and to help us to meet them, where it is practical and reasonable to do so.

Jean Urquhart: It is worth remembering that when people come forward there is sometimes an immediate reaction, but sometimes it takes time. We need to be aware of that. Reports are sometimes written quite quickly, which means that they miss reactions that come later in the participants’ lives. That is why care has to be there during and after participation. The reaction might set in much later.

The Convener: If no one else wants to comment, it remains for me to thank you all for coming and for your written and oral evidence. If you want to raise issues that were not covered this morning, please do so. We encourage you to observe the evidence that we take over the next couple of weeks and to feed back to us informally, to ensure that we take account of your views before we publish our report. Thank you very much for your time.

10:46

Meeting suspended.

10:52

On resuming—

The Convener: We now move to our second panel on the Victims and Witnesses (Scotland) Bill. As usual, we will begin this round-table session with introductions. I am Duncan McNeil, the MSP for Greenock and Inverclyde and the convener of the Health and Sport Committee.

Bob Doris: I am an MSP for Glasgow, and deputy convener of the Health and Sport Committee.

Zachari Duncalf (Care Leavers Association): I represent the Care Leavers Association.

Jacquie Pepper (Care Inspectorate): I am the head of inspection for children’s services and criminal justice for the Care Inspectorate.

Drew Smith: I am an MSP for Glasgow.

Karen Anderson (Care Inspectorate): I am director of strategic development and depute chief executive of the Care Inspectorate.

Gil Paterson: I am the member for Clydebank and Milngavie.

Mark McDonald: I am an MSP for North East Scotland.

David Torrance: I am the MSP for the Kirkcaldy constituency.

Nanette Milne: I am an MSP for North East Scotland.

Aileen McLeod: I am an MSP for South Scotland.

The Convener: Duncan Dunlop is still trying to get here. There has been a slight delay, but we will proceed in hopes that he will make it in time.

Bob Doris: I will keep the first question relatively general. As we know, the national confidential forum is based on the time to be heard pilot. That information has been evaluated and published. Do our witnesses believe that the time to be heard pilot was a good basis on which to
take forward the national confidential forum? All the provisions in the bill clearly follow from that.

**Zachari Duncafl**: It has been a long 10 years. Organisations and individual survivors have all worked really hard. Now, organisations such as Quarriers are on board and we have moved slowly through the processes.

In 2009, I was involved in work that was done by the Scottish Human Rights Commission, the Care Leavers Association and SIRCC, which is now CELCIS, on research to inform the Scottish human rights framework, which resulted in the “Time for ‘Justice’” report.

After that, the pilot confidential forum, time to be heard, was set up. Inevitably, within that, we lost accountability and we have lost justice in that process, even though we campaigned for a number of years to get justice brought back into that. We seem to be moving forward with a confidential forum that lacks any of that.

Although the research is important and good, some elements have—forbibly—not been included in the confidential forum, and that needs to be addressed as we move towards a full forum.

**Bob Doris**: I do not like to say this at this point, Zachari, but at the first round-table session, we made the point that the committee has been asked to specifically consider the health-related aspects of the bill. We are not trying to dodge issues relating to justice, however, and I am grateful that you have put that point on the public record.

To what extent do the witnesses think that the national confidential forum will meet the health or therapeutic needs of those who participate in it? I do not want to downgrade the need for justice, but I would like to know what our witnesses see as the strengths of the forum, at the level at which it is proposed that it will operate. I would also be keen to hear about any perceived weaknesses in respect of the health and therapeutic needs of individuals.

**Karen Anderson**: The Care Inspectorate welcomes the proposals to establish the national confidential forum as an independent and impartial forum. The time to be heard pilot gave us evidence of the health and wellbeing benefits for people who participated in the pilot study.

As we heard in the earlier round-table session, what is clear is the need for support before, during and after participation in any national confidential forum. That is certainly the position that the Care Inspectorate would adopt to supporting people to participate, ensuring that the right support is tailored to individual needs at the right time.

**Bob Doris**: I will move the questioning on. We want to keep the questioning open because we want to give witnesses an opportunity to express what they feel needs to be expressed about the bill.

During our evidence-taking sessions, we have listened carefully to the proposition that talking about historic abuse in residential settings can open up various issues that individuals have kept locked away or which they had developed coping mechanisms for. It has been suggested that, therefore, there is a need for on-going support for individuals who speak at the national confidential forum. To what extent do you believe that that is true? Does the bill make adequate provision for that?

**11:00**

**Duncan Dunlop (Who Cares? Scotland)**: Good morning, I am Duncan Dunlop from Who Cares? Scotland.

I concur with what Karen Anderson has said. People will need support before, during and after the process, and what support they need will depend very much on who the forum’s target group really is, who attends the hearings and how they relive the trauma. I am thinking about the contemporary audience of those who have left care recently—those up to the age of 25 and maybe a little bit beyond that.

If someone faces physical, sexual, mental or psychological consequences because they were in the care system, that will probably be a live issue for the justice system and it ought to be dealt with through that route. It might not necessarily be appropriate for such people to turn up to a separate forum, beyond them talking about living through the overarching experience of care and us using that to improve our care system and services so that other people can get a better outcome from them. A specific case of abuse ought to be heard through other live routes.

I understand that the primary target of the national confidential forum is a different generation of people who went through care and who want their voices to be heard. What we learn from their experiences will impact on the people who are going through the care system today, although I do not think that there is necessarily a primary relationship between the experiences.

I agree with Karen Anderson that if we are putting people through the proposed process, whether they are elderly or young they will need a continuous relationship and support before, during and after the process of giving evidence. Such people should not be handed from professional to professional.

**The Convener**: Does Jacquie Pepper want to comment on the justice aspect that has been referred to?
Jacquie Pepper: I heard the evidence that was given earlier and the questions about whether the national confidential forum must make representation to the police when it is concerned. Provision could be made to allow people to give testimony in a confidential manner and to cover circumstances in which there are current concerns about an immediate risk to a child or a vulnerable adult. We need to balance that with the rights of an individual not to involve the police. It is a delicate balance but it is possible to make such provisions.

The Convener: Does the bill make such provisions?

Jacquie Pepper: It does, but we need to ensure that we are thinking not just about children; we need to think also about vulnerable adults as being at risk, and that needs to be explicit.

Zachari Duncalf: We need to recognise that the mental health of survivors or care leavers of all ages has been affected by their involvement in the pilot forum. Without redress or access to justice—although it is a separate issue—people have been retraumatised and the process has affected many of the survivors who have fought long and hard to access those areas. There needs to be clarity about what the national confidential forum is and what it is not, what can be offered and what is not being offered, and what support there will be before, during and in the long term after the process.

Access to support even needs to be available to people who do not want to give their testimony to the national confidential forum but want access to services. That has also been a cause of tension throughout the pilot process.

Bob Doris: I am just trying to work out what is happening. Usually the committee witnesses are much more strident about expressing their views. I realise that this is quite a sensitive bill and I am tempted to go through some of its individual provisions and to give the witnesses a chance to comment on them.

Jacquie Pepper was here for the earlier panel so she would have heard that there could be an issue with the national confidential forum being hosted in the Mental Welfare Commission for Scotland. Does anyone have any issues with that? Is it appropriate for the NCF to sit within that body?

Karen Anderson: The Care Inspectorate certainly welcomes the fact that the body is to be situated in the Mental Welfare Commission, which clearly has the expertise to support it. We concur with the earlier evidence on the positioning and the body’s perhaps being a subsection of the Mental Welfare Commission. The important point is that governance arrangements are set up to ensure that the forum remains independent and impartial and that people are not stigmatised, as was suggested earlier, because of their mental health issues. However, we believe that the Mental Welfare Commission is well placed to provide that support.

Zachari Duncalf: The Care Leavers Association also supports that, although the governance arrangements are important. However, we also need to recognise that care leavers and survivors have had poor and negative experiences with mental health service providers. Some survivors are surviving and indeed striving, yet the issues of abuse are still prevalent in their lives. They might not want to be labelled as being in mental health services.

Duncan Dunlop: Bob Doris wondered why we were not being vociferous enough, but perhaps this gets us to that point. Perhaps this is the wrong time in the discussion to make this point, but the mental health issue is an interesting one when we look at the overarching state of young people who are in care. The target is to get waiting times for access to child and adolescent mental health services down to 26 weeks. For an adolescent, 26 weeks is a long time, but some people wait for a year to get access to the service.

I will not get into why the confidential forum is wanted, but it will be housed within the commission and resources will be given to it. I respect the fact that there is potentially a different agenda and need for those who went through historical abuse but, for today’s young people in care, there is a real and prevalent need to work out exactly what is going wrong in our care services and care system.

I have been at the Health and Sport Committee before to discuss teenage pregnancy, at the Education and Culture Committee to talk about the educational attainment of young people in care and at the Finance Committee to talk about the employability of those young people. We could also talk about youth justice or about premature death among care leavers. As a society, we are failing these young people massively and we should not think that a national confidential forum will solve those issues for them. It will not—it will be a sticking plaster over something, for whatever reason, but it will not resolve the issues that really affect our looked-after young people today. It will not deal with the fact that our services are not adequate and do not achieve adequate outcomes for young people.

These young people are not on the scrap heap. They are immensely capable characters and individuals yet, somehow, over generations, we have failed them, and we are still failing them. We are their parents, because we took them away from their birth family, often for the right reasons,
but we are not improving their situation. It was only 40 years ago, in the 1970s, when we stopped deporting young people to Australia. How come in our developed Scottish society the issues of our looked-after young people are so far behind many other social issues? It is just not on.

If we are speaking about the current cohort of looked-after young people and those up to 25, I am not sure where the proposed confidential forum fits. We can go into the detail of how it will work but, for me, members of this Parliament ought to be considering a far bigger picture.

**Zachari Duncalf:** I completely agree with Duncan Dunlop.

The national confidential forum has the capacity for an awful lot of learning, as was the case with the pilot forum. Organisations are on board. The pilot forum listened to adult or older care leavers from across the generations—60-year-olds, 50-year-olds, 40-year-olds, 30-year-olds and 18-year-olds—repeatedly saying the same thing and sometimes about the same organisation. The proposed national confidential forum has to provide learning opportunities. Having something on such a scale will enable larger organisations and other organisations across Scotland to get on board on wider agendas and not just on one issue.

**Bob Doris:** I thank Mr Dunlop for his passionate response—I asked for people to be more strident and that certainly was passionate and well put. Obviously, we have a duty to scrutinise the bill, and that is the main part of what we are doing here. However, one of the provisions is on an annual reporting process. Zachari Duncalf mentioned the ability to learn from what has happened to young people in the care of the state not just in the past few years but over generations. How should the annual reporting mechanism work and how should it inform Government policy and the Care Inspectorate in looking at the situation?

**Zachari Duncalf:** As an academic and a researcher, I know that the research on young people in care and care leavers stops at a particular point, and services stop at a particular point. The annual reporting process gives us the ability to see longer-term issues and outcomes around employability, accommodation and mental health, for example. We see those as young people’s issues, but actually they last a lifetime, because there are longer-term effects. Reporting on the statistics, the outcomes, the positive elements of care and the processes can really benefit us in the wider scheme of things.

**Duncan Dunlop:** I like Zachari Duncalf’s point. We did some research that we called a conversation across the care generations. As part of that, a woman who had left care, who is now in her early 40s, was talking to a guy of 17 or 18 who had been in the care system. There was recognition that, materially, the provision that is made for young people in the care system has got a lot better and that there is less risk of physical or sexual abuse, although that can still happen and we need to safeguard against it. However, what is still missing for a large number of young people, which is exactly where the reporting mechanism has potential, is that they are not cared for or loved within the system. They are not given access to what they believe are long-term, caring, loving, stable relationships, which are the fundamental basis of most family situations.

I guess that, whether in relation to the Care Inspectorate, other scrutiny bodies or other systems and services that we create, we ought to be questioning how we enable our services to maintain long-term caring, loving relationships not just for a period of 18 months but for years, and continue that through the entire process of leaving care. We discuss the issue of leaving care, but leaving home is a process and not a point. Most care leavers can tell us the date on which they left care, but not many people can tell us the date on which they left home, because it is a process.

We need to look at the opportunities that may arise in reporting on a number of those issues. How are we improving the psychological wellbeing of our young people in care by securing them long-term stable relationships that they want and have bought into? It would be really valuable to learn about that, because we have seen that, across the generations, we have not managed to get that right.

**Karen Anderson:** We certainly welcome some of the comments that have been made this morning. There are four key points. First, in relation to the national confidential forum, we need to learn from historical abuse and the experiences that people have had. Secondly, we need to ensure that there is appropriate support for people who have had these terrible experiences, that support is tailored to individual needs and that it is available for as long as the individual requires it. That might mean that someone who is now looking at going into residential care as an older person requires particular support, because they might well be revisiting trauma from residential care when they were a child. Thirdly, collectively, we need to prevent further abuse. That is a responsibility of national policy, the delivery partners and indeed scrutiny bodies across the country. Finally, we need to improve the quality of care so that young people do not continue to experience the levels of abuse that we have seen in the past.

**The Convener:** Zachari, do you want to come back in?
**Zachari Duncalf:** Yes. I reiterate a couple of points that Karen Anderson and Duncan Dunlop made. What is lacking in current services and reporting structures is what happens beyond the statistics, outcomes and targeted measures. A life in care and beyond care is much bigger than that. For survivors and adult care leavers, this debate brings in the emotional side—the love, care and support that are seriously lacking in our current care system—and how the longer-term effects of that are played out through people’s lives.

We need to look at how to prevent abuse and safeguard and protect our children, but we need to do that through care and protection and not through control and restraint. The care system throughout the UK and systems in other places around the world are built on previous systems and a fear of historical abuse. We need to use the forum and the learning from it to build a different way forward rather than building a system in reaction to historical abuse.

11:15

**The Convener:** Does Jacquie Pepper want to say something?

**Jacquie Pepper:** On the Care Inspectorate’s responsibility for improvement across services for children and right through the life cycle, we are keen to learn from the outcomes of the national confidential forum as part of our improvement agenda and how we inform our inspection methodology.

**The Convener:** How does the Care Inspectorate’s current methodology assess, recreate or measure a loving, caring relationship such as the one that Duncan Dunlop and Zachari Duncalf have referred to? I would be interested to hear ideas on how to recreate that in a residential setting.

**Karen Anderson:** We will very soon commence a review of all our regulated care service methodology and some of the discussion today and what we learn from that can feed into that. The methodology that we currently use focuses on four quality themes across regulated care services: quality of care and support; quality of staffing; quality of the environment; and quality of leadership and management. As of April 2012, every inspection that is undertaken of any care setting has inspection across four quality themes.

Within those quality themes we have a number of quality statements and some of those focus on the involvement of individuals in the whole service design and delivery process. We look at whether people who participate in a care setting are actively involved and whether the service is tailored to what they look for and their needs, wishes and rights, and we measure that in lots of different ways. One of the key ways is simply to talk to people to get their first-hand experiences of how it looks, feels and tastes to be in a care setting. That gives us rich information and intelligence on how well a care provider is considering the individual needs of people using the service.

**The Convener:** How does that meet the test, Ms Duncaffe?

**Zachari Duncalf:** That requires private conversation and further discussion, and the committee is not necessarily the place for that because we would be here for quite some time. I do not think that the way in which the residential sector is regulated meets the criteria for good practice sometimes and the needs of young people in care. For example, young people make mistakes, as do adults. Young people go out and get drunk and come in late, and yet we want to regulate that or to see that as a problem of their care experience, when actually that is just them being young people. Sometimes we—I do not necessarily mean the Care Inspectorate—are too quick to regulate things, but that perception of regulation does not allow young people to make the mistakes that they are entitled to make as young people.

When we get strands of quality, strands of regulation and a star rating system, it is difficult to get to grips with what it is like to live in care. Having lived in residential care for eight years as a child, I know the reports that were written and I know about my experience, and they are sometimes quite at odds.

I also put into the debate the point that foster care is not regulated. Foster care is not part of the bill or the national confidential forum, and that is a major gap and a major flaw that must be addressed.

**Mark McDonald:** That was rather neatly set up convener, because that covered part of what I was going to ask in my questions. Mr Dunlop’s testimony was very powerful and I do not want him to think that we are ignorant of the issues that he has raised. The committee is about to embark on a substantial piece of work on the inequalities agenda and a lot of what has come out will feed into that. The input of Who Cares? Scotland into that process will be very welcome.

Zachari Duncalf alluded to foster care; the absence of foster care from the bill has been raised in a few of our evidence sessions. My colleague Nanette Milne also mentioned earlier the possibility of kinship care’s being included in the provisions. Another issue about the bill’s provisions has been the minimum age limit of 18. I would welcome the panel’s views on those two issues.
Zachari Duncalf: Kinship care is an interesting issue; there was a point in history when we formalised kinship care. Previously, communities, friends and family looked after children, but we did not formalise that. Anybody, including adoptive parents, who has been formally assessed and has been recommended to be a carer for young people should be under scrutiny for that. People who have experienced abuse in those settings, where the individuals concerned had been assessed as being appropriate adults for their care, should be allowed to come forward and to use the national confidential forum.

On the age threshold of 18, we have a massive issue—which has been raised and again in the research—about the time bar being the point at which survivors cannot get access to justice. Somebody who is 18 years old and who is still in care might get access to other avenues in seeking justice or support, so I think that we should consider 18. However, according to the report “Sweet 16? The Age of Leaving Care in Scotland”, many young people leave care at 16, so people in the 16 to 18 bracket fall through the net because they are not able to access justice through normal routes or services, such as CAMHS or adult services. They are still out of the care system, however, and they could be outside the time bar in respect of abuse in the care system.

Karen Anderson: From the information and statistics that we have, we have noticed a rising trend regarding placements in foster care since 1987, with a decrease in placements in residential care. The important thing in all this is that, although the setting might be different, experiences may be shared. The Care Inspectorate welcomes the proposal to include foster care.

We propose in our submission that the age range should be examined, with eligibility starting at 16. Essentially, that was to concur with Scots law and the rights of young people from age 16. We appreciate the rationale that was provided by the Minister for Public Health in relation to proposing the age of 18. On Zachari Duncalf’s point, there may well be a gap for people who have experienced abuse in residential care between the ages of 16 and 18. If the eligibility threshold is to stay at 18, we need to ensure that mechanisms are put in place for individuals between the ages of 16 and 18 so that they have the opportunity to seek support and raise issues about historical abuse.

Duncan Dunlop: It makes a great deal of sense to include foster care. I will give you an example. We have delivered a lot of independent advocacy, generally based around residential units—we cross the care spectrum. In one particular area, we were doing a review of the foster care network. There was a lot of reticence about allowing advocates in. People asked why we need to speak for their young people because they felt that they could do that for them.

About 90 per cent of the time, the placement will be very good, with the foster parents trying to create a great loving and caring environment for the child or young person. However, there are instances where that is not necessarily the case. In the case of a couple of families, the evidence that we brought through the process of offering access to the children and young people meant that those people were barred from being able to foster families. It is, however, interesting that another local authority then took them on as foster families, so the measures did not manage to cross the local authority boundary. There is a need for foster care to be involved.

Young people will often have had more than one care placement and do not fit neatly into categories of residential care, foster care, kinship care or looked after at home—they cross the spectrum of those care placements in their care journey or care history, so it could be of use to consider the whole care spectrum. If people have been under a supervision order, why not enable foster care to be open to them?

On the age issue, I agree on the technical aspect. Referring to what young people can do under Scots law and in relation to the proposals that have been made about voting and a range of other issues, 16 is a totally acceptable threshold, which we should identify as being the appropriate one for the bill.

In terms of the purpose of this committee, different questions arise for those who were abused in the past, in the 40s, 50s, 60s, 70s or 80s, from the questions that arise for those who have gone through abuse in the last two or three years. We have already talked about potential implications in the justice system and where those sorts of issues ought to be heard.

We have recently done a lot of work for various committees on engaging young people who are or have been in care to speak to MSPs. We hosted a meeting in our offices for the Education and Culture Committee as part of its current review of the issue. It took a lot of preparation work with young people to enable them to reflect on why they had gone into care and what being in care was like. They seemed to feel fine talking about leaving care, but it was very difficult for them to address why they had gone into care. That relates to the question of retraumatisation that was brought up: how to open up to young people the process of addressing the past. As an advocacy organisation, we do not expect many young people to take up that opportunity in the immediate aftermath of leaving the care system.
The question is one of appropriateness. When young people are asked to talk about the past they sometimes realise that a criminal offence was committed of which they were unaware at the time, and so we have to go down a different avenue. A range of issues arise that are very different for the younger population; older people are often accustomed to the consequences of discussing their abuse. I do not expect a large proportion of the younger care-leaver population to come forward to the forum, but they ought to have the right of access to advocacy.

Finally, we need to be very clear about what people will gain from coming to the forum. At the moment young people will speak out because they want to make changes in the care system so that other young people do not suffer in the way that they feel they suffered. That is why young people will speak via our organisation when we give evidence to committees like this. What will they do as individuals talking through their experiences, though? We need to be clear that they do not have unrealistic expectations of what they will get out of it.

**Zachari Duncalf:** I want to make very strongly the point that the national confidential forum should not sideline access to justice. There is a danger of younger people going through the process and not actually having access to justice, as we have seen happen with older care leavers many times.

I also want to look at what training people will get. A few years ago the Care Leavers Association did a UK scoping exercise of mental health services, individual practitioners, councillors and therapists. We could not find a single person who had had any specific training on young people in care, older care leavers, access to records or historic abuse. That is a massive shortfall, which people need to recognise. Some of the problems that have been experienced by adult survivors have involved therapists, councillors and mental health services not knowing, for example, the importance of a record, or not understanding what a children’s home, an orphanage or an approved school was and therefore being unable to work with those people through their experiences. That is a massive gap that we need to fill, specifically in relation to the forum.

**Duncan Dunlop:** I am interested in how young people will find out about the forum. Who Cares? Scotland would have a real issue as an organisation because it would probably fall on us to let young people know about it. Not many people who have been through the care system would know about the forum. As advocates for those children and young people, our organisation can certainly let them know about the forum, but if we are to support them through the process we need to be confident that they will benefit from it. We will work with them up to the age of 25, so there needs to be clarity on what they can expect to gain from the process. That is one proviso that we would give, as an advocacy organisation.

**Mark McDonald:** The committee is looking purely at the therapeutic and health issues relating to the matter. Points were raised at previous evidence sessions about what closure can be provided. Obviously, people might not have had closure if their experience is very recent, as might be the case for some young people, but I note that the bill provides that any experiences that relate to an on-going situation, which would apply in many cases, would lead to the justice system becoming involved in the process.

11:30

I want to shift the focus to support through the process; we have already touched on it. During our first evidence session last week, the point was made that individuals who want to give testimony to the NCF will go through a fairly extensive briefing and interview process in order to ascertain their needs and requirements. Is the panel satisfied that the mechanisms and measures will be in place to identify need for advocacy?

Subsequent to that, does the panel have any views on how the NCF might signpost people to the appropriate advocacy, given my point that people may wish to access not just those organisations whose job or function it is to deliver advocacy under the existing statutory requirements, but those that provide other forms of advocacy? What are the panel’s views on how to strike the appropriate balance there?

**Karen Anderson:** It is critical that we strike the appropriate balance. As I have pointed out probably a few times this morning, the key is to ensure that, when people share their experiences of abuse, any support mechanism that is put in place for them—before, during and after—is tailored to their individual needs. Those needs will be different from individual to individual depending on their circumstances—current health issues, their environment and so on. To summarise, from a Care Inspectorate perspective, whether the support that is provided is advocacy or a package of support for disability, mental health or whatever, the care and support should be tailored to people’s individual needs, reflect their rights and address their wishes. There should be choice, and we need to respect that, too.

**Zachari Duncalf:** Sometimes, people find it difficult to locate what will work for them and what they need. When people know what they need, they can more proactively get support for themselves. Therefore, we need a wide range of
options so that people can explore them and dip in and out of options as time progresses. The whole process—before coming to the forum, during the forum and afterwards—could take a very long time. In thinking about the support that needs to be put in place beyond the pilot, given that in Ireland thousands of people came forward, we need to ask whether we have the capacity not only to support the forum but to provide that support, advocacy and wide range of services that people need.

Jacquie Pepper: Many people already have support mechanisms or relationships with providers of services for independent support and advocacy services, or they may have friendships. Those should also be supported through people’s contact with the NCF. Similarly, after giving testimony to the NCF, people should have locally available support within their community and local network, rather than its being provided at a distance, so that it is easily accessible.

Duncan Dunlop: Further to what Jacquie Pepper said, people who have an advocacy relationship that they feel comfortable with when they come to the forum will not want to go to a stranger. In our experience, they will want that person to walk alongside them through the entire process, from beforehand right through to when they return home. I do not know who might provide that support for the older generation, but people might already have that through various mechanisms. Those services would be expected to give quite a lot of support, in terms of time, to help people to go through the process.

Zachari Duncalf: I disagree with those points. My research, and research that the Care Leavers Association has done with hundreds of care leavers, shows that many older care leavers are isolated. They have not told partners, children or friends that they have ever been in care, let alone that they have experienced abuse. They might not have access to services, and some of those who have accessed services have found those experiences to be negative. Although they might have people who can support them, we have found that, once people have declared to the forum that they have experienced abuse, they have lost those support networks, or those support networks have become a bit rocky.

The younger generation are fortunate in that they have Who Cares? Scotland and leaving-care services that support them up to a particular age. The older population do not necessarily have that support framework, and we should take that on board.

Duncan Dunlop: It is interesting to note that very few people are known for their care identity beyond the age of 18. However, there must be about 40,000 or 50,000 adults in Scotland who have been in care. This summer, we will be launching a sort of alumni of care initiative, which will enable people to talk about the fact that they were in care and say how well they have done for themselves, whether because of or in spite of it. They can come along and say that they are a teacher, a doctor, a businessperson or whatever and have done very well, having been in care.

We need to normalise the care identity and not just brand it with all the other labels that we quickly put on it. That will make it an issue that is more able to be talked about in an everyday fashion, which will mean that more people will be able to talk about their experiences.

Zachari Duncalf: I think that that is the duty of the reporting mechanisms, as well. The annual report should not just report an outcome. If we are looking at an outcome as closure, those numbers will be exceptionally small. That is not to say that the national confidential forum has not been successful in many ways; it is simply to point out that we should not focus just on those outcomes and targets. We should also focus on the positive ways in which people have strived in life, either in spite of their care experience or because they have known good and effective key workers. We can learn from that and take that with us as well.

The Convener: How does the Care Inspectorate hope to use those outcomes and the annual report as resources for identifying the issues and adapting its policies around inspection and review? What needs to be in there to help you?

Karen Anderson: Rather than just wait for an annual report, we would seek early engagement with whoever is appointed to head or oversee the national confidential forum. That is so that we can have early indicators of themes or trends that might be emerging across Scotland or at a localised level. We will take that information and intelligence and use it to inform a proportionate risk-based and targeted scrutiny activity, through strategic inspection across all the partners that are involved in the delivery of children’s services—health, social work, education and police—or down to individual service level. However, regardless of the level, we would be looking to ensure that people who use the service are protected and that we are able to give some form of assurance to members of the public and those who use the service.

In essence, I am saying that we will certainly take the intelligence about themes and trends and use it to inform the target and focus of our inspection and the way in which the inspection is undertaken.

Jacquie Pepper: In response to some of the earlier comments, I should say that the Care
Inspectorate has a broader role than the care commission had. We not only regulate care services, but we have a strategic role with regard to a whole-system look at how children's services are working across Scotland. Ministers have asked us to lead on a joint inspection of services for children, the pilot phase of which is just completing. Taking on board the lessons of the forum into that process at an early stage is important, because it concerns decision making at an early stage in children's lives.

The Convener: The capacity issue was mentioned earlier. Our engagement with your organisation has focused mainly on the care of older people, including the inspection regime, budgets, the number of inspectors and so on. I think that we asked for an assurance that, despite the focus on that, you were not forgetting the other aspects of your work such as the inspection of children's care. Some of this is historical. However, what do you anticipate will be the impact on your organisation of this part of the bill?

Karen Anderson: The first thing to say is that the Care Inspectorate’s inspection plan is approved by Scottish ministers annually. It was approved recently for the forthcoming year. Wherever possible, we look to make efficiency savings throughout the year and redirect resources into front-line scrutiny.

The other key thing to flag up is that we have a complaints process and we actively encourage people to access it. They can do that directly or they can do it anonymously if they prefer. Over the past year or so, we have seen a 20 per cent increase in use of our complaints process. People are accessing the process and telling us their concerns about their quality of care.

We are certainly planning for the national confidential forum in relation to our resources. We believe that we can achieve that by making the necessary efficiency savings wherever possible and redirecting resources into front-line scrutiny.

The Convener: Does the complaints process apply across the board to all the areas that you cover?

Karen Anderson: It applies to regulated care services.

The Convener: As we have no further questions, do our witnesses want to highlight any areas that have not been covered? Is there anything else that you want to put on the record?

Duncan Dunlop: We need to look at the forum as a way of giving a voice to people who have been through our care system. I take the point that this is the Health and Sport Committee, and the issue is one of health and wellbeing, given the impact that the forum will have on individuals in helping them to gain closure. However, this work is also about preventing young people who go through the system in future from going through the same experiences and being scarred as individuals. Over time, the forum may evolve, grow and develop from primarily being there for the older generation who have been through care.

It will be very useful if there is a route directly into Parliament for contemporary care leavers in the younger generation. They will not necessarily need to discuss situations of abuse that they have experienced within the system, but they will benefit from discussing how they felt and why. I am interested in what Mark McDonald said about equalities, because these people represent less than 1.5 per cent of our population, and we need to hear where they feel they fit in our society and whether they feel that they are discriminated against or judged. We also need to hear whether they feel that they are excluded from opportunities in community learning and development, leisure, transport or education.

As an organisation, we think that it is great that various committees and MSPs will look at the issues of young people in care, because although they represent a small proportion of the population of Scotland, the figures show that they account for significant proportions in relation to any social wellbeing indicator where things are not working.

The thing that our Parliament has not yet got to grips with is that all the issues feed into one core story, which is that we do not give young people a good enough care journey while they are in our care system. They do not have the continuity of long-term caring, loving relationships and they do not understand what is happening to them. How do we improve that? If we give them a voice and there is a direct responsibility for it to be reported to and heard by Parliament, that will be effective, because the evidence will be gathered in one place.

I understand that it might not start this way, but it will also be effective if the evidence is not just restricted to whether people suffered abuse. Many more young people will be happy to give useful, constructive evidence, as they have done to a lot of local authorities. Hundreds of them have met elected members on an individual basis to say, “This is what’s going wrong for me as a citizen. As you’re my corporate parent, I want to tell you that I’m not accessing leisure or employment.”

We could learn so much by broadening the conversation and moving it away from just the trauma and abuse—for the younger population in particular—to ask how things are for them and what they are experiencing, because it will be about the notions that Parliament has got right with the getting it right for every child approach and services joining together. From 1.48 per cent
Victims and Witnesses (Scotland)
Bill: Stage 1

09:47

The Convener: Agenda item 2 is our fourth and final evidence session on the Victims and Witnesses (Scotland) Bill. I welcome the Minister for Public Health, Michael Matheson, and his officials from the Scottish Government. Jean Maclellan is head of the adult care and support division; Louise Carlin is the bill team leader from the adult care and support division (SurvivorScotland); Anne MacDonald is a professional adviser in the SurvivorScotland strategy team; and Rosemary Lindsay is principal legal officer for food, health and community care.

We move directly to questions, the first of which is from Bob Doris.

Bob Doris (Glasgow) (SNP): Good morning. Our previous evidence sessions on the bill have provided us with a pretty good focus on where we need to drill down for more clarity from the Scottish Government. I want to discuss some of the details in the bill.

There has been a great discussion about whether it is appropriate to draw the line in the eligibility criteria to participate in the national confidential forum at the age of 18. I know that the minister has written to the committee to outline some of the reasons why the line will be drawn at 18, but there is a feeling that there would be issues wherever a line was drawn—whether at 16, 17 or 18. There are issues if someone falls on the wrong side of the line. Minister, will you put on the record the reasons why you have chosen the age of 18 as the cut-off qualifier for participation in the national confidential forum and say whether the forum could show discretion and perhaps allow a 17-year-old, say, to access the forum in exceptional or unique circumstances?

The Convener: I apologise to Bob Doris and the minister, as the minister may have wished to make an opening statement. He could deal with that question and give his opening statement.

Michael Matheson: The age limit was carefully considered. Mr Doris is right: there will always be an issue to do with whether it should be higher or lower, wherever the line is drawn.

Part of our work involved looking at the experience in other jurisdictions. Ireland and
Northern Ireland, which are ahead of us on this, set an age limit of 18. In both cases, there was no request for anyone under the age of 18 to participate in any inquiry or commission. I suspect that is largely because the policy framework and safeguards that are in place have changed over a number of years. Alternative mechanisms are now in place to address the concerns of under-18s who have been in institutional care.

The focus of the national confidential forum is on adult survivors, and 18 was seen as an appropriate limit. Other jurisdictions have gone for a specific period of time in which an individual had to be in care in order to give evidence to or participate in a forum. We have chosen not to do that. It does not matter when someone was in an institutional care setting as long as they are 18 or over.

The policy framework changed a number of years ago to improve the implementation of institutional care safeguards. There is a range of other mechanisms that can be utilised to pursue issues relating to the management of care of those who are younger than 18. The area was given careful consideration—I was conscious that there would always be different views on it. However, I think that 18 is the appropriate limit. The national confidential forum is informed in large part by our experience with the time to be heard pilot forum, where 18 appeared to be the right age limit.

Bob Doris: I asked whether there could be scope for discretion, without prejudice to whether there should be discretion. The key issue for me is that a 17-year-old who approaches the national confidential forum should not simply be told that they do not fit the criteria and that is the end of the matter. If that 17-year-old has needs, will the national confidential forum deal with those directly or will it find another organisation or support group that can do so? It is about ensuring that if anyone under 18 comes forward with unmet needs, those can be dealt with. If there is unlikely to be discretion, what assurances can you give us that any unmet needs will be dealt with appropriately and sensitively?

Michael Matheson: If someone approached the national confidential forum, which—whether or not they were under 18—was not the appropriate setting for their issues, I expect them to be guided to the most appropriate avenue of support. I expect the forum to have in place a mechanism that allows it to signpost people to the appropriate agency or organisation that can address their concerns or give them advice on what they should do to take those concerns forward. I do not want such people to be told “no” and given no further support. They should be given the advice and guidance that they require on whom they should go to and who could provide that support.

Dr Richard Simpson (Mid Scotland and Fife) (Lab): A concern that I have from my own experience as a psychiatrist of dealing with adult survivors, many of whom were revealing their abuse for the first time—it was not necessarily institutional abuse; nevertheless it was abuse—is that at that juncture such people require a lot of support and help.

I refer to the recent north Wales inquiry and the number of new cases that have just emerged in which people felt able for the first time to reveal abuse relating to the 18 care homes in north Wales. We know from that experience that, unless there is clear advice from the forum that people may wish to consult before they come forward, including advice about their likely reactions, and unless we ensure that there is adequate support, we will end up with the situation that was described to us in evidence, which is that people did not find the experience an entirely good one. Such individuals may have felt able to reveal the abuse, which is an important step for them, but what happens thereafter? It will be vital for people to have a care plan or some sort of pathway so that they can be confident that they will get access to support that is co-ordinated with their appearance before the NCF. Will the Government produce a clear map of the services that are available?

In light of the expectation that the NCF will hold 200 sessions a year, will the Government also say clearly whether the resources are adequate?

Finally, how does the Government intend to broaden the support system where it is patchy to ensure that the experience of appearing before the NCF is positive, not negative?

Michael Matheson: Dr Simpson raises an important point about the support available to individuals who choose to participate in the NCF. It would be fair to say that the time to be heard pilot was broadly a positive experience for those who responded to the evaluation. Most people found it to be of benefit to them, although I recognise and acknowledge that some individuals did not find it as helpful as they had hoped it would be.

We also learned from the pilot that the wraparound support that was provided to participating individuals prior to, during and after proved to be very effective for many. I know that some of the evidence that the committee has received from different stakeholders has highlighted that it is exactly what we need to do with the national confidential forum, and that is what we intend to do.

We are engaged with a range of stakeholders who can provide such before, during and after support to ensure that adequate provision is in place for those who require it. I have no doubt that
Dr Simpson will be aware that individuals will dip in and out of that, depending on their personal circumstances, so bespoke support must be provided to reflect individuals’ needs. We are working with stakeholders to ensure that we have that.

If the national confidential forum happens to be sitting in Glasgow or Edinburgh and some of its participants come from other parts of Scotland, we also need to be sensitive to ensuring that the stakeholders who can provide that support in different parts of the country are geared up to do so. Some of the work that we are progressing relates to making sure that that happens.

We are engaged with more than 80 organisations, I believe, in different parts of the country to ensure such arrangements are in place. It is extremely important that, if we are to get the health and wellbeing benefits that come from the acknowledgement of abuse, we ensure that we have the right supports for people. That will also be on top of the support—that does not relate to counselling—that will be available to someone going through the practical process of the national confidential forum. Once it has been formally established, we expect it to have the procedures and staff in place so that people can be provided with the necessary support while they are going through the acknowledgement process.

The Convener: Before I open the floor to questions from other members, I want to press you on the important evidence in relation to age that the Care Inspectorate raised.

Scotland’s Commissioner for Children and Young People said that a line would be drawn and that we must be careful. The previous children’s commissioner said that we must be careful to ensure that no young person slips through the net. I have no view on this, but the Care Inspectorate suggested that Scots law and the rights of young people were in contradiction here. What is your view on that?

10:00

Michael Matheson: I understand where the Care Inspectorate is coming from, and I understand that Kathleen Marshall highlighted the need to be careful about whether the acknowledgement forum model would work as well for certain young people, given the alternative support mechanisms that are already in place. I am open to considering whether there is evidence to suggest that the age limit should be changed. If there is clear evidence of a view that a lower age limit—16 for example—would be more appropriate, I am prepared to consider that. Before we make that decision, however, it will be important to decide whether the forum is the most appropriate setting for a 16-year-old. That will depend on their circumstances and how the forum would fit with other services that are there to support 16 and 17-year-olds. I am prepared to consider the issue but we have to be careful about the evidence base and how the forum would fit with other services.

The Convener: That is helpful. Do you have a view on the Care Inspectorate’s belief that the minimum age should be 16, to concur with Scots law and the rights of young people from that age? Have you or your officials considered that issue?

Rosemary Lindsay (Scottish Government): It depends on the area of law with which you are dealing. For some purposes, a child is a person under 16. Some legislation might distinguish between a child, who is someone under 16, and a young person, who is someone over 16. However, it is not the case that for all purposes a child is always someone who is under 16. In certain legislation, a young person is defined as being someone who is between 16 and 18. That is the case in relation to the acquisition of certain rights, such as voting rights, which are acquired at the age of 18, and the right to get married, which is acquired at the age of 16. As I say, it depends on the area of law with which you are dealing.

The Convener: We are just looking for some assistance. The Care Inspectorate told us that the proposal was contrary to Scots law.

Jean Maclellan (Scottish Government): Our division largely covers work with adults and older people so I thought that it would be helpful to talk to our childcare colleagues. They tell us that a number of measures are in place at the moment to support 16 and 17-year-olds who are in care and those who are care leavers. Within care, every child or young person will have an assessment, a plan and an allocated worker as well as a named person, whom the child will be involved in choosing. There is a requirement to involve a young person in their own assessment and plan and in deciding who the named person should be. A plan has to be reviewed regularly and should include the views of the young person. At a review, the young person has the opportunity to speak to their named allocated worker, who is responsible for ensuring that their voice is heard. Local authorities also have a duty to ensure that young people are prepared for the time when they will no longer be looked after, and must carry out an assessment for each young person who is leaving care, up to the age of 18.

At the time of leaving care, young people have an opportunity to complain to the relevant local authority, which is under various duties to consider and respond to that complaint. If there were multiple issues to deal with, a local authority might also fund a significant case review. Care leavers
can also alert or complain to the Care Inspectorate, which could investigate, or if the matter is specifically about staff misconduct, they can complain to the Scottish Social Services Council. Therefore, there are many opportunities within the existing system for care leavers at the 16 and 17-year-old stage to have their voices heard. That is part of what our work on historical abuse aims to do: we aim to learn from the past to inform the present and the future.

The Convener: We accepted as much from the minister. However, the Care Inspectorate has said that the current system does not comply with Scots law. We cannot answer that question this morning, although it would be helpful to have some clarity on the situation so that we can weigh it up. I do not think that the committee has any pre-set views on whether the age limit should be 16 or 18. However, given the range of evidence we have had and the bodies from which we have received it, the committee needs to make a decision. The issue has been raised by the Care Inspectorate and the current children’s commissioner, and the deputy convener, Bob Doris, tried to progress things a wee bit by asking about exceptions. I accept that the minister is still prepared to look at the issue. It is a question that we need to resolve.

Another issue that has come up is the fact that some work is being done to ensure that children in the care system can stay in that system for longer—or, at least, there is that ambition. At this stage neither the committee nor I have a view on that, although if our ambition is that young people can stay in the care system to, perhaps, the age of 18, it seems to be a natural progression to change the age limit so that 16-year-olds can have access to the NCF. However, the Government’s position goes against some of the evidence we have had from significant players in the process, and we need to resolve that.

Rosemary Lindsay: I want to clarify that the bill is compliant with Scots law. For the purposes of the bill and the issue of eligibility, a child is defined as a person who is under the age of 18. In other areas, there is a different definition of a child. Different rights are acquired at different ages.

Michael Matheson: I am not aware that evidence has been presented of the potential need for those under 18 to make use of the forum. I understand that people are asking whether the age limit should be lower. However, I am not aware of evidence that there is a requirement for the limit to be below 18 because there are groups of young people under 18 who would like to make use of the forum. That was our experience with the time to be heard pilot, and it has been the experience of other jurisdictions. For example, I think that about three quarters of people in the time to be heard pilot were over the age of 50 and a very small proportion were under the age of 30. Therefore, from our experience—and from experience elsewhere—there has been no demand.

I understand the questions that organisations are raising, but I am not aware of evidence of a need for individuals under 18 to make use of the forum. If there is evidence of demand from young people who have experience of institutional care and feel that the forum is an avenue they would find helpful in acknowledging their experience, I am open to considering that, but it has to be driven by evidence.

The Convener: We are talking about whether there is evidence on both sides of the arguments, although “evidence” is perhaps a strong word to use. I welcome your response. We need to address this together, with regard to the evidence that we have had.

Drew Smith (Glasgow) (Lab): As the convener does, I welcome what the minister said about being prepared to listen further to arguments, and I hear what he said about evidence. However, I assume that we would be talking about very small numbers of 16 and 17-year-olds.

My concern over the minister’s correspondence to the committee is about looking at the issue purely in terms of an age limit. Not everyone who may wish to make use of the forum will leave care at 16, 17 or 18; they may have left institutional care much earlier—for example, they may have left a kinship care arrangement at the age of 12. Have you considered the possibility of making a distinction in eligibility terms based on whether an individual is currently in institutional care, rather than whether they are 16, 17 or 18?

There seems to be consensus in that nobody is arguing that we should go below 16 for eligibility, but eligibility criteria could include a condition that the person must no longer still be in care, because other avenues would be available to them if they were. Has that been considered and, if so, why has it been ruled out?

Michael Matheson: That is a valid point. If there were to be a change to the age limit, it would have to be considered in the context of the possibility that a 16-year-old’s situation could be markedly different from that of an 18-year-old. A 16-year-old may wish to make use of the forum should not be seen as supplementing the safeguards that are already in place, which we have referred to; it would have to be complementary to them. We have to consider carefully how they would play out with one another. The duty of care for someone...
who is under 18 is much greater, and the forum would have to respond to that.

Drew Smith mentioned that the number of 16 and 17-year-olds could be very small. International experience in a number of instances suggests that under-18s do not feel the need to make use of such an acknowledgement forum, because of the existing alternative mechanisms.

The evidence base for eligibility being at 18 and over is very strong, because of the history in this area. The organisations that have questioned the age limit have not been able to demonstrate that there is a group of under-18s who could make use of the forum, if the age limit were to be changed. If there is evidence of that, I am very open to considering it and seeing whether the matter can be addressed. Drew Smith made the point that we would have to consider the wider implications of a lower age limit, and how it would be taken forward if we were minded to lower it.

Gil Paterson (Clydebank and Milngavie) (SNP): I apologise to the panel and the committee; I have a petition that is being considered by the Public Petitions Committee, so I will need to leave early.

My question regards confidentiality and referrals to the police. The bill will give discretion to the NCF in that regard, as it uses the word “may”, but we might need something more definitive. In evidence, we have heard that some people think that that word should be “must” and that no discretion should be given. What is the Government’s rationale on that? Why would it give discretion to NCF to decide on matters individually?

Michael Matheson: It is fair to say that although the NCF will have discretion, it will not have unlimited discretion. It must report when it believes that evidence that has been presented to it could prevent a further crime from being committed. The discretion that the NCF will have is that when it receives evidence, it will have to consider whether it is in the public interest for that information to be passed on. It will not have unlimited discretion, which is important. Some evidence that the committee has received suggests that discretion will be almost unlimited.

10:15

It is about the nature of the acknowledgement forum itself and the participants in it understanding that the circumstances and the nature of the evidence that they present will be considered by the forum commissioners, who will have scope to determine whether that information has to be passed on to the police. It will not automatically be passed on to the police.

Acknowledgement forums in other jurisdictions have been involved in investigating matters as one of several elements working together in a wider process, whereas ours is an acknowledgement forum in itself, which is somewhat different. We believe that we have struck the right balance to assure participants that there will be a degree of consideration of the facts and information that they provide, and that the forum commissioners will come to a judgment as to whether it is in the public interest for that information to be reported. If they do not believe that it is, there is no need for them to do so, but if they think that there is the possibility of further criminal activity being committed they must report that to the police.

Gil Paterson: Thank you for that.

I am a board member of Rape Crisis Scotland. My experience tells me that people who work with vulnerable people who might have been abused will say that the threat of historical abuse being brought to the public’s attention would worry those people and would mean that they would not walk through the door in the first place. I understand what you said and I am pleased about how you are addressing the matter. Some people will only want to walk through the door and disclose matters, which would help them enormously. That is not true of everybody. This is a difficult subject because no two people are the same. It is not like having a broken leg, which gets fixed and that is it done. I am concerned that we ensure that people who want to participate do not feel threatened in the first place. Perhaps they could take a small step and just discuss the issues before making a disclosure. I do not know whether that is possible. I am sure that people will not participate if they think that a threat to someone else is attached to the process.

Michael Matheson: That is why we have set the legislation out in the way that we have. I recognise that some people would not, if information that they disclosed were to be passed on automatically to the police, want to participate in the forum or make use of the acknowledgement process. It is about balancing the therapeutic value that can be gained from the forum with the public interest and public safety. That is why we have not given the forum unlimited discretion. If there is a risk that further harm could be done or a crime committed, the information must be reported.

When an individual is explaining their circumstances, it is only right that the forum members be able to look at them in the context of what is being presented by the individual and to consider whether it is in the public’s interest for issues that they may raise to be passed on to the police. Our approach is to try to give a level of assurance that things will not automatically be
reported to the police and that the forum will consider the overall circumstances.

Part of the forum’s role, and its head’s role, will be to consider the type of information that is to be provided, to those who are considering participating in it, about the forum’s responsibilities in that area. If a participant provides the forum with information that indicates that a further crime could be committed, it must report that information, but there may be other situations in which the forum feels that it is in the public interest for the information to be passed on, which will also be explained to people. That is part of preparing people who may participate in the forum so that they understand that, but they must also understand that evidence that is given to the forum will be not be reported on automatically.

Gil Paterson: Should the forum take that course of action, can we be assured that complete anonymity will be guaranteed to the survivor and that they will not be invoked in any way, which might cause more damage to the individual?

Michael Matheson: The confidentiality of the forum is crucial. I am conscious that the committee has received evidence on reporting of the forum’s work and how it will publish its reports and details of the evidence that it has heard. Some people would like to be named in that process and others, clearly, would not. People have different views.

My view is that it is an operational matter for the head of the confidential forum to find a mechanism for recording information that protects people’s anonymity but which also allows them to identify how their evidence is detailed in the forum’s report. In Ireland, a system was used whereby the evidence that was received was coded, which gave the individuals who gave evidence anonymity but allowed them to trace how their evidence influenced the report. It is for the national confidential forum to consider how to implement a mechanism, but it is important that people are assured that there is confidentiality throughout the process and that they can disclose information safely and securely.

Gil Paterson: Thank you.

Aileen McLeod (South Scotland) (SNP): My questions are about the hosting of the national confidential forum by the Mental Welfare Commission for Scotland. From evidence it seems that there is general satisfaction with that proposal. At one of our evidence-taking sessions, the chief executive of the commission, Dr Donald Lyons, gave an assurance that the commission plans to ensure that the forum is independent of it, and he explained in some detail the governance arrangements that the commission foresees.

Other witnesses underlined the need to ensure the forum’s independence and raised concerns about how we can ensure that such an arrangement does not discourage people from coming forward to talk about their experiences—which as we know is emotionally extremely difficult—and how we can ensure that people do not face issues around the stigma of mental health problems.

Does more work need to be done at the outset of the forum’s work to ensure that anybody who comes to give evidence to it is assured of the body’s independence, and is assured in relation to issues around the stigma of mental health problems?

Michael Matheson: It is important that we include the host body in legislation in order to give individuals who will make use of the forum legal protection against defamation claims that could be made as a result of evidence that they provide.

When we were considering which body should host the national confidential forum, I was conscious of the need to ensure that the body would not compromise the forum’s role and that it would have, to some degree, a track record in pursuing issues relating to equality of care. In my view, the Mental Welfare Commission is the most natural public body to host the forum.

However, I was also conscious of the stigma that could present in relation to some aspects of the work that we have been doing. Although the Mental Welfare Commission is the legal entity that will host the national confidential forum, the forum will have its own persona; it will have a level of autonomy that will allow it to be identified as a body in its own right while receiving support and expertise from the commission.

I would characterise the Mental Welfare Commission’s role as being to provide help and support for the forum’s back-room functions, such as recording and reporting, record keeping and finance. However, the forum will have the autonomy to undertake its work in the way that is most appropriate, so that those who participate in it will see themselves as participating in the national confidential forum rather than in some sub-committee of the Mental Welfare Commission.

The forum will have its own public relations programme to inform those who may want to participate in it about its work, and it will publish its own reports, but some of its back-room functions will be supported by the expertise that the Mental Welfare Commission can offer. That allows us to get the forum up and running more quickly. If we were to create a completely new body without the commission’s expertise, it would take us much longer to get the forum established. However, the forum will have its own identity, and people will be in no doubt that they are engaging with the national confidential forum.
Aileen McLeod: The Mental Welfare Commission mentioned in its evidence to the committee that a memorandum of understanding to clarify the mechanics of the governance arrangements between the forum and the commission is being worked out. When will that memorandum be published and made available to the committee?

Michael Matheson: We are working on that. I cannot give a definitive date when it will be published because it will take us a bit of time to work through some of the issues. It will not be finalised until the head of the national confidential forum is in place, who will have a role in considering some of the issues. I am happy to undertake to forward that information to the committee as soon as the work has been completed, and I will also let you know when we have confirmed the date by which it is likely that it will be complete.

We need to go into a fair bit of detail in that work to ensure that the Mental Welfare Commission, as the legal entity that will be legally accountable, has the right safeguards in place so that it can work with the Government and the national confidential forum while protecting the autonomy and role of the forum. We have to take our time and get it right, but I am happy to keep the committee up to date on that issue.

10:30

The Convener: Can no one be appointed as head of the forum until the bill is passed?

Michael Matheson: We will use the public appointments process for that. I understand that we must wait for the legislation process to be completed first.

The Convener: You referred earlier to operational matters and governance. The question has arisen whether there will be a victims' representative on the forum. The committee heard from the Mental Welfare Commission that it regards itself as a host organisation for the forum, and that it will be branded differently to address stigma issues. Those are practical issues that I suppose will be covered by governance. However, it is important that we get as much information as we can about that in order to address questions that witnesses and stakeholders are asking and reassure them that the issues are being taken on. I presume that you will be able to deal with some of those issues.

Michael Matheson: We are already dealing with some of the issues with the Mental Welfare Commission. I have met the chair and chief executive of the commission to explore the issues, and my officials are engaged in that process. I hesitate, because of the practicalities, to say that it will be finalised by a certain date. We do not want to find ourselves unable to meet a particular date. However, I am more than happy to keep the committee abreast of the issues as I can when we get to significant points, going forward.

I should also say that I am grateful for the way in which the Mental Welfare Commission has gone about taking on its role. From my perspective, it has demonstrated a real willingness to take forward the national confidential forum in order to make it as effective as possible and to make it deliver what it is intended to deliver. Given the commission’s track record, I have every confidence that it will help in that process.

The Convener: I am sure that committee members welcome that. It would be helpful for us as we write our report to know what meetings are taking place and what issues are being discussed and progressed.

Nanette Milne (North East Scotland) (Con): I have a question on an eligibility issue, which is the definition of institutional care. I think that there has been consensus among witnesses that foster care should be included in the definition. We have had discussion about kinship care in that context, and I think that the feeling was that whether a particular form of care was included in the definition would depend on whether there was a link between the care and it being assessed and delivered by the state. Could you comment on that?

Michael Matheson: You referred to foster care and kinship care, but of course abuse also takes place within the family setting. An individual does not have to be in an alternative care setting for that to take place. However, the confidential forum has been set up to focus on institutional care. We have provisions in the bill to allow us to list the types of institutions included. Originally, a lot of the evidence suggested that the confidential forum should focus on residential care, but we have taken a slightly broader approach that allows for institutional care to be addressed, which would include those who were, for example, in long-stay hospital settings that might not have been included had we restricted the focus purely to residential care. If we further widened the approach to include foster care and kinship care, it would then be difficult to explain why we should not include other non-institutional care settings in which abuse may have taken place.

In my view, the acknowledgement forum should be very much focused on historical abuse that took place in institutional settings. To expand the definition could make it more difficult for the forum to take forward its work. There is also the question whether the national confidential forum would be the most appropriate forum for such issues.
We have commissioned research to look at whether the type of acknowledgement model that will be used in the national confidential forum could also be used for individuals who have experienced some form of abuse while in foster care. It may be that the forum in which that should take place would be different from the national confidential forum, but there may be a useful role for acknowledgement in that type of model. The research that we have commissioned, which I understand has already started, will inform us whether that model could be helpful to those who experienced abuse in other, non-institutional care settings.

Nanette Milne: I think that the concern was about care that was initiated and provided by the state, as opposed to kinship care that was provided within the family without the state’s direct involvement. Another issue that was highlighted is that some people may have experienced different forms of care, including foster care and institutional care. Does that need to be taken into consideration?

Michael Matheson: It is not the case that the forum is barred from having anything to do with foster care as such. We have set up the national confidential forum based on our experience of the time to be heard pilot and on the experience of those who made use of that pilot. We are trying to ensure that there is an evidence base for all that we are doing following our experience of the pilot, given the potential unintended consequences of not working these things through in great detail.

I expect the forum to be pragmatic. If, in the course of giving evidence, someone who was in an institutional setting highlighted something that happened during a period of foster care, I would expect the forum to deal with that in a pragmatic way. I expect that the forum could consider that at the time, rather than saying, “No, we cannot listen to that, because it happened in foster care.” That is more of an operational issue, but I expect that the forum would deal with such matters in a pragmatic way, given that it is intended to be a therapeutic setting.

The Convener: Are there any other questions from committee members?

As well as the confidentiality issues that have been mentioned, issues were raised with us about the capacity to deal with the resource demand, the importance of supporting people who engage with the forum and what people should be able to expect from that engagement. The argument was made that people will need a degree of support and discussion prior to and post their engagement with the forum. For as long as it takes, support should be available to those people, who may rediscover an element of trauma when they go through the process. It was described to us how people can feel that a weight has been lifted off their shoulders, but all those experiences can come back to them that they then need to cope with afterwards.

What will be the demand for the hearings? What support will be in place for the people who come through? How will we ensure that support is available to them prior to and post their engagement with the forum?

Michael Matheson: We have given quite a lot of thought to the likely demand on the NCF once it is established. In the time to be heard pilot involving Quarriers, our experience was that around 1 per cent of former Quarriers residents made use of the forum.

We have also drawn on the experience in Ireland and Northern Ireland, where around 1 per cent of people who were in institutional care settings have made use of the various forums and inquiries that have been undertaken there. We are working on the basis that the forum might be subject to that level of demand, which we think it will be able to manage over the years to come.

To come back to the point that Richard Simpson made, the challenge will be to ensure that the right type of care and support is provided before, during and after the process. Over the past few years, we have put more than £6 million into the SurvivorScotland strategy to support a range of organisations that work with individuals who have been subject to various types of abuse. We are working with stakeholders to ensure that we have sufficient capacity in place to meet any increase in demand that could result from the operation of the national confidential forum.

It is particularly important for us to be aware that people could come from anywhere in Scotland, so we must look at the geographical spread. The work that we are doing with stakeholders will scope that to ensure that sufficient capacity exists. We believe that there is sufficient capacity, but we will ensure that that is the case in our discussions with stakeholders. It is certainly my intention that the potential benefits of the NCF should not be undermined in any way by a lack of support before, during or after the process. We have already engaged with more than 80 organisations from different parts of the country, and we will continue to take forward that work.

It is also important that, once the forum has been created, it has the right processes in place so that when someone indicates that they are interested in participating in the forum, it can advise them where they can get support and advice prior to participating in it, as well as during and after their participation. We need to ensure that that works operationally. Our experience of what happened with the time to be heard pilot is...
that, broadly, it appears to have been effective and to have been viewed to work well—that is the evidence that the committee has received—and it is our intention to ensure that that is achieved with the NCF as well.

**The Convener:** From the work that the Government has done, you believe that, on the basis of experience in other countries, you have the capacity to deal with that. There is no additional budget line available to you to beef up those services—you do not feel that there is a need to beef them up.

**Michael Matheson:** Apart from the resources that we are providing, we believe that there is capacity in the system to deal with that.

**The Convener:** Are you saying that the system is not working at full capacity now?

**Michael Matheson:** It depends. Different organisations are in different positions as far as the level of demand on them is concerned.

It is worth bearing in mind that the arrangements that we put in place for the time to be heard pilot demonstrated that the capacity exists in some organisations to undertake some of that support work. Part of the additional work that we are doing at the moment is to ensure that we have the right geographical spread of capacity. If organisations flag up that they are not in a position to provide further support, we will have to address that, because we cannot have individuals going to the NCF without the necessary support before, during and after the process.

**The Convener:** There is not a direct crossover with post-traumatic stress, but we recently held an evidence session on some of the issues to do with that, in which all the witnesses reported that they struggled to get access to many services. Therefore, on the basis of the evidence that we received—which we have not tested—there are gaps in access to wider services in the community and in the health service.

10:45

**Michael Matheson:** We have created some additional resource as well in some areas. For example, we set up the In Care Survivors Service Scotland specifically to work with individuals in Scotland who have been in a care setting and experienced some form of abuse. It was established a couple of years ago and is a dedicated body to support and work with individuals who have experienced abuse in a care setting.

Through our SurvivorScotland strategy, which was introduced in 2005, we invest nearly £1 million annually in helping work with different organisations. A lot of that resource goes to local organisations to support their work with survivors of abuse.

I reassure the committee that we intend to ensure that there is sufficient capacity, because the benefits of the national confidential forum would be undermined if that capacity did not exist. We are taking forward work with organisations to ensure that we have sufficient capacity and services in place that can support people. Our experience from the time to be heard pilot was that we got that right then, and our intention is to ensure that we get it right with the national confidential forum, as well.

**Jean Maclellan:** The minister has talked about the development fund. On the convener’s point about ensuring that we respond to need and develop capacity, we have changed our priorities in each of the funding years to accommodate need. We have therefore covered complex mental health, complex trauma, learning disability, minority ethnic services, physical health, remote and rural services, male survivors, survivors in prison and some prevention work.

**The Convener:** We heard from some of those organisations recently. Thank you for that.

I suppose that the other question from witnesses that we have found most difficult is why the committee is looking at the part of the bill that it is. The argument was put that we should be looking at some of the stuff that the Justice Committee has looked at, such as access to justice and people being denied justice in the wider sense. Those things have also affected people’s health and wellbeing. Could you explain to us the thinking about why this aspect should be dealt with exclusively as a matter of health and not the other aspects?

**Michael Matheson:** This aspect of the national confidential forum stems back to work arising from Tom Shaw’s review of issues to do with abuse in care settings. That highlighted that acknowledgement is a valuable therapeutic tool, and there have been calls for a number of years for a means to be established by which acknowledgement could be provided and recognised, as it has a health and wellbeing benefit. Through being responsible for the survivors strategy from a health perspective, the response that we have taken forward is that the national confidential forum can assist in achieving the health benefits that can come from acknowledgement. There is a significant history of recognising the value of acknowledgement in dealing with health issues that may arise and the therapeutic benefit that can be gained from acknowledgement.

My colleagues on the justice side have also been looking at issues such as the time bar. The
consultation on that closed just last month, and I believe that there were around 40 to 50 submissions. Obviously, they will be considered and, depending on what comes from that consultation, it will give rise to some of the justice remedies. Although we are talking about a health response to particular issues to do with abuse in care settings, that does not mean that that is it. It is clear that the work that my colleagues on the justice side are taking forward on time bar issues relates to aspects of that.

The interaction that has been taken forward by the Scottish Human Rights Commission is also worth keeping in mind. We originally commissioned it to bring forward the framework that gave rise to that interaction, and I attended the first meeting in the interaction—I think that there has been a further meeting since then. The national confidential forum allows us to move on with the health aspect of that. I have no doubt that some of the things that will come from the interaction will have a justice focus. They can be addressed at that particular time, but that does not preclude our being able to move on with the creation of an acknowledgement forum, which, as I have said, was highlighted many years ago. Various organisations have called for such a forum for a number of years.

**The Convener:** I thank the minister for that response.

As there are no further questions, I thank the minister and his team very much for being with us and providing valuable evidence in the process.

As previously agreed, the committee will now go into private session to discuss the work programme.

10:50

*Meeting continued in private until 11:50.*
Subordinate Legislation Committee

20th Report, 2013 (Session 4)

Victims and Witnesses (Scotland) Bill

Published by the Scottish Parliament on 19 March 2013
Subordinate Legislation Committee

Remit and membership

Remit:

The remit of the Subordinate Legislation Committee is to consider and report on—

(a)  subordinate legislation laid before the Parliament;
    (i)  any Scottish Statutory Instrument not laid before the Parliament but classed as general according to its subject matter;

and, in particular, to determine whether the attention of Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b)  proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c)  general questions relating to powers to make subordinate legislation;

*(Standing Orders of the Scottish Parliament, Rule 6.11)*

Membership:

Nigel Don (Convener)
Jim Eadie
Mike MacKenzie
Hanzala Malik
John Pentland
John Scott
Stewart Stevenson (Deputy Convener)

Committee Clerking Team:

Clerk to the Committee
Euan Donald
Subordinate Legislation Committee

20th Report, 2013 (Session 4)

Victims and Witnesses (Scotland) Bill

The Committee reports to the Parliament as follows—

INTRODUCTION

1. At its meetings on 26 February and 19 March 2013 the Subordinate Legislation Committee considered the delegated powers provisions in the Victims and Witnesses (Scotland) Bill at Stage 1 (“the Bill”)\(^1\). The Committee submits this report to the Justice Committee as lead committee for the Bill under Rule 9.6.2 of Standing Orders. The report will also be submitted to the Health and Sport Committee, as the secondary committee for the Bill.

2. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill (“the DPM”)\(^2\).

OVERVIEW OF THE BILL

3. The Victims and Witnesses (Scotland) Bill was introduced in the Scottish Parliament by the Scottish Government on 6 February 2013.

4. The Bill has two main, general objectives. First, there are reforms to the justice system relating to victims and witnesses (sections 1 to 25). The reforms relate mainly to the criminal system rather than civil. Second, the establishment of a National Confidential Forum (NCF) which will hear testimony from adults who were placed in institutional forms of care as children.

5. In the consideration of the DPM at its meeting on 26 February, the Committee agreed to write to Scottish Government officials to raise questions on the delegated powers. This correspondence is reproduced in the Annex.

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\(^1\) The Victims and Witnesses (Scotland) Bill is available here: [http://www.scottish.parliament.uk/S4_Bills/Victims%20and%20Witnesses%20(Scotland)%20Bill/b23s4-introd.pdf](http://www.scottish.parliament.uk/S4_Bills/Victims%20and%20Witnesses%20(Scotland)%20Bill/b23s4-introd.pdf)

\(^2\) The Victims and Witnesses (Scotland) Bill delegated Powers Memorandum is available here: [http://www.scottish.parliament.uk/S4_Bills/Victims_and_Witnesses_Bill_DPM - Final.pdf](http://www.scottish.parliament.uk/S4_Bills/Victims_and_Witnesses_Bill_DPM - Final.pdf)
DELEGATED POWERS PROVISIONS

6. The Committee considered each of the delegated powers in the Bill.

7. The Committee determined that it did not need to draw the attention of the Parliament to the following delegated powers:

Section 1(4) – General principles
Section 2(4) – Standards of Service
Section 2(6) – Standards of service
Section 3(7) – Disclosure of information about criminal proceedings
Section 4(2) – Interviews with children: guidance
Section 4(4) – Interviews with children
Section 5(7) and (8) – Certain sexual offences: victim’s right to specify gender of interviewer
Section 6(b) – Vulnerable witnesses: main definitions
Section 8(b) – Child and deemed vulnerable witnesses: standard special measures
Section 15 – Temporary additional special measures
Section 17(b) – Power to prescribe further special measures
Section 18(c) – Vulnerable witnesses: civil proceedings
Section 21 (new section 253A of the Criminal Procedure (Scotland) Act 1995) – Restitution order where conviction of police assault, etc.
Section 21 (new section 253B of the 1995 Act) - The Restitution Fund
Section 22 (new section 253G of the 1995 Act) – The Victim Surcharge Fund
Section 24(d) – Oral representations to the Parole Board for Scotland
Section 27(2) (inserting paragraph 2(1)(c) of new schedule 1A to the Mental Health (Care and Treatment) (Scotland) Act 2003) – Selection of persons to the membership selection panel for the National Confidential Forum (“the NCF”)
Section 29 – Ancillary provision

8. The Committee’s comments and, where appropriate, recommendations on the remaining delegated powers are detailed below.
Section 22 (inserting new section 253F of the 1995 Act) – Victim Surcharge

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Affirmative

Provision

9. Section 22 makes significant provision to establish a victim surcharge, and a Victim Surcharge Fund. This is achieved by adding sections 253F to 253J into the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”). The court must impose a victim surcharge on offenders who are subject to any sentence which is prescribed by the Scottish Ministers by regulations made under this section, except where a restitution order under section 21 is imposed.

10. The provision for surcharge shall apply where a person is convicted of an offence (other than one prescribed by Ministers), the court does not make a section 21 restitution order, and the court imposes a sentence, or sentence of a class, which is one of those prescribed by regulations by Ministers. The regulations will therefore define the circumstances to which the surcharge applies. So the potential scope in terms of offenders to whom this will apply is much wider than for “restitution orders”.

11. The Policy Memorandum indicates that the Scottish Government’s current intention is that the surcharge would apply to impose an additional penalty in cases of sentence by fine, and if successful the surcharge would be extended to other types of sentence (paragraphs 127 to 131 of the Memorandum). Only one surcharge is payable if there is a conviction for 2 or more offences in the same proceedings. (Table 2 on page 27 of the Policy Memorandum sets out a possible model for amounts of surcharge, depending on the level of fine for an offence.)

12. The Scottish Ministers will be able to specify different levels of surcharge amount for different types of offence or offender, in the regulations. The court (as well as passing any appropriate sentence for the offence) must order the person to pay the surcharge amount as would be prescribed by the regulations, subject to further exceptions which can be prescribed.

13. Amounts of surcharge are paid to a Victim Surcharge Fund, also established by section 22. The Fund is established and maintained by Ministers for the purpose of securing the provision of support services for victims of crime (in general).

14. “Support services” are defined as any type of service or treatment which is intended to benefit the physical or mental health or well-being of a victim. How the Fund operates in detail will be specified by order. This includes the specification of which victims (or classes of victims) can receive payments and how payments are to be made.
Comment

15. The Committee sought further explanation from the Scottish Government as to the proposed scope of the powers to prescribe in regulations the amount/s of the victim surcharge, and the criminal sentences to which it will apply. The Committee asked why is it considered necessary or appropriate that the scope of the powers in the new section 253F(1), (2) and (5) is as wide as enabling any level of victim surcharge amount/s to be prescribed to be payable by different descriptions of offender, or different circumstances, without any maximum (or initial maximum) amount/s being prescribed by the Bill.

16. The Committee also drew attention to the statement in the DPM that the Scottish Government intends to impose the surcharge on those sentenced to a court fine in the first instance, and to set out a tiered scale of surcharge amounts, linked to the amount of the fine (paragraph 69). As further consideration shall be required in advance of putting the proposed details into regulations, with consultation with the appropriate persons and bodies, the Committee asked whether on consideration section 22 should be amended, to include a requirement for the Scottish Ministers to consult appropriate persons and bodies having an interest in the regulations under the section, before they are made.

17. The Government’s response to the Committee has confirmed that while the initial intention is to apply the surcharge to fines, it could be rolled out to other forms of sentence in the future. It is considered more straightforward and appropriate to set maximum amounts for the surcharge in subordinate legislation. A comparison is drawn with the approach used in England and Wales, where applicable sentences and maximum amounts are set by subordinate legislation under section 161A and 161B of the Criminal Justice Act 2003. There would be difficulties in specifying the maximum amount/s without also specifying in the Bill which sentences they would apply to.

18. The Committee does not view the provisions which apply in England and Wales as persuasive in this context, so far as section 22 proposes separate (and not identical) victim surcharge arrangements for Scotland.

19. In relation to consultation, the Scottish Government undertakes in response to the Committee to consult those bodies affected by the proposed regulations under section 22 as a matter of course, before laying draft regulations in the Parliament. Given that the regulations are proposed to be subject to the affirmative procedure, the Committee accepts that explanation and undertaking.

20. The Committee accepts that section 22 sets out the proposed structure for a victim surcharge, and that the proposals to come forward in due course as to the amount or amounts of surcharge, and the sentences to which it will apply, are policy matters. In the view of the Committee, whether the powers should be given to Ministers to specify those amounts and sentences by regulations rather than by making provision (or initial provision) in the Bill is a matter of policy for determination by the Parliament, and should not be prejudged by this Committee.

21. The Committee however draws to the attention of the lead committee that the powers proposed in the new section 253F(1), (2) and (5) of the 1995
Act as inserted by section 22 of the Bill are wide, so far as they enable the Scottish Ministers to prescribe in regulations any amounts of victim surcharge to be ordered by the court, and in relation to any sentences so prescribed. The DPM confirms that the initial policy intention is limited to imposing the surcharge on those sentenced to a court fine in the first instance, and to set out a tiered scale of surcharge amounts, linked to the amount of the fine.

22. The Scottish Government has undertaken to consult those bodies which may be affected by the regulations to be made under section 22, before draft regulations are laid in the Parliament for approval. The Committee recommends that this is done, both for the initial draft regulations and any future modifications to them.

Section 27(2) (paragraph 7 of new schedule 1A to the Mental Health (Care and Treatment) (Scotland) Act 2003) – Eligibility to participate in the National Confidential Forum

Power conferred on: The Scottish Ministers
Power exercisable by: Order
Parliamentary procedure: Affirmative

Provisions

23. Section 27(2) inserts schedule 1A into the Mental Health (Care and Treatment) (Scotland) Act 2003 (“the 2003 Act”). Schedule 1A makes further provision in relation to the National Confidential Forum (NCF). It is inserted into the 2003 Act because the Forum is to operate as part of the Mental Welfare Commission, provision in respect of which is set out in that Act.

24. Paragraph 7 of the new schedule 1A makes provision for eligibility to participate in the NCF. Any person aged 18 years or over and who was placed in institutional care as a child for any length of time, and who is no longer in care, may apply to provide testimony.

25. “Institutional care” for these purposes is defined in paragraph 7(3) of the new schedule. It means a care or health service which meets the conditions in paragraph 7(4) “and otherwise is of a description or type prescribed by order made by the Scottish Ministers.”

26. The conditions set out in that subparagraph (4) cover a type of care or health service which (a) was provided to children in Scotland at some time; (b) provided by a body corporate or unincorporated; and (c) which included residential accommodation for the children placed in care. The institutional care for these purposes will not include services provided at premises used wholly or mainly as a private dwelling (DPM, paragraph 83).
Comment

27. The Committee queried with the Scottish Government a matter in connection with the drafting of the power to make an order, as explained above. It queried whether it could be clearer if the Scottish Ministers are under a duty to make an order under subparagraph (3), or have a discretion to do so.

28. The response to the Committee (at paragraph 18 to 21) confirms that the intention is that the Ministers are under a duty to make the order. In the view of the Scottish Government, the drafting clearly provides for this “as the order is required to give meaning to “institutional care””. “If no order is made then there is no description or type of institutional care”.

29. The Committee notes that this power to make an order will define “a description or type” of care or health service which meets the 3 conditions as set out in the new paragraph 7(4) of schedule 1A. The narrower the description prescribed by order, the narrower the description of “institutional care” for the purposes of the persons who are eligible to participate in the NCF.

30. The Committee would welcome if the Scottish Government could consider, following this report, if the new paragraph 7(3) could clarify further that the Scottish Ministers are under a duty to make an order. Paragraph 7(4) sets out that an order, once made, must prescribe a description of care or health service which meets the conditions in that subparagraph. Paragraph 7(3) provides that “institutional care “ means a care or health service which meets the conditions in subparagraph (4) “and otherwise is of a description or type” prescribed by order. This might be interpreted as an additional provision, that if and when an order is made, the description or type of service will be defined, beyond the criteria which are already set out in subparagraph (4).

31. The Committee also recommends that the Scottish Government considers another point on the clarity of this power. Paragraph 7(3) refers to “a description or type” of care or health service to be prescribed by order. The Government’s response states that wording is intended. Paragraph 7(4) however refers to a “description of type”.

32. The Committee would welcome if the Scottish Government could consider further if the power contained in section 27(2) (inserting paragraph 7(3) to (5) of new schedule 1A to the Mental Health (Care and Treatment) (Scotland) Act 2003) could clarify further that the Scottish Ministers are intended to have a duty to make an order. An order will provide further definition of “institutional care” for the purposes of those who will be eligible to participate in the National Confidential Forum.

33. The Committee also notes that there is a discrepancy between the reference to “description or type” of care or health service to be prescribed by order, in the new paragraph 7(3) and the reference to “description of type” in paragraph 7(4).
Section 30 – Commencement
Power conferred on: The Scottish Ministers
Power exercisable by: Order
Parliamentary procedure: None

34. The general provisions in sections 28 to 30 come into force on the day after Royal Assent. There is also a usual form of commencement power, to bring into force the other provisions in the Bill on an appointed day/s, by order.

35. Section 30(3) proposes that a commencement order may contain transitory, transitional or savings provisions. No Parliament procedure will attach to such provisions (apart from the laying of the order and consideration by this Committee). The DPM does not explain why this is appropriate.

36. In particular, this Bill makes a complex series of amendments to the Criminal Procedure (Scotland) Act 1995 in relation to court procedures for vulnerable witnesses. It may be surmised that any ancillary provisions proposed to be made upon the commencement of specific provisions of the Bill could be either complex, or have significant implications for persons affected by the provisions. It may be appropriate therefore that the negative procedure attaches to any such provisions, so that Parliamentary procedure applies and the Parliament has the ability to annul provisions by resolution, should it so determine.

Comment

37. The Scottish Government indicates to the Committee that it does not envisage that complex or significant transitional provisions would be made under the commencement powers, relying instead on the powers to make ancillary provisions contained in section 29(4). (Those powers are subject to the negative procedure, or the affirmative procedure where an order contains provisions that textually amend an Act.) The Government undertakes however to consider this further, before the completion of Stage 1.

38. While there may be no present intention to make any ancillary provisions in a commencement order, the Committee considers that an appropriate Parliamentary procedure should be applied to such provisions, given that it is proposed the Scottish Ministers should have the power to make such provisions.

39. The Committee recommends accordingly that the negative procedure should apply where a commencement order under subsection (2) of section 30 makes ancillary provisions as provided for by subsection (3). The Scottish Government has undertaken to consider this further before the completion of Stage 1. The Committee asks for further comment on this in the Scottish Government’s response to this report.
Subordinate Legislation Committee, 20th Report, 2013 (Session 4)

ANNEX

Correspondence with the Scottish Government

On 26 February, the Subordinate Legislation Committee wrote to The Scottish Government as follows:

Section 8(b) – Child and deemed vulnerable witnesses: standard special measures

Power conferred on: The Scottish Ministers
Power exercisable by: Order
Procedure: Affirmative

1. Section 271H(1) of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) specifies a range of special measures that may be used to assist vulnerable witnesses to give their evidence to the court. Section 8(a) amends the definition of “standard” special measures.

2. Section 8(b) allows the Scottish Ministers to modify section 271A(14) which sets out the standard special measures, so as to add new ones, or amend or delete the existing ones. It also enables the modification of the procedures for use of these measures, in consequence of a change to the measures (new section 271A(15) of the 1995 Act).

3. The Committee asks the Scottish Government:

- In relation to the power in section 8(b), whether this power could be drawn more narrowly, to allow for the updating of, or addition to, the current list of “standard special measures” for vulnerable witnesses contained in subsection (14) of section 271A of the Criminal Procedure (Scotland) Act 1995, rather than enabling the removal of a measure currently listed?

- Alternatively, if the power to remove any measure currently listed is required in consequence of an updating of (or addition to) the measures, could the power reflect that?

Section 17(b) – Power to prescribe further special measures

Power conferred on: The Scottish Ministers
Power exercisable by: Order
Procedure: Affirmative

4. As above, subsection (1) of section 271H of the 1995 Act specifies a range of 6 special measures that may be used to assist vulnerable witnesses to give their evidence to the court.
5. Section 17(b) will allow the Scottish Ministers to add new special measures to section 271H(1) or to amend or delete existing special measures, and also to modify the procedures for use of the special measures in consequence.

6. The Committee asks the Scottish Government:
   
   • In relation to the power contained in section 17(b), whether this power could be drawn more narrowly to allow for updating of, or addition to, the current list of special measures for vulnerable witnesses set out in subsection (1) of section 271H of the Criminal Procedure (Scotland) Act 1995, rather than enabling the removal of a measure currently listed?
   
   • Alternatively, if the power to remove any measure currently listed is required in consequence of an updating of (or addition to) the measures, could the power reflect that?

Section 21 (new section 253A of the Criminal Procedure (Scotland) Act 1995)
– Restitution order where conviction of police assault, etc.

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations
Procedure: Negative procedure

7. Section 21 provides that, instead of, or in addition to, any sentence for the offence which the court can currently pass, the court may order a person convicted of assaulting or impeding police officers or police staff to pay a sum under a “restitution order” made by the court.

8. The Committee asks the Scottish Government:

   • In relation to the power in section 21 (inserting section 253A(3) of the Criminal Procedure (Scotland) Act 1995), why it is proposed that the power to vary the maximum amount of restitution payment that may be ordered by a court should be exercisable in the form of regulations rather than order, given that an order is the usual form used to prescribe the level of a maximum amount, without other substantive provisions?

Section 21 (new section 253B of the 1995 Act) - The Restitution Fund

Power conferred on: The Scottish Ministers
Power exercisable by: Order
Procedure: Affirmative

9. In connection with restitution order payments as above, any amounts are to be paid on to the Scottish Ministers. Ministers shall establish and maintain a Restitution Fund, to secure the provision of support services for persons who have been the victims of a police assault.
10. Subsection (6) allows the Scottish Ministers to make further provision about the Fund, including in connection with its operation, administration, records and reports to the Scottish Government.

11. The Committee asks the Scottish Government for explanation of the following matter:

- The Delegated Powers Memorandum indicates that there could possibly be a requirement in future to exercise the powers to make urgent changes in the operation or administration of the Restitution Fund (paragraph 65). In that case could the application of the affirmative procedure raise any difficulties, for instance if any changes required to be approved urgently by the Parliament during the summer recess? If the “emergency affirmative” procedure was applied to the exercise of the power to make orders, could this resolve any such difficulties?

**Section 22 (inserting new section 253F of the 1995 Act) – Victim Surcharge**

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<td>Parliamentary procedure:</td>
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12. Section 22 makes significant provision to establish a victim surcharge, and a Victim Surcharge Fund. This is achieved by adding sections 253F to 253J into the 1995 Act. The court must impose a victim surcharge on offenders who are subject to any sentence which is prescribed by the Scottish Ministers by regulations made under this section, except where a restitution order under section 21 is imposed.

13. The Committee asks the Scottish Government:

- (a) Why is it considered necessary or appropriate that the scope of the powers in the new section 253F(2) and (5) is as wide as enabling any level of victim surcharge amount/s to be prescribed to be payable by different descriptions of offender, or different circumstances, without any maximum (or initial maximum) amount/s being prescribed by the Bill?

- The Scottish Government is asked to consider whether the scope of these powers could be drawn more narrowly, to reflect the initial policy intentions. The Delegated Powers Memorandum explains these as – “The Scottish Government intends to impose the surcharge on those sentenced to a court fine in the first instance, and to set out a tiered scale of surcharge amounts, linked to the amount of the fine…”

- (b) Given that statement in the Delegated Powers Memorandum, it is noted that further consideration shall be required in advance of putting the proposed details into regulations, and it is assumed that consultation will be needed with the appropriate persons and bodies on those details.
• The Scottish Government is asked to consider whether section 22 should be amended to include a requirement for the Scottish Ministers to consult appropriate persons and bodies having an interest in the regulations under the section, before they are made?

Section 27(2) paragraph 7 of new schedule 1A – Eligibility to participate in the National Confidential Forum

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Section 27(2) inserts schedule 1A into the Mental Health (Care and Treatment) (Scotland) Act 2003. Schedule 1A makes further provision in relation to the National Confidential Forum. It is inserted into the 2003 Act because the Forum is to operate as part of the Mental Welfare Commission, provision in respect of which is set out in that Act.

14. The Committee asks the Scottish Government:

• In relation to the power contained in section 27(2) (inserting subparagraph (3) of paragraph (7) of schedule 1A to the 2003 Act) whether it is intended that the Scottish Ministers are under a duty to make an order under that subparagraph, or have a discretion to do so. Accordingly, the Scottish Government are asked to consider whether this should be made clearer?

The drafting of the powers in sections 1 to 5, 6(b), 8(b), 17 and 24(d)

15. Sections 1 to 5, 6(b), 8(b), 17, and 24(d) of the Bill have varying drafting methods for the powers to modify the list of persons etc. contained in each section, which is either “the Scottish Ministers may by order/regulations modify subsection (X)” or “the Scottish Ministers may be order/regulations modify the definition of “qualifying person” (for example) in subsection (X)”.

16. Each of those sections contains powers to modify a list of persons, types of information, etc. provided for in a particular subsection. For some sections the power is drafted as a power to modify the definition (or description) of “qualifying person” (for example) in the relevant subsection. For others the power is framed simply as a power to modify the subsection (for example, in section 2(4)).

17. The Committee notes that currently in the Water Resources (Scotland) Bill as amended at Stage 2, section 3(2) specifies that the Scottish Ministers may by regulations modify the list in subsection (1) by (a) adding a public body, (b) updating or removing an entry.”

18. The Committee asks the Scottish Government:

• Could a consistent drafting method be used in the sections of the Bill referred to above, to make clear that the power is to modify a list of persons, etc., in the relevant subsection and to specify how the modification can be done?
Section 30 – Commencement

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: None

19. The general provisions in sections 28 to 30 come into force on the day after Royal Assent. There is also a usual power to bring into force the other provisions in the Bill on days which will be appointed by order.

20. Section 30(3) proposes that a commencement order may contain transitory, transitional or savings provisions. No Parliamentary procedure will attach to such provisions (apart from the laying of the order and consideration by this Committee).

21. The Committee asks the Scottish Government:

- In relation to the power in section 30(3) to make transitional, transitory or savings provisions in a commencement order, why it has been considered appropriate that no Parliamentary procedure will apply to the making of such provisions.

In particular, the Bill makes a complex series of amendments to various provisions of the 1995 Act in relation to court procedures in the interests of vulnerable witnesses. It may be assumed that any such ancillary provisions added to a commencement order could potentially be either complex, or have significant implications for the persons affected by the provisions. The Scottish Government is asked to consider whether the negative procedure could be more suitable for scrutiny of ancillary provisions which are added to a commencement order, given that this would be consistent with the application of the negative procedure to the ancillary powers in section 29?

The Scottish Government responded as follows:

Section 8(b) - Child and deemed vulnerable witnesses: standard special measures
Section 17(b) - Power to prescribe further special measures

The Committee asked:
- In relation to the powers in section 8(b) whether this power could be drawn more narrowly, to allow for the updating of, or addition to, the current list of standard special measures for vulnerable witnesses contained in subsection (14) of section 271A of the Criminal Procedure (Scotland) Act 1995, rather than enabling the removal of a measure currently listed.
- Alternatively, if the power to remove any measure currently listed is required in consequence of an updating of (or addition to) the measures, could the power reflect that?
Identical questions were asked in respect of Section 17(b) which provides a power to prescribe further special measures.

More narrowly drawn powers in these sections would be contrary to our policy intention. We are keen that these powers should allow the Scottish Ministers to add new special measures and amend or delete existing special measures as well as modify the procedures to be used. Having this flexibility will allow Ministers, with Parliament's consent, to remove any existing special measures. The need to do this may arise because, for example, changes in technology or improvements in how courts operate may make a current special measure redundant or inappropriate, even if amended. It may also be necessary to replace an existing special measure with a new special measure.

We do not envisage these powers being used on a regular basis but consider it important to maintain this flexibility in the Bill.

Section 21 (new section 253A of the Criminal Procedure (Scotland) Act 1995 - Restitution order where conviction of police assault etc.

Section 21 provides that, instead of, or in addition to, any sentence for the offence which the court can currently pass, the court may order a person convicted of assaulting or impeding police officers or police staff to pay a sum under a "restitution order" made by the court.

The Committee asked the Scottish Government:
• In relation to the power in section 21 (inserting section 253A(3) of the Criminal Procedure (Scotland) Act 1995), why it is proposed that the power to vary the maximum amount of restitution payment that may be ordered by a court should be exercisable in the form of regulations rather than order, given that an order is the usual form used to prescribe the level of a maximum amount, without other substantive provisions?

The power to vary the maximum amount of the restitution payment is not the only power the Scottish Ministers propose to take through the Bill, in relation to restitution orders. Section 21 of the Bill also proposes to insert 253B(5) and (6) into the 1995 Act, which grant powers to deal with other aspects of the management of the Fund, and its potential delegation. These powers are to be exercised by regulations. In stipulating that the power in the proposed section 253A(3) should be exercised by regulations, rather than by order, the Scottish Ministers sought to ensure that changes to the maximum amount of the restitution payment could be made in the same instrument, if that were felt desirable, as other changes to the operation of the Fund permitted by the provisions of the Bill.

Section 21 (new section 2538 of the Criminal Procedure (Scotland) Act 1995 – The Restitution Fund

Subsection (6) allows the Scottish Ministers to make further provision about the Fund, including in connection with its operation, administration, records and reports to the Scottish Government.
The Committee asked the Scottish Government:
• The Delegated Powers Memorandum indicates that there could possibly be a requirement in future to exercise the powers to make urgent changes in the operation or administration of the Restitution Fund (paragraph 65). In that case could the application of the affirmative procedure raise any difficulties, for instance if any changes required to be approved urgently by the Parliament during the summer recess? If the “emergency affirmative” procedure was applied to the exercise of the power to make orders, could this resolve any such difficulties?

The indication in the Delegated Powers Memorandum that there could be a requirement to make urgent changes explained the Government's view that it should be possible to make such changes in subordinate legislation, rather than requiring primary legislation every time they might be required.

However, the Committee raises the valid point that the affirmative procedure is not, itself, the procedure which would allow the most rapid and urgent change to the management of the Fund. As the Memorandum indicated, a balance must be struck between flexibility and proper Parliamentary scrutiny. It is very likely that changes will occasionally be required at short notice. However, the notice is unlikely to be so short as to preclude affirmative procedure. In this respect it is noteworthy that the requirement on the Scottish Ministers to pay amounts received into the Fund, in new section 2538(2) is not subject to a time limit. Therefore, if for any reason the Fund became inoperable in its then current form, the Scottish Ministers would not need to transfer monies to it until such time as any problems were overcome. This would allow for time to make regulations by affirmative procedure, even if the requirement to make them arose during recess.

Section 22 (inserting new section 253F of the Criminal Procedure (Scotland) Act 1995- Victim Surcharge

The Committee asked:
• Why it is considered necessary or appropriate that the scope of the powers in the new section 253F(2) and (5) is as wide as enabling any level of victim surcharge amount(s) to be prescribed to be payable by different descriptions of offender, or different circumstances, without any maximum (or initial maximum) amount(s) being prescribed by the Bill?
• The Scottish Government is asked to consider whether the scope of these powers could be drawn more narrowly, to reflect the initial policy intentions. The Delegated Powers Memorandum explains these are - "The Scottish Government intends to impose the surcharge on those sentenced to a court find in the first instance, and to set out a tiered scale of surcharge amounts, linked to the amount of the fine ."
• Given that statement in the Delegated Powers Memorandum, it is noted that further consideration shall be required in advance of putting the proposed details into regulations, and it is assumed that consultation will be needed with the appropriate persons and bodies on those details.
• The Scottish Government is asked to consider whether section 22 should be amended to include a requirement for the Scottish Ministers to consult appropriate persons and bodies having an interest in the regulations under the section, before they are made?
While our initial intention is to apply the surcharge to fines, the surcharge could be rolled out to other forms of sentence in the future. Accordingly, it is more straightforward and considered more appropriate to set maximum amounts for the surcharge in subordinate legislation. This is the approach used in England and Wales whereby applicable sentence and maximum amounts are set by subordinate legislation under section 161A and 161B of the Criminal Justice Act 2003. Essentially, it would be difficult to specify a maximum amount of surcharge in the Bill without specifying in the Bill which sentences it would apply to. In relation to consulting on regulations proposed under section 22, we would consult those bodies affected as a matter of course before bringing any regulations to Parliament. We do not consider any statutory requirement to consult is necessary in this section.

Section 27(2) paragraph 7 of new schedule 1A - Eligibility to participate in National Confidential Forum

The Committee asked the Scottish Government:-
• "In relation to the power contained in section 27(2) (inserting subparagraph (3) of paragraph (7) of schedule 1A to the 2003 Act) whether it is intended that the Scottish Ministers are under a duty to make an order under that subparagraph, or have a discretion to do so. Accordingly, the Scottish Government are asked to consider whether this should be made clearer?"

It is confirmed that the intention is that the Scottish Ministers are under a duty to make the order. We consider that the Bill as drafted clearly provides for this as the order is required to give meaning to "institutional care".

To be an "eligible person" under paragraph 7(2) of new schedule 1A, a person must have been in "institutional care". In paragraph 7(3) "institutional care" is a care or health service, which meets the conditions in paragraph 7(4) and conforms to what is in the order. If no order is made then there is no description or type of institutional care. The Bill provisions will, therefore, not have effect as there will be no eligible persons.

Paragraph 7(4) provides that the order under 7(3) "must prescribe a description or type of care or health service which ". It then goes on to set out the parameters within which the order can prescribe a description or type of care or health service.

It is clear that paragraph 7(4) cannot stand alone without the order to give meaning to "institutional care".

The drafting of the powers in section 1 to 5, 6(8), 8(b), 17 and 24(d)

The Committee asked:
• Could a consistent drafting method be used in the sections of the Bill referred to above, to make clear that the power is to modify a list of persons, etc., in the relevant subsection and to specify how the modification can be done.
We are of the view that the drafting is consistent and the differences between modifying a subsection and modifying a special part of a subsection are all deliberate. Sections 1(4), 2(4), 3(7)(b), 4(4), 5(7), 6(b), 8(b) and 17(b) all allow Ministers to modify a subsection. Generally this is in order to add to, or amend, a list.

Subsection 3(7)(a) allows Ministers to modify the definition of "qualifying person" in section 3(5). To allow Ministers to modify subsection (5) would mean allowing modifications of "qualifying information" as well and that is not our policy intention. Section 24(d) allows Ministers to modify the description of convicted person specified in subsection (1)(b) of the amended section 17 of the 2003 Act. Subsection (1)(b) creates a right to make oral representations to the Parole Board - the descriptions of "convicted person" are only one aspect of that subsection. By restricting the power to modify subsection 1(b) we are ensuring that the right to make oral representations cannot be changed but the description of "convicted person" can.

Section 30 - Commencement
The Committee asked:
• In relation to the power in section 30(3) to make transitional, transitory or savings provisions in a commencement order, why it has been considered appropriate that no Parliamentary procedure will apply to the making of such provisions.
• In particular the Bill makes a complex series of amendments to various provisions of the 1995 Act in relation to court procedures in the interests of vulnerable witnesses. It may be assumed that any such ancillary provisions added to a commencement order could potentially be either complex, or have significant implications for the persons affected by the provisions. The Scottish Government is asked to consider whether the negative procedure could be more suitable for the scrutiny of ancillary provisions which are added to a commencement order, given that this would be consistent with the application of the negative procedures to the ancillary powers in section 29?

Section 30(3) would allow Ministers to make transitional provisions for certain sections of the Bill at the time those sections come into force. While we would not envisage complex or significant transitional provisions being made under the section 30(3) power (relying instead on section 29(4)) we are happy to reflect further on the Committee's comments on this section before the completion of Stage 1.
5 June 2013

Dear Euan,

1. I write in response to the Subordinate Legislation Committee's report on the Victims and Witnesses (Scotland) Bill. A number of issues have been raised by the Committee in relation to the Bill and our response to each of these is as follows.

Section 22 (inserting new section 253F of the 1995 Act) – Victim Surcharge

2. The Committee states at paragraphs 21 and 22 of its report:

   • The Committee however draws to the attention of the lead committee that the powers proposed in the new section 253F(1), (2) and (5) of the 1995 Act as inserted by section 22 of the Bill are wide, so far as they enable the Scottish Ministers to prescribe in regulations any amounts of victim surcharge to be ordered by the court, and in relation to any sentences so prescribed. The DPM confirms that the initial policy intention is limited to imposing the surcharge on those sentenced to a court fine in the first instance, and to set out a tiered scale of surcharge amounts, linked to the amount of the fine.

   • The Scottish Government has undertaken to consult those bodies which may be affected by the regulations to be made under section 22, before draft regulations are laid in the Parliament for approval. The Committee recommends that this is done, both for the initial draft regulations and any future modifications to them.

3. The Scottish Government acknowledges the need for consultation with stakeholders before the arrangements for the Victim Surcharge are set out in subordinate legislation and also before any major changes are made to those arrangements. Accordingly, the Scottish Government undertakes to consult the various bodies which are to be tasked with the administrative arrangements relating to the Fund both prior to the initial regulations and any major modifications to those regulations.
Section 27(2) (paragraph 7 of new schedule 1A to the Mental Health (Care and Treatment) (Scotland) Act 2003) – Eligibility to participate in the National Confidential Forum

4. The Committee states at paragraphs 32 and 33 of its report:
   - The Committee would welcome if the Scottish Government could consider further if the power contained in section 27(2) (inserting paragraph 7(3) to (5) of new schedule 1A to the Mental Health (Care and Treatment) (Scotland) Act 2003) could clarify further that the Scottish Ministers are intended to have a duty to make an order. An order will provide further definition of “institutional care” for the purposes of those who will be eligible to participate in the National Confidential Forum.
   - The Committee also notes that there is a discrepancy between the reference to “description or type” of care or health service to be prescribed by order, in the new paragraph 7(3) and the reference to “description of type” in paragraph 7(4).

5. In relation to the first point made by the Committee (in paragraph 32), the Scottish Government confirms that it has considered this further and remains of the view that the Bill as currently drafted clearly provides that the Scottish Ministers are required to make an order under paragraph 7(3) of new schedule 1A. This is on the basis that an order under paragraph 7(3) is required to give meaning to the term “institutional care” without which the Bill provisions cannot operate. This reasoning is set out more fully in the correspondence with the Scottish Government annexed to the Committee’s report.

6. The Committee noted at paragraph 30 of its report that paragraph 7(3) of schedule 1A provides that “institutional care” means a “care or health service which meets the conditions in subparagraph 7(4) of schedule 1A and “otherwise is of a description or type prescribed by order made by the Scottish Ministers.”. The Committee commented that:

   “This might be interpreted as an additional provision, that if and when an order is made, the description or type of service will be defined, beyond the criteria which are already set out in subparagraph (4).”

7. The Scottish Government considers that since paragraph 7(4) says that the order must prescribe a description or type of health care which meets the conditions listed in subparagraph (4), it would be ultra vires for such an order to go beyond such conditions.

8. In relation to the second point made by the Committee (in paragraph 33) the Scottish Government confirms that the words in paragraph 7(4) should read “description or type of care”. This is a typographical error and an amendment will be brought forward at Stage 2 to correct this.

Section 30 - Commencement

9. The Committee states at paragraph 39 of its report:
   - The Committee recommends accordingly that the negative procedure should apply where a commencement order under subsection (2) of section 30 makes ancillary provisions as provided for by subsection (3). The Scottish Government has undertaken to consider this further before the completion of Stage 1. The Committee asks for further comment on this in the Scottish Government’s response to this report.
10. Section 30 of the Bill provides that sections 28 to 31 will come into force on the day after Royal Assent and the remaining provisions of the Bill will come into force on such day as the Scottish Ministers may by order appoint. An order under section 30 may contain transitory or transitional provision or savings. The Committee notes that, as there is no Parliamentary procedure for commencement orders, transitional provisions could be made under section 30 without any Parliamentary scrutiny.

11. The Scottish Government acknowledges the concern that significant transitional arrangements could be made through the section 30 power. However, the intention behind section 30(3) is that minor transitional provisions for certain sections of the Bill could be made to coincide with the coming into force of the relevant sections. The Scottish Government does not intend to make significant or complex transitional provisions under the section 30(3) power and would seek to rely instead on the order-making powers in section 29 for any such provisions.

12. There is precedent for attaching transitional provisions to a commencement order. Section 150(2) of the Licensing (Scotland) Act 2005 read along with section 146(2) of that Act enables Ministers to make transitional provision in a commencement order. Similar provision can be found in section 150 of the Legal Services (Scotland) Act 2010 and section 206 of the Children’s Hearings (Scotland) Act 2011.

13. I hope the Committee finds this information helpful, and please let me know if we can be of any further assistance.

GRAHAM ACKERMAN
Bill Team Leader
Victims and Witnesses (Scotland) Bill
Did you take part in either of the Scottish Government consultation exercises which preceded the Bill and, if so, did you comment on the financial assumptions made?
1. Yes we responded to the consultation but did not make comment on the financial assumptions.

Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?
2. n/a

Did you have sufficient time to contribute to the consultation exercise?
3. Yes

Costs
If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details?
4. We anticipate that the In Care Survivors Service Scotland will be (and should be) the main organisation contacted by survivors for support through the process of the forum. This will be with existing survivors currently accessing ICSSS and new survivors who would benefit from support and this should be provided by ICSSSS due to substantial experience in this area. However ICSSS budgets have been cut for the past two years with further cuts due next year leading to reduced capacity. Therefore to work with increased demand and support required for survivors that can be intensive we would anticipate that further staff hours will be a financial implication. We were pleased to see that ICSSS were specifically mentioned but were unclear if the professional support for participants aspect involved additional financial support for ICSSS or if it was to be found from the existing budget. If it involves additional support then it is accurately reflected at £60,000.

Do you consider that the estimated costs and savings set out in the Financial Memorandum and projected over 15 years for each service are reasonable and accurate?
5. Yes

If relevant, are you content that your organisation can meet the financial costs associated with the Bill which your organisation will incur? If not, how do you think these costs should be met?
6. As above
Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

7. Yes

Wider Issues

Do you believe that the Financial Memorandum reasonably captures costs associated with the Bill? If not, which other costs might be incurred and by whom?

8. Yes with consideration to the above points

Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?

9. We are not aware of any
Did you take part in either of the Scottish Government consultation exercises which preceded the Bill and, if so, did you comment on the financial assumptions made?
1. COPFS were aware of both consultation exercises and submitted a response to the initial “Making Justice Work for Victims and Witnesses” paper. In this response COPFS supported the broad principles contained in the consultation paper, but did not comment on any financial assumptions made. However, COPFS were fully consulted on the content of the financial memorandum and provided information as required.

2. COPFS did not provide a response to the second consultation paper on the National Confidential Forum.

Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?
3. Yes.

Did you have sufficient time to contribute to the consultation exercise?
4. Yes.

Costs
If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.
5. Policy officials from COPFS provided a range of information to the Scottish Government in relation to the Financial Memorandum. This focused on the areas which were likely to directly impact on the work of COPFS and included the following:

- estimated increase in the number of notifications to the court for the use of special measures, following the increased entitlement to certain categories of witnesses;
- estimated increase in the number of child witnesses, following the change of definition to include 16 and 17 year olds and the associated increase in the number of notifications to the court for the use of special measures;
- estimated costs of completing and submitting a child/vulnerable witness notification to the court;
- estimated costs for the increased use of special measures, covering expenses paid to witness supporters;
- estimated costs for the increased number of child witnesses who will fall within the remit of the Victim, Information and Advice service provided by COPFS; and
estimated costs for administering the initial stages of the Victim Notification Scheme, on the basis that there will be increased eligibility under the proposals contained in the Bill.

6. COPFS is content that the financial implications referred to above are accurately reflected in the Financial Memorandum.

**Do you consider that the estimated costs and savings set out in the Financial Memorandum and projected over 15 years for each service are reasonable and accurate?**

7. COPFS is content that the estimated costs and savings set out in the Financial Memorandum (as they apply to COPFS) are reasonable and are as accurate as possible.

8. It was not possible to provide exact figures in relation to some of the information set out above and certain assumptions were required to be made. This is on the basis that COPFS uses a live operational case management system, specifically designed to receive criminal and death reports from the police and other specialist reporting agencies and to manage the cases for prosecution purposes. The information held on the system is structured for these operational needs, rather than for statistical reporting or research purposes.

9. For example, in relation to the increased number of child witnesses who would now be entitled to special measures, it is possible that some of these witnesses would already have been entitled to special measures under current provisions (e.g. as a victim of a sexual offence). It was not possible to quantify this.

10. Further, it was not possible to provide exact information in relation to the number of victims of domestic abuse, sexual offences, stalking and human trafficking and stalking. These figures were obtained from other sources, for example, the Scottish Government statistical publications on sexual offences and domestic abuse. These provided details of how many people had been reported or prosecuted for certain categories of offences in any years. Assumptions were made in relation to how many victims would be associated with each case and how many would ultimately proceed to trial. However, COPFS is satisfied that the information provided is as reasonable and accurate as possible in the circumstances.

11. The Financial Memorandum sets out the total estimated recurring costs to COPFS. However, COPFS is content that these costs can be met from within the organisation, following an internal review of processes and procedures.

**If relevant, are you content that your organisation can meet the financial costs associated with the Bill which your organisation will incur? If not, how do you think these costs should be met?**

12. Yes. As stated in the response to question 5 above, certain assumptions were made in relation to the information provided for the Financial Memorandum.
These assumptions and associated estimates have been accurately covered in the Memorandum.

Wider Issues

Do you believe that the Financial Memorandum reasonably captures costs associated with the Bill? If not, which other costs might be incurred and by whom?

13. COPFS believes that the Financial Memorandum reasonably captures the costs associated with the Bill, but can only comment in respect of COPFS.

Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?

14. It is not anticipated that there will be future costs associated with the Bill that would impact on COPFS.
Did you take part in either of the Scottish Government consultation exercises which preceded the Bill and, if so, did you comment on the financial assumptions made?
1. No

Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?
2. N/A

Did you have sufficient time to contribute to the consultation exercise?
3. Yes

Costs
If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details?
4. The proposed formation of the National Confidential Forum in respect of children abused while in residential care could, contrary to what is stated in the papers to the Finance Committee, could have implications on NHS Boards in respect of the reactivation of traumatic memories and associated psychological problems/distress that this could cause. There is a chance that this may impact on Boards, though clearly the impact would depend on the numbers of people coming forward and the arrangements in place for the NCF to ameliorate and/or address these issues as part of their process.

Do you consider that the estimated costs and savings set out in the Financial Memorandum and projected over 15 years for each service are reasonable and accurate?
5. The potential costs for NHS Boards are not factored in to these assumptions, however as this would be difficult to quantify it would seem reasonable for Boards to respond to this as part of their broader health care pressures.

If relevant, are you content that your organisation can meet the financial costs associated with the Bill which your organisation will incur? If not, how do you think these costs should be met?
6. Boards will need to keep a watching brief on the impact, but it would be reasonable to assume that this could be managed within existing health care resources.

Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?
7. No comment.

Wider Issues
*Do you believe that the Financial Memorandum reasonably captures costs associated with the Bill? If not, which other costs might be incurred and by whom?*
8. No comment.

*Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?*
9. No comment.
Our Finance Director, Carol Gillie has reviewed the questions and has advised the following points. NHS Borders did not take part in the consultation preceding the bill and therefore did not submit comments on the financial assumptions. It is unlikely there will be any financial impact on NHS Borders through the introduction of the bill and we are therefore unable to provide further comment regarding costs not captured through the Memorandum or potential future costs.
Did you take part in either of the Scottish Government consultation exercises which preceded the Bill and, if so, did you comment on the financial assumptions made?

1. The Scottish Court Service (SCS) submitted a response to the initial “Making Justice Work for Victims and Witnesses” paper identifying where the proposed changes would have resource implications for the SCS but did not at that time comment on any financial assumptions made.

SCS were consulted and provided input during the development of the Financial Memorandum to the Bill. No submissions were made in relation to the National Confidential Forum.

Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

2. Yes.

Did you have sufficient time to contribute to the consultation exercise?

3. Yes.

Costs

If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details?

4. The figures provided in the Financial Memorandum reflect the submissions made by SCS on the basis of additional workload estimates provided by the Crown Office and Procurator Fiscal Service (COPFS). The estimates informed:
   - the potential increase in vulnerable witness numbers encapsulated within the provisions of the Bill
   - the likely impact upon the provision of special measures.

5. SCS also submitted estimates associated with the administration of the proposed Victim Surcharge and Restitution Orders.
Do you consider that the estimated costs and savings set out in the Financial Memorandum and projected over 15 years for each service are reasonable and accurate?

6. SCS is content that the estimated costs set out in the Financial Memorandum, insofar as they relate to SCS, are reasonable and as accurate as possible, based on the projected figures and assumptions provided by COPFS.

If relevant, are you content that your organisation can meet the financial costs associated with the Bill which your organisation will incur? If not, how do you think these costs should be met?

7. SCS is content that the estimated costs set out in the Financial Memorandum, insofar as they relate to SCS, are reasonable and as accurate as possible, based on the projected figures and assumptions provided by COPFS.

6. SCS is content that the estimated costs set out in the Financial Memorandum, insofar as they relate to SCS, are reasonable and as accurate as possible, based on the projected figures and assumptions provided by COPFS.

If relevant, are you content that your organisation can meet the financial costs associated with the Bill which your organisation will incur? If not, how do you think these costs should be met?

7. SCS is content that the estimated costs set out in the Financial Memorandum, insofar as they relate to SCS, are reasonable and as accurate as possible, based on the projected figures and assumptions provided by COPFS.

Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

8. SCS is content that the estimated costs set out in the Financial Memorandum, insofar as they relate to SCS, are reasonable and as accurate as possible, based on the projected figures and assumptions provided by COPFS.

Insofar as the estimated running costs are concerned, these are not factored into current provision and the costs would need to inform future discussions with Scottish Government on SCS funding.

Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

8. The figures in the Financial Memorandum represent an informed estimate of the costs which will vary depending on the volume of notices/applications received from vulnerable witnesses.

Wider Issues

Do you believe that the Financial Memorandum reasonably captures costs associated with the Bill? If not, which other costs might be incurred and by whom?

9. SCS believes that the Financial Memorandum reasonably captures costs associated with the Bill, insofar as they relate to SCS.

Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?

10. SCS is not aware of any future costs associated with the Bill.
Did you take part in either of the Scottish Government consultation exercises which preceded the Bill and, if so, did you comment on the financial assumptions made?
1. The Scottish Legal Aid Board formulated the cost assumptions made on the Legal Aid Fund in consultation with officials in the Scottish Government.

Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?
2. Yes.

Did you have sufficient time to contribute to the consultation exercise?
3. Yes.

Costs
If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details?
4. Yes. The costs are estimates based on Scottish Government assumptions as to the numbers of notices for special measures likely to be challenged.

Do you consider that the estimated costs and savings set out in the Financial Memorandum and projected over 15 years for each service are reasonable and accurate?
5. As per answer to Q4. We cannot see any projection of costs over 15 years in the Financial Memorandum.

If relevant, are you content that your organisation can meet the financial costs associated with the Bill which your organisation will incur? If not, how do you think these costs should be met?
6. Funding for legal aid cases in Scotland is non-cash limited. As the FM states at paragraph 17, the Scottish Government is under a statutory obligation to meet the cost of cases that meet the statutory tests. The likely impact on Legal Aid Fund expenditure is expected to be relatively minor.

Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?
7. In terms of the Legal Aid Fund, yes.
Wider Issues

Do you believe that the Financial Memorandum reasonably captures costs associated with the Bill? If not, which other costs might be incurred and by whom?

8. Yes.

Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?

9. There is nothing in the Bill’s documentation to suggest that there would be future, additional costs for the Legal Aid Fund as a result of this Bill.
FINANCE COMMITTEE CALL FOR EVIDENCE

VICTIMS AND WITNESSES (SCOTLAND) BILL: FINANCIAL MEMORANDUM

SUBMISSION FROM VICTIM SUPPORT SCOTLAND

1. Victim Support Scotland is the largest third sector organisation in Scotland that provides practical and emotional support to victims, witnesses and persons affected by crime in Scotland. Annually, we offer support to around 180,000 victims and witnesses through our community based Victim Services which operates in every Local Authority area and our Court based Witness Service which operates in all Sheriff and High Courts in Scotland.

2. Victim Support Scotland welcomes the opportunity to respond to the Finance Committee’s questionnaire in relation to the Victims and Witnesses (Scotland) Bill.

3. We acknowledge that the financial implications of the proposed Victims and witnesses Bill will have cost implications and note the information which has been previously provided by statutory organisations. In our view, these estimates of costs appear to be fair and reasonable.

4. We would wish to make comment in relation to possible additional costs associated with Victim Support Scotland’s support to victims and witnesses within the justice system.

Vulnerable Witnesses and the use of Special Measures

5. In relation to vulnerable witnesses and the use of special measures we note from the information provided by the Scottish Court Service (SCS) that this could result in an additional 18,438 vulnerable witnesses having the ability to access special measures. The Victim and Witnesses Bill Explanatory notes (para 64) indicate that the majority of supporters will come from Victim Support Scotland’s court based Witness Service which operates in all Sheriff and High Courts in Scotland. Our support services are primarily carried out by trained volunteers, for whom there are costs associated to daily travelling and subsistence for volunteers.

6. The additional demands on our services, based on average daily travel and subsistence costs per volunteer of £9.80, and projected costs for Victim Support Scotland in the range of £90,346 to £180,694 (based on a between 50% and 100% requirements for a supporter).

7. We forecast additional costs arising from extra volunteer recruitment and associated training elements required to meet the additional demands on our services. Our 3 day Foundation training course costs an average of £850 per volunteer. Based on an estimate for potentially 50 additional volunteers, this would cost £42,500 (50@ £850).
8. Total estimate of costs to Victim Support Scotland associated with Vulnerable Witnesses and the use of special measures would be between £132,846 and £223,194 per annum.

Victims Surcharge
9. The introduction of the Victims Surcharge Scheme is warmly welcomed by Victim Support Scotland who have been operating a Victims Fund since 2009. It is our understanding that currently the Scottish Government views the administration of this fund being done potentially by the third sector in Scotland. Victim Support Scotland currently operates a Victims Fund from within existing resources. We recognise that establishing a totally new scheme would potentially require some money to cover initial start-up costs and ongoing administration and management costs.

Victim Notification Scheme
10. The extension of the Victim Notification Scheme (VNS) could have a potential financial impact on Victim Support Scotland who have involvement in supporting victims who require assistance in completion of the documentation associated with the scheme. Based on the potential increase of 3000 victims and a take-up rate of between 50% and 100%, (based on average daily travel and subsistence costs per volunteer of £9.80) provisional costings would be between £14,700 to £29,400 per annum.

Oral Representations to Parole Board
11. In relation to oral representations to the Parole Board, Victim Support Scotland could envisage a role in relation to “supporter” for the victim attending Parole Board Hearings. Any associated costs would reflect the information provided by the Parole Board in relation to Victim, plus supporter travel and expenses based on potential take up rate.

Summary of potential additional costs
12. Taking all of the above into consideration, the total estimated financial impact is set out below;

- Total estimate of costs to Victim Support Scotland associated with Vulnerable Witnesses and the use of Special Measures would be between £132,846 and £223,194 per annum
- Total estimate of costs to Victim Support Scotland associated with the Victim Notification Scheme would be between £14,700 to £29,400 per annum
- Total estimate of costs between £147,546 to £252,594 per annum
Justice Committee

Victims and Witnesses (Scotland) Bill

Response from the Scottish Government to the Committee’s Stage 1 report

I write in response to the Justice Committee’s Stage 1 Report on the Victims and Witnesses (Scotland) Bill. I would like to take this opportunity to thank the Committee for its careful consideration of the Bill and all those who contributed to that consideration by giving evidence.

I am pleased that the Committee supports the general principles of the Bill. A number of important issues have been raised during Stage 1 proceedings and a detailed response to each of these is attached in the Annex to this letter.

I hope the Committee finds this information helpful in its further consideration of the Bill.

Kenny MacAskill
Cabinet Secretary for Justice
13 June 2013
Victims and Witnesses (Scotland) Bill

Response from the Scottish Government to the Justice Committee

1. The Committee has sympathy for the Faculty of Advocates’ view (as set out in paragraph 41) and is concerned at any suggestion that the presumption of innocence of the accused may be compromised by the Bill’s use of the term ‘victim’ when referring to cases where guilt has not yet been proven or admitted. There is also the point that the word ‘complainer’ is used in the Criminal Procedure (Scotland) Act 1995 and, as some of the provisions in this Bill are to be incorporated into that Act, issues of clarity and consistency need to be addressed. However, the Committee acknowledges that the word ‘complainer’ may not strike the right tone for a Bill aimed at improving support for victims. We would therefore welcome the Cabinet Secretary’s views on this matter and would refer him to our recommendation on the definition of victim.

2. The Committee recommends that the Scottish Government gives full consideration to including a definition of ‘victim’ on the face of the Bill. This would assist in providing some clarity for individuals, in what may be extremely traumatic circumstances, as to what rights they have under the Bill. We also believe that a clear definition would in some way alleviate concerns raised that use of the term ‘victim’ in the Bill to refer to cases prior to and during a trial may give rise to an assumption that the accused is guilty. The Committee suggests that, as a starting point, the Scottish Government considers those definitions included in the Victims of Crime Assistance Act 2009 of Queensland, Australia, (as suggested by the Law Society of Scotland) and in the EU Directive on establishing minimum standards on the rights, support and protection of victims of crime.

I note the Committee’s comments on these two recommendations. The overarching policy objective of the Bill is to improve the support available to victims and witnesses throughout the justice system, putting victims' interests at the heart of ongoing improvements to that system and ensuring that witnesses are able to fulfil their public duty effectively. I can assure the Committee that, in pursuing that aim, I am mindful that we must also ensure that the justice process is fair to the accused.

While there should clearly be no need for a criminal conviction before a person can be considered a victim for the purposes of receiving support services, otherwise many of the improvements in the Bill would be unavailable to those affected, I agree that there is a need to ensure no negative inference is drawn in relation to the guilt of the accused. I believe that the Bill achieves this, and does in fact draw a distinction between alleged victims and those where a crime has been proven by the courts, by providing clarity in the context of individual sections.

For example, in relation to the right to choose the gender of an interviewer, section 5 of the Bill refers to “... a person who is or appears to be the victim of an offence of a type mentioned in subsection (5)”. Similarly, section 6 of the Bill, which introduces a new category of “deemed vulnerable witnesses”, identifies such individuals by clearly...
referring to a situation where “…the offence is alleged to have been committed against the person…”

I also note the point raised in relation to the word ‘complainant’, and welcome the Committee’s acknowledgement that this may not be appropriate in this Bill. As I explained to the Committee on 14 May, I think the use of the word “victim” to describe those who the Bill seeks to support is accurate and easily understandable and, given the clarity provided in each case where such individuals are referred to, I do not consider that there is a risk to the presumption of innocence.

In relation to the second recommendation, I would like to take this opportunity to assure the Committee that consideration was given to setting out an overarching definition of “victim” in the Bill. However, given that the word “victim” has a fairly clear meaning, and the risk of inadvertently excluding individuals through an overly narrow definition, I considered it to be better to qualify and explain, where necessary, the use of the term where it occurs.

I note the concerns raised by both the Committee and the Faculty of Advocates and, while I am not persuaded that there is a need for an overarching definition of “victim” in the Bill, I am happy to consider further, in conjunction with our justice partners, whether any further clarity is required.

3. The Committee has concerns regarding the level of confusion amongst organisations within the criminal justice system surrounding the meaning of section 1(3)(d) which would allow victims and witnesses, as far as would be appropriate to do so, to participate effectively in investigations and proceedings. We also consider that the lack of clarity on this provision could raise the expectations of victims that they will have a more active role to play in criminal proceedings than can realistically be met, or that, in the attempts to comply with this principle, access to justice for the accused may be compromised. We therefore urge the Scottish Government to consider either clarifying the meaning of section 1(3)(d) in guidance or removing the provision from the Bill.

I note the Committee’s concerns and the call for clarity in relation to the words ‘participate effectively’ which are contained in section 1(3)(d) of the Bill. The general principles are intended to be fairly high level, and to inform the approach and priorities of criminal justice agencies, particularly when setting standards of service under section 2 of the Bill.

The idea of effective participation - that victims and witnesses are an integral part of the justice system, and should be treated as such - underlies much of this Bill and the EU Directive. Victims and witnesses report crime; give evidence; have an interest in the outcome of cases; and a continuing interest in the status of the offender, where there is a conviction. The principle in question is simply intended to reflect that position, and to ensure that it is given consideration by justice agencies when dealing with victims and witnesses. The duty to set out standards of service under section 2 of the Bill, meanwhile, will ensure that a more detailed and practical explanation of how victims and witnesses can expect to be involved in the process is provided along with information on the service they will be entitled to receive from a
particular agency. My officials will continue to engage with relevant organisations during the Parliamentary process to ensure that there is no confusion about any specific aspects of the Bill.

4. The Committee asks the Scottish Government to consider placing the actual standards of service to be complied with by prescribed organisations and individuals, along with details of a reporting mechanism on how the standards are working in practice, within guidance for approval by the Parliament in order to improve the experiences of victims and witnesses.

I note the Committee’s comments in relation to placing standards of service and details of a reporting mechanism in guidance to be approved by the Parliament. If a single set of standards was to be set out in guidance, my concern is that this would not give a detailed and organisation specific indication of what victims and witnesses can expect. I believe this is important, as different organisations inevitably interact with victims and witnesses in different ways.

I consider that organisation-specific standards will better reflect the role each plays in relation to victims and witnesses. To ensure a level of consistency, each of the organisations, in setting out their standards of service, will be required to have regard to the general principles set out in the Bill.

While it would be possible to maintain this organisation-specific approach and set out each individual set of standards in statutory guidance subject to Parliamentary approval, this would inevitably slow down the process of putting the standards in place, and hinder subsequent updates or adjustments to those standards – as may well be necessary in light of experience.

It may be helpful to note that all the named organisations already have in place robust complaints procedures and I believe that any issues arising can be dealt with through this route. This will ensure that, where people are not satisfied with the response, complaints can be escalated to appropriate bodies where necessary (for example the Police Complaints Commission or the Scottish Public Services Ombudsman, as at present).

Given the duty to publish standards and to comply with the general principles, and the existence of robust complaints procedures, I am therefore not persuaded that there is a need to put the standards themselves within statutory guidance.

In relation to monitoring I would draw to the Committee’s attention that Best Value guidance for public sector bodies already requires organisations to ensure that feedback, including complaints about service standards and failures, are recorded and monitored, and feed into the continuous improvement of services. Action to improve support for victims and witnesses is also part of the wider Making Justice Work programme, on which the relevant organisations are represented and which allows them to ensure that actions are co-ordinated. I can assure the Committee that the preparation and publication of the initial published standards will be monitored through the Making Justice Work programme, including arrangements for consulting with victims and witnesses support groups.
However, in light of the points raised by the Committee and witnesses during Stage 1, I am happy to explore the establishment of a more explicit reporting mechanism to ensure that the standards are working in practice.

5. **The Committee supports the proposal to create an online hub to give victims access to information about their individual case, but cautions against this tool completely replacing human interaction and support for victims, which we believe is vital.**

I welcome the Committee’s support for the creation of an online information hub. I assure the Committee that the hub is intended to provide easier access to case specific information and to supplement, rather than replace, the support victims and witnesses already receive from justice agencies and other organisations. It is also hoped that the hub will be a source of useful practical information and guidance about the criminal justice system in general.

My officials will continue to work closely with justice organisations in assessing the feasibility of establishing such a hub.

6. **On balance, the Committee does not believe that a compelling case has been made in support of the introduction of case companions or for the establishment of a Victim’s Commissioner at this time. However, we acknowledge that some victims and witnesses asked for continuity in the support provided across the system.**

I welcome the Committee’s view on this matter and note that it is supported by several victim support organisations.

I continue to believe that a Victims’ Commissioner would largely duplicate the service currently being provided by our victim support organisations in Scotland, as well as using valuable resources which would be better used in directly helping victims of crime.

I note the Committee’s statement regarding continuity of support and agree that this should always be strived for. While I do not support the introduction of “case companions”, I am happy to discuss further with relevant justice organisations how the concerns raised by some witnesses during Stage 1 might be addressed.

7. **The Committee believes that it is vital that communication with victims and witnesses is improved and therefore supports the duty in the Bill to disclose to them case-specific information. We believe that criminal justice bodies must also take better care to ensure that the written information they provide to victims and witnesses is in plain English.**

I welcome the Committee’s support for the duty to share case specific information, and agree that it is essential that victims are able to access information that is set out in appropriate language they are able to understand. I am happy to work with our justice partners to ensure that any written information provided to victims and witnesses is in plain English.
8. The Committee notes concerns regarding the capacity of organisations to comply with the duty to provide information and calls on the Scottish Government to ensure that the necessary finances, training and support is available to those criminal justice bodies to ensure that expectations of victims and witnesses can be met. We also urge the Scottish Government to provide further guidance in relation to those circumstances in which it would be 'inappropriate' for an organisation to disclose case-specific information to victims under section 3 of the Bill.

I note that concerns have been raised about the capacity of some justice organisations to comply with the duty to provide case specific information. My officials were in regular contact with all those organisations which will be affected by the Bill during its development and all were fully involved in discussions about the impact on them, financially and otherwise. Where possible, detailed information was provided and is set out in the Financial Memorandum. This includes specific details of staffing and training requirements as well as the financial implications generally. I anticipate that these organisations will continue to play an active role in contributing to the development of the Bill.

I also note the Committee’s concerns about the occasions when it is considered inappropriate to disclose case specific information. It is anticipated that this will only be required in a minority of cases, for example if releasing information would adversely affect the case.

However, I am happy to consider the provision of further guidance on this section to clarify the circumstances in which a request for information may be refused. My officials will also discuss this matter with the relevant criminal justice organisations.

9. The Committee notes the view of some witnesses that a right to request a review of decisions not to prosecute, as provided for under the EU Directive, could assist in ensuring that decisions are transparent and accountable. We therefore await with interest the conclusions from research commissioned by the Crown Agent on whether to introduce a system of formal review.

I note the Committee’s comments.

10. The Committee welcomes the Cabinet Secretary’s indication that he would be happy to engage with the Crown Office and Procurator Fiscal Service to ensure that the appropriate level of information is given to families of road death victims wherever possible and we would welcome an update on these discussions. Nevertheless, we believe that a statutory requirement may give a greater level of certainty to victims that they would be entitled to receive the information they request at the end of criminal proceedings.

I note the Committee’s comments. COPFS currently release the investigation documents to bereaved families who request them, unless criminal proceedings are ongoing which could be prejudicial to releasing the documents. In these circumstances release will be delayed until the proceedings are concluded.
There are questions around whether releasing such documents to the family would always be appropriate given the distressing nature of the content, including photographs taken at the scene. Releasing the papers on request reflects the fact that some families will not wish to receive such material.

I am not persuaded that it is necessary to give bereaved families a statutory right to obtain copies of the investigation papers relating to fatal road deaths but, given the concerns raised by the Committee, I have asked my officials to discuss this matter further with COPFS to ensure that appropriate information is passed to families where possible.

11. The Committee notes the concerns raised regarding the practical difficulties for the police in complying with the requirement to allow victims to specify the gender of their interviewer and urges the Scottish Government to work in helping the police to improve its capacity to meet the rights under the Bill. The Committee suggests that consideration be given to specifying that, in those circumstances where it is not possible to comply with a request, a full explanation is provided to the individual concerned and is included in the report to the Procurator Fiscal.

I note the Committee’s concern. While this is essentially an operational matter for the police we will be working with Police Scotland on the practical implementation of the measures in the Bill. I note the Committee’s suggestion that an explanation should be provided where the police are unable to fulfil a request. We are happy to discuss that further with Police Scotland and will consider whether the Bill should be amended along the lines suggested.

12. The Committee welcomes the Cabinet Secretary’s commitment to look into the suggestion that the right under section 5 be extended so that a victim can also specify the gender of their forensic examiner and looks forward to receiving details of his conclusions on this matter.

The Committee may be aware that a short-life working group involving Police Scotland, Rape Crisis Scotland, Archway and other stakeholders is considering improvements to the procedures for forensic examination. That group is finalising its report. We will consider this further in light of the group’s report.

13. The Committee welcomes the Cabinet Secretary for Justice’s commitment to consider fully the provisions in the Bill relating to access for vulnerable witnesses to special measures and the right to object to such measures and, in doing so, we would urge him to make every effort to strike the appropriate balance between the rights of victims and the accused. More generally, the Committee seeks clarification as to where responsibility lies in relation to establishing the vulnerability of victims and witnesses and confirmation that those organisations involved in identifying vulnerability will be examining their procedures in light of these provisions in the Bill.

I note the Committee’s comments and can assure it that, while it is not expected that such objections will be lodged or accepted frequently, I do recognise the concerns that have been raised by VSS, COPFS and others. As I advised the Committee on
14 May, I am of course willing to give this matter further consideration and my officials have already begun discussions with COPFS.

It may be helpful if I explain the rationale behind these provisions. At present, there is limited opportunity to raise concerns about the granting of special measures. In light of this I considered that there should be some mechanism by which parties to proceedings can raise any legitimate concerns and have them considered by the court. Sections 9 and 13 of the Bill aim to ensure that while there is a presumption that special measures will be available, there are safeguards in place which allow the court the flexibility and discretion to consider concerns raised about the particular circumstances of a case.

While the Bill will widen the availability of special measures, I agree that it is vital that any changes made are without prejudice to the accused and indeed, this is stated in the recent EU Directive on victims’ rights. The need for such a balance was highlighted in a recent appeal lodged on the grounds that decisions to grant special measures are made by the court with no opportunity for the other party to be present at a hearing, and no opportunity to challenge or review a decision on special measures.

While the court held, in the Opinion delivered by Lady Paton in AMI – v- PF Glasgow [2012], that existing legislation is compatible with Articles 6 and 8 of the European Convention of Human Rights, the proposals in the Bill do significantly extend the categories of individuals entitled to special measures. To ensure compatibility with ECHR and reduce the risk of future challenges, it was decided to include provisions in the Bill for a right to object to special measures to ensure that any legitimate concerns can be raised with the court by any party to proceedings (including the prosecution) and given due consideration.

The Bill allows any witness to be considered vulnerable following an individual assessment and the Committee requests clarification on where responsibility lies for establishing vulnerability. I can confirm that the party citing the witness (COPFS in most cases) will be obliged to carry out individual assessments (which take account of personal characteristics, type or nature of the crime and the circumstances of the crime) of each of their intended witnesses to see whether that witness is vulnerable and, if they are, to submit an application specifying which special measure would be appropriate to assist them. The court will then determine if they are indeed vulnerable and if the special measures sought are the most appropriate.

Vulnerable witnesses for the prosecution will be identified at an early stage in proceedings by a member of COPFS staff, based on the information provided by the police and also on their own findings. All of these witnesses will be sent information on the support available to them and they will also be referred to Victim Information and Advice (VIA). Witnesses can discuss with VIA staff how they have been personally affected by the crime and whether they would benefit from the use of special measures. In some cases it may be appropriate to personally meet with the witness to ensure that they are fully assessed and offered the necessary support for giving evidence.
14. The Committee asks the Scottish Government to make every effort to ensure that removal of the presumption that child witnesses under the age of 12 will give evidence away from the court building does not lead to the unintended consequence of children giving evidence in court against their will.

I note the Committee’s concern. Feedback from stakeholders indicated that the presumption that children under 12 years of age will give their evidence away from the court building in certain cases may be being applied too strictly, resulting in children who wish to give evidence in court, perhaps to ensure that they are not separated from a parent/guardian, are being forced to do so from a remote location. The Bill makes a small amendment to put more weight on the views of the child so that if a child expresses a desire to give evidence in court, there will be a presumption that this will be allowed.

The Bill will not, however, force child witnesses to appear in court, nor will it make significant changes to the current, and sensible, presumption that young witnesses should give evidence remotely. The Bill will provide children with more choice, not less. However, in light of the Committee’s comments, I am also happy to discuss the points raised during Stage 1 evidence with relevant justice partners.

During the Committee session of 14 May there were some questions raised about the longer-term impacts of children under 12 appearing in court. While I am not aware of any research looking at this area specifically, I assure the Committee that the rationale for taking this proposal forward was to ensure that individual circumstances are taken into account in order to reduce stress for the witness and their family.

I recognise that children under 12 are particularly vulnerable and I want to ensure that they are able to give their evidence in a way and in an environment that best meets their needs. I would reiterate that this change does not mean that a child witnesses cannot give evidence away from the court building, just that it is not automatically assumed to be the best support, if this is against the child’s wishes.

15. The Committee has concerns regarding the apparent lack of regard given to victim statements by the courts given that, in writing them, victims are likely to have spent some time and experienced distress reliving the crime, in the belief that their statement will have some impact. The Committee asks the Cabinet Secretary to respond to these concerns.

It is absolutely right that victims of crime should have the opportunity to communicate the physical, emotional and economic impact of that crime. That is why I introduced the victim statement scheme. I note the Committee’s concerns about the consideration that is given by the courts to victim statements and I will bring this to the attention of relevant justice organisations and the judiciary. While the Bill offers more flexibility about the timing of victim statements, the ultimate decision on sentencing is a matter for the sheriff or judge and he or she will consider all the circumstances of the case, including what weight should be given to any victim statement.
16. The Committee recognises how distressing it would be for victims of some offences to receive money from their offender. We therefore welcome the Cabinet Secretary’s assurances that appropriate guidance will be prepared to ensure that victims’ views on whether or not the appropriateness of a compensation order being imposed are taken into account.

I note the Committee’s comments on compensation orders. It is already current practice for the court to consider the views of the victim when making a decision on the appropriateness of imposing a compensation order. My officials will, however, discuss this matter further with the Judicial Office for Scotland and relevant justice organisations.

17. The Committee accepts that police officers and staff are at disproportionate risk of being assaulted while at work; however, we believe that introducing restitution orders only for police officers and staff and not for other occupations could prove divisive. We also appreciate that extending restitution orders may increase administration costs. On balance, we would ask the Scottish Government to give further consideration to the merits of this proposal.

The key to the successful operation of the restitution order is that there is a defined offence, affecting a defined group of persons, for whom exist already appropriate beneficiaries whose functions are precisely assisting that group of persons. All these conditions are present in the case of police officers and police staff. While, for example, definitions of emergency workers exist, and there are respective statutory offences, there is no equivalent beneficiary from which all emergency workers would qualify for assistance. The operation of any fund for emergency workers is thereby rendered greatly more difficult. Appropriate beneficiaries (which may not currently exist) would have to be identified for each category of emergency worker.

Moreover it is likely that the legislation would then have to be framed to ensure that where a court awarded a restitution order in respect of an offence against a particular category of emergency worker – for example a nurse – the proceeds would go to a beneficiary offering services to nurses and not, say, to coastguards or social workers. Given the relatively low incidence of convictions for assaults on emergency workers (324 for all categories combined in 2010-11) the amounts available to any particular beneficiary are likely to be very small indeed, particularly in comparison with the administrative effort involved. These difficulties are compounded for other categories of workers, in respect of which there is not a defined offence.

Nevertheless, if a practical method could be found of overcoming these difficulties, I would be happy to give it serious consideration.

18. The Committee welcomes the Scottish Government’s commitment to consult those bodies affected by section 22 of the Bill in relation to the victim surcharge, before laying draft regulations before the Parliament. The Committee would welcome sight of these regulations as soon as possible to assist its scrutiny of the Bill.
I welcome your comments on the introduction of the victim surcharge and the creation of a victim surcharge fund to provide additional practical and immediate support to victims in the aftermath of crime.

Draft regulations setting out further detail on the operation of the surcharge will be developed over the coming months, and will be made available to the Committee prior to Stage 2.

19. The process of assessing whether a life prisoner should be released is likely to be an extremely traumatic experience for a victim and it is therefore essential that they are not given false expectations as to the level of influence that their representations can have on the Parole Board of Scotland’s decision. The Committee therefore believes that guidance is required to ensure that victims are fully aware of the Parole Board’s role in assessing the risk of the offender if they are released on licence. This guidance should include, for the benefit of the victim, those factors that they may comment on and should also make clear that the victim’s views are shared with the offender.

We will continue discussions with the Parole Board for Scotland (PBS) on the changes to the way that victims who are entitled to do so will be able to make representations to the PBS about the release of a prisoner.

This will include the development of revised guidance, which will include generic information on the role of PBS in assessing suitability for release; what representations should focus on and what the PBS can and cannot consider in reaching a decision. The guidance will include reference to the fact that the prisoner will see any representations that are made, and that they will only be withheld from the prisoner in very particular circumstances where there were deemed to be non-disclosable under Rule 6, non-disclosure of information, of the Parole Board (Scotland) Rules 2001, for example if the personal safety of the victim making the representations would be put at risk by doing so. However, it would be very unusual to withhold representations from a prisoner.

We will also revise and update the related guidance that is made available to victims who are registered on the Victim Notification Scheme (VNS) to take account of the reforms being made by the Bill.

20. The Committee supports the general principles of the Bill. We consider that the Bill provides much-needed support and protection for victims and witnesses and we hope that it will help improve their experiences of the criminal justice system in the future. However, we believe that improvements are required to certain provisions in the Bill, in particular to ensure that the rights of both the accused and those of victims and witnesses are balanced appropriately. Our recommendations on these issues are set out in the main body of this report.

I welcome the Committee’s support for the general principles of the Bill, and note its comments on certain provisions.

Other issues arising during evidence
I note the Committee’s comments in relation to the suggestion by the Faculty of Advocates and Rape Crisis Scotland that independent legal representation be available to victims in certain circumstances, and am happy to engage with both bodies to seek further detail on this proposal.

The other matters raised which do not relate directly to the Bill (e.g. child witnesses having access to witness statements; police assessments of vulnerability; and victims being informed of bail conditions) are primarily operational in nature. However, we are happy to discuss these further with relevant justice partners and respond to the Committee in due course.
Victims and Witnesses (Scotland) Bill: The Cabinet Secretary for Justice (Kenny McAskill) moved S4M-06987—That the Parliament agrees to the general principles of the Victims and Witnesses (Scotland) Bill.

After debate, the motion was agreed to (DT).
Victims and Witnesses (Scotland) Bill: Stage 1

The Deputy Presiding Officer (John Scott):
The next item of business is a debate on motion S4M-06987, in the name of Kenny MacAskill, on stage 1 of the Victims and Witnesses (Scotland) Bill.

I call Mr MacAskill to speak to and move his motion. Cabinet secretary, you have 13 minutes.

15:11

The Cabinet Secretary for Justice (Kenny MacAskill): I am grateful for the opportunity to open the stage 1 debate on the Victims and Witnesses (Scotland) Bill and I thank the Justice Committee and the Health and Sport Committee for their efforts in scrutinising the justice and health elements of the bill at stage 1 and for preparing their comprehensive stage 1 reports. I also record my thanks to the groups and individuals who provided evidence to the committees during stage 1, as well as those who have engaged directly with us during the bill’s development and the parliamentary process to date.

The bill’s clear aim is to put the needs of victims and witnesses at the centre of the criminal justice system. It includes proposals that ensure that justice agencies set out clear standards of service for victims and witnesses; that give victims and witnesses a right to access information about their case; that improve the identification of vulnerable witnesses and the support available to them; that introduce a victim surcharge and restitution orders to make offenders contribute to the cost of providing vital support to the victims of crime; and that make various other improvements to the justice system.

The bill also contains proposals to establish a national confidential forum that will give adults who were placed in care as children the opportunity to recount their experiences in a confidential and non-judgmental setting to an independent panel. Those proposals sit separately from the justice-related proposals, and I will turn to that part of the bill in due course.

The bill’s proposals have not been developed in isolation. In addition to the formal consultation exercise, we have in developing the bill engaged extensively with victim support groups and individual victims. Only this morning, I visited Victim Support Scotland’s national support centre in Hamilton and heard from volunteers and indeed victims about their experiences of interacting with the justice system and the improvements that
would have made the process a little easier for them.

It is important to note that the bill cannot be seen in isolation. It is integral to our wider making justice work programme, which brings together a wide range of reforms to the structure and processes of the courts, access to justice and tribunals and administrative justice. That programme has been and is being developed with partners across the justice system, including the Crown Office and Procurator Fiscal Service, the Scottish Court Service, the Scottish Legal Aid Board and the Police Service of Scotland, and represents the most significant set of reforms to our courts for more than a century. One of the programme’s central objectives is to improve the experience of victims and witnesses, and the bill is a key component of that.

I warmly welcome the support of both the Justice Committee and the Health and Sport Committee for the general principles of the bill and their recommendation to the Parliament that they be approved. We recognise that the need for witnesses and victims to be cared for and their care to be improved is a matter that is shared across the political divide.

I turn, first, to the Justice Committee’s report. It is clear that although the committee is generally supportive, concerns have been raised in certain areas and requests have been made for further clarification. I will address a few of those issues briefly now and will be interested to hear members’ views during the debate.

The use of the word “victim” in the bill has raised concerns that the presumption of innocence of the accused may be compromised; it was pointed out that the term “complainer” is used in other legislation. The report recommended that the term “victim” be defined in the bill. I have made it clear from the start that ensuring that the rights of the accused are not compromised is absolutely critical, and I welcome the committee’s scrutiny of the bill from that important perspective. However, I do not believe that the bill poses any risks to the presumption of innocence. While there is no overarching definition of the term “victim”, the bill provides clarity where necessary in the context of individual sections—for example, by making it clear that the individuals referred to may be victims or alleged victims.

I look forward to members’ comments today and, although I am not persuaded that an overarching definition is required, I am happy to consider whether any further clarity may be necessary. If members have such views, I will be happy to meet them for discussion.

Another area of concern that was raised by the committee is the proposed right to object to special measures for vulnerable witnesses. The intention behind those provisions was not to complicate proceedings or to undermine the support that is available to vulnerable witnesses, but rather to ensure compatibility with the European convention on human rights, as we are required to do, and to give the court the flexibility and discretion to consider any legitimate concerns that are raised by any party to the proceedings.

While we do not expect objections to be lodged or granted very often, there is clearly a possibility that there may be legitimate concerns about the particular special measure to be used. Therefore, we consider that there should be a way of raising objections with the court. I certainly understand the concerns around how the proposals may operate in practice.

Malcolm Chisholm (Edinburgh Northern and Leith) (Lab): Is the cabinet secretary saying that the existing law is not compatible with the ECHR? What does he have to say to Scotland’s Commissioner for Children and Young People and, I believe, others, who say that there is no ECHR issue with regard to children, for example?

Kenny MacAskill: We would not have laws in this country that were not compatible with the ECHR, because of the nature of how this Parliament is established. I can assure Mr Chisholm of that. Equally, we wish to ensure that those who may seek to challenge this legislation in respect of the rights of an individual who may be facing a charge are able to be dealt with. We are looking to establish a way to take account of the right of the accused, which may be used very rarely but which would give their agents the opportunity to raise the matter with the court, for the judiciary ultimately to preside. That would not take away from what is clearly intended—and, indeed, delivered—in the bill: that we ensure that vulnerable victims and witnesses have the right to express themselves.

I think that I can satisfy the member that no matters will be made worse in terms of children’s hearings. Equally, we will provide an opportunity to build upon the good work that will be done to help vulnerable witnesses, balancing that with a very few cases in which there may be a legitimate right at least to put an objection, ultimately to be considered by the judiciary.

As I advised the committee, I will give further consideration to the issue, and I can confirm that my officials have begun discussions with the Crown Office and Procurator Fiscal Service.

Jenny Marra (North East Scotland) (Lab): Does the cabinet secretary share the concerns of organisations such as Scottish Women’s Aid that the challenge to the use of special measures may increase circumstances of anxiety and reduce
confidence among witnesses about giving their evidence in court?

Kenny MacAskill: I do not believe so. I met Scottish Women's Aid just recently and I believe that, overall, the bill will provide what such agencies clearly desire. However, to ensure compliance—to ensure that we provide a safety net—the issue needs to be dealt with appropriately in a balanced way, which is why we have started discussions. I assure Ms Marra that the discussions will not simply be with the Crown—they will also be with agencies such as Scottish Women’s Aid, to ensure that we reach the right balance.

On the proposals in the bill to put a duty on justice organisations to set out standards of service for victims and witnesses, the committee suggested that the standards should be set out in statutory guidance to be approved by the Parliament, along with details of a reporting mechanism. Although it would be possible to set out each individual set of standards in that way, I have been very clear that they must be organisation specific and I am concerned that such an approach would slow down the establishment of the standards.

I am satisfied that the organisations will work together—with input from victim support organisations—to create robust sets of standards, without the need for further parliamentary scrutiny. However, as I noted to the committee, I am willing to consider further whether there should be a more formal reporting mechanism to monitor how the standards are working in practice. We will discuss that with our justice partners.

I was pleased to note the committee’s view that a compelling case has not been made with regard to the establishment of a victims’ commissioner. I share that view, along with several victim support organisations, including Victim Support Scotland and Scottish Women’s Aid. Given the excellent work that is being done by our victim support organisations in Scotland, I continue to believe that the establishment of such a post would simply be a duplication of effort and an extra layer of bureaucracy, and that our limited resources would be better used in directly helping victims of crime.

On the provision in the bill for the establishment and operation of the national confidential forum, again I thank the Health and Sport Committee for its careful and thoughtful scrutiny during stage 1. I also thank the witnesses who provided evidence, in particular former residents of childcare institutions who have shown great fortitude in coming forward to share their views. We have listened with great care and attention to those views, which will help to ensure that the national confidential forum makes a real difference to the lives of people who were placed in institutional care as children by helping to improve their health and wellbeing and contributing to the improvement of provision and support to looked-after children.

I am delighted that there is widespread support for the establishment of the forum. I am also heartened by the recognition of the value of acknowledgement to people who were placed in institutional care as children, in particular survivors of abuse and neglect. Those survivors have been asking for their experiences to be heard and acknowledged for many years and we are responding.

In 2010, we established the time to be heard pilot forum for people who were placed in Quarriers village as children. The pilot forum, which operated for only a matter of months, was attended by nearly 100 former residents of Quarriers. The independent evaluation of the experience showed clearly that it was of positive value and benefit to the people who took part and that they felt heard and believed.

It is our intention, with the bill, to extend that opportunity to all the people who were placed in institutional care as children in Scotland. The experience of time to be heard clearly demonstrates that acknowledgement is of value and that it is most certainly not a second-class option. The experience also shows that the benefits to people of acknowledgement are not contingent on access to justice remedies. For some people, justice remedies hold little appeal, but safe, supported, confidential acknowledgement does.

It was the Scottish Government that approached the Scottish Human Rights Commission in 2009 to develop a human rights framework to inform the development of what has become the national confidential forum. That approach, in turn, led to the interaction process, which was mentioned by several stakeholders who gave evidence.

The Scottish Government is participating in the interaction process with an open mind. However, we do not intend to wait for remedies that may arise from the interaction process to take forward the establishment of the national confidential forum.

The Deputy Presiding Officer (Elaine Smith): Cabinet secretary, could you come to a conclusion?

Kenny MacAskill: People should not be denied the opportunity of acknowledgement—they should not be denied that benefit.

Jenny Marra: Will the member take an intervention?

Kenny MacAskill: I am sorry; I have been asked to wind up.
I welcome the wide support to date for both the justice and health elements of the bill. We are happy to discuss and debate the bill, as would be expected, at stage 1 and that option is open to Ms Marra outwith the chamber or at a future date.

I thank the Presiding Officer for her indulgence, and I move,

That the Parliament agrees to the general principles of the Victims and Witnesses (Scotland) Bill.

The Deputy Presiding Officer: I call Christine Grahame, who will speak on behalf of the Justice Committee. Ms Grahame, you have nine minutes.

15:25

Christine Grahame (Midlothian South, Tweeddale and Lauderdale) (SNP): As the Presiding Officer says, I speak in this debate on behalf of the Justice Committee, which was the lead committee considering the bill. However, I want to put on record—I feel a letter to the Standards, Procedures and Public Appointments Committee coming on—that I have never understood why, in a stage 1 debate, the cabinet secretary or minister gives the Government’s response to the convener’s report on behalf of the committee before the convener has reported to the chamber. It would be much more useful if I got to say my stuff and then—if he will forgive me for saying so—the cabinet secretary gave his response afterwards. Much of my speech has probably been pre-empted, but off I go anyway.

The bill has two main purposes: first, to improve the experience of victims and witnesses, which was the focus of the Justice Committee’s consideration; and secondly, to create the national confidential forum, which was examined by the Health and Sport Committee and which my colleague Duncan McNeil, along with other members, will speak about. The Justice Committee has already written to the Health and Sport Committee to say that we anticipate that it should consider those provisions at stage 2, as we took no evidence on them and that would seem an appropriate division of the bill.

I, too, thank all those who provided written and oral submissions. I also thank the members of the Justice Committee, which it is always a pleasure to chair—that is a brownie point for me. I also thank all those victims who spoke to committee members about their individual experiences of the criminal justice system during a specially arranged private and informal discussion. Key themes from that session were reflected in the committee’s formal scrutiny of the bill and in its report. I know how difficult it was for those people to speak to us about their experiences and to relive the pain that they had suffered five or 10 years previously. We saw how the pain of those events and of their experiences of the justice system was just below the surface.

As the cabinet secretary has said—I shall not say that more than once—the committee supports the general principles of the bill. We believe that the bill will provide much-needed support and protection for victims and witnesses. Many people in those positions hope never to be in a court, and of course it is an extraordinarily difficult experience for them. However, our stage 1 report highlights, as it should, a number of areas that could be improved to ensure, in particular—I know that this is a difficult issue—that the rights both of the accused and of victims and witnesses are balanced appropriately. Let me highlight some of those issues.

On the definition of victim, like the Faculty of Advocates we are concerned that the innocence of the accused might be compromised. Therefore, we suggested the use of the term “complainer”, which is used in certain sections of the Criminal Procedure (Scotland) Act 1995. The cabinet secretary rejected that in his response, but I think that we still have concerns about the proposal. However, I will leave members to raise that point in the open debate.

On the general principles, there was broad support that certain criminal justice bodies should follow those in their dealings with victims and witnesses, but there was some confusion and concern, which we felt will be shared by the general public, about the provision that gives victims and witnesses a right “to participate effectively in the investigation and proceedings.”

Victim Support Scotland went so far as to suggest that the provision “should be struck from the bill”.—[Official Report, Justice Committee, 16 April 2013; c 2596.]

There are concerns that such a right would lead people to have expectations that would never be fulfilled and were never intended to be fulfilled. I note that we will look at a more detailed and practical explanation of how victims and witnesses are expected to be involved in the process.

Communication with victims and witnesses is very important and is not as effective or as co-ordinated as it should be. Victim Support Scotland told the committee that victims have to tell their story around 16 times during the course of reporting a crime through to the trial process. That should not happen. Therefore, the committee believes that individuals working in the criminal justice system should be properly trained to show sensitivity and respect in their communications with victims. Any written information that is provided must be—these are key words—in plain English.
Although continuity in the support that is provided across the system is needed, like the cabinet secretary we do not believe that a compelling case was made for the introduction of case companions or the establishment of a victims commissioner. The issue with case companions is a practical one about how someone could always be available as a case companion to liaise with a witness or a victim. However, we certainly think that there should be continuity in the personnel who keep people informed.

Jenny Marra rose—

Christine Grahame: I hope that you are not going to challenge me—it is your report.

Jenny Marra: I am not going to challenge you, convener. The evidence that we heard from the victims of crime compellingly showed that people do not want to tell their story again and again to different people in the criminal justice system. Does the convener agree that the message from those victims was that they were looking for some point of contact and one go-to person to provide continuity?

The Deputy Presiding Officer: I remind members to speak through the chair.

Christine Grahame: The report states:

“witnesses asked for continuity in the support provided across the system.”

That is the important part. However, I think that we all agreed that allocating one person was just not practicable.

It has been suggested that there should be an online hub to give victims access to information on their individual cases. That would not be a bad thing, but it should not replace the human touch, because victims and witnesses need a bit of TLC. It is not good enough just to have a hub. Again, the information should be provided in plain English and not in the legal jargon that the lawyers, courts and police understand but which means nothing to civilians who are engaged in the process.

On vulnerable witnesses, there was particular concern that the bill will allow objections to requests for measures to protect child witnesses. We have concerns about the removal of the presumption that child witnesses under the age of 12 should give evidence away from court. That must not have the unintended consequence of children giving evidence in court against their will. We just flag that up as a bit of an orange light.

We appreciate that there might be absolutely justifiable practical reasons why the police could not comply with a witness request to specify the gender of their interviewer, but we suggest that, where that is not possible, a full explanation should be provided to the person concerned and should be included in the report to the procurator fiscal, so that everybody knows why that could not happen.

We see the possible merits of compensation orders, but we feel that the orders could be counterproductive and that it could be distressing for victims to be offered money from an offender, as it were. We therefore suggest that the issue should be dealt with sensitively by ensuring in the first place that the victim wants that to happen.

We have asked the Scottish Government to give further consideration to the merits of the proposal in the bill to introduce restitution orders. We accept that police officers and staff are at disproportionate risk of being assaulted while at work, but we believe that introducing restitution orders for police officers and not for those in other occupations could prove to be divisive. Where would one draw the line? Would we include firefighters, ambulance staff, teachers or shopkeepers? There are difficulties with that, which have already been aired in the press.

Just as participating effectively in a case should not lead to heightened expectations, victims should not have heightened expectations about the level of influence that they can have through any representations that they make to the Parole Board for Scotland. A victim might think that they have more influence than they actually have, which would be unfair and wrong. We therefore recommend the introduction of guidance so that no one misunderstands the position.

I will leave the issue of road death victims to other members, but we hope that we can get something into the bill on that. We recommended a statutory requirement to give people a right to ask for all information relating to a family member’s or loved one’s death in a road traffic accident, although not necessarily a right to receive everything. Other members can develop that.

We support the bill. We have identified a number of recommendations to improve certain provisions with a view to ensuring that the rights of the accused and those of victims and witnesses are balanced appropriately, which is terribly important. I have touched on some of the recommendations and I am sure that other committee members will pick up on some of the aspects of the bill that I have not had time to cover. I look forward to hearing the other speeches.

The Deputy Presiding Officer: I call Duncan McNeil to speak on behalf of the Health and Sport Committee.
Duncan McNeil (Greenock and Inverclyde) (Lab): I, too, express my thanks and appreciation for all those who allowed us to do our job in support of the Justice Committee in considering the bill, with a particular focus on the national confidential forum.

It must be said that the process was not without challenges, because people did not see the split in responsibilities. It is worth noting that the justice aspects of the forum posed some difficulties as we took evidence. On one hand, our committee’s focus was clearly on health and wellbeing. On the other, a number of witnesses suggested to us that the absence of accountability itself proved detrimental to the health and wellbeing of some survivors. There was a difficulty in that.

We did not ignore the justice-related issues as we heard and listened to them, but we had to make it clear to the witnesses that we were not considering in depth issues such as the time bar and consultation. We heard, listened to and recorded their evidence on them and we respectfully suggest that, if those matters need to be dealt with, that should be done by the Justice Committee.

Therefore, I will concentrate my remarks on the Health and Sport Committee’s work, with a particular focus on the national confidential forum.

Sorry is the hardest word and even more difficult than saying the word is acting upon it. Nine years ago, Jack McConnell stood where the cabinet secretary is sitting and offered a full apology to adult survivors of childhood abuse. The then First Minister said:

“we in the Parliament, on behalf of the people of Scotland, recognise that they were wronged and that we will do more to support them in the future than we have ever done in the past.”—[Official Report, 1 December 2004; c 12389.

The national confidential forum will provide a voice to some who, until now, have been denied the right to have their say. One participant in the time to be heard pilot forum told of their experience of abuse in a children’s home in the 1940s. They had to shoulder that burden alone for 70 years. It is unimaginable.

The forum will certainly meet the needs of some people but it will not satisfy everyone. The expectations of the survivor community are high and anyone who has spent time with survivors, as we did in our engagement, can tell members that they place great value on trust. However, their trust is fragile. People have been promised help in the past, only to be let down.

Therefore, we were pleased to hear that the Scottish Government is contributing to the interaction process. There is also activity on the civil litigation time bar and other justice-related issues. I am sure that we all agree that that momentum must be maintained if the interests of all survivors are to be served.

The committee heard evidence at stage 1 from individuals, survivors groups, children’s organisations, care providers, regulators and human rights experts. One witness told us:

“Survivors will judge the process, the bill, the act and the national confidential forum on the personal outcomes for them.”—[Official Report, Health and Sport Committee, 23 April 2013; c 3640.]

For those who choose to participate in the forum, it is crucial—we heard it time and again—that support be provided before they take part so that they know what to expect out of it and what the process will be. An element of support is also needed during and, indeed, after the process because, as we heard, there is a real risk of retraumatisation as a result of it.

Another issue on which we took evidence was the exclusion of those who had been in foster care. We would like that part of the eligibility criteria to be given further consideration. Kathleen Marshall, who was involved in the time to be heard pilot and was formerly Scotland’s Commissioner for Children and Young People, told us that it was an area from which there was most to learn, and learning lessons was something of a theme in what we heard.

The Care Leavers Association said that measures and outcomes were all fine and well, but that

“A life in care and beyond care is much bigger than that ... this debate brings in the emotional side—the love, care and support that are seriously lacking in our current care system”.—[Official Report, Health and Sport Committee, 23 April 2013; c 3659.]

How the work of the national confidential forum will inform in practice that care system now and in the future is not entirely clear from the bill. The centre for excellence for looked after children in Scotland asked for more detail; perhaps the minister will be able to elaborate later. The Church of Scotland raised the point about exploring links between the forum and the care providers, and we took other evidence on that, so I hope that that point is taken up.

We acknowledge the wider approach that is being taken by the Scottish Government via its survivors strategy. We recognise that access to counselling, support, mental health services and advocacy is crucial. From the evidence that we took, we saw the need for a choice of accessible services, long-term support and a skilled mental health workforce. The Health and Sport Committee welcomes the therapeutic value that the national confidential forum will bring. We recall
that apology from the First Minister in 2004 and pledge to do more to help those who were abused as children in the care of the state. There is a moral imperative here. A tailored choice of therapeutic supports and other remedies should be available to survivors.

The Deputy Presiding Officer: Mr McNeil, you must conclude.

Duncan McNeil: Whether we call it a person-centred approach or the right thing to do, or say that it is not before time, action is necessary. We support the bill at stage 1.

15:41

Jenny Marra (North East Scotland) (Lab): Labour is happy to support the Government’s motion and the general principles of the Victims and Witnesses (Scotland) Bill.

Earlier this year, at the Scottish Labour Party conference in Inverness, we were privileged to hear about Helen Richardson’s journey through the Scottish justice system as an immediate family member of a victim of crime. In 2010, Helen’s sister was murdered in her Angus home, which turned the lives of Helen and her family upside down.

During her powerful speech at the conference, Helen Richardson detailed her frustration as she moved through disjointed, confusing and protracted processes in the justice system at a time of great anxiety and grief. We cannot escape the need for people such as Helen to assist in the disposal of justice but, while recognising her duty to the justice system, we must also recognise our responsibility to provide victims and witnesses with the knowledge and support that they need.

We agree with the underpinning principles of the bill, but it does not go far enough in practice to offer the required level of support. For example, let us look at the measures to supply more information to victims and witnesses.

The bill seeks to improve the flow of information to victims and witnesses by placing a duty on the procurator fiscal, the Scottish Court Service and Police Scotland to disclose case-specific information. We acknowledge that those measures will make more information available, but the Crown Office has made it clear that information will be useful only if the victim or witness who receives it can understand it. Furthermore, changes such as those relating to victim statements in court or to victim and witness representations to the Parole Board will, while giving greater flexibility, inevitably demand more answers and decisions from victims and witnesses.

For that reason, Scottish Labour’s proposal for case companions is compelling. As a single point of contact, a case companion would be assigned to a victim or witness from the moment when they were identified and for as long as their interaction with the justice system lasted. They would be a central point of information and guidance, whether they were appointed as a third-party provider or internally in the justice system.

We believe that the provision of case companions would best embody the letter and spirit of the European Union directive that has brought us to the chamber today. That legislation states:

“Member States should consider developing ‘sole points of access’ or ‘one-stop shops’, that address victims’ multiple needs when involved in criminal proceedings, including the need to receive information, assistance, support, protection and compensation.”

Christine Grahame: I simply want Jenny Marra to confirm her position, because she signed up to the words:

“On balance, the Committee does not believe that a compelling case has been made in support of the introduction of case companions”.

What has changed for her?

Jenny Marra: Committee reports are always agreed by the committee, but Scottish Labour thinks that there is a compelling case for case companions.

Just as the Government is legislating to expand the choices and information given to victims and witnesses, so is it legislating to expand the need for guidance and support on making those choices. To make his changes as meaningful as possible, I hope that the cabinet secretary thinks again about our call for case companions.

One area of concern that we have is about the bill’s monitoring and reporting procedures.

John Finnie (Highlands and Islands) (Ind): Given the member’s strength of feeling on case companions, did she think about whether it would have been appropriate to have a minority entry put in the Justice Committee’s report? The position that the committee’s convener outlined is entirely accurate.

Jenny Marra: As I said in response to the convener, committee reports are always agreed by the committee, and I think that we made our point in committee that we think that case companions are a good idea. Stewart Maxwell is shaking his head, but he was not there to hear the discussions.

Bruce Crawford (Stirling) (SNP): Will the member give way?

Jenny Marra: No.
As I said, one area of concern that we have is about the bill's monitoring and reporting procedures. Our concerns were raised during the committee’s evidence sessions and are reflected in the committee’s report. Scottish Labour believes that the best way to achieve effective performance monitoring is through a fully independent victims commissioner, to which the cabinet secretary alluded in his opening speech. Creating such a role would ensure transparent, independent and focused oversight of a complex system.

Christine Grahame: Will the member give way?

Jenny Marra: No.

The Deputy Presiding Officer: The member is not giving way. [Interuption.] Can we have order, please?

Jenny Marra: I clarify that I am speaking from the Labour Party's position and that I am not speaking on behalf of the committee. [Interuption.]

The Deputy Presiding Officer: Order.

Jenny Marra: Creating an independent victims commissioner role would ensure transparent, independent and focused oversight of a complex system.

Gil Paterson (Clydebank and Milngavie) (SNP): Is this a Labour pamphlet that we are hearing?

The Deputy Presiding Officer: Mr Paterson, can we please have order in the chamber to hear Jenny Marra?

Jenny Marra: Creating a role such as a victims commissioner would ensure transparent, independent and focused oversight of a complex system. It would do so exclusively through the eyes of victims and witnesses and would lend a powerful voice to their cause.

When my colleague Dave Stewart consulted on the proposal in 2009, it gained a favourable 77 per cent in support from organisations, including Victim Support Scotland, which said:

“We look forward to seeing the development of the new office and hope it will play an active, tangible role in the protection and promotion of victims' rights in Scotland.”

I hope that our call for a victims commissioner is considered more fully by the Government as the bill moves forward.

An important provision that I believe is missing from the bill and which Rape Crisis Scotland highlighted is the right of complainants of sexual offences to access legal advice when the defence requests records in relation to their sexual history, medical records or character.

We have concerns, as the convener said, about the use of the word “victim” throughout the bill and its impact on the presumption of innocence, which is a cornerstone of our legal system. Similarly, the provision for victims to participate effectively in an investigation and proceedings remains ambiguous at best. Murdo MacLeod, Queen’s counsel, stated in his evidence that he could

“only imagine that it means that people can effectively participate in terms of giving evidence ... Beyond that, I have no idea what the provision means.”—[Official Report, Justice Committee, 23 April 2013; c 2683.]

I think that the Government has yet to address the concerns of the committee that the provision might falsely raise the expectations of victims.

We sympathise with the idea of a victim surcharge, but it is vital that it does not become a substitute for properly funded victim services. [Interuption.]

The Deputy Presiding Officer: Order. There are conversations taking place in the chamber when the member is trying to make her speech.

Jenny Marra: We would therefore appreciate assurances that it is feasible to collect the money and that the money will not simply be used to plug holes in a decreasing justice budget.

The bill gives us an opportunity to make a difference to the lives of victims and witnesses of crime. However, we believe that the Government should do more to clarify the points that I have raised and should provide greater support and better oversight for victims and the organisations that support them. Although we agree with the principles, there is still more work that can be done. I look forward to working with the Government at stages 2 and 3 to address those issues.

15:50

John Lamont (Ettrick, Roxburgh and Berwickshire) (Con): I welcome the opportunity to speak in the debate. The Justice Committee has spent a lot of time considering the bill and gathering the views of all those who are involved in the justice system. As the committee’s convener said, we also took evidence in private from witnesses, who recounted their experiences.
There is a consensus that more needs to be done for victims of crime and that more can be done to ensure that victims are put in their rightful place, which must be at the heart of the justice system. I therefore welcome the bill, which the Scottish Conservatives will support at stage 1.

The bill will go a fair way towards helping those who are unlucky enough to be affected by crime. Some of the most useful measures include the introduction of a victim surcharge, which will mean that offenders contribute to supporting those who are affected by crime; the creation of a right for victims and witnesses to access certain information about their case; the widening of the application of special measures that are available to witnesses who are deemed to be vulnerable; the right to choose the gender of an interviewer in sexual offence and domestic abuse cases; and the creation of police restitution orders to help support officers who are injured in the line of duty.

The Scottish Government is to be commended for introducing a bill that is dedicated to victims and witnesses; that has not happened in Scotland before. The committee considered a number of suggestions for improving the bill, which I hope that the Government will reflect on. Perhaps most significantly, we heard from a number of witnesses that, although it confers rights on victims, the bill does not define the term "victim". That appears to be a glaring omission, and I hope that the Government can come up with a definition that will provide clarity while protecting the right to a fair trial.

The bill extends the entitlement to special measures that are available to victims who are deemed vulnerable. Those are important measures that can make it easier for witnesses to give evidence. However, the bill also introduces a right for parties to object to the use of standard special measures in all cases. Lawyers welcomed that, but it was of great concern to Victim Support Scotland and the children’s commissioner, because it introduced uncertainty for vulnerable witnesses about whether the support that is offered to them will be challenged and possibly withdrawn. To seek a solution that is accepted by victims and prosecutors must be one of the priorities as the bill progresses.

We heard concerns about section 3(4), which allows the police, the Scottish Court Service and the Crown to withhold information that victims request if they consider it inappropriate to release that information. The Government should consider whether that needs amending or, at the very least, provide clear guidance on what factors should be taken into account when considering the appropriateness of disclosing information.

More generally, the committee heard that communication between justice bodies is poor and that that is causing problems. Astonishingly, David McKenna of Victim Support Scotland suggested that victims have to tell their story about 16 times to various agencies, which is clearly unnecessary and can add to victims’ distress.

Some of the evidence that was received painted a less than enthusiastic picture of the bill. It is worth pointing out that the bill will bring Scotland up only to the minimum standards that are required by the EU directive on victims and witnesses. In some respects, it is arguable that the bill falls short of that minimum standard. For example, it does not establish a formal right to review a decision not to prosecute.

Peter Morris, a campaigner for victims’ rights, expressed his disappointment with the bill in his submission. He wrote:

“To say that this legislation as it stands will make any significant difference to victims’ lives is just not true. To say that this legislation is radical is not true and to say that this now puts victims at the heart of the justice system is also not true.”

The Scottish Conservatives’ priority is to strengthen the bill so that it does more and goes further towards improving the lot of victims and witnesses. For example, the victim surcharge should apply to all offenders, so that we do not have a situation in which motorists must contribute but violent offenders do not do so.

Ten days ago, the Sunday Post reported that sex offenders who had been placed on the register for life but who now have the right to challenge that are being taken off the register without their victims being informed. The bill will give victims of life prisoners the right to be notified when the offender is released; the same right should be granted to the victims of sex offenders who were put on the register for life but have been taken off the register.

The bill can be criticised for being modest. Moreover, there is an elephant in the room. Even if the victim is better and more swiftly informed about the process, and even if they are given more support throughout and can have a more meaningful role before a conviction is secured, that is cold comfort for the victim if the sentence that is served is nothing like the sentence that was imposed.

Automatic early release of prisoners, which the Scottish National Party promised in 2007 to abolish, is a scandal. It does the victim a disservice, it discredits the system and it destroys public confidence. The Scottish Government’s claim that it wants to stand up for victims would be more credible if it did not continue to allow the vast majority of offenders to be released from prison after serving only half their sentences.
I accept that it was a United Kingdom Government that introduced automatic early release. However, that Government quickly realised the error of the approach and left provision for its repeal on the statute books in 1997. That was ignored by the incoming UK Labour Government, just as numerous calls from the Scottish Conservatives to end automatic early release have been ignored by the SNP Scottish Government.

Where was the consideration of victims when the Scottish Government and SNP members of the Justice Committee pushed through the closure of a fifth of our sheriff courts? The closures might save the Scottish Court Service money, but they will pass on costs to victims and witnesses and create yet more delays and a clogged-up justice system.

Christine Grahame: Will John Lamont give way?

The Deputy Presiding Officer: I am afraid that John Lamont must conclude.

John Lamont: The bill is a welcome step forward, but the Scottish Government should not forget that some of its other actions in relation to our justice system will impact on the victims of crime.

The Deputy Presiding Officer: Members might have guessed that we are very tight for time. We move to the open debate, with speeches of a maximum of six minutes.

15:57

Sandra White (Glasgow Kelvin) (SNP): I am a bit confused about what Jenny Marra said. I wonder whether what she and Labour members say in the Justice Committee does not represent the Labour Party’s position. I say to her that she could have recorded her dissent if she felt strongly about the matter. I wanted to make that point—[ Interruption.]

The Deputy Presiding Officer: Order. Members must speak through the chair, please.

Sandra White: Thank you, Presiding Officer.

I thank the many individuals and organisations that responded to the consultation, and I thank the committee clerks for their support. I also thank the Health and Sport Committee for its work. I am a member of the Justice Committee, so I did not take part in the Health and Sport Committee’s investigations, but I was involved with the petition that was lodged when I was a member of the Public Petitions Committee. I am pleased that things have moved so far, and I congratulate Duncan McNeil on his speech, which I must say was wonderful.

The bill aims to improve support for victims and witnesses as they encounter and move through the criminal justice system. That is to be welcomed. As the Justice Committee said on page 5 of its report, under the heading “Background to the Bill”, improvements in support have been happening “against the backdrop of a growing public perception that the balance of rights is tipping in favour of the accused.”

That is why we need the bill and why it is so important that we talk about victims and witnesses.

Many people might think that the perception is not correct, but the evidence that we received certainly suggested that the public and witnesses need to be made more aware of court proceedings, enabled to have more involvement with key stakeholders and given access to information, support and protection. Above all, people need to be treated with respect. Many people who gave evidence felt that they did not receive such a service from the justice system.

The bill covers many areas, but I will concentrate on a couple of issues, because time is short. Much has been made of the definition of “victim”. Everyone who has spoken in the debate has used that word, and I remember that at one of our many committee meetings—I am sure that other members of the committee remember it, too—a lot of time was taken up debating the term and whether we should talk about a victim or a complainer.

I can only repeat what I said at the committee. If a crime is committed against me, I am a victim and not a complainer. I note—Jenny Marra raised this when I asked a question—that the Criminal Procedure (Scotland) Act 1995 uses the word “complainer”. However, most members of the public are not lawyers and, if a crime is committed against them, they are victims. That is why the bill is called the Victims and Witnesses (Scotland) Bill. I draw members’ attention to that. I am pleased that the committee’s recommendation recognises that, and I take on board the cabinet secretary’s comments and the clarity in that area.

Most people know that it is not just the victims of crime who are affected but their families and loved ones. I know that my colleague Willie Coffey will highlight that again. I have made the point about using the word “victim” rather than “complainer” more than once because, as I said, we discussed it for a long time—probably longer than any other aspect of the bill—and, given the time that that took, I am concerned about how long it would take to discuss a definition to be put in the bill.

I welcome the measures—particularly live television links and the use of screens and supporters—that are being taken to protect
vulnerable witnesses and encourage them to take part in court procedures. I particularly welcome the inclusion of victims of sexual offences, domestic abuse, human trafficking and stalking, which will ensure that they are automatically entitled to use standard special measures when giving evidence. I ask the cabinet secretary whether he is minded to extend the powers in the bill—or will consider doing that—to include further measures to protect victims of human trafficking and particularly children who have been trafficked.

Jenny Marra and others have mentioned the letter from the victims organisation collaboration forum Scotland and Scotland’s Commissioner for Children and Young People, their objection to the provision that both parties have the right to object to special measures being used when evidence is given and their call for the removal of sections 9 and 13. I take on board what they say, but I believe that a balance has to be struck. Vulnerable witnesses should be and will be identified early and, if special measures are needed, they should and will be explained to witnesses as early as possible. I welcome the cabinet secretary’s comments on that issue in his speech.

I look forward to processing the bill through the Parliament. It has many good provisions. We have heard about them and we will hear more later. We will also hear concerns that other members raise. That is how it should be in debates, particularly at stage 1. The bill’s overall principle is to ensure that victims and witnesses receive support and feel able to participate in the justice system. The bill will give them that opportunity and enable them to do so.

16:03

Malcolm Chisholm (Edinburgh Northern and Leith) (Lab): I agree with the principles and much else in the bill, but I will concentrate on areas in which it could have gone further. The standards that section 2 mentions are a case in point. They need to be consulted on with victims organisations and others, they need to be in regulations and they should be reported on.

More than that, however, the standards and other aspects of the bill raise, for me, a fundamental question. How will they be policed? Who will ensure that they are enforced? In some countries, victims can go to court if they feel that their rights have been abused, but what recourse will there be for victims in Scotland? That fundamental question led to the proposal from the Labour Party for a victims commissioner.

Now, we can argue about that commissioner’s remit. I agree with what Jenny Marra said about a commissioner achieving effective performance monitoring. I would like the commissioner to take on some of an ombudsman’s role so that, if somebody had an example of where they had not been treated properly by the system, they could go to the commissioner to get recourse. It is up to those who oppose having a commissioner to say how they would answer the fundamental question about how the legislation will be policed and who will ensure that it is enforced.

Christine Grahame: Like me, the member has been in the Parliament for a very long time. He can see why we are a bit taken aback—I think that I speak for the rest of the committee—to find out now that the position of Labour members is that they want a victims commissioner and case companions. That was not dealt with at committee. The objection could have been put in our report, but it was not. The position as I understood it when I stood up to speak for the committee was that the committee was unanimously opposed—at this point, on balance—to having a victims commissioner and case companions. The member knows the process.

Malcolm Chisholm: I object to such a long intervention. I would not have given way had I known how long it would be. Christine Grahame makes a procedural point; it is not a substantive point. I will give one small example and waste more of the time for my speech. I did not vote at the Finance Committee against the recommendation in that committee’s report that there should not be energy efficiency measures in the Land and Buildings Transaction Tax (Scotland) Bill, but I took a different position when I lodged an amendment to that bill. It is perfectly possible for a member to take at a subsequent stage a position that they have not pushed to a vote in committee. I have now wasted a minute of my speech, which I bitterly regret.

I agree with the proposal that there should be more information for victims and witnesses, but I note that section 3 does not mention information about bail and bail conditions, which is often complained about. The best way to provide that information is through a single point of contact, which would provide continuity of support as far as possible. That will not always be possible, but the principle of a case companion is absolutely right.

Kenny MacAskill: Will the member give way?

Malcolm Chisholm: I will not give way again. I am sorry, but I have already lost a minute because of the previous intervention.

More information for victims and witnesses is good for them, but publicly available information about victims and witnesses is not good. I note what Victim Support Scotland said about having some control over how the media report on victims and witnesses—that is hard to have.
I should mention something that I mentioned in a debate last June—the case of my constituent whose personal details were all published on the Scottish Court Service website following a divorce case. That problem is on-going. I have had two meetings with the Information Commissioner’s Office assistant information commissioner—the Scottish data protection commissioner—about it and I am still awaiting a further reply from the SCS.

It has emerged that the judiciary is not subject to the Data Protection Act 1998. The sheriff allowed intimate details to go on the website, including bank details. It seems that, although the principle of judicial independence is good in practice, it sometimes goes too far. The publication of a court judgment on the website made my constituent a victim; apart from anything else, she was stalked as a result of it.

I have to be very quick now, because I have only two minutes left. I welcome the extension of special measures for victims of sexual offences and domestic abuse, but I note that Victim Support Scotland said that its greatest concern about the bill was about the right of parties to object to the use of special measures. That right is not in place now, which led to my intervention about whether the ECHR was being invoked against the existing legislation. The children’s commissioner clearly says that the existing legislation is not against the ECHR, and Scottish Women’s Aid and Rape Crisis Scotland say the same.

Scottish Women’s Aid and Rape Crisis Scotland have made many points about the bill. I do not have time to go over them all, but they are certainly issues on which I would like questions to be asked at stages 2 and 3. They include the complainer’s right to access legal advice when the defence requests records that relate to sexual history, character or medical history; the right to request a review if there is no prosecution proceeding—remember that only 25 per cent of rape complaints are carried forward; the extension of special measures to civil cases, which is often where domestic abuse and other sexual offences are addressed; the right to choose the gender of a forensic examiner; and the amendment of section 20 to make it clear that there should not be a compensation order when that is contrary to the victim’s wishes. I support all those concerns from Scottish Women’s Aid and Rape Crisis Scotland.

Now I have 40 seconds for the national confidential forum. I note and agree with what Duncan McNeil said. There are many positive features of the forum, but it should include those who have been in foster care. Many of the witnesses said that. It should also have a wider mandate and remit. I noticed that paragraph 95 of the Health and Sport Committee’s report said that the Scottish Human Rights Commission “could not identify another initiative in the world that dealt only with acknowledgement and no other elements of remedy, whether inquiry-related, civil-law focused or reparation-based.”

I note the Health and Sport Committee’s concern about the extent of knowledge and expertise of mental health professionals in this area. That reminds me of a report by Sarah Nelson, which I launched probably 12 years ago, that said exactly the same thing. At that point, it was psychiatrists who had no awareness of sexual abuse issues. I hope that that has changed in the interim, but the Health and Sport Committee’s report suggests that perhaps it has not changed as much as we would like it to.

Colin Keir (Edinburgh Western) (SNP): The bill has been one of the most interesting pieces of legislation that I have worked on in my time on the Justice Committee, and I believe that many of my colleagues feel the same. The submissions that have been provided by individuals and groups have shown the real experiences of real people affected by crime on their journey through the justice system, not necessarily as the direct victims of crime but as victims who have lost loved ones as a result of crime and negligence.

As Christine Grahame mentioned, perhaps the most informative session that the Justice Committee held was the round-table event that was held in private, which victims of crime attended to give their stories and experiences of and comments about the justice system. Some of what we heard was quite harrowing, and I felt that some negative experiences could have been avoided merely by the authorities’ using a degree of common sense. It was difficult not to leave such a session demanding wholesale change, such was the effect of some of those traumatic stories. However, justice must be balanced, and I hope that the committee’s stage 1 report strikes a good balance as a starting point in identifying necessary reforms to the way in which we deal with victims and witnesses in the Scottish justice system.

As the cabinet secretary mentioned and as Malcolm Chisholm highlighted, it is only reasonable for those who enter the justice system to expect care and service of such a standard that a very difficult situation is not made even more traumatic. As we have heard, many victims and witnesses felt that every time that they moved further down the justice system chain, they had to describe and relive their experiences for a different official. I believe that that problem can be avoided, but like the majority of my colleagues on the
Justice Committee I am not minded to support the idea of a case companion.

Like others, I want to ensure that the victim has the right to be questioned by someone of the same gender—a particularly obvious request in serious sexual assault cases. However, I take on board the fact that, due to other factors in the police service, such as shift patterns and court work, that may be difficult to achieve at all times. I am content with the assurances that have been given by Police Scotland that every attempt will be made to ensure that investigation officers of the same gender as the victim are made available when required.

Another difficulty is the definition of vulnerable witness. Only as the difficulties of keeping a truly balanced justice system were highlighted, after hearing from the likes of the children’s commissioner, Children 1st and others, did the rather settled view that I started this legislative journey with change slightly. I totally agree that, if possible, we must ensure that vulnerable witnesses—certainly, victims under 12—are given the opportunity to give their testimony away from court. Along with other special measures, that will ease the intimidation that is felt prior to and during court proceedings, especially if the victim or witness is a child, and it will improve the quality of that person’s testimony while protecting them from the full force of our adversarial system. That can only be good.

Nevertheless, there are certain individuals aged under 18 who have seen the justice system at first hand over a number of years and are extremely tough nuts to crack. Should those people, in the interests of justice, not be allowed to face interrogation in court because of their age? That is something for discussion. I am of the belief that there is a case for challenging the granting of special measures in some cases. I am not convinced that a one-size-fits-all approach is correct. However, caution is called for and, as the stage 1 report points out, clarity is required

“as to where responsibility lies in relation to establishing the vulnerability of ... witnesses”.

During the committee’s deliberations, I had personal difficulty with the issue of the relatives of victims of road traffic accidents obtaining, as a matter of right, all information relating to the investigation of the fatality. I fully understand the wishes of relatives to obtain information relating to the loss of a loved one, as I went through the same heartache when my brother Lindsay was killed in a motorcycle accident just over four years ago. Of course, the relatives want to know what happened—there needs to be closure. In my experience, Strathclyde Police dealt with the problem in an exemplary manner. They showed me the crash scene and went through the details of what happened, as seen by witnesses and taking into consideration the road conditions. On a personal level, I am unclear about why more detail is required. My problem with full disclosure as a right is that the description and, in particular, the photographs of the accident may be gruesome and rather harrowing in nature.

If the cabinet secretary is minded to support the right to full disclosure, I ask that he ensures that the systems are in place to explain to relatives what is in the documents, and that that is done sensitively. I suggest that raw data should not just be handed over as a matter of course.

Jenny Marra: Will the member take an intervention?

The Deputy Presiding Officer: The member is concluding.

Colin Keir: Many issues in the bill are worthy of discussion—members have raised some fascinating issues. The bill is vital. I hope that we can maintain cross-party solidarity. I will most certainly support the bill at stage 1.

16:15

Alison McInnes (North East Scotland) (LD): I, too, take a moment to thank the many people and organisations that took the time to respond to the committee’s call for evidence on the bill.

The Scottish Liberal Democrats welcome the Victims and Witnesses (Scotland) Bill and support its general principles. It is right that we seek to protect and enhance the rights of witnesses to and victims of crime. Crime is a story of people whose lives have been adversely affected through the actions of others. It is vital that, when working on justice reforms, we remember that and all do what we can to provide support and protection for those who are affected by crime.

Although we are fortunate in Scotland to have access to well-developed voluntary services, much more is still to be done. It is vital that our laws offer the best possible protection to victims and witnesses so that support organisations are at their most effective.

I will focus briefly on a couple of the bill’s key points, before touching on a few matters that it does not yet cover.

Quite rightly, much of the focus has been on the proposed improvements for vulnerable witnesses. I welcome in particular the right to an individual assessment for all vulnerable witnesses to determine the most appropriate special measures to assist them. The widening of eligibility for those special measures is also welcome.

We must acknowledge that there is dismay among victims and those who speak for them
about the proposals to allow objections to special measures. In particular, the VOCFS—the victims organisations collaboration forum Scotland—and the Commissioner for Children and Young People have challenged us to look again at the matter.

The VOCFS argues cogently that that approach will not only create uncertainty for witnesses but, in the case of children—who currently have an automatic entitlement to special measures—lead to a dilution of their current protection. The VOCFS argues that it is illogical to extend eligibility for special measures on the one hand while allowing the granting of special measures to be challenged on the other. The VOCFS goes so far as to say:

“If implemented, this provision will result in an increase in the number of witnesses re-victimised by the process of going to court ... we consider that it will undermine all the other provisions and rights contained the Bill.”

I listened to what the cabinet secretary said in his opening speech about engaging further on the matter. I urge him to give careful consideration to amending the bill in light of such strong representations. At the very least, children’s rights must be protected and not eroded in any way. I am keen for the committee to take further evidence on sections 9 and 13 of the bill at stage 2, if necessary.

The other area that has attracted a lot of attention is the so-called victim surcharge. In the debate during the consultation on the bill last year, I mentioned the Liberal Democrats’ slight unease with the plan. Our long-term vision is to increase the amount of paid work that takes place in prisons. As part of that, we could develop a means of taking a contribution from prisoners’ wages, which would be used to provide additional funding for victim support measures. That would re-emphasise the need for all offenders to make reparations over the course of their sentence.

I now turn to matters that are not in the bill. At committee, there was discussion—as there has been this afternoon—of the creation of a victims commissioner and the introduction of case companions. I understand why those could appear to be positive measures, but they each have practical problems.

Commenting on a possible victims commissioner, Louise Johnson of Scottish Women’s Aid said:

“we already have very good links with the Scottish Government, and we have direct links to people at very senior levels in the Crown Office and the police ... We do not think that another body’s intervention would help us at all. Why should we have to go through an intermediary?” — [Official Report, Justice Committee, 16 April 2013; c 2617.]

I agree.

Similarly, while on the face of it case companions might offer a reassuring presence, they could in practice cause significant problems with information flow.

There are a couple of suggestions that I believe are worthy of further exploration at stage 2. The first of those relates to anonymity orders, which were mentioned in the consultation but did not make it into the bill. It is thought that, because such orders are in use in England and Wales, certain issues may arise with cross-border cases. I would be grateful to hear the cabinet secretary’s view on the issue; perhaps it is something that we can return to.

I want also to mention the brief discussions that we had in committee—which are mentioned in the report—on a right for victims to a review of a Crown Office decision not to proceed with prosecuting a case. Members will be aware that the Director of Public Prosecutions in England and Wales recently announced a consultation on plans that would enhance the right to appeal against Crown Prosecution Service decisions not to prosecute.

As a result of an EU directive, it is incumbent on us to ensure that victims have the right to have a decision reviewed. I acknowledge the Crown Office’s view that its current arrangements are compliant with the directive; I also acknowledge that the Crown Agent has commissioned a review to consider whether the arrangements in Scotland can be further enhanced. I do not wish to pre-empt the outcome of that review, given the importance of the right and the context of the bill, but I am minded to agree with Victim Support Scotland that there is a strong case for us to include on the face of the bill a right to a review of a decision not to prosecute. It is an issue that I hope that we can return to and one on which I would welcome further thoughts from the cabinet secretary.

16:21

Christian Allard (North East Scotland) (SNP): First, I acknowledge the excellent contributions that have been made in the debate so far. I also congratulate all the members of the Justice Committee on their stage 1 report on the Victims and Witnesses (Scotland) Bill. Unfortunately, I withdraw my congratulations for one particular member. As a new member of the Parliament, I am quite astonished that a member for North East Scotland has done so much to undermine a committee of the Parliament. When I started in committees, I was told that if I signed up to a report, that meant that I agreed with it, and I would never come to the chamber to deny what I had said in committee.
Malcolm Chisholm: I have been a member of this Parliament for 14 years and of another Parliament for seven years before that. I did exactly what Jenny Marra did on the Land and Buildings Transaction Tax (Scotland) Bill—I let something go through on energy efficiency and then I moved an amendment. There are perfectly good reasons for doing that, and I think that it is totally unacceptable that there has been a concerted attempt by SNP members to attack Jenny Marra on the issue.

Christian Allard: If she had had a perfectly good reason for doing what she did, I am sure that Ms Marra would have told us so.

There is a lot in the bill on which we can all agree, such as the bill’s general principle of ensuring that the legal system in Scotland pays better regard to victims and witnesses, particularly in the help and support that is given to them during and after the investigation or proceedings.

The bill’s aim is to improve the experience of victims and witnesses and to make justice work for them. Over the past few weeks, the Presiding Officer may have heard me say several times that I was not born in Scotland, and I have to confess that English was not my favourite subject at school. Perhaps more than others in the chamber, I understand that plain English should be used when informing and supporting victims and witnesses. It is an appropriate language that most of us can read and understand, regardless of where we live or come from.

I note that Tam Baillie, Scotland’s Commissioner for Children and Young People, agrees with the principle of the need for good communication with victims and witnesses. When he gave evidence to the Justice Committee, he put on record his general support for the bill. We need to ensure not only that children and young people are heard, but that we communicate in a way that they can understand.

Incidentally, the word “victims” is the right choice of word for the bill. Families of victims are very sensitive to the language that we use. They are a highly vulnerable group. Children of victims, in particular, might need help and support for many years. Losing a parent at an early age or losing a child as a parent is a very traumatic event, whatever the circumstances.

Given that recorded crime in Scotland is at its lowest level for 39 years and that the number of attempted murders and serious assaults has gone down by 50 per cent since June 2007, I believe that it is important that the Scottish Government reflects on the need to support the families of people who are killed on our roads. My experience is that families want an explanation of what happened, particularly if they know or are related to the person who was responsible for the road fatality.

I happen to live in the relatively new and prosperous town of Westhill in Aberdeenshire. Young families settled there two or three decades ago and so there is a disproportionate number of younger people there. Over the past 20 years, I have often attended the funerals of young people, many of whom—too many—were victims of accidents on our north-east roads. I know that when criminal proceedings are on-going it is difficult to address the needs of the families of those who have been killed on our roads and to ensure that they have the information that they require, and I understand why some bereaved families might not wish to receive some of the material from the investigation. However, the issue was raised when the Justice Committee took evidence from families of road death victims, and I ask the cabinet secretary to explore ways of increasing the amount of information that is given to the families of such victims.

Jenny Marra: Will the member give way?

Christian Allard: No.

I seek reassurance that the bill can allow for a statutory requirement to give bereaved families information—which they may or may not request—at the end of criminal proceedings. Again, as with the use of appropriate language, I believe that giving bereaved families the right to obtain copies of the investigation papers relating to fatal road deaths is good practice and the right thing to do.

I congratulate all the organisations and individuals who work hard to make our roads safer. This weekend’s Royal Highland Show will attract many visitors from our rural communities, and I urge them to stop at the road safety village in the show’s lifestyle area. Our country roads account for around 70 per cent of all road fatalities in Scotland and as a member who represents many rural communities in the north-east I will be attending the greatest show on earth to listen to expert advice and information on road safety.

The Deputy Presiding Officer (John Scott): You should be drawing to a close, Mr Allard.

Christian Allard: I am delighted that the Justice Committee supports the bill’s general principles and look forward to hearing the cabinet secretary’s response. I, too, believe that the bill will help to improve the experiences of victims and witnesses of the criminal justice system in the future.

16:27

Gil Paterson (Clydebank and Milngavie) (SNP): It is just my luck to follow a Frenchman who speaks English better than I do. I declare that
I am a board member of Central Scotland Rape Crisis & Sexual Abuse Centre.

The issue of men’s violence against women and children is always dealt with seriously by the Parliament. Although the focus of this debate and the stage 1 report is not exclusively on victims of men’s violence against women and children, most of my speech will consider how the debate relates to that issue and how the bill might offer some support to victims. After all, much of what is in the report will go some way towards assisting those who fall into that category.

It is crucial that when a woman or a child is raped, services are available in an instant. I know that Rape Crisis is at the sharp end of such matters and although it can and does deliver vital early assistance, it also knows the importance of good reliable evidence in rape cases and will signpost victims towards medical examinations as soon as possible. Rape Crisis, Scottish Women’s Aid and many other third sector organisations that deal with women and children are well aware that the trauma of the medical examination is that bit more difficult to deal with if it is carried out by a male doctor, particularly if the crime has been of a sexually violent nature.

The last thing I want to do is to call into question the professional capabilities of male doctors. I have the highest regard for the men who work in this very difficult field, but I believe that even they, when they begin work in the area, are reluctant participants. Of course, they find things much easier as they gather experience. On the other hand, for victims, no matter whether they are women or children, the presence of a female doctor makes an important experience less traumatic, is just that little bit more reassuring and is one less thing to worry about. As I have said, although the experience will be traumatic for the female or child victim, it is vital for the purposes of getting good, safe forensic evidence purposes. Therefore, I encourage the Scottish Government to consider the matter carefully and to seriously consider finding ways to provide more female doctors for the service at what is a vital and traumatic time for victims.

There is then the issue of victims and relatives attending court only to be confronted by the accused—worse still, by an abuser—when the court sits for sentencing. I know that some of our courts do not easily lend themselves to separation of the accused and the accuser, but that is one of the most negative experiences that victims and their loved ones complain about. Such a scenario has a massive psychological impact on the victim, their family and friends. For that reason, I ask the Scottish Government again to look carefully at that sensitive subject with a view to finding ways to keep the parties apart as much as is humanly possible. I am sure that keeping them apart from the accused before the court sits would be of great assistance to victims and would offer them protection from any possible further intimidation.

Children are the most difficult to accommodate at trials. By its very nature, a court is a grown-up establishment, and it is difficult—if not impossible—to soften its edges to accommodate children, let alone having courts that are entirely suited to children. At best, vulnerable children see courts as unwelcoming places; at worst, they see them as somewhat frightening places. We need to build on the good work that is already in place to make courts and the system more sympathetic to children. Fully training those who deal with children and their needs, and who navigate for them a pathway through court proceedings, is therefore of practical benefit to children. I would be pleased if all those who deal with children were trained to the highest level—particularly those involved in the interview stages both before and during court hearings. If things are made as normal as possible for vulnerable children, they can give good evidence. That is a must—it must be a top priority for the end result. It would benefit not only the child and their family but those who are engaged at that high level. It would benefit the court process in both the short term and the long term because the safest possible conclusions on guilt or innocence would be reached.

I hope that the Government can take positive steps on the matters that I have raised to ensure that victims are protected not only in the justice system but in their daily lives.

Many thanks, Presiding Officer, for allowing me to make a contribution on this very important matter.

16:33

Graeme Pearson (South Scotland) (Lab):

Many members will be pleased that my voice is on the verge of collapsing, but I hope that I will maintain it for six minutes.

The cabinet secretary introduced the debate by indicating that the bill seeks to place

“victims and witnesses at the centre of the criminal justice system.”

The evidence that the Justice Committee received from victims and witnesses was harrowing in identifying that, for many of them, their experience reflected almost a pass-the-parcel attitude to dealing with the problems that they faced and the challenges that they saw in obtaining necessary information.

A picture emerged that reflected a justice system that is focused on solving administrative challenges, but a real question remained about
whether victims’ and witnesses’ needs are being properly answered. There was also a challenge in respect of an absence of monitoring the standards that are expected and the services that are delivered. Questions are therefore pending, and they require answers. One hopes that, at the end of our debate, the minister will be able to give us some comfort in supplying those answers.

Is the Government confident that the various services have the ability to update the system accurately and in a timely fashion so that victims and witnesses can access that knowledge? Certainly as far as the police service was concerned in its evidence to the committee, the answer is no. It has neither the systems nor the support necessary to be properly aware of the current situation with regard to the cases that it deals with—likewise, I doubt that many others in the system are able to do that either.

From the point of view of a witness or a victim, they face not only the police but family liaison officers, Victim Support Scotland, the victim information service, procurators fiscal, Crown Office advocates, court administrators and lawyers. It is a difficult environment for a member of the public to face.

The cabinet secretary indicated that he would be happy to engage with COPFS in relation to road traffic deaths and road traffic accidents generally. Families want information from the authorities about deaths and serious injuries that family members have suffered, and I hope that the minister will be able to give us some comfort in relation to that specific issue.

Allusions have been made to the difficulties that the police might have in supplying victims with an interviewer of a specified gender. As indicated previously, I think that it is important that, when services cannot provide what is expected of them, a full explanation should be supplied timely so that there is transparency on why the services are not supplied and what alternatives are arranged in those circumstances.

Victims may be uncomfortable and distressed about receiving money from offenders, so the victim surcharge payment and compensation orders might not always be appropriate. The minister should give us some indication about whether victims and/or witnesses will be consulted in relation to such arrangements.

In addition, the victim surcharge does not appear to do much for the victim per se. Indeed, the list of services that may be provided from the use of such surcharge payments includes the cleaning of a crime scene, the provision of very basic requirements of the victim and some other peripheral issues, but it does not deal with the long-term needs of a victim after the process has been completed.

Much has been said about the use of the nomenclature “victims” and “complainers”. Many in the chamber will not be surprised that I did not contribute particularly to that debate. It is important that families know that, when they have been victimised as a result of a crime or an offence, that status will be acknowledged. Nevertheless, the balance of ensuring a proper trial and the balance of justice also need to be adhered to.

Much has been said about Scottish Labour’s position that there is a need for a victims commissioner. It is appropriate that Jenny Marra should raise that issue, as it was referred to by individual witnesses who sought someone to act on their behalf to ensure that services are delivered and it was discussed at some length within the Justice Committee.

Scottish Labour wants victims and witnesses to receive the services and information that they deserve. We want victims of serious crime to be given the right to be heard by those involved in sentencing, bail decisions and parole proceedings in the future. I look forward to hearing from the minister in that regard, and I will support the motion at decision time.

16:39

Willie Coffey (Kilmarnock and Irvine Valley)
(SNP): I am grateful for the opportunity to contribute, and I hope that I can offer a perspective on the issues to complement the obvious hard work that has been carried out by all our colleagues who serve on the Justice Committee and on the Health and Sport Committee.

Getting the proposals right is inevitably going to involve a careful balance between the rights of the accused and the rights of victims and witnesses. The conclusion of the Justice Committee report says as much and anticipates further improvements at stage 2, but the general principles of the bill are supported and that is very welcome.

If the bill is approved, victims and witnesses will be entitled to more information about their case, standards of service will be consistent and clear, restitution orders will be made against those convicted of assaulting police officers, and a victim surcharge will be introduced to require offenders to contribute to the cost of supporting victims.

I note the proposal to allow children more freedom to give evidence in court if they wish to do so. The committee raised a concern about that becoming a requirement, but the cabinet secretary clarified in his response that that will not be the
case and that he is happy to discuss the matter with the relevant justice partners.

I know that there is also continuing debate about the extension of special measures to vulnerable witnesses and about the entitlement to contest the use of those measures in court. I have listened carefully to colleagues who, having considered those matters in greater depth, will go on to consider the issues further at stage 2.

From my own experience of the justice system, both as a victim and as an elected member supporting victims, I think that the proposals in the bill will improve the situation for victims in Scotland. In my view, the proposals offer a little tilt in favour of victims that has been overdue for some time.

When the Public Audit Committee looked at the criminal justice system recently, it was clear from one of the charts illustrating the process that the focus is almost exclusively on the alleged offender’s journey through the system. Of course, there are clear and obvious reasons for that, not least of which is that the requirement to obtain justice for offences committed inevitably means that the spotlight falls on the accused and on how they are to be taken on that journey. However, it was not at all clear to me what the victim’s journey looks like or should look like.

Often, victims feel like onlookers staring in through a window while the process takes place and sometimes does not include them at all. That was the feeling of two families in my constituency—one whose daughter was murdered and the other whose daughter died in a tragic accident. Both families were clearly victims who needed support. They needed to be at the centre of the processes that followed, but they were not. That led them to feel alienated from a system that they desperately hoped would provide closure for them. They expected to be in the loop at all times and to feel that they, too, were key parts of the process rather than left feeling like innocent bystanders who were being carried along in the slipstream.

To address that issue, the bill must regard victims and witnesses as integral to the justice system. I know from the committee report that there has been a call for standards of service to be set out in regulations. If the Government is not minded to effect that proposal through the bill, I hope that it will give consideration at least to setting out guidance advising what the victim’s journey is supposed to look like.

From the initial incident and evidence gathering through to the trial or fatal accident inquiry—and beyond to any further investigations—victims and their families must be equally served by good communication, by access to information and by clear indications of timescales, of the extent to which they can participate and of any further options that are open to them that they may wish to progress. That level of support should be automatic rather than offered only on request. If it was, many victims and their families would begin to feel that the justice system is about them, too.

My attention was also drawn to the proposal to allow victims to make representations to the Parole Board when a prisoner becomes eligible for release. As the cabinet secretary is aware, one of the families to which I have referred is concerned to ensure that a full and detailed risk assessment is carried out on any prisoner who is eligible for release and that public safety is paramount in making that decision. I very much hope that the views of victims can be taken into account in that process. Perhaps that can be extended to the families who are affected by the crime, too.

I am encouraged by the proposals in the bill and by the direction of travel that we are taking in Scotland to support victims and witnesses. Setting new standards of service, providing better access to information and better communication and, we hope, putting victims at the centre of the justice system will together be a further step in delivering a fairer justice system, as will the requirement that offenders make reparation to their victims. I think that all those proposals will be supported by the people of Scotland.

As we proceed to stage 2, I remind committee members of the comments by the Royal College of Speech and Language Therapists that people with speech, language and communication difficulties are more likely to be the victims of crime. I ask colleagues to bear that in mind as we firm up the bill at stage 2.

I congratulate the committee on its efforts so far. I support the motion that is before us today.

16:44

Stewart Maxwell (West Scotland) (SNP): I am grateful for the opportunity to speak on a subject that goes straight to the central purpose of the justice system—namely, the role of victims and witnesses of crime in that system.

Before I get into the detail, I cannot let the moment pass without referring to an issue that has been raised a number of times, particularly by Labour members. As a member who has been in the Parliament for more than 10 years and, I think, as a rather experienced committee convener, I believe that, frankly, members risk breaking trust in a committee if they sign up to a recommendation in a report and then come to the chamber and oppose that recommendation. That is a mistake, although it is up to members if that is what they wish to do.
Ultimately, the success of our justice system and our society as a whole can be judged by how we treat the victims of crime. Similarly, it should be recognised that witnesses of crime carry out an important civic duty, and we must offer them appropriately tailored support and confidence that their personal safety will be ensured, in addition to providing them with an adequate level of knowledge to contribute effectively to the cases in which they are involved.

I believe that the Scottish Government’s making justice work programme will improve the standards of treatment for victims and witnesses as well as improving the criminal justice system as a whole. Constituents have outlined to me—and, I am sure, to other members—their experiences of crime. The clear psychological and financial pressures of being a victim of crime are self-evident. The trauma and emotional burden of such events are far reaching and can often affect entire families and communities.

While trying to overcome what can often be traumatic events, victims must also try to deal with everyday practicalities. Under normal circumstances, it can often be difficult for people to manage their life, finances and personal relationships effectively. When people are given the additional burden of recovering from the emotional scars of a disruptive criminal event in their life, we must do everything that we can to support them. That can also be applied to witnesses to crime, who should be able to count on the law’s full support, as their contribution is essential to an effective justice system.

New measures such as the victim surcharge could help to strengthen the perception among victims that the perpetrators of crime are being held to account for the damage that they have caused. I welcome the structure of priorities that has been put forward for the consideration of the amount that an offender needs to pay—namely, the prioritising of the compensation payment, followed by the victim surcharge and then the principal fine.

As Victim Support Scotland highlighted in its consultation response, “compensation following a crime is often of deeper significance than simply receiving a financial award. Of central importance is the formal acknowledgement and recognition of the suffering of the victim, as well as a validation that what the victim says is true. As such, compensation is an important part in the victim’s recovery process.”

Any requirement for a compensation payment to the victim should ensure that the payment is made as soon as possible. Failure to do so might ultimately lead the victim to further feelings of victimisation and could prevent them from having some form of closure.

I understand that, in some cases, receiving money from the offender might be distressing for the victim. I would welcome further assurances from the cabinet secretary that the views and needs of victims will continue to be considered before each individual decision is made on the appropriateness or otherwise of imposing a compensation order.

When looking through the consultation, I was encouraged to see the level of engagement in the process, with 59 organisations sending submissions to the Scottish Government. A number of consistent themes emerged from the submissions, two of which I would like to highlight.

First, the consultation responses repeatedly highlighted the need for victims and witnesses to have access to information that is consistent, clear and accessible. The creation of an online information hub will assist in the development of that principle and, if implemented effectively, will greatly assist in improving accessibility.

I note the Justice Committee’s concerns that the online information hub should not be a replacement for human interaction and support for victims. I therefore welcome the cabinet secretary’s clarification that any new online information hub would act only as a supplement to, rather than a replacement for, the vital face-to-face support that victims obviously need and already receive.

Secondly, allowing victims to access more general practical information about the justice system is another welcome measure. Previous constituency cases in which I have been involved have shown that constituents would welcome measures that give them a better understanding of procedures that have the potential to have a significant impact on their lives. I also understand that constituents would feel a greater sense of engagement with the criminal justice system more generally if they were given more case-specific information that is relevant to their circumstances. Indeed, any additional support or information could alleviate the frustrations that victims often feel as a result of having no previous knowledge or experience of the justice system.

Consultation responses also consistently called for victims and witnesses to have access to information that gives them an accurate appraisal of their active role within the system as an extension to the proposal of an online information hub. If the participants have greater understanding, it will lead to an overall more engaging experience and ensure that their expectations are managed more effectively.

Victims and witnesses should not be made to feel that their role has been downplayed to such an extent that they feel undervalued or detached.
from the process; nor should their part be overinflated such that their expectations of an active role cannot realistically be met.

In particular, clarity has been sought about the definition of "participate effectively" when referring to a victim’s or witness’s active participation. A number of organisations expressed confusion in their consultation responses about what exactly that term implied. Other members, including the convener of the Justice Committee, raised that point earlier. I hope that the cabinet secretary is able to offer additional clarity on the concerns that the Justice Committee raised on that point.

The Victims and Witnesses (Scotland) Bill is relatively broad in its scope, and there are a number of other points that I would like to be examined in further detail. The extension of the victim notification scheme, the establishment of the national confidential forum and the improvement of support for vulnerable witnesses are all worthy of further debate. However, I am pleased to note the Justice Committee’s support for the general principles of the bill and I am delighted that the Scottish Government has continued to commit to improving the experiences of people within the justice system.

16:51

John Finnie (Highlands and Islands) (Ind):

How we deal with victims and witnesses marks the sort of society that we are. I want us to be a society that cares about, and is compassionate towards, victims and witnesses.

With my background as a police officer, I know only too well that police officers, procurators fiscal and court officials routinely deal with witnesses and victims. However, we forget at our peril that, for many victims and witnesses, it is a unique experience and their first engagement with those services. There are, of course, particular challenges associated with repeat victims.

Since my time, the police and the Crown have made huge progress with regard to domestic abuse and sexual crimes. There is still a way to go on those, and the bill will play its part, although it is not without some challenges.

There has been much discussion in the debate about giving witnesses and victims the right to certain information. The Justice Committee supported that call and the proposal for an online hub. Like others, I am grateful for the cabinet secretary’s response to the stage 1 report, which suggested that the online hub was not intended as a replacement for human contact. There is no substitute for an empathetic human. Let us also not forget that the needs of those who are not online must also be serviced.

The phrase “Clear standards of service” has been mentioned. Often, unintended offence is caused to victims by the manner in which information is or—more commonly—is not relayed. Such information can relate to changes of plea, charges being dropped and the accused being released on bail, for example.

The children’s commissioner gave the committee an excellent document—"Children’s Rights Impact Assessment: The SCCYP Model"—in which he refers to the standards of service and the fact that there is no mention of their being monitored, evaluated or reported on. I note that, in his response to the stage 1 report, the cabinet secretary said that there would be individual standards. I am sure that the committee will want to look further into that.

I see no intrusion into the rights of the accused. A presumption of innocence must apply. The bill certainly passes the human rights test and is not in conflict with human rights legislation.

There are degrees of vulnerability. No one welcomes standing in a court and, as is often the case, being required to point out the accused. Most will feel vulnerable. The presumption that certain categories of person are more vulnerable and given the right to use special measures is important. I welcome it, and I also welcome the witness assessment.

However, there is no point in assessing need unless we meet it. One way that we will move towards meeting the need is the commitment from the Scottish Court Service in the past couple of weeks to make facilities for special measures available throughout the country. That is to be welcomed.

The Justice Committee asked the Scottish Government

"to make every effort to ensure that removal of the presumption that child witnesses under the age of 12 will give evidence away from the court building does not lead to the unintended consequence of children giving evidence in court against their will."

That illustrates the differing views. The cabinet secretary has given the following reassurance:

"The Bill makes a small amendment to put more weight on the views of the child so that if a child expresses a desire to give evidence in court"—

and some do, along with their parents—

"there will be a presumption that this will be allowed."

The correspondence from the victims organisations collaboration forum Scotland has been mentioned by some members, such as Alison McInnes, so I will not go into detail on that. I reiterate that the forum has a genuine concern about the right to appeal the use of special measures and calls for the removal of certain
provisions from the bill. I note that, in his response to the stage 1 report, the cabinet secretary advises us that he is discussing that with the Crown Office and Procurator Fiscal Service. It is an important issue, and I hope that there is a positive response to the forum’s specific concerns.

Committee members have alluded to the harrowing first-hand testimony that we heard from victims about the traumatic and long-lasting effects on them and their families, friends and entire communities, and the health and wellbeing implications for them. No one wants to be a victim or a witness, and I am delighted that the 40-year low in the level of crime means that there are fewer victims, but there is of course no room for complacency.

We also heard about the discussion of the terms “complainant” versus “victim”. I support and encourage others to support the position of the children’s commissioner that child victims must be believed and they are believed by being given that tag. Perhaps the committee became more hooked up on that point than the general public would be.

In recent days, I have written to the justice secretary and the health secretary asking for Victim Support Scotland to play a lead role in implementing the legislation. It is important that that organisation is involved from the very start. Police liaison officers have a specific case-related role to discharge, and it is not a criticism of that role to say that it is not the same as the hands-on, practical role that VSS can and should have.

As members know, VSS administers the victims’ fund for harrowing cases to provide for things such as a replacement bed for a rape victim or glasses for an older person who has been the victim of a robbery. That is an important early contact for victims, and I would put it in line with the preventative spend that the Scottish Government is following. If we can get the issues right, the cost of individual and family health and employment can be dealt with. That will come if we provide adequate support.

There is a range of other issues, but I do not have time to touch on them. It is fair to say that there are challenges connected with the information technology system and the support that it can give to victims. Graeme Pearson’s comments on that are right. There are also particular challenges in the issue of gender-specific interviewers, not least in rural areas.

I support the principles of the bill, and I look forward to scrutinising it at stage 2.

16:57

Roderick Campbell (North East Fife) (SNP): I welcome the opportunity to speak in the debate and I refer to my register of interests, as I am a member of the Faculty of Advocates.

I believe that the bill is a welcome step forward and comprises a package of measures that are designed to ensure that those who find themselves caught up in the criminal justice system obtain effective and efficient assistance from the organisations that they have to deal with during criminal procedure, through to trial and sentencing, and after proceedings have come to an end.

We have come a long way in extending the rights of victims and witnesses since devolution began, with the victims’ strategy being published 12 years ago and the national standards for victims of crime being set in 2005. Since then, the victim notification scheme has been extended. Victim statements were introduced for solemn cases from 2009—although, as we have heard, many witnesses do not believe that their statements are accorded as much importance in the process as they would like. We also heard from Graeme Pearson that many witnesses feel quite detached from the process. Nevertheless we have made progress, although we still have a long way to go, as Victim Support Scotland and others have said.

In the short time that is available, I will highlight a couple of points. With regard to reviewing the decision not to prosecute, section 3 of the bill provides that victims will be able to request information about a decision not to proceed with a criminal investigation and any reasons for that decision. That is, of course, in line with the EU directive on victims, and offers victims an additional safety net. I was initially concerned by the idea that victims would be able to challenge the Crown’s decision not to prosecute, but I believe the purpose of the provision is simply to request a review, and that it will introduce greater transparency and accountability. I await with interest the Crown Office’s research on a review, which has yet to be disclosed.

With regard to victim notification generally, the effect on a victim of releasing an offender from prison without providing reasonable notice and giving the victim time to prepare physically and mentally for the offender’s return to their community, for example, can be extremely traumatic. Specifically, in relation to life prisoners who have passed the punishment part of their sentence, and when the only considerations are protection of the public and whether the offender represents a danger to the public, it is right that false expectations should not be raised. Although I recognise the right of victims to make oral representation to the Parole Board, it is also right that consideration be given to allowing legal
representation for offenders. The process must be balanced.

The Justice Committee recognised that further guidance needs to be developed on the matter. I am pleased that the cabinet secretary and his officials will continue to engage with the Parole Board for Scotland to ensure that appropriate measures are put in place through revised guidance in order that, it is hoped, victims understand the process more fully. I believe also that the revised guidance should allow for the offender to see the victim’s views in most cases when they meet the Parole Board. Again, that would be in keeping with transparency.

I also welcome the cabinet secretary’s assurance that victims who are currently registered on the victim notification scheme will be kept informed of changes to the nature of the information to which they are entitled.

I note the Scottish Government’s position on restitution orders and I have to accept that the focus in relation to the orders should be on the police. However, I also note the flexibility on that issue.

On the more controversial area of the extent to which there should be a right of objection to the grant of special measures, although I accept the argument that it seems to be illogical to extend the categories of vulnerable witnesses for whom access to special measures is automatic, while at the same time bringing in provisions enabling objections to be raised, I nevertheless instinctively side with the lobby that suggests that a right of objection needs to be preserved under ECHR. I heard what Malcolm Chisholm said earlier, but I was not quite sure whether he had misunderstood what the Commissioner for Children and Young People in Scotland had said, as he said that there was no reference to the matter in the EU directive. However, I would be happy to stand corrected if what Malcolm Chisholm described is the children’s commissioner’s position.

Murdo MacLeod of the Faculty of Advocates pointed out that under the Criminal Procedures Act 1995’s section 271D, which is not being reviewed by the bill, a judge can review special measures at any time, even during the trial itself, although it is unlikely that he would do so, save in exceptional circumstances. I think that we need to have faith in judges. I do not see a perfect solution to the problem, and I note that the Government is consulting further. I hope, however, that some flexibility will be preserved, although I recognise that there are real concerns that objections should not be routinely allowed for automatic special measures for children.

With regard to families of road-death victims, although I recognise that we heard evidence from witnesses to the effect that they encountered difficulties in obtaining information from the Crown, I believe that an unfettered statutory right to information would on occasion cause distress—particularly given the content of some photographs of crash scenes. I would therefore welcome a Crown code of practice rather than statutory rights.

Finally, I want to mention separate representation for victims in, for example, dealing with sexual history applications. We ought to recognise that the Crown’s interest may not be identical to that of the victim. It is right that the issue is to be explored further, and I welcome the Government’s commitment to engage with the Faculty of Advocates and Rape Crisis Scotland on it.

The Deputy Presiding Officer: We move to the closing speeches. Nanette Milne has up to seven minutes.

Nanette Milne (North East Scotland) (Con): Thank you, Presiding Officer. With a voice that is a little bit like Graeme Pearson’s, I must apologise for my late arrival in the chamber this afternoon, the reasons for which I have explained in writing.

I am pleased to speak at stage 1 of the Victims and Witnesses (Scotland) Bill. Praise is certainly due to the Government for bringing before Parliament a bill that is dedicated to the rights of victims and witnesses. That reflects the growing consensus that victims are not given sufficient thought in the criminal justice system. Of course, what a victim wants more than anything else is not to be a victim at all, but if a crime is committed, the justice system must at all stages deliver for them. It has become clear that that is not always the case.

The victim must not become a side thought, a prosecution witness or a name on a police file who drops off the radar screen unless, or until, a trial commences. The bill goes some way to redress that imbalance in our criminal justice system, which too often places the rights of the accused above those of victims. However, there is room for improvement, as others have said.

The bill will significantly extend the entitlement to special measures that are available to victims and will automatically grant them to witnesses under the age of 18 and to victims of sexual offences, domestic abuse, human trafficking and stalking. It will also allow any witness to be considered to be vulnerable, following assessment. Murdo MacLeod QC told the Justice Committee that he expects that about 18,000 additional witnesses will be deemed to be vulnerable, under the proposals, which will mean
that giving evidence will be made easier for a significant number of victims of crime.

The bill will place a duty on courts to consider a compensation order in relevant cases, including where a person has been caused personal injury, loss, damage, alarm or distress as a result of an offender’s actions. Clearly, some victims do not want anything to do with an offender, but many would consider justice to be done if those who caused them harm or loss were forced to compensate directly. I hope that the bill will increase use of compensation orders, but more must be done to ensure that the Scottish Court Service is more effective at collecting fines.

The bill also establishes a victim surcharge, which will require offenders to pay into a fund that will be used to provide practical assistance to victims who have immediate unmet needs. That will go some way towards helping victims in the aftermath of a crime. Again, that policy is welcome, but it is hardly ambitious because—as far as I understand it—the victim surcharge will apply, at least initially, only to those who are given court fines. That means that an offender who is found guilty of a road traffic offence will contribute to the fund, but a violent offender will not. That seems to be far from ideal.

As a member of the Health and Sport Committee, the only part of the bill that I have studied in detail is that which concerns the establishment of a national confidential forum, which was generally welcomed by those who gave evidence to the committee. There were some caveats, however. For example, although the Aberlour Child Care Trust and Children 1st welcomed proposals to create a safe confidential space in which people can discuss their experiences, they pointed out that although some survivors of childhood abuse might find that to be a cathartic experience that helps them to move on, others might find it to be re-traumatising, or might discover that it raises thoughts and feelings that they need to explore outwith the forum.

Some witnesses felt that acknowledgement alone is not enough and that, without remedies, the process could impact negatively on the health and wellbeing of some survivors. There was consensus—as was recognised by the Scottish Government—that access to counselling, therapeutic support, mental health services and advocacy will be essential if the health and wellbeing of survivors are to benefit from participation in the forum. It was agreed that appropriate services must be available for all who take part in the confidential forum, whether they are older people or young adults, whether they have disabilities or mental health issues and whether they live in or outside Scotland, whatever their life circumstances.

A person-centred approach was held to be crucial, with a choice of support being available for up to two years, and there being a one-stop approach to counselling and advocacy. So strong was the stated need for support that the committee wishes the Scottish Government to ensure availability of services for participants in the confidential forum to support them before, during and after taking part—as Duncan McNeil said in his speech—and, more widely, for all adult survivors who may require psychological or counselling support.

The NCF must have operational autonomy if it is to perform its role effectively and with credibility, and some concerns were expressed about the proposal to position it within the Mental Welfare Commission, as a result of fears that the stigma that is associated with mental ill health might transmit to adult survivors of childhood abuse.

However, the committee was reassured that it would be clear to survivors who come forward that they would be taking part in the NCF as a separate entity from the Mental Welfare Commission, and that the forum would benefit from the infrastructure, governance and expertise of the commission.

A number of other issues were raised at committee, which will no doubt be aired at stage 2. Suffice it to say that expectations for the NCF are high. The Health and Sport Committee welcomes what is envisaged, but sees the need for more detail to be provided on how it can work in practice.

Although the bill is largely to be welcomed, it can undoubtedly be improved and built on. It will help to put the rights of victims and witnesses near the front of the minds of the police, the Crown and the Scottish Court Service. It is just a shame, as my colleague said, that victims and witnesses were ignored by the Scottish Government when it took the decision to close a fifth of Scotland’s sheriff courts, which has added to the ongoing slap in the face for victims of crime that is the continuation of automatic early release of prisoners. However, that is another debate, and I will leave it for another time.

As John Lamont said, my party is supporting the bill at stage 1.
Jenny Marra: One of the most important opportunities that the bill has given us is the opportunity to listen to and learn from the experiences of people who have suffered damage—often irreparable damage—as a result of crimes that have been committed against them and their loved ones. In that context, I will consider the bill’s provision for a national confidential forum for survivors of historical abuse.

Since 2004, successive Governments have sought to account for the abuse that children have suffered in residential care in Scotland. The forum represents the latest development in that journey, as Duncan McNeil said, and stems from the time to be heard pilot, which listened to the stories of 98 survivors of abuse at Quarriers residential care homes alone. We recognise the need for survivors to be heard in a confidential forum and fully support the approach. Many people’s suffering can be eased by acknowledgment of the abuse, which is hugely beneficial.

In her response to a parliamentary question in April from Neil Bibby, the Minister for Community Safety and Legal Affairs said that a consultation on the time bar in relation to historical abuse had just closed and that responses were being analysed. She noted that the Victims and Witnesses (Scotland) Bill was going through Parliament and suggested that the member keep tabs on the bill in relation to the time-bar issue. When the minister sums up, will she tell us what progress has been made in analysing the consultation responses and say whether we will have the opportunity to consider altering the time bar during the passage of the bill, as her answer to Neil Bibby suggested? I understand that there have been no proposals so far from the Government to amend the bill in that regard, but I am interested to know whether the Government intends to propose changes to the time bar at stage 2 or stage 3.

We would like the bill to provide for additional protection for families who are affected by fatal road accidents. The committee heard evidence from Scotland’s Campaign against Irresponsible Drivers, which is campaigning for a statutory right to access investigation materials on request. The “on request” element is an important part of the proposal. I listened carefully to Colin Keir’s personal account and am convinced that it would be extremely harrowing for a family to be given such documents when they do not want them. That should not happen. However, access on request will give grieving families the information that they need if they are to understand what happened to their loved ones.

Colin Keir: Does Jenny Marra agree that grieving relatives would not necessarily know what they were seeking, even though they were asking for all the information? The information might include harrowing details of road traffic accidents, which might do more harm than good.

Jenny Marra: I take Colin Keir’s point; this is not an easy issue. I have come to the conclusion that SCID’s campaign for a statutory right to access material on request is a better approach. Many families who gave evidence to the committee had not been given access to documents—documents that they really wanted because they did not know the circumstances under which their loved ones had lost their lives. We need improvements in that regard. Many families would like a statutory right to access information on request, so I hope that the Government will consider amending the bill at stage 2 to provide for such a right. I note that there is support for the proposal among the Government’s back benchers, as Mr Allard articulated.

Sandra White commented on the need for better provision in the bill for victims of human trafficking, and the organisation CARE, which works with victims of trafficking, has made specific suggestions in that regard. CARE’s proposals stem from provisions in the European Union anti-trafficking directive, which came into force in Scotland on 6 April this year. The directive requires three steps to be taken to protect victims of human trafficking that are not included in the bill—to avoid unnecessary repetition of interviews during investigation, prosecution and trial; to avoid visual contact between victims and defendants while they are giving evidence in interviews and cross-examination; and to avoid unnecessary questioning about the victim’s private life, which I touched on more widely in relation to sexual offences in my opening remarks.

The directive also outlines a range of measures—in article 15.3—specifically to protect child victims. Given that the date for implementing the directive has passed—it was 6 April—I would like to know whether the Government intends to use the bill as an opportunity to put those protections in place, because victims of human trafficking are particularly vulnerable. I understand from correspondence between the cabinet secretary and me that the Scottish Government believes that it is compliant with that directive. Perhaps the minister will tell us in her closing speech whether the Scottish Government believes that the protections for victims of human trafficking that I outlined exist in other legislation and do not, therefore, need to be put in the bill.

Although we back the principles of the bill, it is clear that many improvements could be made. Labour’s proposals for case companions and a victims commissioner would improve how we
interact with victims and witnesses as well as how we keep the system under constant review. We have made suggestions in areas such as fatal road accidents, sexual offences and human trafficking, and we would like to hear the Government’s proposals for any alteration to the time bar on cases of historical sexual abuse, which the minister mentioned to my colleague previously.

All those suggestions warrant further consideration, and I hope to see progress on them as the bill proceeds to stage 2 and beyond. Scottish Labour will support the general principles of the bill today.

17:17

The Minister for Community Safety and Legal Affairs (Roseanna Cunningham): I thank members for their many—and even occasionally constructive—contributions. I particularly thank those members who sit on the Justice Committee and the Health and Sport Committee for all their work on the bill over the past few months. Christine Grahame rightly reminded us of all the individuals who gave evidence to one or other of those committees, and Duncan McNeil talked in those terms as well. We owe those people thanks for taking the time to give evidence even when it may have been a very difficult thing for them to do.

A huge number of issues have been raised and, frankly, it would be impossible for me to deal with every single point in the time that is available. I hope to deal with some of the main issues that have arisen throughout today’s debate.

Members throughout the chamber clearly share a desire to create a justice system that offers more support to victims and witnesses than there has been in the past. If we are honest, for too long victims were treated as nothing more than bystanders in proceedings. Jenny Marra mentioned a particularly distressing case in her opening speech, which directly affected a constituent of mine, with whom I have been working closely for a number of years. Many issues were raised by the experience of the family concerned. They were pleased to meet the cabinet secretary this morning to discuss the bill, which they see as a big improvement.

The bill may not answer every single question that has been raised today or by others, but it is a significant step towards putting victims and witnesses at the heart of the justice system and it will give them more of a voice. For example, it will enable victims to make oral representations to the Parole Board for Scotland when life sentence prisoners are being considered for release on licence if victims feel more comfortable making their concerns known in that way.

The bill also addresses one of the biggest issues raised by victims and witnesses—that there is a lack of information about cases. Practically every member in the chamber will have had experiences of people who felt that they simply did not have enough information about a case that involved them. The bill will give such individuals the right to certain information from organisations across the justice system, which will ensure that vital information is available to those who need it, when they need it. I hear Christine Grahame’s request that any information be supplied in plain English—we would all echo that desire.

Outwith the bill, we have committed to working with our justice partners to examine the feasibility of setting up an online information-sharing hub, to make accessing information easier. It is important that everybody recognises that the bill is not the only work that is being done in respect of victims and witnesses.

The creation of the victim surcharge will ensure that offenders contribute directly to a fund to assist victims of crime. The fund will provide prompt and practical support to victims when they need it most: in the immediate aftermath of the crime. There may be reservations about that, which I understand, but Stewart Maxwell is right to commend its introduction. Of course, the victim surcharge will be considered sensitively.

A number of members, including John Lamont, raised the issue of the definition of the word “victim”. I confess that I am baffled by this sudden apparent confusion over the definition. Neither as an MP or MSP nor in my previous profession as a lawyer have I ever had any doubt about who or what a victim was, and I am curious as to quite how the concern has arisen. In the Government’s view, it does not seem to be a particularly well-founded concern, given that the word “victim” is used so much by the public and is well understood, as it is throughout the justice system.

Sandra White and Jenny Marra requested that the Government give further consideration to the issue of trafficked victims and I confirm that the Government will be happy to do so.

Colin Keir and Gil Paterson both raised the question of same-gender support, particularly in sensitive criminal proceedings. They will be pleased to know that the cabinet secretary is in discussion with Rape Crisis Scotland regarding medical examiners and is looking at the wider issue. The Government will discuss it further before stage 2 with the police and, crucially, the national health service.

Jenny Marra: The minister said that she would be happy to look at protection for victims of human trafficking. Will she confirm that the three measures that are specified by the EU directive
are already in Scots law, or, if they are not, that the Government will consider including them in amendments to the bill at stage 2?

Roseanna Cunningham: Jenny Marra probably knows that those matters are under review and that the Government is working directly with the police on them.

I know that each member asked about a number of different things, but I am trying to collate some of the key points. Alison McInnes asked about anonymity orders. There has been discussion with the police and the Scottish Crime and Drug Enforcement Agency, but so far there does not seem to be compelling evidence to support the introduction of investigative anonymity orders in addition to the protections currently in place, such as witness anonymity orders. However, the discussions are on-going.

Being a witness is a vital civic duty and giving evidence in court can be an unfamiliar and uncomfortable experience. Often that fact is forgotten by professionals in the system. Vulnerable witnesses often need help to give their best evidence, and the bill will make a number of changes to improve the way in which vulnerable witnesses are identified and supported to do that. The changes include raising the age at which a witness is no longer considered to be a child from 16 to 18 and introducing a presumption that alleged victims of certain crimes are vulnerable and should be able to access special measures. The bill will also ensure that every witness is given an individual assessment to determine their potential vulnerability, so that the appropriate support can be put in place.

I was interested in a general theme in both Christine Grahame’s and Roderick Campbell’s speeches, which was an overarching concern about the management of expectations of both victims and witnesses and the need to ensure that people are not led to believe that they will get more than is realistically possible. That will be kept in mind.

The bill will create a duty on criminal justice agencies to set out clear standards of service for victims and witnesses, and an effective route for complaints. That will ensure that victims and witnesses know how they can expect to be treated when dealing with each justice agency and how to complain if standards are not met.

A number of members, including Malcolm Chisholm, raised the issue of the appointment of a victims commissioner. There has been some heated debate around that idea, but its proponents must respond to the opposition of both Victim Support Scotland and Scottish Women’s Aid to the proposal.

Along with Graeme Pearson and Willie Coffey, Malcolm Chisholm also raised concerns about how the standard of service is to be monitored and asked questions related to that. I reassure those members that victim support organisations will be consulted on the setting of standards and that the Government is willing to consider the establishment of a formal monitoring process. Those things are still under consideration.

Christian Allard concentrated on access to information about fatal road accidents. It would be useful for the chamber to take a moment to commend the Dekker family and SCID for their tireless work on the issue of road deaths over many years in the Parliament.

The establishment of the national confidential forum is a critical part of our SurvivorScotland strategy, which aims to improve the health and wellbeing of all survivors of childhood abuse. The forum will be unique in offering people who were placed in institutional care as children acknowledgement and belief without judgment or interrogation. It will also be uniquely placed to reflect the experiences that it hears in recommendations to policy makers and service providers to ensure that the mistakes of the past are not repeated. It is important and timely that people who grew up in children’s homes and other institutions are given a voice. That is particularly important for survivors of historical institutional abuse who may never have had the opportunity to share their experiences.

The focus of the national confidential forum on institutional care is on evidence of what works. We know that the model of confidential acknowledgement that is to be offered by the forum works for people who were placed in institutions as children. It will be particularly important for people who were placed in care at a time when there were no national standards, no inspection regimes and few routes for children to raise complaints.

It is clear that the forum is not the whole response. Many of Duncan McNeil’s comments were directed at that concern. I reassure him that the Government is considering how we might take cognisance of the issue of those who were abused while in foster care. They have not been forgotten. The centre for excellence for looked-after children in Scotland and In Care Survivors Service Scotland are currently undertaking work that is funded by the Scottish Government into how acknowledgement as a model could work in the context of foster care. I accept that some stakeholders think that the bill has not gone far enough. However, I believe that the forum must have a clear and distinct role and scope, which will enable it to complement but not duplicate the
range of other responses that are available for survivors of childhood abuse.

I have been heartened by the general support for the bill and for the wider aim of improving support for victims and witnesses. The Government is not, however, complacent and recognises that there is a need to give further consideration to some of the issues that have been discussed today. We will work with colleagues throughout the process to ensure that victims’ rights are embedded in our justice system.
24 June 2013

Dear Duncan,

VICTIMS AND WITNESSES (SCOTLAND) BILL: NATIONAL CONFIDENTIAL FORUM: STAGE 1 REPORT

I write in response to the Health and Sport Committee’s Stage 1 Report on the provisions in the Victims and Witnesses(Scotland) Bill to establish the National Confidential Forum, published on 27 May 2013.

I would like to thank the Committee for its careful consideration of these provisions in the Bill and all of those who contributed to that consideration by giving evidence.

I welcome the Committee’s recommendation to the Parliament that the Bill, in respect of the provisions to establish the National Confidential Forum, should proceed to Stage 2.

A number of important points have been raised in the Committee’s Stage 1 Report and I would like to take the opportunity to respond to these prior to the Stage 1 debate in the Parliament on 19 June 2013. My response is set out in the Annex to this letter.

Best wishes

Michael Matheson
1. Functions of the National Confidential Forum

92. The Committee notes that the evaluation of the Time to be Heard pilot indicated the therapeutic value of an acknowledgement forum in giving people the opportunity to be heard, believed and perhaps even to attain a sense of validation in a safe, confidential and non-judgemental setting.

97. The Committee considers that the Scottish Government's participation in the InterAction process, consultation on the time-bar on civil litigation, work that has been undertaken on restorative justice, and emphasis on the Survivor Strategy are all welcome developments. It is imperative, however, that this momentum is maintained and that all the policy strands be pulled together if the best interests of survivors are to be served.

I note the Committee's comments, both in relation to the principal function proposed for the National Confidential Forum (NCF) and in reflecting the evidence from some witnesses that the functions of the NCF do not go far enough.

The overarching policy objective of the part of the Bill concerned with the NCF is to enhance the health and wellbeing of people placed in institutional care as children, including survivors of abuse and neglect, through the provision of confidential acknowledgment. It is a public health initiative, established in direct response to calls from survivors of child abuse in institutional care over many years for their experiences to be heard and acknowledged – and based on the positive evaluation of the Time to be Heard Pilot Forum (TTBH).

I would like to reiterate that I do not consider the provision of confidential acknowledgement by the NCF to be secondary to justice remedies nor contingent on the implementation of the recommendations set out in the Human Rights Framework. I am pleased that the Committee has recognised our participation in the InterAction process, in which we plan to continue to engage in the hope that a clear and realistic way forward can be agreed by all of the parties engaged in that process.

98. As was highlighted by some witnesses, the links between the NCF and care providers is a matter that has not really been addressed. The Committee suggests this could merit further consideration by the Scottish Government. Evidently, such a connection will not always be helpful, welcome or appropriate - particularly in relation to individual survivors and their vulnerability - but the wider point, in the context of policy learning and prevention of the same mistakes being made in current care settings, could usefully be explored.

I would agree with the Committee's view that a connection between the NCF and care providers will "not always be helpful, welcome or appropriate, particularly in relation to individual survivors".
The Scottish Government has given a great deal of thought to the connection between the NCF and care providers, particularly following the experience of TTBH involving Quarriers. However, there is not provision to this effect in the Bill as this is not necessary nor, for the reasons the Committee sets out, always desirable.

As you know, part of the TTBH experience included a restorative justice pilot, funded by the Scottish Government and delivered by SACRO. This was intended to offer a further opportunity for participants in TTBH to explore with Quarriers harm done and how this could be repaired. The evaluation of this pilot project, I think yields interesting learning for care providers in terms of engaging with former residents who experienced abuse while in their care.

In terms of policy learning and the prevention of a repetition of the mistakes of the past, the Historical Abuse Review Systemic Review, which we commissioned in 2006, sets out a series of recommendations both in relation to supporting former residents of care and in relation to current and future provision. Over the last six years, the Scottish Government has taken forward these recommendations, almost all of which are now implemented.

Notable achievements in implementing the Review recommendations include; the passage of the Public Records (Scotland) Act 2011 to address the poor record keeping which has created difficulties for former residents of residential schools and children’s homes in tracing their records; the establishment of the National Residential Child Care Initiative which has resulted in better guidance on safer recruitment practices and a requirement for all staff to register with the Scottish Social Services Council; and the establishment, in 2010, of In Care Survivors Service Scotland, the only dedicated support service for adults who have experienced childhood abuse in care and their families.

The Committee may also be interested to know that the members of the NCF Reference Group have agreed (in June 2013) to develop guidance for care providers to inform their responses to former residents who choose to participate in the NCF. The representative from the Church of Scotland who gave evidence to the Committee at Stage 1 on this point sits on our reference group and intends take part in this process.

2. Eligibility to participate in the NCF

135. The Committee recognises that the focus of the NCF is on historic abuse and the right of adult survivors to be heard. It also appreciates the need for a cut-off to be applied at a specific age and that the Scottish Government gave consideration to ages 16, 18 and 21.

I am pleased to see that the Committee has recognised the desirability of including in the Bill an age threshold for participation in the NCF. As the Committee is aware, this is in addition to the requirement that participants must have left institutional care when applying to participate in the NCF. In combination, these provisions will enable the NCF to only hear past experiences of care, which is particularly important as the NCF will not have a defined historical period from which it will hear such experiences.
In setting a minimum age threshold for participation in the NCF of 18 years of age, we considered different age options in light of the legitimate goals of the legislation. A threshold of 18 years of age is considered to be reasonable and proportionate as young people in Scotland are much more likely to no longer be in institutional care at 18 years of age, than at 16 and 17 years of age. As the Committee recognises, the focus of the NCF will be on historic abuse and, as such, the age of participants is likely to be significantly older than 16, 18 or 21 years of age. This was certainly the case in Ireland.

I have not seen any specific evidence that young people leaving institutional care at 16 and 17 years of age will seek, almost immediately on leaving that care, to participate in the NCF. Indeed, stakeholders have told us that participating in the NCF would not be a priority for most young people leaving care.

I am, however, aware that the possibility of a 16 or 17 year old care leaver seeking to participate in the NCF exists. On that basis I have asked my officials to explore the possibility of an amendment to the Bill which would enable 16 and 17 year olds, who have left institutional care, to apply to participate in the NCF.

137. It is also welcome that the Scottish Government has commissioned CELCIS to carry out a piece of work on the suitability of an acknowledgment forum for people who might have experienced abuse in foster care. The Committee was pleased to hear the Minister's expectation that a pragmatic approach would be taken by the NCF should foster care be broached by participants in the Forum.

142. Given the evidence from a series of witnesses – among them a TTBH Commissioner, CELCIS, ICSSS, the Care Inspectorate, Who Cares? Scotland, Aberlour Child Care Trust, Barnardo's Scotland, and the Care Leavers Association – the Committee recommends that further consideration be given to including foster care in the eligibility criteria for participation in the NCF.

I would like to reassure the Committee that we have consider fully the purpose and effect of provision in the Bill to focus the scope of the NCF on past experiences of institutional care.

The rationale for the focus of the NCF on institutional care is based on positive evidence that this model works for people placed in institutional forms of care as children. There is no evidence to inform a widening of the scope of the NCF beyond institutional care to foster care or indeed to other forms of care.

The rationale for the focus of the NCF on institutional care is also based on a need to develop a specific response to the distinct development and characteristics of institutional forms of care in Scotland, particularly that provided on an historical basis. It was evident in testimonies given by people who participated in TTBH that there were implications for many former residents of the experience of having been placed in an institution as a child – both for those who had been abused and those who had not.
I believe that it is important that we respond, specifically and appropriately, to the calls from former residents of institutional care that their particular experiences be recognised and acknowledged.

In addition, where abuse is perpetrated in an institutional context this can compound the trauma caused by that abuse and can have particular implications for disclosure. The confidential, non-judgemental context of the NCF is particularly valuable to survivors of historic institutional abuse given those implications.

I would also observe that the more specific arguments for extending the scope of the NCF to foster care made by some stakeholders (namely, that abuse occurs in this setting and that significant numbers of children have been placed in this type of care) are not unique to foster care. As such, an extension of the scope of the NCF on the basis of these arguments would, by the same token, enable a widening of the scope of the NCF to further care categories – and indeed to children not placed in care. This could present a significant risk to the NCF in terms of its capacity, expertise and resources.

All of this is not to say that confidential acknowledgement of the experience of being placed in foster care as a child would definitely not be of value and benefit. That is why we are funding ICSSS and CELCIS to undertake a piece of work to hear the views of people placed in foster care themselves as to the value and potential benefit to them of acknowledgement and what specific form this might take.

I note the recommendation made by the Committee that the Scottish Government give further consideration to widening the scope of the NCF to include foster care. While I am not persuaded by the arguments to widen the scope of the NCF in this particular way, I have asked my officials to continue to work with relevant stakeholders to ensure that the views of people placed in all forms of care as children continue to be fed into the implementation of the SurvivorScotland Strategy.

3. Support to participants

Given that support is so crucial for the health and wellbeing of those who suffered childhood abuse, the Committee seeks also an undertaking from the Scottish Government that it will ensure the availability of services for those who choose to participate in the Forum – so as to be supported before, during and after taking part – and more widely still to all adult survivors who may require psychological or counselling support.

I can assure the Committee that, as with the support arrangements underpinning TTBH, support to participants before, during and after participation in the NCF will be offered. The nature and duration of this support will be the choice of the participant. There will also be comprehensive information available prior to people applying to take part in the NCF and suitably qualified and experienced support staff will be in place to offer guidance and signposting.

As part of the wider SurvivorScotland Strategy the Scottish Government funds a range of support and counselling services for survivors of childhood abuse including a Scotland-wide agency specifically for survivors of in care abuse, In Care Survivors...
Service Scotland (ICSSS), and services in rural and remote areas. The Scottish Government will be working closely with these services, and all stakeholders, in the run up to the establishment of the NCF to determine the shape and balance of support which should be available for people before, during and after participation in the NCF.

The Scottish Government has also provided funding to a range of stakeholders to explore what particular barriers people might face in terms of participation in the NCF – and the support they might need to enable their full and effective participation in the Forum. For example, we have funded the Scottish Council for Learning Disability and Enable to engage with people with learning disabilities to both raise awareness of the NCF and to identify any particular access or support needs. Learning from all of these funded projects will feed into the operational planning for the establishment of the NCF.

197. The extent of the knowledge and expertise required of mental health professionals to engage with survivors was a question that arose from some of the evidence. This has a degree of resonance with some recent work the Committee has undertaken on Post-traumatic Stress Disorder. It would be welcome, therefore, if the Scottish Government could elaborate on any plans to further develop or “up-skill” the people who will be working closely in support of survivors, whether those taking part in the NCF or otherwise.

I would refer the Committee to my recent letter, dated 19 June 2013, in response to the Committee’s queries set out in your letter to me of 3 June 2013, following its roundtable discussion on trauma.

4. Confidentiality

231. On balance, the Committee considers the confidentiality aspects as set out in the Bill to be sensible, proportionate and intended to weigh the emotional and therapeutic benefits of participation with the public interest and safety, should information come to light that indicates an immediate or current risk.

232. The Committee believes the parameters of confidentiality ought to be set out as clearly as possible. This will certainly be a sensitive subject for survivors but no-one should be expected to take part in the Forum without a proper understanding of the process, including its benefits, outcomes and consequences.

I welcome the Committee’s view of the provisions in the Bill to balance confidentiality and disclosure as “sensible” and “proportionate”.

The provisions in the Bill, in relation to the disclosure of information by the NCF, must strike a proportionate balance between the rights of those making allegations in hearings of the NCF and those against whom allegations are made and the rights of persons against whom allegations may be made. I am satisfied that the provisions in the Bill strike an appropriate and proportionate balance between those different
rights and indeed that all of the provisions in respect of the NCF are ECHR compliant.

5. Status

254. The Committee recognises that the NCF must have operational autonomy if it is to perform its role effectively and with credibility, especially in the eyes of the survivor community.

255. It is reassured that most of the witnesses were comfortable with what is proposed or, in more positive terms, considered the MWC to be “a good location”. The potential for stigmatisation arising from the mental health tag and how that might put off would-be participants arose, but was generally not seen as problematic, provided its independence could be guaranteed and the NCF was badged in its own right.

256. The memorandum of understanding will be vital in ensuring the Forum can carry out its core work as it sees fit while benefitting from the infrastructure, governance and expertise of the MWC. The Committee welcomes the Minister’s undertaking to forward that information once the document has been finalised.

I am pleased at the response by the Committee and stakeholders to the proposal that the Mental Welfare Commission host the NCF. There are clear benefits to the establishment and operation of the NCF in this arrangement, which will enable both accountability in terms of the discharge of the NCF functions and a high level of operational independence for the NCF itself.

As I intimated at the Committee session on 30 April 2013, I am very happy to share the Memorandum of Understanding between the Scottish Government and the Commission when it is finalised, following the appointment of the Head of the NCF.

6. Reports

285. People who were abused in care and have perhaps carried the feeling they did “not count” want their testimony to the Forum to matter; the Committee was told that survivors who come forward to participate expect to recognise their testimony in the reports of the NCF. It is acknowledged, as the Minister said, that this is likely an operational matter for the NCF, but the Committee suggests that the coding of testimony as practised in the Irish model (the Ryan report – highlighted by the SHRC) could be explored.

I note the Committee’s suggestion that methods by which the testimony of participants in the NCF is able to be recognised in reports be explored. I want to assure the Committee that the Scottish Government will be encouraging the NCF to put in place a system whereby testimony can be recognised, in accordance with the obligations in the Bill to anonymise information.
Victims and Witnesses (Scotland) Bill: Financial Resolution: The Cabinet Secretary for Finance, Employment and Sustainable Growth (John Swinney) moved S4M-06730—That the Parliament, for the purposes of any Act of the Scottish Parliament resulting from the Victims and Witnesses (Scotland) Bill, agrees to any expenditure of a kind referred to in paragraph 3(b) of Rule 9.12 of the Parliament’s Standing Orders arising in consequence of the Act.

The motion was agreed to (DT).
Victims and Witnesses (Scotland) Bill: Financial Resolution: The Cabinet Secretary for Finance, Employment and Sustainable Growth (John Swinney) moved S4M-08039—That the Parliament, for the purposes of any Act of the Scottish Parliament resulting from the Victims and Witnesses (Scotland) Bill, agrees to any charge or payment in relation to which Rule 9.12.4 of the Parliament’s Standing Orders applies arising in consequence of the Act.

After debate, the motion was agreed to (DT).
Victims and Witnesses (Scotland) Bill

1st Marshalled List of Amendments for Stage 2

The Bill will be considered in the following order—

Sections 26 and 27 Sections 1 to 25
Sections 28 to 31 Long Title

Amendments marked * are new (including manuscript amendments) or have been altered.

Section 26

Michael Matheson

1 In section 26, page 20, leave out lines 34 to 36 and insert—

<( ) sub-paragraph (2) of paragraph 11 of schedule 1A applies in relation to the Commission’s annual report mentioned in section 18(1) as it applies in relation to a report prepared under that paragraph,>

Section 27

Michael Matheson

2 In section 27, page 23, line 29, leave out <18> and insert <16>

Michael Matheson

3 In section 27, page 23, line 34, leave out <otherwise>

Michael Matheson

4 In section 27, page 23, line 36, leave out from beginning to end of line 37 and insert—

<The conditions are that the care or health service>

Michael Matheson

5 In section 27, page 24, line 3, leave out <placed in care>

Michael Matheson

6* In section 27, page 25, line 16, leave out <could lead to the identification of> and insert <creates a real risk of identifying>

Michael Matheson

7 In section 27, page 25, leave out lines 21 and 22
Michael Matheson
8 In section 27, page 25, line 22, at end insert—

< ( ) Sub-paragraph (2) does not prevent a report from including information which is otherwise in the public domain.>

Michael Matheson
9 In section 27, page 25, leave out lines 31 and 32 and insert—

< ( ) Sub-paragraph (2) of paragraph 11 applies in relation to a report prepared under this paragraph as it applies in relation to a report prepared under that paragraph.>

Michael Matheson
10 In section 27, page 26, line 22, after <11> insert <or 12, or

(ii) the Commission to prepare its annual report mentioned in section 18(1)>

Michael Matheson
11 In section 27, page 26, line 31, leave out from <another> to <child> in line 32 and insert <an offence involving the abuse of a child has been committed>
1st Groupings of Amendments for Stage 2

This document provides procedural information which will assist in preparing for and following proceedings on the above Bill. The information provided is as follows:

- the list of groupings (that is, the order in which amendments will be debated). Any procedural points relevant to each group are noted;
- the text of amendments to be debated on the first day of Stage 2 consideration, set out in the order in which they will be debated. **THIS LIST DOES NOT REPLACE THE MARSHALLED LIST, WHICH SETS OUT THE AMENDMENTS IN THE ORDER IN WHICH THEY WILL BE DISPOSED OF.**

**Groupings of amendments**

**Forum and Commission reports: confidentiality**
1, 6, 7, 8, 9, 10

**Participation in the Forum: age limit**
2

**Meaning of “institutional care”: minor and drafting**
3, 4, 5

**Disclosure of information to police by Forum**
11
Amendments in debating order

Forum and Commission reports: confidentiality

Michael Matheson

1 In section 26, page 20, leave out lines 34 to 36 and insert—

<(  ) sub-paragraph (2) of paragraph 11 of schedule 1A applies in relation to the Commission’s annual report mentioned in section 18(1) as it applies in relation to a report prepared under that paragraph.>

Michael Matheson

6* In section 27, page 25, line 16, leave out <could lead to the identification of> and insert <creates a real risk of identifying>

Michael Matheson

7 In section 27, page 25, leave out lines 21 and 22

Michael Matheson

8 In section 27, page 25, line 22, at end insert—

<(  ) Sub-paragraph (2) does not prevent a report from including information which is otherwise in the public domain.>

Michael Matheson

9 In section 27, page 25, leave out lines 31 and 32 and insert—

<(  ) Sub-paragraph (2) of paragraph 11 applies in relation to a report prepared under this paragraph as it applies in relation to a report prepared under that paragraph.>

Michael Matheson

10 In section 27, page 26, line 22, after <11> insert <or 12, or (ii) the Commission to prepare its annual report mentioned in section 18(1)> Participation in the Forum: age limit

Michael Matheson

2 In section 27, page 23, line 29, leave out <18> and insert <16>

Meaning of “institutional care”: minor and drafting

Michael Matheson

3 In section 27, page 23, line 34, leave out <otherwise>
Michael Matheson

4 In section 27, page 23, line 36, leave out from beginning to end of line 37 and insert—
   <The conditions are that the care or health service>

Michael Matheson

5 In section 27, page 24, line 3, leave out <placed in care>

Disclosure of information to police by Forum

Michael Matheson

11 In section 27, page 26, line 31, leave out from <another> to <child> in line 32 and insert <an
   offence involving the abuse of a child has been committed>
HEALTH AND SPORT COMMITTEE

EXTRACT FROM THE MINUTES

31st Meeting, 2013 (Session 4)

Tuesday 5 November 2013

Present:
Malcolm Chisholm (Committee Substitute) Bob Doris (Deputy Convener)
Rhoda Grant Richard Lyle
Mark McDonald Aileen McLeod
Duncan McNeil (Convener) Nanette Milne
Gil Paterson

Also present: Michael Matheson (Minister for Public Health)

Apologies were received from Dr Richard Simpson.

The meeting opened at 10.00 am.

Victims and Witnesses (Scotland) Bill: The Committee considered the Bill at Stage 2.

The following amendments were agreed to (without division): 1, 2, 3, 4, 5 6, 7, 8, 9, 10 and 11.

The following provisions were agreed to as amended: sections 26 and 27.

The Committee completed its Stage 2 consideration of the Bill.
Victims and Witnesses (Scotland) Bill: Stage 2

National Confidential Forum

The Convener (Duncan McNeill): Good morning and welcome to the 31st meeting in 2013 of the Health and Sport Committee. As usual, I remind those present to switch off mobile phones, BlackBerrys and other wireless devices, as they can interfere with the sound system.

Members of the public may have noticed that some members and officials are using iPads and other tablet devices instead of hard copies of the papers.

We have received apologies from Richard Simpson and I welcome Malcolm Chisholm, who is with us again as the Labour Party substitute.

The first item on the agenda is stage 2 of the Victims and Witnesses (Scotland) Bill. Members will recall that, although the Justice Committee is the lead committee on the bill, at stage 1 this committee took evidence on and reported to the Justice Committee on the national confidential forum aspect of the bill. The Parliamentary Bureau has agreed that this committee should also lead on that aspect of the bill at stage 2.

Members should have a copy of the bill, the marshalled list of amendments and the groupings.

I welcome Michael Matheson, the Minister for Public Health; Sue Moody, from the bill team, adult care support; and Rosemary Lindsay, from the Scottish Government legal directorate.

Our task is to consider sections 26 and 27 only, and all the amendments to them. Our Justice Committee colleagues will deal with the rest of the bill.

As all the amendments are in the minister’s name, I will call him to open the debate on each of the four groups by moving the lead amendment and speaking to all amendments in the group. I will then call any other members who wish to speak on the group. Finally, I will invite the minister to wind up and indicate whether he wishes to press or withdraw the lead amendment.

We will follow normal procedure if a division is required. When we reach amendments on the marshalled list that have already been debated, I will ask the minister to move or not move the amendment. If the minister does not move the amendment, any other member who is present may move it. Finally, I politely remind the officials who are accompanying the minister—I am sure that they know this already—that they cannot speak during proceedings.

Section 26—National Confidential Forum

The Convener: I move to the first group. Amendment 1, in the name of the minister, is grouped with amendments 6 to 10.

The Minister for Public Health (Michael Matheson): Thank you, convener.

The bill aims to be as clear and consistent as possible. The amendments in this group are designed to achieve that aim in relation to published reports about the national confidential forum.

The bill creates a duty of confidentiality—at paragraph 13 of proposed new schedule 1A—which applies to information obtained in connection with the carrying out of the NCF’s functions. The duty of confidentiality is a crucial part of the NCF provisions, as it gives participants some security and certainty about who will have access to their testimony.

The duty of confidentiality in paragraph 13 will not apply to information that is already in the public domain. A person can disclose information provided to him or her in connection with the NCF if it has already been published or made widely available to the public.

Amendments 1, 8, and 9 are designed so that the restrictions on information contained in reports published by the NCF and reports by the Mental Welfare Commission that refer to the NCF are consistent with the duty of confidentiality. The effect of the amendments is to permit information that is already in the public domain to be included in such reports.

That means, for example, that an institution could be identified in a report about the NCF if the institution had been the subject of an inquiry and the results had been made available to the public. An individual who had been convicted of a criminal offence against children in institutional care could also be identified in a report.

Three parts of the bill deal with reports about the NCF: section 4ZD(1)(c), referring to annual reports of the Mental Welfare Commission; paragraph 11 of proposed new schedule 1A, in relation to reports by the NCF based on the testimony that it hears; and paragraph 12 of proposed new schedule 1A, concerning NCF annual reports. The
amendments will enable information already in the public domain to be included in all such reports.

I make it clear that the amendments will not alter in any way the duty of confidentiality in relation to information not in the public domain. The amendments will also not alter the requirement placed on the NCF to preserve the anonymity of participants, others referred to in testimony and establishments providing institutional care mentioned in the testimony.

Amendment 6 addresses an issue raised by survivors and other stakeholders at stage 1, which was supported in the committee’s report. Recommendation 18 of the report states:

“Survivors ... will expect to recognise their testimony in the reports of the NCF”.

The committee asked me to explore the coding of testimony, as practised in the confidential committee in Ireland, which was included in the reports of the Ryan commission that investigated child abuse in the Irish Republic. The current provisions concerning confidentiality at paragraph 11(2) of new schedule 1A might make it more difficult for the NCF to use a coding system in its published reports. That is because the current wording bars even the remotest possibility of being able to identify participants. Since the individual codes could, in association with the list of names, lead to the identification of participants, it is not clear that a coding system could be adopted by the NCF in light of the existing bill provisions.

Changing the wording by inserting a requirement for a “real risk” of identification allows for a higher threshold. It means that a coding system could be introduced by the NCF unless for any reason the disclosure of certain information in a report could create a real risk of identification of the person providing testimony to the NCF.

I make it clear that coding is an operational matter for the NCF and that, as such, we would not seek to prescribe how it should be designed or managed. I am also mindful of the possibility that in some cases coding could cause distress to participants, so use of such a system will need to be considered carefully by the head of the NCF. It could vary, for example, depending on the nature and focus of a report from the NCF.

Amendment 7 proposes to delete paragraph 11(2)(b) of proposed new schedule 1A. This is a technical amendment to improve the clarity of the bill. No substantive change will be made to the confidentiality requirements for reports, which remain as set out in paragraph 11(2)(a). Paragraph 11(2)(b) states that a report of the NCF must not

“include any other information which is subject to a confidentiality restriction under paragraph 13.”

Paragraph 13 of proposed new schedule 1A sets out the confidentiality requirements for information provided to the NCF in connection with its functions. An exception is provided for in paragraph 13(3)(b) to allow reports to be prepared. Since the reports are excepted from the confidentiality provision, it is somewhat confusing and circular for paragraph 11(2)(b) to refer back to paragraph 13.

The bill’s provisions seek to strike a balance between the duty of confidentiality, which as its name makes clear is an essential part of the national confidential forum, and the need to produce reports. Amendment 7 does not affect that balance but simply clarifies the provisions.

Finally in this grouping, amendment 10 proposes a change to paragraph 13(3)(b) of new schedule 1A, which will provide an exception to the national confidential forum’s duty of confidentiality when disclosure of information is necessary to enable the national confidential forum and the Mental Welfare Commission to produce their annual reports. As currently drafted, that part of the bill refers only to reports that are based on testimony received and does not include annual reports that the national confidential forum is required to produce under paragraph 12 or annual reports from the Mental Welfare Commission.

Amendment 10 will allow exceptions to the duty not to disclose information from the NCF to apply to the NCF and the Mental Welfare Commission’s annual reports. That will enable the NCF and the Mental Welfare Commission to provide important information in annual reports about, for example, the number of participants, their age and gender, the arrangements for hearings, and other business that is undertaken by the NCF. The confidentiality provisions in relation to reports will apply to all three types of report.

I move amendment 1.

Rhoda Grant (Highlands and Islands) (Lab): This is fraught with difficulty. The reports need to show people the outcomes of the testimonies that they give while protecting their confidentiality. Will the victims be involved in the drawing up of the reports, and will they have sight of the reports before they are published? That could help to overcome some of the problems that come about when victims think that something is being disclosed that they do not want to be disclosed. They can see that what they have said is not being treated differently from what they thought. It might be an idea to put draft reports to the victims so that they can look over the parts that pertain to themselves and give some feedback. Would that be helpful? Is that something that you see happening?
Michael Matheson: I think that it would be generally helpful—

The Convener: Minister, I do not mean to be rude but we have to treat this as the debate. I have to take other comments first, if there are any.

No other committee member wishes to come in so I will give the minister the opportunity to sum up and respond.

Michael Matheson: What Rhoda Grant suggested could be a helpful approach to dealing with some of the possible concerns about the contents of reports on testimony. It is a matter for the NCF itself and I would expect it to engage with different stakeholders and consider the best way of laying out a report and the process that is used before publishing a final report on an element of testimony. I would have thought that the NCF would wish to consider Rhoda Grant’s suggestion as part of the way that it goes about drawing together the reports and testing them before they are finally published.

Amendment 1 agreed to.

Section 26, as amended, agreed to.

Section 27—NCF: constitution and operation

The Convener: Amendment 2, in the name of the minister, is in a group on its own.

Michael Matheson: Amendment 2 acknowledges the views that have been expressed by a range of stakeholders during stage 1. The committee will recall that I gave a commitment to consider the views of, and evidence from, experts on children and young people, in order to explore the possibility of lowering the age of eligibility for the NCF from 18 to 16. I have considered how likely it is that 16 and 17-year-olds will want to participate in the national confidential forum; stakeholders and experts expect that not many young people will take up the opportunity to participate immediately on leaving the care system. There are other ways in which care leavers can raise concerns about their time in care, including through robust complaints processes and independent advocacy.

It has also been made clear to me that lowering the age of eligibility will be fair and will put young people in the same position as adult applicants to the NCF. The committee will recall that I gave a commitment to consider the views of, and evidence from, experts on children and young people, in order to explore the possibility of lowering the age of eligibility for the NCF from 18 to 16. I have considered how likely it is that 16 and 17-year-olds will want to participate in the national confidential forum; stakeholders and experts expect that not many young people will take up the opportunity to participate immediately on leaving the care system. There are other ways in which care leavers can raise concerns about their time in care, including through robust complaints processes and independent advocacy.

It is clear to me that 16 and 17-year-olds should, at the very least, be given the opportunity to have their experiences and testimony heard in the safe and confidential setting that the NCF will offer.

I have also considered whether the NCF is an appropriate setting for a young person between the ages of 16 and 18. I have taken advice on that, and the view of those whom we consulted is that the NCF can accommodate young people because the process is designed to be flexible and to take into account the individual needs of participants, including their age and capacity.

10:15

The bill envisages that those who wish to participate will no longer be in institutional care. The NCF is intended to deal with historical matters, so participants must have left the institution in which they were resident before they can take part. I accept that there could be situations in which a young person who had left institutional care might return to institutional care after taking part in the NCF.

I would like to add that, once the head of the NCF is appointed, he or she will be independently responsible for providing information about advice and assistance to participants, and for taking practical steps to ensure that young people are clear about the opportunities that are open to them in relation to participating in the NCF.

I am clear in supporting the view that, for the purposes of the national confidential forum, an “eligible person” should be a person who is 16 years of age or over.

I move amendment 2.

The Convener: The minister has the option to wind up. If he does not wish to, I will proceed.

Michael Matheson: I am happy to let you proceed.

Amendment 2 agreed to.

The Convener: Amendment 3, in the name of the minister, is grouped with amendments 4 and 5.

Michael Matheson: I will speak to amendments 3, 4 and 5.

Under paragraph 7(2)(b) of proposed new schedule 1A to the 2003 act, an “eligible person” is a person who

“was placed in an establishment providing institutional care during the person’s childhood”.

Amendments 3, 4, and 5 will clarify the provisions that are set out in proposed new schedule 1A in subparagraphs (3) and (4) of paragraph 7, which relate to the definition of “institutional care” for the purposes of the bill.

The committee will be aware that the principal criterion for participation in the national confidential forum is the experience of having been placed in institutional care as a child. The
particular type or description of institutional care will be set out in an order, but the intention is that there will be scope to include all forms of institutional care, including private boarding schools, secure units and long-stay hospitals. The bill provides that everyone who was placed in such institutional care as a child is eligible, whether they were placed in that care setting by the state or through a private arrangement.

Amendments 3, 4 and 5 should ensure that the NCF can offer survivors of child abuse from a wide range of institutions the opportunity to participate. In amendment 3, I propose that the word “otherwise” that is currently in paragraph 7(3) of new schedule 1A be removed on the basis that it is not necessary and could be confusing. Its removal will result in a more robust description in relation to defining “institutional care”, and will mean that the key issues—that a care or health service was provided to children in Scotland at some time, that it included a residential element and that it is of a description or type prescribed by the Scottish ministers by order—are emphasised.

Amendment 4 will allow the intended bill provisions to be set out more clearly in relation to the three elements that I have mentioned. Replacing the existing wording in paragraph 7(4) with

“The conditions are that the care or health service”

will remove ambiguity and will clearly introduce the conditions that are set out in the rest of the paragraph.

Amendment 5 will remove the words “placed in care” from paragraph 7(4)(b) of new schedule 1A, to ensure that “institutional care” can be defined to cover a wide range of institutions in which children receive a care or health service. I am keen, for example, that young offenders institutions be included in the definition of institutional care. I consider that young offenders institutions come within the parameters of a care service, although that is only one of their functions, but I am not convinced that the words “placed in care” are particularly appropriate for persons who are sent to a young offenders institution. By deleting those words, we will ensure that young offenders institutions and other similar institutions, such as remand homes, will be included for the purposes of the NCF.

I ask the committee to support amendments 3, 4 and 5.

I move amendment 3.

The Convener: Thank you, minister.

Nanette Milne (North East Scotland) (Con): During stage 1, there were quite a lot of mentions of people who have been placed in foster care.

Will the redefinition of “institutional care” cover foster care?

Michael Matheson: You might recall that at the time we had commissioned a report on whether it would be appropriate to include foster care within the parameters of the national confidential forum, principally because the forum is about institutional care, and foster care is not considered to be a form of institutional care. We have only just received the first draft of the report, but we expect to see the final version before stage 3, which will enable us to consider the issue in more detail.

The committee will be aware that we want the national confidential forum to work very much on the basis of the experience of the time to be heard pilot, which focused on institutional care. We will consider the report in the context of our intentions with regard to the national confidential forum, so we will consider whether it is necessary or appropriate to include foster care in the NCF’s role.

Rhoda Grant: You said that we are talking about residential care. Will the scope of the NCF include non-residential care settings such as schools, where people can be quite vulnerable, or is it just about residential care?

Malcolm Chisholm (Edinburgh Northern and Leith) (Lab): I wonder whether the bill will still be a bit clumsy in referring to “conditions” and “a description”. Would it not be simpler if the bill said that in the new schedule 1A, “institutional care’ means a care or health service of a description or type prescribed by order,” and then said what the order must prescribe? It seems to be clumsy to have two different categories, but I accept that we are dancing on the head of a pin. I suppose that is in the nature of the amendments.

Michael Matheson: I will deal with members’ comments in reverse order. We can reflect on Malcolm Chisholm’s point, and consider whether there is a need to tidy the wording further at stage 3 and to offer further clarification.

On Rhoda Grant’s point, schools are not covered, because there must be a residential element—as I said, if there is a residential element, an institution could come within the scope of the national confidential forum. We will consult on the order that we will make to prescribe the institutional settings that will be covered, so that people with an interest in the area can make their views known about what should be prescribed.

Amendment 3 agreed to.

Amendments 4 to 10 moved—[Michael Matheson]—and agreed to.

The Convener: Amendment 11, in the name of the minister, is in a group on its own.
Michael Matheson: Paragraph 13(5) of proposed new schedule 1A will provide that a member of the national confidential forum may disclose to the police information that has been given in testimony by a participant, “to the extent that—
(a) it relates to an allegation made by a person who has given testimony that another identifiable person has committed an offence involving the abuse of a child, and
(b) it is, in the opinion of the member acting in good faith, in the public interest to do so.”

Amendment 11—the final amendment that we will consider—will remove the words “another identifiable person” from the paragraph, thereby removing a restriction that is unnecessary and has no clear rationale.

Testimony from people who participate in the national confidential forum might contain allegations that crimes have been committed without including information that clearly identifies the alleged perpetrator. However, such testimony might include information about matters such as dates and locations, which, if shared with the police, could lead after investigation to the identification of alleged perpetrators. My view is that the provision would be more appropriate if the words “another identifiable person” were removed. The wording could prevent NCF members from being able to report cases when it was clearly in the public interest so to do.

I make it clear that amendment 11 will not in any way affect the duty that NCF members will have under paragraph 13(4) of new schedule 1A to report offences where doing so is “reasonably necessary to prevent the commission of an offence involving the abuse of a child.”

I do not want to alter in any way the protection for children who are considered to be at risk of abuse at the time when testimony is offered to the national confidential forum. Paragraph 13(4), which is not being amended, is designed to ensure that protection of children will be paramount when the forum considers whether to report allegations to the police.

As I said to the committee on 30 April, we are trying to balance the therapeutic value that can be gained from the forum with public interest and public safety. I ask the committee to support amendment 11.

I move amendment 11.

Amendment 11 agreed to.

Section 27, as amended, agreed to.

The Convener: That concludes the Health and Sport Committee’s consideration of the bill at stage 2. The Justice Committee will consider the remainder of the bill at its meeting on 12 November. Members should note that the deadline for lodging amendments to the remainder of the bill is 12 noon on Thursday.

I thank the minister and his officials for attending.

10:27
Meeting continued in private until 12:09.
Victims and Witnesses (Scotland) Bill

2nd Marshalled List of Amendments for Stage 2

The Bill will be considered in the following order—

Sections 1 to 25
Long Title
Sections 28 to 31

Amendments marked * are new (including manuscript amendments) or have been altered.

Before section 1

Margaret Mitchell

Before section 1, insert—

<Definition of victim
(1) For the purposes of this Act, a victim is a person who has suffered harm—
   (a) because an offence is committed against the person,
   (b) because the person is a prescribed relative or dependent of a person who has died or suffered harm because an offence is committed against that person, or
   (c) as a direct result of intervening—
      (i) to help another person against whom an offence is committed, or
      (ii) to prevent an offence being committed against another person.
(2) For the purposes of subsection (1), “harm” includes—
   (a) physical, mental or emotional harm,
   (b) economic loss.
(3) In subsection (1)(b), “prescribed” means prescribed by the Scottish Ministers by order.
(4) An order under subsection (1)(b) is subject to the negative procedure.>

Section 1

Elaine Murray

In section 1, page 1, line 26, at end insert—

<( ) In having regard to the principles mentioned in subsection (3), each person mentioned in subsection (2) must consider the specific needs, rights and wishes of a child who is or appears to be a victim or witness in relation to a criminal investigation or criminal proceedings.>
Elaine Murray
56 In section 1, page 1, line 26, at end insert—

<( ) In having regard to the principle mentioned in subsection (3)(a), each person mentioned in subsection (2) must take steps to provide information to a child who is or appears to be a victim or witness in relation to a criminal investigation or criminal proceedings in such form as the child may reasonably require.>

Elaine Murray
57 In section 1, page 1, line 28, at end insert—

<( ) In this section, “child” means a person under 18 years of age.>

Section 2

Kenny MacAskill
12 In section 2, page 2, line 4, leave out <any of the person’s functions> and insert <the functions of the person mentioned in subsection (3)>

Elaine Murray
58 In section 2, page 2, line 8, at end insert—

<( ) Each person mentioned in subsection (2) in setting and publishing standards under subsection (1), in so far as the standards could relate to a child, must do so in such a way that the welfare of a child is of paramount consideration.>

Kenny MacAskill
13 In section 2, page 2, line 10, leave out from <but> to end of line 11

Kenny MacAskill
14 In section 2, page 2, line 12, leave out from <but> to end of line 13

Kenny MacAskill
15 In section 2, page 2, line 18, at beginning insert <in the case of the Lord Advocate,>

Kenny MacAskill
16 In section 2, page 2, line 19, at beginning insert <in the case of the Scottish Ministers,>

Kenny MacAskill
17 In section 2, page 2, line 20, at end insert—

<( ) in the case of any other person mentioned in subsection (2), any functions.>

Kenny MacAskill
18 In section 2, page 2, line 20, at end insert—
Before a person mentioned in subsection (2) (“the publisher”) publishes standards under subsection (1), the publisher must consult—

(a) every other person mentioned in subsection (2), and

(b) such other persons as appear to the publisher to have a significant interest in the standards.

Kenny MacAskill

In section 2, page 2, line 21, at end insert—

so far as is necessary or expedient in consequence of any modification made under paragraph (a), modify subsection (1), (3) or (5).

Elaine Murray

As soon as practicable after the end of each 1 year period, each person mentioned in subsection (2) must publish a report on how the person has met the standards set under subsection (1).

In preparing a report under subsection (4A), those persons mentioned in subsection (2) are, so far as reasonably practicable, to ascertain and have regard to the views of victims and witnesses in relation to a criminal investigation or criminal proceedings.

A person mentioned in subsection (2) may in consequence of a report under subsection (4A) revise the standards the person set so as to meet the needs of victims and witnesses in relation to a criminal investigation or criminal proceedings.

Where a person mentioned in subsection (2) revises the standards set the person must publish those revised standards.

The Scottish Ministers may by regulations prescribe the information that reports published under subsection (4A) must contain.

Before making regulations under subsection (4E), the Scottish Ministers must consult those persons mentioned in subsection (2).

Regulations under subsection (4E) are subject to the negative procedure.

In subsection (4A), “1 year period” means—

(a) the period of 1 year beginning with the date on which the standards are published, and

(b) each subsequent period of 1 year.

Elaine Murray

In section 2, page 2, line 22, at end insert—

“child” means a person under 18 years of age.

Margaret Mitchell

In section 2, page 2, leave out line 25
Margaret Mitchell
76 In section 2, page 2, line 26, leave out subsection (6)

Kenny MacAskill
20 In section 2, page 2, line 28, leave out <(6)> and insert <(5)>

After section 2

Kenny MacAskill
21 After section 2, insert—

<Reports
(1) This section applies where a person publishes standards under section 2(1).
(2) The person must prepare and publish a report in relation to the matters mentioned in subsection (3)—
   (a) before the end of the period of 12 months beginning with the day on which standards are first published under section 2(1), and
   (b) as soon as practicable following—
      (i) the expiry of the period of 12 months beginning with the day on which a report is published under paragraph (a), and
      (ii) each subsequent period of a year.
(3) The matters are—
   (a) an assessment of how, and the extent to which, the standards have been met during the period of the report,
   (b) an explanation of how the person intends to meet the standards during the year after the period of the report,
   (c) a description of any modification of the standards made during the period of the report, and
   (d) a description of any modification of the standards that the person proposes to make during the year after the period of the report.
(4) The Scottish Ministers may by regulations prescribe information (in addition to that required under subsection (3)) that reports prepared under subsection (2) must contain.
(5) Regulations under subsection (4) are subject to the negative procedure.>

Kenny MacAskill
77 After section 2, insert—

<Rules: review of decision not to prosecute
Rules: review of decision not to prosecute
(1) The Lord Advocate must make and publish rules about the process for reviewing, on the request of a person who is or appears to be a victim in relation to an offence, a decision of the prosecutor not to prosecute a person for the offence.
(2) Rules under subsection (1) may in particular make provision for or in connection with—
(a) the circumstances in which reviews may be carried out,
(b) the manner in which a request for review must be made,
(c) the information that must be included in a request for review,
(d) the matters to be taken into account by the Lord Advocate when carrying out reviews,
(e) the process to be followed by the Lord Advocate when carrying out reviews.

(3) In this section, “prosecutor” means Lord Advocate, Crown Counsel or procurator fiscal.

Margaret Mitchell

78 After section 2, insert—

<Co-ordination of support for victims and witnesses

Co-ordination of support for victims and witnesses

(1) In so far as appropriate, the persons mentioned in subsection (2) (“the persons”) must take steps to co-operate and co-ordinate in the provision of support to a person who is or appears to be a victim or witness (“victim” and “witness”) in relation to a criminal investigation or criminal proceedings and, in particular, take the steps mentioned in subsections (3) and (5).

(2) The persons are—

(a) the Lord Advocate, but only in relation to functions relating to the investigation and prosecution of crime,
(b) the chief constable of the Police Service of Scotland.

(3) The persons must, in respect of each 3-year period, jointly prepare, publish and lay before the Parliament a strategic communications plan.

(4) The strategic communications plan must, in particular, set out the steps the persons will take to—

(a) co-operate and co-ordinate in the provision of information to victims and witnesses in relation to a criminal investigation or criminal proceedings,
(b) co-operate and co-ordinate in the provision of appropriate support to victims or witnesses during and after a criminal investigation or proceedings,
(c) share information, in so far as appropriate, in relation to victims and witnesses,
(d) share and promote best practice in relation to victims and witnesses,
(e) consult with other persons providing support to victims and witnesses,
(f) provide advice, guidance and training in relation to the provision of co-ordinated support to victims and witnesses.

(5) The persons must jointly establish a single point of contact for all victims and witnesses seeking information or support in relation to a criminal investigation or criminal proceedings.

(6) Information about the single point of contact must be published and made available to victims or witnesses.

(7) The single point of contact must—
(a) provide information on the range of services available to support victims and witnesses,

(b) direct a victim or witness to the relevant person where a victim or witness is seeking information or support in relation to a criminal investigation or criminal proceedings.

(8) The Scottish Ministers may by regulations make further provision in respect of the single point of contact.

(9) Regulations under subsection (8) are subject to the negative procedure.

Alison McInnes

79* After section 2, insert—

<Restorative justice

Restorative justice

(1) The Scottish Ministers must by regulations make provision for the referral of a victim and a person who has or is alleged to have committed an offence to restorative justice processes.

(2) Regulations under subsection (1) must, in particular, make provision for—

(a) the circumstances where referral to restorative justice processes may be appropriate,

(b) the procedure for referral to restorative justice processes,

(c) the conditions for referral to restorative justice processes.

(3) The conditions mentioned in subsection (2)(c) must include—

(a) that such services are used only where they are in the interest of the victim and are based on the victim’s free and informed consent which may be withdrawn at any time,

(b) that provision must be made to ensure the safety of the victim and that the victim is protected from victimisation and retaliation,

(c) that full and impartial information about the process, including information about potential outcomes, is provided in advance to the victim,

(d) that the person who has or is alleged to have committed an offence has acknowledged the basic facts of the case,

(e) that discussions in restorative justice processes that are not conducted in public are confidential and not subsequently disclosed except with the agreement of the parties or as required in the public interest.

(4) For the purposes of this section, “restorative justice” means any process whereby the victim and a person who has or is alleged to have committed an offence are enabled, where they freely consent, to participate actively in the resolution of matters arising from an offence through the assistance of an impartial third party.

(5) Regulations under subsection (1) are subject to the negative procedure.>
Section 3

Kenny MacAskill

22 In section 3, page 2, line 36, at end insert—

<(aa) in the case where the death of a person mentioned in paragraph (a) was (or appears to have been) caused by the offence or alleged offence, a prescribed relative of the person,>.

Kenny MacAskill

23 In section 3, page 3, line 8, at end insert—

<“prescribed” means prescribed by the Scottish Ministers by order.>.

Kenny MacAskill

24 In section 3, page 3, line 24, at end insert—

<(  ) the place in which the hearing of an appeal arising from a trial is to be held,
   (  ) the date on which and time at which the hearing of an appeal arising from a trial is to be held,>.

Kenny MacAskill

25 In section 3, page 3, line 26, leave out <disposal in criminal proceedings> and insert <decision of a court in a trial or any appeal arising from a trial,>.

Margaret Mitchell

80 In section 3, page 3, line 26, at end insert—

<(6A) For the purposes of subsection (4), the circumstances where it would be inappropriate to disclose information include if—
   (a) doing so is prohibited by or under any enactment,
   (b) doing so would constitute, or be punishable as, a contempt of court,
   (c) it would, or would be likely to, prejudice the administration of justice,
   (d) it is likely to cause substantial distress to the requester,
   (e) the information is not available in a format which could be transmitted to the requester,
   (f) the information can reasonably be obtained other than by a request to the qualifying person,>.

Margaret Mitchell

81 In section 3, page 3, line 29, at end insert—

<(  ) subsection (6A).>.

Kenny MacAskill

26 In section 3, page 3, line 30, after <under> insert—
<(  ) subsection (2)(aa) is subject to the negative procedure;>

Section 4

Alison McInnes

61 In section 4, page 4, line 1, leave out <have regard to> and insert <comply with>

John Finnie
Supported by: Elaine Murray

62 In section 4, page 4, line 1, after <have> insert <due>

After section 5

Kenny MacAskill

27 After section 5, insert—

<Medical examinations

Certain medical examinations: gender of medical examiner
(1) This section applies where a person makes a complaint to a constable alleging that the person is the victim of an offence listed in any of paragraphs 36 to 60 of Schedule 3 to the Sexual Offences Act 2003.
(2) Before a medical examination of the person in relation to the complaint is carried out by a registered medical practitioner in pursuance of section 31 of the Police and Fire Reform (Scotland) Act 2012, the constable must give the person an opportunity to request that any such medical examination be carried out by a registered medical practitioner of a gender specified by the person.
(3) If the person makes such a request, the constable must ensure that the registered medical practitioner who is to (or, but for the request, would) carry out the examination is informed of the nature of the request.
(4) In this section, references to a registered medical practitioner include references to a person of such other description as the Scottish Ministers may by order prescribe.
(5) An order under subsection (4) is subject to the negative procedure.>

Graeme Pearson

82* After section 5, insert—

<Evidence in relation to sexual offences: health information

(1) The Scottish Ministers must by regulations make provision for the circumstances when information relating to the physical or mental health of a person who is or appears to be a victim of an offence of a type mentioned in subsection (3) (“the victim”) can be disclosed in relation to a criminal investigation or criminal proceedings.
(2) Regulations under subsection (1) must make provision in particular about—
(a) the circumstances when it may be considered appropriate to seek disclosure of such information,
(b) the process by which a decision to disclose such information must be made,
(c) subject to paragraph (d), the need to obtain the free and informed consent of the victim,
(d) the circumstances when it may appropriate to disclose such information without the consent of the victim,
(e) the nature of the support that must be made available to the victim where disclosure of such information is sought.

(3) The types of offence are—
(a) an offence listed in any of paragraphs 36 to 60 of Schedule 3 to the Sexual Offences Act 2003 (c.42),
(b) an offence under section 22 of the 2003 Act (traffic in prostitutions etc.),
(c) an offence under section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (c.19) (trafficking of people for exploitation),
(d) an offence consisting of domestic abuse,
(e) stalking.

(4) Regulations under subsection (1) are subject to the affirmative procedure.

Margaret Mitchell

83* After section 5, insert—

<Medical and other sensitive information

Evidence relating to sexual offences: medical and other sensitive information

(1) This section applies where a relevant person wishes to access medical or other sensitive information about a person who is or appears to be the victim of an offence of a type mentioned in subsection (6) in relation to—
(a) the questioning of that person in the course of criminal proceedings which have been instituted in relation to another person,
(b) the questioning of that person with a view to instituting criminal proceedings against another person,
(c) an application under section 275(1) of the 1995 Act.

(2) The person must be given the opportunity to—
(a) obtain legal advice,
(b) appoint a legal representative.

(3) Where the person appoints a legal representative, the legal representative must be given an opportunity to submit evidence on whether access to the medical or other sensitive information should be provided.

(4) The legal representative may provide such evidence—
(a) in writing,
(b) at any relevant hearing.

(5) The fees incurred by a legal representative appointed under subsection (3) are to be paid out of the Scottish Legal Aid Fund.

(6) The types of offence are—
(a) an offence listed in any of paragraphs 36 to 60 of Schedule 3 to the Sexual Offences Act 2003 (c.42),
(b) an offence under section 22 of the 2003 Act (traffic in prostitutions etc.),
(c) an offence under section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (c.19) (trafficking of people for exploitation),
(d) an offence consisting of domestic abuse,
(e) stalking.

(7) In this section—

“medical information” means information which relates to the physical or mental health or condition of a person,
“other sensitive information” includes information in a social work record, an educational record, a local authority care record and a counselling record,
“relevant person” means—

(a) a constable,
(b) a prosecutor (as defined in section 307(1) of the 1995 Act),
(c) a person accused of an offence or the legal representative of the person so accused.

Section 6

Kenny MacAskill

28 In section 6, page 5, line 32, at end insert <or>

Section 9

Alison McInnes

63 In section 9, page 8, line 10, after <measure> insert <(other than a standard special measure)>

Kenny MacAskill

64 In section 9, page 8, line 16, leave out <(5)> and insert <(5)(a)(ii)>

Elaine Murray

65 Leave out section 9

Section 10

Alison McInnes

66 Leave out section 10
Section 13

Elaine Murray
67 Leave out section 13

After section 16

John Finnie
84* After section 16, insert—

<Special measures: intermediary
(1) In section 271H(1) of the 1995 Act (the special measures), after paragraph (ea) (inserted by section 16(1) of this Act), insert—
“(eb) taking of evidence through an interpreter or other person approved by the court for the purposes of section 271HC of this Act,”.
(2) After section 271HB of the 1995 Act (inserted by section 16(2) of this Act), insert—

“271HC Taking of evidence through an intermediary
(1) This section applies where the special measure to be used in respect of a vulnerable witness is taking evidence through an interpreter or other person approved by the court (“the intermediary”).
(2) The intermediary must in so far as is necessary—
(a) communicate to the witness any questions put to the witness,
(b) communicate to any person asking such questions the responses given by the witness,
(c) provide any further information to the witness or person asking the questions to enable such questions and responses to be understood.”.
(3) In section 271F(8)(a) of the 1995 Act (special measures not applying in relation to a vulnerable witness who is the accused), after “271H(1)(c)” insert “and (eb)”.

After section 17

Margaret Mitchell
85* After section 17, insert—

<Legal representation for complainer
Evidence relating to sexual offences: legal representation
In section 275 of the 1995 Act (exception to restrictions under section 274), after subsection (5), insert—

“(5A) Where an application under subsection (1) is made, the complainer must in respect of that application—
(a) be informed of the right of the complainer—
(i) to seek legal advice,
(ii) to appoint a legal representative,
(b) be given the opportunity—
   (i) to seek such advice,
   (ii) to appoint such a representative.

(5B) Where the complainer appoints a legal representative—
   (a) a copy of the application must be sent to the legal representative, and
   (b) the legal representative must be given an opportunity to—
      (i) submit written evidence on the matters set out in the application in
          accordance with subsection (3),
      (ii) represent the complainer at any hearing in relation to the
           application.

(5C) The fees incurred by a legal representative appointed under subsection (5B) are
     to be paid out of the Scottish Legal Aid Fund.”.

Section 19

Kenny MacAskill
29 In section 19, page 12, line 3, leave out <as follows> and insert <in accordance with subsections
(2) to (7).>

Graeme Pearson
86 In section 19, page 12, line 10, at end insert—

<( ) After subsection (5), insert—

“(5A) A victim statement or a statement supplementary to, or in amplification of, the
victim statement may be made—
   (a) in writing,
   (b) by way of oral representation,
   (c) by such other means as the Scottish Ministers may prescribe by order.

(5B) Where a person chooses to make a statement by way of oral representation, the
person may do so by use of a live television link.

(5C) Where a person chooses to make a statement by way of live television link the
court must make such arrangements as seem to it appropriate for the person to
give evidence by means of such a link.

(5D) An order under subsection (5A)(c) must not be made unless a draft of the
instrument has been laid before, and approved by a resolution of, the
Parliament.”.

Kenny MacAskill
30 In section 19, page 12, line 13, leave out <14> and insert <12>

Elaine Murray
68 In section 19, page 12, line 23, leave out from beginning to end of line 10 on page 13 and insert—
(11A) A child must be given an opportunity to make a victim statement where the child has not attained the age of 12 but is of sufficient age and maturity to make such a statement.

(11B) Where a child is not of sufficient age and maturity under subsection (11A)—

(a) any victim statement must instead be made by a person who has parental responsibilities or rights under the Children (Scotland) Act 1995 (c.36), or

(b) if a statement cannot be made by a person under paragraph (a), the statement may be made by a “qualifying person” whose relationship to the child is listed in subsection (10).

(11C) In determining the maturity of a child a view must be obtained from a person registered in the part of the register maintained under the Health Professions Order 2001 which relates to practitioner psychologists.

(11D) Where there is more than one qualifying person in relation to a child, the court must determine which qualifying person should make that statement.

(11E) In making a determination under subsection (11D), so far as practicable and having regard to the age and maturity of the child, the court must—

(a) give the child an opportunity to express any views on which qualifying person is to make the statement, and

(b) take into account any such views in determining which qualifying person is to make the statement.

(11F) A child who is given an opportunity to make a victim statement by virtue of subsection (11A) or to express views on which qualifying person is to make the statement under subsection (11C) must be provided with such support as the child needs to enable the child to make the statement or express views, as the case may be.”.

Kenny MacAskill

31  In section 19, page 12, line 23, leave out <14> and insert <12>

Kenny MacAskill

32  In section 19, page 13, line 13, at end insert—

<(7)  After subsection (12), insert—

“(13) A victim statement, or a statement made by virtue of subsection (3) in relation to a victim statement, may be made in such form and manner as may be prescribed.

(14) An order under subsection (13) may—

(a) include such incidental, supplementary or consequential provision as the Scottish Ministers consider appropriate,

(b) modify any enactment (including this Act).

(15) An order under subsection (13) may be made so as to have effect for a period specified in the order.
(16) An order under subsection (13) containing provision of the type mentioned in subsection (15) may provide that its provisions are to apply only in relation to one or more areas specified in the order.”.

(8) In section 88(2) of the 2003 Act (orders), at the beginning of paragraph (b) insert “14(13) or”.>

Section 20

**Elaine Murray**

69 In section 20, page 13, line 19, at end insert—

<(4B) In considering whether to make a compensation order, the court must take steps to ascertain the views of the victim.

(4C) No compensation order may be made where the victim notifies the court that the victim does not wish to receive compensation from the person convicted of the offence.

(4D) For the purposes of subsections (4B) and (4C), “victim” has the meanings given by subsections (1A) and (1C).”.

Section 21

**Alison McInnes**

70 In section 21, page 13, line 26, at end insert—

<( ) section 1(1) of the Emergency Workers (Scotland) Act 2005 (assaulting or impeding certain providers of emergency services).>

**Alison McInnes**

71 In section 21, page 13, line 26, at end insert—

<( ) section 2(1) of the Emergency Workers (Scotland) Act 2005 (assaulting or impeding certain emergency workers responding to emergency circumstances).>

**Kenny MacAskill**

33 In section 21, page 14, line 3, leave out <and maintain> and insert <, maintain and administer>

**Alison McInnes**

72 In section 21, page 14, line 6, after <(asp 8)> insert <and section 1(1) of the Emergency Workers (Scotland) Act 2005.>

**Alison McInnes**

73 In section 21, page 14, line 6, after <(asp 8)> insert <and section 2(1) of the Emergency Workers (Scotland) Act 2005.>
Kenny MacAskill
34 In section 21, page 14, line 8, at end insert—
   ⟨( ) the Scottish Ministers or, with the consent of the Scottish Ministers, a
   person specified by order by virtue of subsection (5) in respect of outlays
   incurred in administering the fund.⟩

Kenny MacAskill
35 In section 21, page 14, line 10, leave out ⟨and maintaining⟩ and insert ⟨, maintaining and
   administering⟩

Kenny MacAskill
36 In section 21, page 14, line 12, after ⟨about⟩ insert ⟨the administration of⟩

Kenny MacAskill
37 In section 21, page 14, leave out lines 14 and 15

Section 22

Margaret Mitchell
87 In section 22, page 16, line 6, leave out from ⟨other⟩ to end of line 8

Margaret Mitchell
88 In section 22, page 16, leave out line 10

Margaret Mitchell
89 In section 22, page 16, line 11, leave out from beginning to ⟨Ministers,⟩ in line 12

Kenny MacAskill
38 In section 22, page 16, line 34, leave out ⟨and maintain⟩ and insert ⟨, maintain and administer⟩

Kenny MacAskill
39 In section 22, page 16, line 36, leave out ⟨have been the victims of crime (“victims”)⟩ and insert
   ⟨are, or appear to be, the victims of crime and prescribed relatives of such persons.⟩

Kenny MacAskill
40 In section 22, page 16, line 38, leave out ⟨victim⟩ and insert ⟨person who is, or appears to be, the
   victim of crime,

   (aa) a prescribed relative of a person who is, or appears to be, the victim of
   crime,⟩
Kenny MacAskill

41 In section 22, page 16, line 40, leave out <victims> and insert <persons who are, or appear to be, victims of crime,>

Kenny MacAskill

*42 In section 22, page 16, line 40, at end insert <or

( ) the Scottish Ministers or, with the consent of the Scottish Ministers, a person specified by order by virtue of subsection (5) in respect of outlays incurred in administering the fund.>

Graeme Pearson

90 In section 22, page 16, line 40, at end insert—

<( ) A payment out of the fund may not be used to supplement or replace payments to be made out of the Scottish Consolidated Fund.>

Kenny MacAskill

43 In section 22, page 17, line 2, leave out <and maintaining> and insert <, maintaining and administering>

Kenny MacAskill

44 In section 22, page 17, line 4, leave out <order> and insert <regulations>

Kenny MacAskill

45 In section 22, page 17, line 4, after <about> insert <the administration of>

Kenny MacAskill

46 In section 22, page 17, leave out lines 6 to 9

Kenny MacAskill

47 In section 22, page 17, line 14, leave out <or (6) is> and insert <and regulations under subsection (6) are>

Kenny MacAskill

49 In section 22, page 17, line 15, after <section> insert—

<“prescribed” means prescribed by the Scottish Ministers by regulations,>

Kenny MacAskill

48 In section 22, page 17, line 15, leave out <victim> and insert <person who is, or appears to be, the victim of crime>
Kenny MacAskill
50 In section 22, page 17, line 17, leave out <victim> and insert <person or a prescribed relative of the person>

Kenny MacAskill
51 In section 22, page 17, line 17, at end insert—

<(  )> Regulations under subsections (3), (4) and (8) are subject to the negative procedure.>

Graeme Pearson
91 In section 22, page 18, line 15, at end insert—

<The Victim Surcharge Fund: reports>

(1) The Scottish Ministers, or such person to whom they have delegated the duties imposed on them by section 253G(3), must prepare and publish a report in relation to the matters mentioned in subsection (3).

(2) A report under subsection (1) must be published—

(a) before the end of the period of 12 months beginning with the day on which the fund is established, and

(b) as soon as practicable following—

(i) the expiry of the period of 12 months beginning with the day on which a report is published under paragraph (a), and

(ii) each subsequent period of a year.

(3) The matters are—

(a) the sum paid into the fund,

(b) the sum still due to be paid into the fund by persons who the court has ordered to make payment of a victim surcharge,

(c) a list of those persons ordered to make payment of a victim surcharge who are yet to make that payment,

(d) the sum paid out of the fund,

(e) an account and assessment of how the sum paid out of the fund has been used.

(4) The Scottish Ministers may by regulations prescribe information (in addition to that required under subsection (3)) that reports prepared under subsection (1) must contain.

(5) Regulations under subsection (4) are subject to the negative procedure.”.

Section 23

Margaret Mitchell
92 In section 23, page 18, line 21, at end insert—

<(  )> in subsection (1), after paragraph (c), insert—
“(ca) to any period of imprisonment or detention and the following conditions apply—

(i) the person was subject to an indefinite notification period under or by virtue of the Sexual Offences Act 2003, and

(ii) has ceased to be subject to such a notification period.”.

Graeme Pearson

93 In section 23, page 18, line 22, after <(3),> insert—

<( ) before paragraph (a) insert—

“(za) at the time of sentencing, the date on which the convicted person is, under or by virtue of the 1993 Act, eligible for release;”,

( )>

Kenny MacAskill

52 In section 23, page 18, line 24, leave out <Prisons (Scotland) Act 1989 (c.45)> and insert <1989 Act>

Graeme Pearson

94* In section 23, page 18, line 25, at end insert—

<( ) in subsection (4), after paragraph (a), insert—

“(ab) specify the minimum period of time before the date on which the convicted person is released, under or by virtue of the 1989 Act or the 1993 Act, (other than by being granted temporary release) by which time a person must be notified of that release; or”.>

Section 24

Graeme Pearson

95 In section 24, page 18, line 33, leave out from <if> to <imprisonment,>

Margaret Mitchell

96 In section 24, page 18, line 33, after <imprisonment,> insert <or is, or has at any time been, subject to an indefinite notification period under or by virtue of the Sexual Offences Act 2003 (c.42)>
In section 24, page 18, line 37, at end insert—

<( ) be afforded an opportunity to make oral representations to the convicted person by way of video link as respects such release and as to the conditions which might be specified in the licence in question.>.

In section 24, page 19, line 2, after <made> insert <, including how such representations to the offender may be made by way of video link>

In section 24, page 19, line 7, leave out lines 7 to 9

Section 25

In section 25, page 19, line 18, leave out <Prisons (Scotland) Act 1989 (c.45)> and insert <1989 Act>

After section 25

After section 25, insert—

<Communications with victims and witnesses

(1) Any communication providing information by a relevant person to a person who is or appears to be a victim or witness in relation to a criminal investigation or criminal proceedings must be in such form as the person reasonably requires.

(2) For the purposes of subsection (1)—

(a) the relevant person must take steps to ascertain the views and wishes of the victim or witness in relation to the form that such communications should take,

(b) a communication includes notification to a victim in respect of the release of an offender.

(3) In this section—

“relevant person” means a—

(a) a constable,

(b) a prosecutor (as defined in section 307(1) of the 1995 Act),

(c) a prescribed person providing support services to victims and witnesses,

“victim” includes a prescribed relative of a victim.

(4) In subsection (3), “prescribed” means prescribed by the Scottish Ministers by order.

(5) An order under subsection (4) is subject to the negative procedure.>
In section 30, page 27, line 33, after <sections> insert <26 so far as it inserts the new section 4ZA, 27(1), 27(2) so far as it inserts paragraphs 1, 2 and 5 of the new schedule 1A, 27(3),>
Victims and Witnesses (Scotland) Bill

2nd Groupings of Amendments for Stage 2

This document provides procedural information which will assist in preparing for and following proceedings on the above Bill. The information provided is as follows:

- the list of groupings (that is, the order in which amendments will be debated). Any procedural points relevant to each group are noted;
- the text of amendments to be debated on the second day of Stage 2 consideration, set out in the order in which they will be debated. **THIS LIST DOES NOT REPLACE THE MARSHALLED LIST, WHICH SETS OUT THE AMENDMENTS IN THE ORDER IN WHICH THEY WILL BE DISPOSED OF.**

Groupings of amendments

**Definition of victim**
74, 75, 76, 20, 22, 23, 26, 39, 40, 41, 49, 48, 50, 51

**General principles: consideration of children**
55, 56, 57

**Standards of service**
12, 58, 13, 14, 15, 16, 17, 18, 19, 59, 60, 21

**Review of decision not to prosecute**
77

**Co-ordination of support for victims and witnesses**
78

**Restorative justice**
79

**Disclosure of information about criminal proceedings**
24, 25, 80, 81

**Interviews with children: compliance with guidance**
61, 62

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Notes on amendments in this group
Amendment 61 pre-empts amendment 62

**Certain medical examinations: gender of medical examiner**
27

**Evidence in relation to sexual offences: disclosure of information**
82, 83, 85
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Present:

Christian Allard  Roderick Campbell
John Finnie  Christine Grahame (Convener)
Alison McInnes  Margaret Mitchell
Elaine Murray (Deputy Convener)  John Pentland
Sandra White

Also present: Kenny MacAskill, Cabinet Secretary for Justice and Graeme Pearson.

Victims and Witnesses (Scotland) Bill: The Committee considered the Bill at Stage 2 (Day 2).

The following amendments were agreed to (without division): 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 77, 22, 23, 24, 25, 26, 27, 28, 63 and 64.

The following amendments were agreed to (by division)—
79 (For 5, Against 4, Abstentions 0)
62 (For 5, Against 4, Abstentions 0).

The following amendments were disagreed to (by division)—
59 (For 4, Against 5, Abstentions 0)
78 (For 4, Against 5, Abstentions 0)
80 (For 2, Against 7, Abstentions 0)
81 (For 1, Against 8, Abstentions 0)
82 (For 2, Against 4, Abstentions 2)
66 (For 3, Against 5, Abstentions 1).

The following amendments were moved and, no member having objected, withdrawn: 74, 55 and 61.

The following amendments were not moved: 56, 57, 58, 60, 75, 76, 83, 65 and 67.

The following provisions were agreed to without amendment: sections 1, 5, 7, 8, 10, 11, 12, 13, 14, 15 and 16.

The following provisions were agreed to as amended: sections 2, 3, 4, 6 and 9.

The Committee ended consideration of the Bill for the day section 16 having been agreed to.

Roderick Campbell indicated that he is a member of the Faculty of Advocates.
Victims and Witnesses (Scotland) Bill: Stage 2

The Convener: Item 3 is stage 2 of the Victims and Witnesses (Scotland) Bill. As I said before the meeting—and will repeat for the benefit of the Cabinet Secretary for Justice, so he knows how long he is going to be sitting here—I intend to hold the session for two hours. If it looks as though people are willing on the vine, I may take a little break, after which we will move to consideration of our budget report, which needs to be signed off today. If we do not get through all the amendments to the bill, we can return to them next week; I know that members are delighted about that.

I welcome the cabinet secretary and his officials. I remind members that he is giving evidence on and responding to the amendments, while the officials are here strictly in a supporting capacity and cannot speak during proceedings or be questioned by members.

Members should have a copy of the bill, the marshalled list and the groupings of amendments.

I thank the cabinet secretary and all his officials for attending today.

Before section 1

The Convener: Amendment 74, in the name of Margaret Mitchell, is grouped with amendments 75, 76, 20, 22, 23, 26, 39, 40, 41, 49, 48, 50 and 51.

Margaret Mitchell (Central Scotland) (Con): Amendment 74 is in line with the committee’s stage 1 report recommendation that a definition of “victim” should be provided in the text of the bill. It appears somewhat strange that a bill that confers a range of rights on victims of crime does not include a definition of the term. The inclusion of a clear definition would assist in providing clarity for individuals in what may be traumatic circumstances, thereby avoiding further distress and anxiety. It would also assist the qualifying person in determining and complying with their duties and obligations under the provisions in the bill.

The amendment is intended to cover both natural persons and legal entities in three sets of circumstances: first, cases in which the person has a crime committed directly against them; secondly, where a relative or dependant of that person suffers harm as a result of a crime committed against that person; and thirdly, cases in which a person suffers as a result of intervening to help another person against whom a crime is being committed. Harm is defined in such a way as to include physical, mental or emotional harm as well as economic loss.

Amendment 74 would also require Scottish ministers to set out in a negative instrument the family members to which the definition would apply, as is the case elsewhere in the bill.

Amendments 75 and 76 are consequential to amendment 74.

I move amendment 74.

The Cabinet Secretary for Justice (Kenny MacAskill): Amendments 74 to 76, in the name of Margaret Mitchell, would insert an overarching definition of “victim” in the bill and make minor consequential amendments. In its stage 1 report, the committee recommended that the Scottish Government should give full consideration to including a definition of “victim”, to provide clarity. I do not consider such an overarching definition to be necessary, but I indicated that I was happy to consider further whether additional clarity was required in relation to the use of the word “victim” in the bill.

The word “victim” is used and understood, without definition, by justice organisations and victim support organisations throughout Scotland. By inserting an overarching definition of such a clearly understood term, we would significantly complicate matters and risk inadvertently excluding individuals who should benefit from the bill or including those who would not fall within any reasonable interpretation of “victim”.

For example, the definition in amendment 74 hinges on an offence having been committed against a person. That could imply that a conviction is necessary to establish that an offence has been committed against the victim, as there is no reference to an offence that is alleged to have been committed against a person.

Given the concerns that were raised at stage 1 about the presumption of innocence, the current drafting of the bill—which refers, where necessary, to people who appear to be victims and to the offence or alleged offence—is preferable. It also ensures that people who appear to be victims are treated as such before a trial or conviction.

The definition in amendment 74 covers only offences against the person, so offences against property might not be covered. The risk is that people whose property had been vandalised would not be classed as victims under that definition.

In addition to potentially excluding some victims, the definition would include some who do not need to be covered. The inclusion of prescribed relatives of all victims—not only victims who have died as a result of an offence but victims who have suffered any harm—seems a step too far. I
Elaine Murray (Dumfriesshire) (Lab): I understand that Children 1st supports Margaret Mitchell's amendments because children might in some cases—such as those involving domestic abuse—be treated as witnesses, although they are victims because of their vulnerability and the circumstances in which the offences were committed.

My concern about having the definition of “victim” in the bill is that it might be overprescriptive and that, if the definition were not appropriate, we would have to amend primary legislation. The issue might be better addressed in regulations. The suggestion from the cabinet secretary is that some of his amendments would mean the ability to define “victim” in regulations rather than in the bill, and that would probably be a better approach.

Kenny MacAskill: I think that I agree with Elaine Murray. The nature of crime and victims has changed; people can be the victim of internet crime when that could not have been conceived of 20 or 30 years ago. We do not necessarily know what the situation will be in five or 10 years, so we have to treat victims as we find them in the world in which we live. I therefore agree with Elaine Murray.

Margaret Mitchell: The cabinet secretary's amendments are to be welcomed but I do not think that they necessarily exclude putting a definition of “victim” into the bill. However, I take the point and am open to looking at the issue again at stage 3, particularly because of the concern, which the cabinet secretary highlighted again this morning and which was raised at stage 1, that the term “victim” is sometimes used in the bill in reference to cases in which the guilt of the accused has not been proven in court. The Faculty of Advocates argued that that approach might give rise to an implicit assumption that a victim's allegations are true, thereby potentially undermining the presumption of innocence of the accused, as the cabinet secretary has stated.

I still think that there is good reason for a definition in the bill although the cabinet secretary might be clear in his mind about what a victim is. The three situations outlined in amendment 74 clarify who is included and I am happy to look at those again and come back at stage 3 with a revised proposal.

I should say that amendment 74 is supported in principle by the Law Society of Scotland.

With the committee’s permission, I will withdraw amendment 74.

Amendment 74, by agreement, withdrawn.

Section 1—General principles

The Convener: Amendment 55, in the name of Elaine Murray, is grouped with amendments 56 and 57. I call Elaine Murray to move amendment 55 and speak to the other amendments in the group.

Elaine Murray: I will start by moving amendment 55 because I will have forgotten to do it by the time I get to the end of what I am going to say.

The Convener: I nearly forgot to remind you to move it, but we will get to that shortly. We need to get our sleeves rolled up. Off you go.

Elaine Murray: Amendment 55 would ensure that when a victim or a witness is a child, the
information that is provided by the persons listed in section 1(2) is in a form that might be understood by that child. Amendment 56 would ensure that the rights, needs and wishes of children who are victims or witnesses are considered by the persons who are listed in section 1(2). Amendment 57 has been lodged to ensure that the definition of “child” is consistent throughout the bill.

Evidence suggests that more than 60 per cent of people in the youth justice system have difficulties with speech, language and communication, which makes it even more important that information should be accessible to those children. Indeed, it is the difficulties that many young people have with communication in the justice system that make it more difficult for them to navigate their way around the court system. At the moment, there is no requirement for anyone who is involved in criminal proceedings to communicate with children and young people in formats and ways that best suit their needs. That could include sending text messages about the date of a trial, sending out a leaflet, or emailing a link to a video in which a young person can see the information that they require to become involved.

Because of the range of ways in which people, particularly young people, communicate now, I hope that the bill will incorporate the need to communicate in some of those ways. I hope that the cabinet secretary and ministers are amenable to the intent of the amendments, even if there are technical issues, so that we can get some way towards achieving this.

I move amendment 55.

The Convener: So you are probing.

09:45

Kenny MacAskill: I appreciate the intent of the amendments and what Elaine Murray and others are trying to achieve.

Section 1 sets out a number of general principles that are deliberately high level and aspirational and are intended to inform the creation of standards of service under section 2. The intention behind including a section on general principles was to set out the underlying aim of the bill and of the justice system as a whole, and ensure a level of consistency when justice agencies consider how they interact with victims and witnesses.

I therefore expect the bodies listed in sections 1 and 2 to consider the needs, rights and wishes of children in the same way as I would expect them to consider the needs, rights and wishes of all other victims and witnesses involved in criminal proceedings. If we were to single out child victims and witnesses, as Elaine Murray's amendments 55, 56 and 57 propose, should we not also include persons with a mental or physical disability, older persons—indeed, where would we stop?

Although I commend Elaine Murray for bringing to the fore the need for organisations to take into consideration the requirements of children, I believe that the general principles should be precisely that: general and equally applicable to all groups of victims and witnesses who come into contact with the criminal justice system—albeit that refinement might be required for individual categories.

I therefore invite Elaine Murray to withdraw amendment 55 and not to move amendments 56 and 57. I give an assurance that we are happy to continue working with organisations to address the issue, so that the particular needs of particular sections of society are dealt with.

Elaine Murray: In my introductory remarks, I said that I was not convinced that section 1 was the best section in which to put the requirement proposed in amendments 55 to 57, although it was important to discuss it. There might be other more suitable parts of the bill. I am prepared to withdraw amendment 55 and not to move amendments 56 and 57 at the moment and to examine at stage 3 whether there might be an appropriate part of the bill for such a requirement.

Amendment 55, by agreement, withdrawn.
Amendments 56 and 57 withdrawn.
Section 1 agreed to.

Section 2—Standards of service

The Convener: Amendment 12, in the name of the cabinet secretary, is grouped with amendments 58, 13 to 19, 59, 60 and 21.

Kenny MacAskill: Amendments 12 to 19 and 21 all relate to the proposed duty on criminal justice agencies under section 2 to set out clear standards of service for victims and witnesses. The proposal has broad support but, at stage 1, the committee and some victim support groups suggested that improvements could be made, particularly in relation to ensuring that there is some consistency in the standards set out by different organisations, and that compliance with the standards is monitored.

Amendment 18 will place a duty on each of the named organisations to consult all the other named organisations and relevant stakeholders before setting their standards of service. I believe that requiring the organisations to consult each other will ensure a level of consistency in their approach to the standards, while maintaining the general approach of allowing for the development
of organisation-specific standards that relate to the type of service that a particular organisation provides.

Furthermore, the duty to consult those who have an interest in the standards will ensure that organisations such as Victim Support Scotland and Scottish Women’s Aid—with their years of invaluable experience from working with victims and witnesses—will have a chance to contribute.

Amendment 21 will place a duty on the named organisations to publish a report that assesses how their standards have been met, how they intend to continue to meet them, any modification that has been made to the standards during the reporting period and any modification that they propose to make during the following year.

Best-value guidance for public sector bodies already requires organisations to ensure that feedback, including complaints about service standards and failures, is recorded and monitored and feeds into the continuous improvement of services. However, on reflection, and in light of representations that were made at stage 1, I believe that a duty should be placed on the organisations to publish a report in relation to their standards of service. That reporting will ensure that the criminal justice organisations not only report on how they have met the standards during the period of the report, but think ahead as to how they intend to meet the standards in the future.

Elaine Murray’s amendment 59 is very similar to my amendments 18 and 21, as it would also require the making of reports annually, with an element of consultation. While I obviously support the intention behind amendment 59, on balance I consider that my amendments 18 and 21 are more appropriate.

In particular, the requirement in amendment 21 for the organisation to set out not only how it has met the standards, but how it intends to continue to meet them over the next reporting period and to signal any changes that it intends to make—not just in response to any issues raised, but more generally—will build in a vital element of reflection and continuous improvement. I therefore invite Elaine Murray to consider supporting my amendments 18 and 21, and not to move amendment 59.

Amendments 12 to 17 and 19 are all technical drafting amendments to aid the clarity of the bill following the insertion of the consultation requirement through amendment 18.

Amendment 58, in the name of Elaine Murray, would put a duty on a person who was “setting and publishing standards” under section 2—in so far as the standards could relate to a child—to do so in “such a way that the welfare of a child is of paramount consideration.”

I welcome Elaine Murray’s commitment to child victims and witnesses and agree that organisations should take into consideration the specific needs of that group. However, as I also stated in relation to the general principles, if we were to single out child victims and witnesses, should we not also include other groups of victims and witnesses? The list could be considerable.

I have proposed, through amendment 18, that we place a duty on each of the named organisations to consult relevant stakeholders before setting their standards of service and I would expect such stakeholders to include children’s organisations where appropriate. I do not, therefore, believe that it is necessary or desirable to single out any particular group of victims and witnesses in this section of the bill.

I move amendment 12.

Elaine Murray: As the cabinet secretary said, the purpose of amendment 58 is to require that “setting and publishing standards” in respect to victims and witnesses who are children must be done in “such a way that the welfare of a child is of paramount consideration.”

We know that the impact on children of issues to do with criminal proceedings can be extremely traumatising and that the way in which young people are dealt with, whether it is by the police, by the legal services or by anyone else, is extremely important. Children often find it very difficult to verbalise what is happening to them and what they have experienced.

This may not be the most appropriate section in which to put amendment 58, but I think that there should be somewhere in the bill that deals specifically with the issues for children. It may not be about inserting the amendment in the standards of service or in the general principles—perhaps we need to have an amendment to the bill that looks specifically at children and the way in which we deal with child victims and witnesses.

The cabinet secretary mentioned that my amendment 59 is very similar to his amendments 18 and 21. Amendment 59 requires that the persons listed in section 2 report on their compliance with the standards of service annually and that they seek the views of victims and witnesses in preparing that report. It also enables those standards to be revised as a consequence of the report and requires any revision of standards of service to be published. It enables ministers to prescribe the information to be contained in the reports by negative procedure. That enables compliance with the standards of
service to be monitored and revised in the light of experience.

Amendment 21, in the name of the cabinet secretary, is similar in that it also requires the annual publication of reports and requires assessment of whether the standards have been met, a look forward to how they might be met in the following year and any proposed modifications. It also enables ministers to prescribe information by negative procedure.

The principal difference is that my amendment 59 requires those persons listed in section 2(2) to consult, as far as is practicable, victims and witnesses in preparing the report and in revising the standards, in order to meet the needs of victims and witnesses. I hear the cabinet secretary’s plea that I support his amendment 21. However, I think that the provision in my amendment 59 of consultation of victims and witnesses is important.

Amendment 60 defines the meaning of the word “child” in this section and it is obviously consequential to amendment 58.

The Convener: I think that one of your pleas fell on deaf ears, but we will find out.

Graeme Pearson (South Scotland) (Lab): In the evidence that we received at stage 1 from witnesses and victims who were involved in court procedures, I was certainly impressed—I am sure that others were impressed, too—by the feelings of impotence and almost abuse that witnesses and victims felt, whether rightly or wrongly, when they were in the system.

I know that the cabinet secretary is loth to create a special category for children in trying to deal with such situations, as he mentioned in relation to Elaine Murray’s amendment 55. However, there is no doubt that the culture within courts as it affects witnesses and victims—no matter the various pieces of legislation—appears to be quite corrosive in their experience.

We should consider at least beginning the shift towards understanding the impact on witnesses. Children are particularly vulnerable, and the world is new to them, so courts will be all the more challenging from their perspective. If the Government could show its intentions on a shift, that might begin to send a signal that would prevent a recurrence of some of the most awful examples that have been reported over the years in which victims have had a dreadful time in the public environment of a court. Acceptance of the amendments might begin to signal a change in the approach of those who work in our courts.

Kenny MacAskill: We accept that we are on a journey. I put on record my gratitude to former Lord Advocate Elish Angiolini, who kicked off the process, and to the current Lord Advocate, Frank Mulholland, who has expanded the work on victims to include witnesses. We recognise that horrendous situations have occurred that should not have arisen, and we hope that similar situations will not arise in future. Work is under way through judicial studies and the Crown Office and Procurator Fiscal Service to address those matters. However, I believe that we have the overall balance right in the bill, with our amendments in this group.

Children come with a variety of issues, needs and wants—we will deal later with how evidence is given. Our approach is to ensure that standards are dealt with by the agencies and bodies that are required to deliver. I am happy to reflect on how we can improve matters but, equally, the bill as it stands and the amendments in my name have been reached after discussion with organisations including Victim Support Scotland, Scottish Women’s Aid and Shakti Women’s Aid. Those organisations deal not only with adults but with children, although I accept that some children’s charities deal specifically with that. However, the current view of those who help victims and witnesses to deal with the challenges is that we need to view things in the totality, although obviously we have to reflect on and recognise the needs and wants of each individual in their particular circumstances.

Whatever someone’s age, they might have a physical or mental incapacity that needs to be taken on board and there might be particular challenges. That is why we think that the individual must be considered but victims and witnesses must also be dealt with in the totality. We need to ensure that we have the ability to deal specifically with the individual but that we have the general guidance right, and that is the balance that we have provided for.

Amendment 12 agreed to.

The Convener: Amendment 58, in the name of Elaine Murray, has already been debated with amendment 12.

Elaine Murray: I will not move amendment 58 at stage 2, because I want to reflect on whether there is a more appropriate part of the bill in which to introduce provisions on children. I might bring that back at stage 3.

The Convener: You have put down a marker.

Amendment 58 not moved.

Amendments 13 to 19 moved—[Kenny MacAskill]—and agreed to.

The Convener: Amendment 59, in the name of Elaine Murray, has already been debated with amendment 12.
Elaine Murray: I will move amendment 59, because I believe that, as it requires consultation with victims and witnesses, it is preferable to amendment 21, although I know that amendment 21 goes part of the way.

Amendment 59 moved—[Elaine Murray].

The Convener: The question is, that amendment 59 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)

Against
Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

The Convener: The result of the division is: For 4, Against 5, Abstentions 0.

Amendment 59 disagreed to.

Amendments 60, 75 and 76 not moved.

Amendment 20 moved—[Kenny MacAskill]—and agreed to.

Section 2, as amended, agreed to.

After section 2
Amendment 21 moved—[Kenny MacAskill]—and agreed to.

The Convener: Amendment 77, in the name of the cabinet secretary, is in a group on its own.

10:00
Kenny MacAskill: Article 11 of the European Union victims directive requires that victims of crime should be able to request a review of a decision not to prosecute, and that the procedure for the review should be determined by national law. I noted with interest the discussion of article 11 at stage 1. Stakeholders, including Rape Crisis Scotland and Scottish Women’s Aid, questioned why there was no provision in the bill for a right to request a review of a decision not to prosecute. The Crown Office advised that it was reviewing its current procedure in light of the directive.

Having considered the matter further since stage 1, I concluded that article 11 should be reflected in the bill, although I think that the detail of how such reviews are carried out is best left to the Lord Advocate. Amendment 77 will place an obligation on the Lord Advocate to set and publish the procedural rules for conducting a review of decisions not to prosecute, following a request by a victim.

I move amendment 77.

Margaret Mitchell: I welcome the approach. It is a positive move and I support amendment 77.

Alison McInnes (North East Scotland) (LD): I, too, welcome and support amendment 77. Does the cabinet secretary think that it is fully compliant with the victims directive, in the context of victims’ understanding of when they can request a review?

Kenny MacAskill: I think that it is. The devil is in the detail, as always, and some of that will depend on what the Lord Advocate brings forward. By enshrining in statute the right to request a review, we place obligations on the Lord Advocate that will be challengeable in judicial review, but I think that the Crown is willing, and I am sure that discussions between Alison McInnes or the committee and the Lord Advocate will ensure that the balance is struck and that the European convention on human rights is complied with, so that there will be rights for people who remain aggrieved.

Roderick Campbell (North East Fife) (SNP): Constituency MSPs frequently get correspondence from people about decisions not to prosecute. The move is a positive step forward.

The Convener: I remind members to indicate when they want to comment on an amendment. I am trying to give everyone a chance to speak, while keeping us apace. I take it that the cabinet secretary does not wish to wind up the debate.

Kenny MacAskill: No.

Amendment 77 agreed to.

The Convener: Amendment 78, in the name of Margaret Mitchell, is in a group on its own.

Margaret Mitchell: During stage 1, the committee heard that communication between justice organisations is not as good as it could be, which is causing problems. For example, David Ross, of the Scottish Police Federation, said:

“All partners in the criminal justice system would probably accept that we have been poor at keeping victims and witnesses informed as to the progress of cases in which they are involved.”—[Official Report, Justice Committee, 30 April 2013; c 2708.]

Victims told us that correspondence was often complex and difficult to understand, particularly when they were already confused and distressed in the aftermath of a crime. Worse still, David McKenna, of Victim Support Scotland, told the committee that victims sometimes have to tell their story around 16 times to various agencies. That is
clearly unnecessary and unacceptable and can add to victims' distress.

I lodged amendment 78 to explore what can be done in the bill to tackle the problem. It would require the Crown and the police to co-operate and co-ordinate in providing support and information to victims and witnesses, through a strategic communications plan; to share information about victims, thereby reducing the need for victims to repeat their stories; and to share best practice in relation to victim support.

Amendment 78 would also require there to be a single point of contact for all victims and witnesses who sought information, so that the people who were involved in the criminal justice system would know where they could get help. The single point of contact would be made known to all victims and witnesses and would have to provide information on the services that were available to them. My intention is that properly trained individuals would provide much-needed support for victims, who are not currently, in all cases, treated with compassion or given the time that they deserve to be given.

I move amendment 78.

Kenny MacAskill: I appreciate the underlying principles behind amendment 78, which aims to ensure that justice organisations work together more closely in ensuring that victims and witnesses have the information and support that they need. Indeed, a key aim of the making justice work programme that this Government set up in 2010 is for justice organisations to work together more closely in delivering system structures and processes that are fit for the 21st century.

However, although I agree that justice organisations should work together to support victims and witnesses and ensure that information is provided effectively, I do not consider that that requires primary legislation. We are already participating in discussions between all the justice organisations to explore how they can work together more effectively, and an important element of that work is mapping the victim's journey through the criminal justice system and identifying areas in which the organisations can offer victims a more joined-up experience. Margaret Mitchell mentioned that.

The justice organisations will also collaborate with one another and with stakeholders in developing standards of service for their functions in relation to victims and witnesses. As we discussed when we considered an earlier group of amendments, the persons who are named in section 2(2), including the Lord Advocate and the chief constable of Police Scotland, will be required to consult each other and relevant stakeholders prior to publishing their standards. They will also have to publish a report that assesses how their standards have been met and states how they intend to meet them in the future and whether they require any modification to be made to them.

On the proposal for a single point of contact, again, I do not consider that that requires a statutory basis. We are looking at the feasibility of establishing an online information hub to provide easier access for victims and witnesses to case-specific information, and we are open to other ideas that would improve communication and benefit victims and witnesses.

In summary, although I support the broad principles behind amendment 78, I consider it unnecessary. It is sometimes distressing for the organisations in question to put witnesses through the present process, and they are working to amend and change it. I invite Margaret Mitchell to consider withdrawing her amendment 78 on the basis that these matters are under review. Work is on-going and the agencies are showing willingness to go down that route.

The Convener: I do not usually let members in at this point, but Elaine Murray is waving her pen at me. Do you want to say something?

Elaine Murray: I was just going to support Margaret Mitchell's amendment.

The Convener: You should have come in earlier. I will train them. Some day, they will be trained. I ask Margaret Mitchell to wind up.

Margaret Mitchell: I listened carefully to what the cabinet secretary said. I agree that the organisations that I mentioned should co-operate and communicate, but the fact is that that is not happening just now. My amendment focuses clearly on what should be done and it would put that in statute, which would be a clear guide. It would ensure that victims and witnesses are right up there receiving the service that they should expect.

I freely admit that witnesses were split on the idea of having a single point of contact, and I note that the cabinet secretary has said that he is not supportive of that. However, Diane Greenaway, a former precognition officer, stated:

"I cannot stress ... enough the need for dedicated ... and informed support persons (Case Companions) who have essential experience of criminal justice processes".

In essence, the amendment would allow a huge improvement for the people who, above all, deserve our support. They should get a better experience and better treatment in the courts. For that reason, I will press my amendment.

The Convener: As soon as I mention training members, I get members wanting to come in. I am happy to let members develop the discussion because I am a flexible person, as you know.
Sandra White wants to say something. I will let the cabinet secretary back in after that if he wishes.

Sandra White (Glasgow Kelvin) (SNP): Thank you, convener. Good morning, cabinet secretary. Will there be further information before stage 3 on the online information hub that you mentioned?

The Convener: Before the cabinet secretary answers that, I will let Elaine Murray in. I must not show partisanship here. It was all going too well.

Elaine Murray: I apologise that I did not indicate right at the beginning that I wanted to speak, but I was listening carefully to what the cabinet secretary said in response to Margaret Mitchell.

The Convener: Of course you were.

Elaine Murray: I am sympathetic to the principles of Margaret Mitchell’s amendment 78. As she said, the issue is that the system has not been working well in practice even though the principles are there, and her amendment would strengthen the requirement. I appreciate that some witnesses were not happy about the idea of having a single point of contact, but I presume that Margaret Mitchell’s amendment would not force anyone to have one. It would simply require that to be done when it is required. The bill would be strengthened if the provision were included.

The Convener: Do you want to say anything else, cabinet secretary?

Kenny MacAskill: All that I would say on Sandra White’s point is that we are looking at a feasibility study. Whether that will be ready for stage 3, I do not know. Some of the issues will be systemic as they involve linking up computer systems, and we are aware of issues there, but the intention is to look into the matter and there is a desire to achieve it.

The glass is most certainly half full. We have come a long way. Each of the organisations has improved and they are now seeking to work together. That is why I think that we should have more trust and faith in them.

Margaret Mitchell: I refer members again to the statement from David McKenna of Victim Support Scotland that, in courts today, victims and witnesses sometimes have to repeat their stories 16 times. That is unacceptable. Amendment 78 would address that situation, so I will press it.

The Convener: The question is, that amendment 78 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)

Against
Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

The Convener: The result of the division is: For 4, Against 5, Abstentions 0.

Amendment 78 disagreed to.

The Convener: Amendment 79, in the name of Alison McInnes, is in a group on its own.

Alison McInnes: My amendment largely reflects article 12 of the European Union victims directive, which stipulates that member states must “facilitate the referral of cases, as appropriate to restorative justice services, including through the establishment of procedures or guidelines on the conditions for such referral.”

The directive maintains that victims who choose to participate should have access to safe and competent restorative justice services.

Amendment 79 would require ministers to provide for the referral of a victim and the perpetrator of a crime to restorative justice services. It would require ministers to define when that should occur and to set out the procedures for referrals.

The amendment sets out safeguards. A referral would occur only if the victim had consented, and that consent could be withdrawn at any time. The victim should also be fully informed of how relevant restorative justice services work and protected from any form of further victimisation or retaliation.

We know how effective diversion from prosecution projects can be in reducing reoffending. That is why the amendment allows for referral to occur before or after sentencing, but only when the perpetrator acknowledges the basic facts of the case.

The Government has acknowledged that restorative justice services can assist victims to overcome their experiences and provide a form of accountability and a forum in which to receive an apology. Restorative justice can enable those who have committed crimes to reflect on their actions, take personal responsibility, appreciate the harm that they have caused and start to make amends. That can prove key to the rehabilitation of both parties.

Given that a fundamental purpose of the bill is to ensure that Scotland complies with the directive, I am disappointed that the bill does not mention
restorative justice. It makes no effort to promote the value of that, to instil greater confidence in the system or to standardise referral procedures.

I move amendment 79.

Roderick Campbell: I have some sympathy with Alison McInnes’s view, but the committee did not look at the subject at stage 1. The issue is important and we need to pay attention to it, but I am not persuaded that introducing regulations is the right way forward.

Graeme Pearson: Sacro has made strong representations in support of Alison McInnes’s approach. Over the years, we have regularly spoken about developing such services, and we now have the opportunity to do something about that in legislation.

Margaret Mitchell: I will listen carefully to what the cabinet secretary says, but there seems to be an omission from the bill. I am sympathetic to Alison McInnes’s amendment.

John Finnie (Highlands and Islands) (Ind): I support the amendment, which achieves the correct balance. Restorative justice is often seen—simplistically—as just another avenue of disposal, without regard to the victim. However, the amendment would provide appropriate protection for the victim. This important element should be considered.

Kenny MacAskill: I fully understand the intention behind amendment 79. Alison McInnes is right to flag up restorative justice, which I support and which has in many instances great benefits for offenders and especially for victims.

We have seen that restorative justice processes can be useful in relation to youth justice in particular, but I am not persuaded that the time is right to introduce what is essentially a statutory right to access such services. Detailed consideration would need to be given to the nature and effectiveness of the services that were to be offered and to the potential costs, which cannot be ignored in the current financial situation.

Given the voluntary and case-specific nature of any restorative justice services, there are compelling reasons for adopting a more flexible approach than would be possible through a statutory scheme. In particular, it would be difficult to establish definitive circumstances in which referral would be appropriate, and which reflect the very personal and specific circumstances of each case.

A relatively small number of responses to the “Making Justice Work for Victims and Witnesses” consultation that we carried out last year referred to restorative justice. Two responses suggested the need to review the role of restorative justice for victims of crime committed by adults. I would be willing to consider such a review if there was support from victims’ organisations, particularly given the provisions on restorative justice services in the recent EU directive on victims’ rights.

In summary, I cannot support amendment 79, and I invite Alison McInnes to consider withdrawing it, with my assurance that we are open to giving further consideration to whether the potential benefits of restorative justice should be more widely reviewed. At present, there is certainly a difference between what is available in some areas for children and what would be available as a statutory requirement for all.

Alison McInnes: I thank members for their support for amendment 79. I will press the amendment, because it is important. In response to the cabinet secretary’s comment about restorative justice as a statutory requirement for all, the amendment would require the Government to define when it should occur and to set out procedures for referral. The amendment would allow the cabinet secretary to take a stepped approach.

I acknowledge that there are many excellent restorative justice services already operating; I have met Sacro, and I know that it supports the concept. However, I have been concerned for some time that the system is emerging in a very ad hoc fashion; that provision is not consistent throughout the country; and that best practice is not always being shared.

I believe that amendment 79 would bring the bill into line with the EU directive and help to establish appropriate guidelines and procedures, and I urge members to support it.

The Convener: The question is, that amendment 79 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Finnie, John (Highlands and Islands) (Ind)
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)

Against
Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

The Convener: The result of the division is: For 5, Against 4, Abstentions 0.

Amendment 79 agreed to.
Section 3—Disclosure of information about criminal proceedings

Amendments 22 and 23 moved—[Kenny MacAskill]—and agreed to.

The Convener: Amendment 24, in the name of the cabinet secretary, is grouped with amendments 25, 80 and 81.

Kenny MacAskill: Section 3 of the bill gives victims and witnesses the right to access certain information about their case on request from the Scottish Court Service, the Crown Office and Procurator Fiscal Service and Police Scotland. The section largely reflects the requirements of article 6 of the EU victims directive.

Amendment 24, in my name, introduces two new paragraphs to section 3(6), to clarify that victims and witnesses can access information about the location, time and date of any appeal arising from a trial as well as accessing information in relation to the trial itself. That coincides with article 6 of the directive as read with recital 31 of the directive.

Amendment 25, also in my name, is a minor drafting amendment to reflect more accurately the wording in article 6(2) of the directive by providing that the final decision in a trial and the reasons for that decision should be disclosed to victims and witnesses on request. It also clarifies that the decision in any appeal arising from a trial, and the reasons for that decision, should be disclosed to victims and witnesses on request.

Amendments 80 and 81, in the name of Margaret Mitchell, seek to set out specific occasions when information need not be disclosed under section 3.

The bill reflects the requirements of article 6 of the EU directive, which provides that victims should be able to request information on all aspects of the proceedings in which they are involved. As the directive acknowledges, however, there will inevitably be occasions on which releasing some information will not be appropriate.

The bill as introduced allows for the police, Crown Office and Scottish Court Service to exercise their professional discretion in response to the individual circumstances of a case, by not attempting to set out specific circumstances in which the exemption would apply. I consider amendments 80 and 81 to be unnecessary and that those organisations are entirely capable of making decisions without particular circumstances being set out in the text of the bill.

In addition, there is a real risk that the inclusion of the amendments could result in a breach of the requirements in article 6 of the EU victims directive. There is nothing in article 6 that would permit a member state to withhold information from a victim—for example, on grounds that it is not in a format that could be given to the victim. The use of the word “inappropriate” in section 3(4) of the bill is designed to capture the situations that are described in article 6(3) and recital 28 of the directive while giving the persons listed in section 3(5) of the bill the discretion to decide when a request falls within one of those situations.

I urge the committee to support amendment 24 along with amendment 25. I invite Margaret Mitchell not to move amendments 80 and 81.

I move amendment 24.

Margaret Mitchell: Section 3 will place a duty on the chief constable, the Scottish Court Service and prosecutors to provide information to victims and witnesses that relates to criminal investigations in their cases, but under subsection (4) the police and Crown may withhold the information that has been requested if they consider that it would be “inappropriate” to release it.

The exemption might be necessary in a range of circumstances, and withholding information might be in the interests of the victim or, more widely, in the interests of justice. However, the bill provides no guidance on what is meant by “inappropriate”. People who gave evidence to the committee, including the Law Society of Scotland and Scotland’s Commissioner for Children and Young People, told us that guidance is needed.

Amendment 80 would make clear the range of circumstances in which disclosure of information that had been requested could be refused. It would be inappropriate to disclose information if doing so would breach other legislation, constitute contempt of court, prejudice justice or cause distress to the person who had requested it. Also, information would not have to be disclosed if it was not available in a transferable format or could easily be obtained elsewhere.

I do not accept that amendment 80 is so prescriptive that it breaches article 6 of the victims directive. I lodged it in an attempt to tease out what the Government means by “inappropriate”. The information that section 3 covers is:

“(a) a decision not to proceed with a criminal investigation and any reasons for it,
(b) a decision to end a criminal investigation and any reasons for it,
(c) a decision not to institute criminal proceedings against a person and any reasons for it,
(d) the place in which a trial is to be held,
(e) the date on which and time at which a trial is to be held,
(f) the nature of charges libelled against a person,
(g) the stage that criminal proceedings have reached,
(h) the final disposal in criminal proceedings and any reasons for it.”

Those are all important issues.

Amendment 80 sets out reasons why such information should not be disclosed to victims, although in the vast majority of cases there will be no reason why it should not be disclosed. In the interests of clarity, clear guidance in the bill or elsewhere should point towards the circumstances in which information should not be disclosed. Amendment 81 is consequential on amendment 80.

I support amendments 24 and 25, which will improve the bill.

Alison McInnes: I support amendment 80, which would prevent people from hiding behind a single word and saying, “We’re not disclosing information because that would be inappropriate.” The approach will encourage people to be open, so we should welcome the amendment.

The Convener: I invite the cabinet secretary to wind up the debate.

Kenny MacAskill: The intention of amendments 24 and 25 is to make clear that organisations should seek to provide information. It is difficult to clarify precisely the circumstances that would preclude disclosure, because the circumstances would be case specific. John Finnie has given examples from his experience as a police officer, and it has been suggested that it might not be appropriate to disclose information to an individual who was being investigated, for example, in relation to fraud that related to the case.

It is difficult to specify such matters. What we need is a general presumption about disclosure, while allowing organisations some flexibility. If we go down the route that Margaret Mitchell proposes and specify circumstances, then as soon as we come across matters that are not specified there could be great difficulties for the organisations involved. We must have trust and faith in organisations, which will have a statutory duty to provide information and will try to do the right thing but will need some flexibility to deal with circumstances that might arise and which we perhaps cannot currently envisage.

The Convener: The question is, that amendment 24—

Margaret Mitchell: May I respond to the cabinet secretary?

The Convener: Yes, you may respond.

Margaret Mitchell: Transparency is fundamental. Amendment 80 would make transparent the range of circumstances—not specific circumstances, to which the cabinet secretary tried to whittle it down—in which it would be inappropriate to disclose information. On that basis, I will press amendment 80.

The Convener: Before you do that, I bring in the cabinet secretary, to—

Kenny MacAskill: I think that where Margaret Mitchell is taking us—

The Convener: Hang on a wee minute; I am not finished. I was just saying that I have allowed some flexibility here.

I am finished now.

Kenny MacAskill: Margaret Mitchell’s amendment 80 would presumably open up the opportunity for judicial review and perhaps for somebody to have to disclose that there is an ongoing investigation or, indeed, disclose circumstances that would be quite distressing for relatives.

We will ensure that guidance is given and that organisations can make decisions from that perspective. Referring to specific matters in the bill would naturally mean that some matters would be excluded, which would cause difficulties; equally, decisions would be open to challenge, which could cause significant problems and greater distress.

The Convener: I let the cabinet secretary in again because the process is that the member who moves the first amendment in a group winds up at the end of the debate. However, I am happy to let other people come back in. The process is that, if someone speaks to their amendment in the middle of a group but is not the member who moves the first amendment in the group, they are not the person who winds up at the end. However, I am happy to be flexible about that where there are issues to be clarified. I want to—

Margaret Mitchell: Convener, I think that an important point is raised by giving the cabinet secretary the right of reply.

The Convener: No. I did not give him the right of reply. The member who moves the first amendment in a group is the person who winds up.

Margaret Mitchell: Okay.

The Convener: That is the usual process. I remind members: if you move the first amendment in a group, notwithstanding that you might have another amendment in the middle of the group, you have the right to sum up at the end. That is just how the procedure operates. However, I am happy to let back in someone who has an amendment in the middle of a group.

Have I made myself clear? John Pentland is looking puzzled. Have I explained that point?
John Pentland (Motherwell and Wishaw) (Lab): Yes, you are very clear, convener.

The Convener: I am very clear. Oh, I do like you.

I explained the process so that people are clear that, if they move the first amendment in a group, they have the final say. Is that okay?

Margaret Mitchell: Yes.

Amendment 24 agreed to.

Amendment 25 moved—[Kenny MacAskill]—and agreed to.

Amendment 80 moved—[Margaret Mitchell].

The Convener: The question is, that amendment 80 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)

Against
Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
White, Sandra (Glasgow Kelvin) (SNP)

The Convener: The result of the division is: For 2, Against 7, Abstentions 0.

Amendment 80 disagreed to.

Amendment 81 moved—[Margaret Mitchell].

The Convener: The question is, that amendment 81 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Mitchell, Margaret (Central Scotland) (Con)

Against
Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
McInnes, Alison (North East Scotland) (LD)
Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
White, Sandra (Glasgow Kelvin) (SNP)

The Convener: The result of the division is: For 1, Against 8, Abstentions 0.

Amendment 81 disagreed to.

Amendment 26 moved—[Kenny MacAskill]—and agreed to.

Section 3, as amended, agreed to.

Section 4—Interviews with children: guidance

The Convener: Amendment 61, in the name of Alison McInnes, is grouped with amendment 62. I point out that, if amendment 61 is agreed to, I cannot call amendment 62, because of pre-emption.

Alison McInnes: The fact that the bill will place the existing guidance on joint investigative interviews on a statutory basis is welcome. However, amendment 61 would require constables and social workers to comply with the guidance issued by Scottish ministers when carrying out interviews with children—anyone under the age of 18—in relation to criminal proceedings. I am concerned that the current provision in the bill that those persons should “have regard” to the guidance will not adequately ensure that it is consistently adhered to. The current provision rather gives the impression that it matters little if they do not follow it.

Amendment 62, in the name of John Finnie, builds on the Government’s proposals. The convener has just noted that amendment 61 would pre-empt amendment 62. If amendment 61 is not passed, I will support amendment 62’s proposed minor strengthening of the current provision.

I share Children 1st’s concern that guidance of this nature should be deviated from only in exceptional circumstances. It strikes me that such circumstances—cases or instances where it is deemed permissible to depart from the rules—could be accommodated within the guidance.

I move amendment 61.

10:30

John Finnie: The convention of joint investigations has meant some good experiences for children, primarily as a result of the training. However, it is still perceived that there are different interests. The interests of the child are foremost and the guidance should have primacy. Competing interests, such as those that arise through the pressures on staffing and overtime budgets, for example, could begin to impact, particularly in rural areas. It is important to be consistent and the examples that will be known to many of the different approaches that are taken by people who have received this training and those who have not, and the different outcomes that are achieved, mean that the training is significant. I will not dissent too much from what Alison McInnes has said.
Elaine Murray: I support the amendments, although one precludes the other. The general thrust of both is correct. Amendment 62, in John Finnie’s name, is a bit more flexible in that Alison McInnes’s amendment would appear to insist on compliance in every single circumstance. John Finnie’s is a bit more flexible and allows for that exceptional circumstance when it is not possible to be accommodated.

The Convener: John, would you like to come back in on that?

John Finnie: Thank you for being flexible, convener, and allowing me to come back in.

The Convener: Well, you have got a flexible amendment, apparently.

John Finnie: The reality of the situation is that that flexibility can be used positively and pragmatically if the interests of the child are to the fore, or it could be used if there is an insistence. The amendment builds in flexibility around staffing deployment for the police in particular. I do not think that social work has the same issue with having competently trained people being involved in joint investigative interviews.

Kenny MacAskill: The guidance on interviewing child witnesses in Scotland currently sets out principles of best practice for police and social workers who are undertaking joint investigative interviews, and aims to make the process more child focused and to enhance the quality of such interviews. Section 4 intends to put that guidance on to a statutory footing and to require police and social workers to have regard to it when undertaking such interviews.

Amendment 61, in the name of Alison McInnes, would have the effect of requiring the police and social workers to comply with the guidance rather than simply having regard to it. Placing an obligation on the police and social workers to comply with the guidance would effectively take away any discretion that those professionals have to make decisions that are based on the individual circumstances of a case, no matter how exceptional those circumstances might prove to be. Furthermore, a requirement to comply with the guidance rather than have regard to it might force the police or social workers into a position in which, in order to do the sensible thing in the circumstances of the interview, they must breach their statutory obligation, as no departure from the guidance, however reasonable, would be permitted by the amendment.

Amendment 61 would also have the effect of empowering Scottish ministers to issue instructions to the police and social workers to operate in a certain way without any requirement for parliamentary scrutiny of those instructions. The guidance issued under section 4 does not require to be laid before Parliament. Clearly, the use of the term “guidance” would be misleading if it were compulsory.

I also welcome John Finnie’s recognition of the importance of the guidance. However, although I agree that ensuring that regard is paid to the guidance is vital, I consider the reference to “due regard” to be unnecessary. Departing from the duty that is currently in the bill that is commonly used might also create some uncertainty about how the guidance would apply in different circumstances. I believe that the wording of the bill as introduced strikes the appropriate balance between putting such important guidance on a statutory footing and not removing the discretion that might prove to be essential in protecting the best interests of the child at a particular time or interview. I therefore cannot support amendments 61 and 62.

Alison McInnes: We have heard already this morning that how the police or social workers conduct interviews with children is key. At the start of the investigation process, we need to ensure that children feel comfortable and confident when they are telling their often traumatic experiences. Conducting the interview in a manner that coheres with the child’s best interests will ultimately lead to a better quality of evidence.

However, I have listened to what the cabinet secretary has said about discretion and I would not wish to fetter the professionals’ ability to respond flexibly to a particular child’s needs. On that basis, I will withdraw my amendment. However, I still support John Finnie’s amendment, which gives a little more clout to the guidance.

Amendment 61, by agreement, withdrawn.

Amendment 62 moved—[John Finnie].

The Convener: The question is, that amendment 62 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Finnie, John (Highlands and Islands) (Ind)
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)

Against
Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

The Convener: The result of the division is: For 5, Against 4, Abstentions 0.

Amendment 62 agreed to.
Section 4, as amended, agreed to.

Section 5 agreed to.

After section 5

The Convener: Shall I slow down for you all? Have you not had your Weetabix or porridge?

Amendment 27, in the name of the cabinet secretary, is in a group on its own.

Kenny MacAskill: Section 5 contains provisions that will allow victims of certain offences to choose the gender of the officer who interviews them. At stage 1, stakeholders welcomed those provisions and called for the right to be extended to enable such victims to choose the gender of the person who carried out their forensic medical examination. In my response to the committee’s stage 1 report, I made a commitment to consider that suggestion.

As I said when I gave evidence at stage 1, the issue is not just about legislation but about ensuring that things happen in practice. All those who deal with such matters, whether the police, the Procurator Fiscal Service or the health service, recognise that the process is traumatic, and anything that can be done to reduce the distress for the victim is very important.

We want to ensure flexibility to deal with such situations as they arise, regardless of time of day or geographical location, so that if the victim says that they want a doctor of a specific gender, we should seek to provide that doctor.

Clearly, there are wider justice and health implications involved in delivering a service that is responsive to the needs of victims of sexual offences, which cannot be achieved through legislation alone. Crucial discussions are already under way between Police Scotland and NHS Scotland to ensure that appropriate guidance and support are available to those who are responsible for carrying out the forensic examination and to the victims of sexual offences. It is also clear that the development of the relevant workforce of the future must be responsive to the requirements of such victims.

Amendment 27 will underpin that on-going work. It will ensure that the police inform alleged victims of sexual offences that they may request a forensic medical examiner of a specified gender. It will also ensure that such a request is relayed to the doctor who is to conduct the forensic medical examination. To take into account the evolving remit of healthcare professionals, I have proposed a power to amend the reference to a registered medical practitioner, if it were required to reflect future practice.

I acknowledge that meeting the needs of victims of sexual offences clearly requires more work, and that amendment 27 alone is not a complete solution to the issues raised. However, I believe that it is a vital first step to ensure that victims’ views are sought and efforts are made to meet such requests, and that it will act as a driver for more comprehensive change.

I move amendment 27.

Margaret Mitchell: I am very supportive of amendment 27. It is a positive move forward for victims.

Sandra White: I echo Margaret Mitchell’s comments. I am very supportive of amendment 27 and welcome it from the cabinet secretary. It certainly is a step forward. I thank all the groups who requested the amendment in their evidence to the committee. It will help the justice system move forward.

Graeme Pearson: I agree with earlier statements on the matter. Access to practitioners at a time of great stress is a very sensitive issue and amendment 27 strikes the right balance, in terms of responsibilities and responses.

Amendment 27 agreed to.

The Convener: Amendment 82, in the name of Graeme Pearson, is grouped with amendments 83 and 85.

Graeme Pearson: Amendment 82 deals with a very sensitive issue for the courts, which has caused a great deal of controversy over a number of years. It relates to evidence on sexual offences and the ability or otherwise of the courts to review a victim’s previous health record.

Amendment 82 seeks to empower the Scottish ministers to make provision, by means of regulation, “for the circumstances when information relating to the physical or mental health of a person who is or appears to be a victim of an offence of a type mentioned in subsection (3) ... can be disclosed in relation to a criminal investigation or criminal proceedings.”

In particular, the regulations must make provision for “the circumstances when it may be considered appropriate to seek disclosure of such information”, as well as “the process by which a decision to disclose such information must be made” and “the need to obtain the free and informed consent of the victim”, although that is subject to the following provision, which is on “the circumstances when it may be appropriate to disclose such information without the consent of the victim”. 
The regulations would also have to cover
“the nature of the support that must be made available to the victim where disclosure of such information is sought.”

Evidence from Rape Crisis Scotland and other women’s aid groups made it clear that victims feel a further level of victimisation when their histories or medical conditions are exposed in the public domain of a court in inappropriate circumstances. Victims feel that that disclosure not only breaches their rights of confidentiality but exposes them to a great deal of embarrassment and further victimisation. Such disclosure has occurred in a number of cases and the way that it has been dealt with has caused a great deal of public angst.

Currently, it is left to individual judges to decide whether such information should be shared in the public domain as part of the criminal process. Amendment 82 seeks to ensure that the Government offers guidance on those decisions. Such guidance would be helpful in deciding the law in certain circumstances and in particular cases without further abusing a victim. Victims can become the target of intrusive questioning by defence agents, who sometimes investigate historical circumstances. Many who witness such interrogations in open court deem them to be inappropriate in the extreme. I encourage the cabinet secretary to look kindly on amendment 82, which I think would be welcomed by victims of sexual offences, who have suffered over many years in our courts. Despite the previous guidance that has been offered to the courts on how those circumstances should be managed, members of our communities are still badly affected by such interrogations in the public domain.

Through amendment 83, Margaret Mitchell seeks to deal with a similar set of circumstances. She seeks to introduce the idea that legal advice would be made available to victims in such circumstances. I presume from the detail that we have received that such legal advice would seek to offer protection in a similar domain. It is a challenge to conceive how a third member of the legal profession could be involved in the court process with the specific duty of protecting the victim in such circumstances.

I presume that the cabinet secretary will be concerned about the financial implications of that arrangement. We should be responsible and acknowledge and deal with the financial implications. In administering justice, our Scottish courts should, with proper guidance for the Crown Office and Procurator Fiscal Service and for advocates who appear in court, be able to deliver on our behalf without the need for an additional member of the legal profession to be there. A trial process would become enormously complicated if another member of the legal profession was in court solely to deal with the needs and requirements of the victim. For that reason, amendment 83 is a challenge and I am not minded to support it.

I move amendment 82.

10:45

Margaret Mitchell: The concerns surrounding the use of sexual history and character evidence in sexual offence trials are not new; they have stretched back for far too many years. Sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995 allow the defence to make an application to use evidence on the sexual history and character of the complainant in sexual offence trials.

Legislation designed to restrict the use of this type of evidence was passed in 2002, which means that it is now necessary for a written application to be submitted in advance of the preliminary hearing. The court can admit such evidence only where it is satisfied that it is relevant to whether the accused is guilty of the offence and that the value of it is likely to outweigh any risk of prejudice.

An evaluation commissioned by the Scottish Government and published in 2007 found that, far from tightening the use of sexual history and character evidence, legislation that was introduced by the Scottish Executive in 2002 had led to an increase in the use of this type of evidence. The key findings of the research made for very concerning reading. Seventy-two per cent of trials featured an application to introduce sexual history or character evidence and only 7 per cent of those applications were refused.

Concerns about the use of this evidence relate to its potential to be highly prejudicial, particularly in light of pre-existing attitudes among some jurym members. It can also, without doubt, be extremely distressing for victims and can actively deter them from reporting crimes to the police.

The type of information requested on sexual history is often irrelevant to the case. Twenty-four per cent of the evidence sought relates to the general character of the complainant, including previous and long-resolved mental health issues.

Amendments 83 and 85 were suggested by and have the support of Rape Crisis Scotland. Its experience is that the use of this type of information is causing distress to victims and the relevance of the evidence is not being routinely challenged by the Crown. It appears that, in the vast majority of cases, complainants consent to their records being recovered but do not feel that such consent is given freely, because the likely alternative is the possibility of the prosecution
being dropped or a warrant being sought for the information.

Part of the problem is that we do not have up-to-date information on the use of applications made under sections 274 and 275 of the 1995 act. The Crown does not currently record the use of applications and therefore we have only the 2007 figure to go by.

The amendments would have two effects. Amendment 83 would require independent legal advice to be provided to victims of sexual offences when the information is requested from the Crown, the defence or the police. Such legal advice would provide victims with information on their rights and would explicitly make them aware that they are able to refuse such requests. Amendment 85 would provide independent legal advice at a preliminary hearing where the Crown and the defence can lodge an application to use evidence on complainers’ sexual history and character.

It is hoped that such legal advice would be provided largely on a pro bono basis—at little cost—but it may be that legal aid would be required to be extended to cover such legal representation. Access to independent legal advice is a routine entitlement across European jurisdictions such as France, Belgium, Austria, Finland, Greece, Spain and Sweden. In Ireland, which has an adversarial legal system, sexual offence complainants have a right to independent legal representation if the defence makes an application to the judge to introduce sexual history evidence.

Independent legal advice could be implemented in a phased way, and my amendments leave it open for a pilot to be carried out. The proposed changes are a practical way in which to help rape victims to avoid unnecessary distress during the court process. Currently, they have little way to challenge the legality of the use of their private information in court, and it appears that the Crown is not robust enough in challenging section 274 and 275 applications. Perhaps more important, if this type of evidence is routinely being used, there is a real concern that medical records and sensitive information are being used to discredit witnesses, which plays into the prejudices and myths that we know prevail around sexual offences.

I note in amendment 82 that Graeme Pearson seeks to address the same issue but in a slightly different way. The amendment requires Scottish ministers to make rules on when information relating to a victim’s physical or mental health can be disclosed in court. The problem is that those rules are already legislated for but they seem not to be robustly followed, and inappropriate information continues to be used in court.

Amendment 82 does not establish independent legal representation for victims.

I add that amendments 83 and 85 have the broad support of the Faculty of Advocates.

Elaine Murray: I am sympathetic to the policy intention of all the amendments in the group. The issue is important, because we know the damage that can be done to victims if they are forced to disclose aspects of their lives that are not really relevant to the case. That can cause them extreme distress.

However, I have some concerns about Margaret Mitchell’s amendments 83 and 85. I tend to support Graeme Pearson’s amendment 82: it is more flexible, and I prefer its approach of compelling ministers to make new regulations, which would come before the committee under the affirmative procedure. With Margaret Mitchell’s amendments, there is an issue about the relationship between the legal representation that she calls for and the legal representation that already exists in court.

The other thing that worries me—although it might worry me only because I am a novice on the committee and do not have a legal background—is that the provisions in subsection (5) of amendment 83 and subsection (5C) of amendment 85 that the complainer is automatically entitled to legal aid seem to be contrary to the circumstances in which legal aid is normally available, where it is income dependent. Maybe it is a misunderstanding on my part, but the amendments seem to make a particular exception for these cases. I would be a little concerned if that were the case.

The Convener: I do not think that it is a misunderstanding. You are too clever for that.

Elaine Murray: I have a concern about the provisions being introduced in that way.

Roderick Campbell: I refer members to my entry in the register of members’ interests, which states that I am a member of the Faculty of Advocates.

I have sympathy with Margaret Mitchell’s amendment 85. On the point about legal aid, I rather concur with Elaine Murray. It does not seem appropriate for those provisions to be in the bill. However, we need to make some progress in dealing with the widespread attitude that people hold. People look at the Crown as representing the public interest and they ask, “Who is representing my interest? Who is my lawyer?” It is precisely in applications such as those that we are discussing that such questions arise.

There is a real issue. It was flagged up when Murdo Macleod of the Faculty of Advocates gave evidence, although we did not explore it in detail.
The proposal would break substantial new ground. I am not sure what discussions the Government has had with the Faculty of Advocates, as opposed to Rape Crisis Scotland, since stage 1. I think that the onus is on the Faculty of Advocates to convey its thoughts to the Government. That was the impression that I got from the evidence session in May.

Although I have reservations about amendment 85, the issue will not go away. I will oppose Margaret Mitchell’s amendments today, but the issue needs wider attention than we have given it so far.

**The Convener:** I want to comment, for a change. Although I am hugely sympathetic in relation to the difficulties of giving evidence in court for many people, particularly victims of sexual offences, I am pleased that both amendment 82 and amendment 83 use the term “a person who is or appears to be a victim”.

There is always a difficulty in using the term “victim” in court proceedings, when there is a presumption of innocence and the onus is on the Crown to establish guilt. It is a difficult area in which to get definitions right.

I was immediately concerned when Margaret Mitchell said that we could introduce a pilot. If we pilot an approach, we change access to justice in certain areas. In the context that we are talking about, there would be independent inquiries into the medical and sexual health background of some people but not others, while trials were going on.

Margaret Mitchell’s suggestion that pro bono legal advice could be given also concerned me, again because that would mean that different people would have different access to independent legal advice. Those are practical comments on what Margaret Mitchell said, rather than on the amendments in her name.

I think that I have said before to the cabinet secretary that there is a huge difficulty about using the term “victim”, as opposed to “appears to be a victim”. There is a difficult balance to strike to ensure that legislation is fair to victims and to the accused.

**Kenny MacAskill:** I think that everyone has a great deal of sympathy with the intention behind all the amendments in the group, but I echo the comments of Graeme Pearson and others on amendments 83 and 85, in Margaret Mitchell’s name.

On amendment 82, in Graeme Pearson’s name, making regulations that governed the application for, the granting of and the circumstances of disclosure of information relating to a victim’s physical or mental health would be a major departure from current practice. Mr Pearson might draw an analogy with the regime in sections 274, 275, 275A and 275B of the Criminal Procedure (Scotland) Act 1995, in respect of evidence of a complainer’s sexual history, but his proposal goes further in two important respects.

First, the restrictions on rehearsing a complainer’s sexual history in a trial relating to sexual offences are of obvious and immediate relevance. Amendment 82 would greatly extend the categories of offence in which restrictions would be imposed and the kind of evidence that could be denied. Aside from the reluctance that we should have to withhold evidence from a jury, the link between sexual offences and sexual history is wholly absent in the proposal. If evidence of a victim’s mental or physical health is to be restricted in that broad category of offences, why not restrict such evidence in other categories of offence? Why should evidence of a victim’s state of health be restricted in a stalking case but not in a case of assault?

The other major difference with the regime in the 1995 act is that amendment 82 would oblige the Government to define in legislation matters that the court is currently free to decide. For example, the Government would even decide whether a court might allow application to be made to it. This Government has promoted—and indeed set in statute—the independence of the judiciary. We take the view that decisions about proceedings are best left to the courts themselves. We would be very reluctant to take on the function of making courts’ procedural decisions for them. Such decisions are best made in the circumstances of each case by experienced personnel who have heard all the proceedings.

We are also conscious that restricting by law the availability of evidence, irrespective of any circumstances on which a case might turn, would have clear human rights implications.

Amendments 83 and 85, too, would result in a major innovation in our law. There are currently no rights for victims to have independent legal representation in criminal proceedings. I question such a step, particularly given that the proposed approach would apply to a restricted group of victims. It would be a tricky task to defend a situation in which a victim of an assault who had been left in a wheelchair by her attacker was not deserving of legal representation, when the victim of a sexual offence was deserving of such representation.

The assault parallel is apposite, given that evidence about the victim’s state of health or previous conduct might well be relevant, for example in the case of a self-defence plea. It is difficult to defend the scope of the drastic innovation that amendments 83 and 85 would
make. Inevitably, the approach would lead to demand for similar rights for other victims, possibly to the great detriment of the availability of evidence and thus the fairness of trials.

Finally, it is unclear what additional benefit would be brought by the proposed approach in amendment 83 that alleged victims be given an opportunity to seek legal advice or representation when information is being sought, for example by the Crown Office or the police, before criminal proceedings have been raised.

If information is being sought, the reason for that should be clearly explained, but that could be dealt with on a practical basis, rather than by requiring advice to be sought from a solicitor. I understand that the Crown Office, in particular, already has comprehensive guidance in place to ensure that victims are given a full explanation of exactly why any sensitive information is being asked for. Furthermore, in the event that legal advice is required, current legal aid legislation already makes that available to victims and witnesses through advice and assistance, subject to the usual statutory tests.

11:00

As I said, I appreciate the intention behind the amendments and agree that we should do all that we can to reduce the distress of alleged victims in such cases. I discussed the matter with Rape Crisis Scotland, which spoke in favour of similar proposals at stage 1, just last month. As I said then, I think that these proposals are a step too far, but I am more than willing to consider the underlying concerns that have been raised and to work with Rape Crisis Scotland, the Crown Office and Procurator Fiscal Service and others to explore what more can be done.

In relation to the specific point that Rod Campbell raised, we met Rape Crisis Scotland recently. My understanding is that the Crown Office has agreed to gather more information on section 275 of the 1995 act and that it will discuss the matter with Rape Crisis Scotland. The Faculty of Advocates has not been in touch with us since it indicated its support for Rape Crisis Scotland. I fall back on the position that Graeme Pearson takes in relation to amendment 83, which is that a fundamental change in how we conduct trials would be involved, and that would cause great difficulties for those who preside at trials.

The Convener: Graeme Pearson will sum up, because he moved the lead amendment in the group. I will take Margaret Mitchell first.

Margaret Mitchell: I gently remind the cabinet secretary that the greatest threat to the fairness of trials is his endorsement of the proposal to abolish corroboration.
Roderick Campbell has acknowledged that there is a real issue, and Margaret Mitchell has outlined in detail the evidence that lies behind the need for such an amendment. The cabinet secretary has indicated that he is sympathetic to the problems that we have mentioned and is willing to discuss them with all the relevant partners.

It is now time for us to show a real commitment to dealing with an issue that has caused enormous embarrassment in the public courts; has been reported on repeatedly in the media; and has, it must be acknowledged, largely affected women—and sometimes children—who are exposed in our public courts and have to live with that exposure in their own communities day after day, month after month and year after year. We all just walk away from that and feel that we have been part of a process.

The cabinet secretary has a real opportunity to address the issues. I would be happy to see some discussion of amendment 82, but I hope that the committee will support it and allow us to break with what has previously been an injustice suffered by victims in our courts, which we have condoned until now.

The Convener: Are you pressing amendment 82?

Graeme Pearson: I am indeed.

The Convener: The question is, that amendment 82 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
McInnes, Alison (North East Scotland) (LD)
Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)

Against
Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

Abstentions
Finnie, John (Highlands and Islands) (Ind)
Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 3, Against 4, Abstentions 2.

Amendment 82 disagreed to.
Amendment 83 not moved.

Section 6—Vulnerable witnesses: main definitions

The Convener: Amendment 28, in the name of the cabinet secretary, is grouped with amendments 52 and 53.

Kenny MacAskill: Amendment 28 is a minor drafting amendment to section 6 to make it clear that the sub-paragraphs in new section 271(1)(c) of the Criminal Procedure (Scotland) Act 1995 are intended as alternatives.

Amendments 52 and 53 are minor drafting amendments to sections 23 and 25 of the bill, to correct the format of the references to the Prisons (Scotland) Act 1989 in our amendments to section 16 of, and our addition of section 17A to, the Criminal Justice (Scotland) Act 2003.

I move amendment 28.
Amendment 28 agreed to.
Section 6, as amended, agreed to.
Sections 7 and 8 agreed to.

Section 9—Objections to special measures: child and deemed vulnerable witnesses

The Convener: Amendment 63, in the name of Alison McInnes, is grouped with amendments 64, 65 and 67.

Alison McInnes: Members will recall that the victims organisations collaboration forum Scotland, which comprises 12 victim support organisations, wrote to the Justice Committee on 18 June regarding the proposal to allow objections to special measures. The organisations described their shared "deep concern" and united opposition to the Scottish Government's plans. They argued that it would "undermine all the other provisions and rights contained in the Bill".

That is a truly damning verdict.

My amendment 63 would remove the proposed right of any party to a criminal proceeding to lodge an objection notice to the use of standard special measures, which are those protections to which children and vulnerable witnesses are entitled by law at present.

A live television link, a screen or a supporter can empower those individuals to give their best evidence. Removing that entitlement would result in an increase in the number of vulnerable witnesses who have to appear in the courtroom. The objection process, even if it is unsuccessful, will serve only to prolong the process, increase the witness's apprehension about giving evidence and severely dent their confidence in the system. It will make their experience worse. We should not ask vulnerable witnesses and their legal representatives to justify the use of standard
special measures and risk denying them their rights.

I note that Elaine Murray’s amendment 65 proposes to delete section 9 entirely. My amendment 63 differs from amendment 65 because it would still afford both parties the right to lodge an objection notice to an application for further special measures for children and deemed vulnerable witnesses. If additional special measures are applied for, the accused should have the right to question why they are necessary, given the considerable list of standard measures.

As drafted, section 9 would erode the existing rights of children and deemed vulnerable witnesses, not enhance them. The committee raised concerns about section 9 at stage 1 and I hope that it will agree with me that standard special measures for those groups must always be deemed appropriate.

I move amendment 63.

Kenny MacAskill: I fully support Alison McInnes’s amendment 63 and consider that it addresses the concerns that were expressed during stage 1 by the committee, the Crown Office and various victim support organisations. I emphasise that the intention behind the original provisions was not to complicate proceedings or undermine the support that is available to vulnerable witnesses, but to ensure compatibility with the ECHR and give the court the flexibility and discretion to consider any legitimate concerns raised by any party to the proceedings.

As I indicated to the committee, the issues that were raised in evidence at stage 1 caused me some concern, and my officials had extensive discussions over the summer with the Crown Office and Procurator Fiscal Service and victim support organisations. Following those discussions, I am satisfied that objections should not be possible in relation to those standard special measures that are automatically available to vulnerable witnesses, but to ensure compatibility with the ECHR and give the court the flexibility and discretion to consider any legitimate concerns raised by any party to the proceedings.

As I indicated to the committee, the issues that were raised in evidence at stage 1 caused me some concern, and my officials had extensive discussions over the summer with the Crown Office and Procurator Fiscal Service and victim support organisations. Following those discussions, I am satisfied that objections should not be possible in relation to those standard special measures that are automatically available to vulnerable witnesses, but to ensure compatibility with the ECHR and give the court the flexibility and discretion to consider any legitimate concerns raised by any party to the proceedings.

Amendment 64, in my name, is consequential on amendment 63 and will ensure that when a vulnerable witness notice contains a request for both standard and non-standard special measures and an objection is lodged in relation to the latter, the resulting hearing will deal only with the non-standard measures—with the standard special measures being granted as usual.

Elaine Murray’s amendment 65 proposes to remove section 9 altogether, which would have the effect that the procedure for objecting to any special measures that were specified in a vulnerable witness notice in respect of child and deemed vulnerable witnesses would be removed. Furthermore, her amendment 67 proposes to remove section 13, which would have the effect that the procedure for objecting to any special measures specified in a vulnerable witness application, which relates to objections to special measures for other vulnerable witnesses, would also be removed.

As I said, my officials have had extensive discussions with the Crown Office and victim support organisations on these matters and have given considerable thought to what is required to meet the needs of the victim while upholding the rights of the accused.

It is worth noting that representations can already be made to the court in relation to special measures, albeit without any formal procedure or process involved, and that that would continue to be the case even if sections 9 and 13 were removed. I consider it more appropriate, therefore, to clarify what can already happen and put that on a statutory footing, while ensuring that special measures that are automatically available to certain groups are not subject to challenge.

I do not believe that removing sections 9 and 13 is the right approach. I urge the committee to support amendments 63 and 64, and I invite Elaine Murray not to move amendments 65 and 67.

Elaine Murray: I lodged amendments 65 and 67 after receiving representations from members of the victims organisations collaboration forum Scotland, who are deeply concerned about sections 9 and 13. They believe that giving the accused the right to object to special measures will increase uncertainty and pressure on vulnerable witnesses. Those sections could mean that child witnesses, who have an automatic right to special measures, could find themselves subject to objections and possible loss of those measures.

The VOCFS argued that it would be illogical to extend the rights of vulnerable witnesses to special measures while at the same time bringing in provisions to deny them those rights. Special measures enable witnesses to provide the best evidence to court and sections 9 and 13 appear to contradict the general principles of the bill. In addition, as special measures are provided to ensure the provision of best evidence, they are not prejudicial to the interests of the accused.

Alison McInnes’s amendment 63 would remove the right to object to standard special measures, which would go some way to allay the fears of the VOCFS. I think that amendment 63 may well be a better way to deal with the issue than the deletion of section 9. However, I ask whether there should
be a similar amendment to section 13 to address concerns about that section.

Kenny MacAskill: Section 13 is in a different category and deals with different aspects. I welcome Elaine Murray’s position and I understand where she is coming from. I presume that her amendment was lodged at the same time as Alison McInnes’s amendment 63. If we support Alison McInnes’s amendment together with amendment 64, which is consequential, we will get the right balance and provide the appropriate protection that Elaine Murray correctly wants.

11:15

Alison McInnes: The cabinet secretary is correct that my amendment 63, with his consequential amendment 64, strikes the right balance. It is unfair for children, who already have automatic entitlement to standard special measures, to find themselves subject to objections in relation to the use of those standard special measures. An objection would require the child and their solicitor or counsel to justify their entitlement to standard special measures, which would put vulnerable children through an unnecessary additional court process.

Standard special measures were introduced to enable vulnerable witnesses such as children to give their best evidence. Making that entitlement conditional would diminish the purpose and reduce people’s ability to give their best evidence. Children and young people often experience court in a negative way, despite the provision of special measures. Perpetrators often make threats about what they will do to children if they tell about what is happening to them. A perpetrator might threaten to kill a child’s family or pets if they tell. For that reason, it is difficult for children to give evidence in court, as there is a high level of fear. My amendment 63 would remove the right to object to standard special measures and I very much welcome the cabinet secretary’s support for that.

Amendment 63 agreed to.

Amendment 64 moved—[Kenny MacAskill]—and agreed to.

Amendment 65 not moved.

Section 9, as amended, agreed to.

Section 10—Child witnesses

The Convener: Amendment 66, in the name of Alison McInnes, is in a group on its own.

Alison McInnes: Can I just have a moment to find my notes, convener?

The Convener: You can. I am whizzing on. While you are looking, I point out that I hope to get to the end of section 16 today, which is a good pace. Then we will have a break, but not a permanent break because, as members know, we are busy bees.

Have you found them now, Alison?

Alison McInnes: Yes, I have—thank you very much.

I am concerned that section 10 will remove the assumption that child witnesses who are under the age of 12 will give evidence away from the court building. The committee heard evidence on that and raised concerns about it. The measure seeks to address poor practice through statutory provision. The law as it stands, in section 271A of the Criminal Procedure (Scotland) Act 1995, is sufficient in enabling children to give evidence in person should they wish to do so. Indeed, it presumes that they will give evidence away from the courtroom unless the child has expressed a wish to be present, or where the risk of prejudice to the fairness of the trial and to the interests of justice outweighs the risks to the interests of the child.

As our stage 1 report noted, the Scottish Government’s justification for removing the existing presumption through section 10 is that it is being too rigidly applied by the courts. It is argued that the current law has led to children being required to give evidence remotely and separately from their parents, who are in the court. However, Children 1st points out that, rather than legislate further, training and guidance need to be improved to help better present the options to children and young people on how and where they can give evidence. We need to be more sensitive to the needs of vulnerable families. Earlier, the cabinet secretary spoke about the need for flexibility, and I believe that amendment 66 would give flexibility. The creation of new categories of vulnerable witnesses and the extension of special measures to more distressed adult victims will help to overcome any perceived problem.

My amendment 66 therefore seeks to remove section 10 entirely, to ensure that the bill does not have the unintended consequence of empowering other people to decide when a child should be in court, perhaps even against their will.

I move amendment 66.

Roderick Campbell: On section 10, there is a difference of opinion between Children 1st and Scotland’s Commissioner for Children and Young People. I kind of side with the children’s commissioner, who points out that the bill as drafted will give more choice to the child, and I do not share the concerns of Children 1st on the issue.

Elaine Murray: I support Alison McInnes’s amendment 66. I considered lodging an
amendment along the same lines. Representative children’s organisations have expressed serious concern that young children could be compelled to give evidence. We are talking not about 17-year-old ruffians or whatever but about children who are under the age of 12, and they need to be protected.

Kenny MacAskill: Amendment 66 would delete section 10 so that the current presumption that children under the age of 12 will give evidence away from the court building in trials for certain offences would stand.

Section 10 makes a minor amendment to the existing legislation to place greater weight on the views of the child, with the result that if the child expresses a desire to give evidence in court, there is a presumption that that will be allowed. The intention is to give children greater freedom to give evidence in the manner that will be of least emotional stress and upset to them, which will improve their experience and could result in better-quality evidence from them.

The changes that would be made by section 10 were proposed in response to feedback from victim support organisations such as Scottish Women’s Aid, Rape Crisis Scotland and the ASSIST—advice, support, safety and information services together—project, which indicated that the current presumption might be being applied too strictly with the result that children who wish to give evidence in court are being forced to give evidence from a remote location. For example, a child might wish to give evidence in court to prevent them from being separated from a parent who is required to be in court for the proceedings. The change being made by the bill will not force child witnesses to appear in court, nor will it make significant changes to the current and sensible presumption that young witnesses should give evidence remotely. However, it will provide that when a child witness has expressed a desire to give evidence in court, the preference is heeded unless there is good reason why it would be inappropriate.

Section 10 will give children more choice, not less. The point was welcomed by Scotland’s Commissioner for Children and Young People at the committee’s meeting on 30 April. I therefore cannot support Alison McInnes’s amendment.

Alison McInnes: I listened to what the cabinet secretary said, but I will press amendment 66. Children have told us things such as:

“I know I should feel better now that he is in jail, but I keep having flashbacks of court.”

That was a 14-year-old boy who probably thought that it would be okay to give evidence in court. A 15-year-old girl who was the victim of an attempted rape said:

“When I entered the courtroom I was really really scared. There were all these people staring at me. The lawyers had wigs, the judge didn’t say anything to me except to tell me to stand. There were all these people taking notes about what I was saying. [The accused] was always in the corner of my eye... The court day was the worst day of my life.”

We need to listen to the voices of young children and protect them, so I will press amendment 66.

The Convener: The question is, that amendment 66 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
McInnes, Alison (North East Scotland) (LD)
Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)

Against
Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

Abstentions
Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 3, Against 5, Abstentions 1.

Amendment 66 disagreed to.
Section 10 agreed to.
Sections 11 and 12 agreed to.

Section 13—Objections to special measures: other vulnerable witnesses

Amendment 67 not moved.
Section 13 agreed to.
Sections 14 to 16 agreed to.

The Convener: We have come to the end of the sections that we are dealing with today. If members are content, we will have a short break and move on. I apologise to John Finnie, but doing this will allow us to have a short break. I thank the cabinet secretary and his officials for attending and we now move into private session.

11:23

Meeting continued in private until 13:01.
The Bill will be considered in the following order—

Sections 26 and 27  Sections 1 to 25
Sections 28 to 31  Long Title

Amendments marked * are new (including manuscript amendments) or have been altered.

After section 16

John Finnie

84 After section 16, insert—

*SPECIAL MEASURES: INTERMEDIARY*

(1) In section 271H(1) of the 1995 Act (the special measures), after paragraph (ea) (inserted by section 16(1) of this Act), insert—

“(eb) taking of evidence through an interpreter or other person approved by the court for the purposes of section 271HC of this Act,”.

(2) After section 271HB of the 1995 Act (inserted by section 16(2) of this Act), insert—

“271HC TAKING OF EVIDENCE THROUGH AN INTERMEDIARY

(1) This section applies where the special measure to be used in respect of a vulnerable witness is taking evidence through an interpreter or other person approved by the court (“the intermediary”).

(2) The intermediary must in so far as is necessary—

(a) communicate to the witness any questions put to the witness,

(b) communicate to any person asking such questions the responses given by the witness,

(c) provide any further information to the witness or person asking the questions to enable such questions and responses to be understood.”.

(3) In section 271F(8)(a) of the 1995 Act (special measures not applying in relation to a vulnerable witness who is the accused), after “271H(1)(c)” insert “and (eb)”.>
After section 17

Margaret Mitchell

85 After section 17, insert—

<Legal representation for complainer

Evidence relating to sexual offences: legal representation

In section 275 of the 1995 Act (exception to restrictions under section 274), after subsection (5), insert—

“(5A) Where an application under subsection (1) is made, the complainer must in respect of that application—

(a) be informed of the right of the complainer—

(i) to seek legal advice,

(ii) to appoint a legal representative,

(b) be given the opportunity—

(i) to seek such advice,

(ii) to appoint such a representative.

(5B) Where the complainer appoints a legal representative—

(a) a copy of the application must be sent to the legal representative, and

(b) the legal representative must be given an opportunity to—

(i) submit written evidence on the matters set out in the application in accordance with subsection (3),

(ii) represent the complainer at any hearing in relation to the application.

(5C) The fees incurred by a legal representative appointed under subsection (3) are to be paid out of the Scottish Legal Aid Fund.”.

Section 19

Kenny MacAskill

29 In section 19, page 12, line 3, leave out <as follows> and insert <in accordance with subsections (2) to (7).>

Graeme Pearson

86 In section 19, page 12, line 10, at end insert—

<( ) After subsection (5), insert—

“(5A) A victim statement or a statement supplementary to, or in amplification of, the victim statement may be made—

(a) in writing,

(b) by way of oral representation,

(c) by such other means as the Scottish Ministers may prescribe by order.
(5B) Where a person chooses to make a statement by way of oral representation, the person may do so by use of a live television link.

(5C) Where a person chooses to make a statement by way of a live television link, the court must make such arrangements as seem to it appropriate for the person to give evidence by means of such a link.

(5D) An order under subsection (5A)(c) must not be made unless a draft of the instrument has been laid before, and approved by a resolution of, the Parliament."

Kenny MacAskill
30 In section 19, page 12, line 13, leave out <14> and insert <12>

Elaine Murray
68 In section 19, page 12, line 23, leave out from beginning to end of line 10 on page 13 and insert—

"(11A) A child must be given an opportunity to make a victim statement where the child has not attained the age of 12 but is of sufficient age and maturity to make such a statement.

(11B) Where a child is not of sufficient age and maturity under subsection (11A)—

(a) any victim statement must instead be made by a person who has parental responsibilities or rights under the Children (Scotland) Act 1995 (c.36), or

(b) if a statement cannot be made by a person under paragraph (a), the statement may be made by a “qualifying person” whose relationship to the child is listed in subsection (10).

(11C) In determining the maturity of a child a view must be obtained from a person registered in the part of the register maintained under the Health Professions Order 2001 which relates to practitioner psychologists.

(11D) Where there is more than one qualifying person in relation to a child, the court must determine which qualifying person should make that statement.

(11E) In making a determination under subsection (11D), so far as practicable and having regard to the age and maturity of the child, the court must—

(a) give the child an opportunity to express any views on which qualifying person is to make the statement, and

(b) take into account any such views in determining which qualifying person is to make the statement.

(11F) A child who is given an opportunity to make a victim statement by virtue of subsection (11A) or to express views on which qualifying person is to make the statement under subsection (11C) must be provided with such support as the child needs to enable the child to make the statement or express views, as the case may be.”.

Kenny MacAskill
31 In section 19, page 12, line 23, leave out <14> and insert <12>
Kenny MacAskill

32 In section 19, page 13, line 13, at end insert—

<(7) After subsection (12), insert—

“(13) A victim statement, or a statement made by virtue of subsection (3) in relation to a victim statement, may be made in such form and manner as may be prescribed.

(14) An order under subsection (13) may—

(a) include such incidental, supplementary or consequential provision as the Scottish Ministers consider appropriate,

(b) modify any enactment (including this Act).

(15) An order under subsection (13) may be made so as to have effect for a period specified in the order.

(16) An order under subsection (13) containing provision of the type mentioned in subsection (15) may provide that its provisions are to apply only in relation to one or more areas specified in the order.”.

(8) In section 88(2) of the 2003 Act (orders), at the beginning of paragraph (b) insert “14(13) or”.>

Section 20

Elaine Murray

69 In section 20, page 13, line 19, at end insert—

<(4B) In considering whether to make a compensation order, the court must take steps to ascertain the views of the victim.

(4C) No compensation order may be made where the victim notifies the court that the victim does not wish to receive compensation from the person convicted of the offence.

(4D) For the purposes of subsections (4B) and (4C), “victim” has the meanings given by subsections (1A) and (1C).”.

Section 21

Alison McInnes

70 In section 21, page 13, line 26, at end insert—

<( ) section 1(1) of the Emergency Workers (Scotland) Act 2005 (assaulting or impeding certain providers of emergency services).>

Alison McInnes

71 In section 21, page 13, line 26, at end insert—

<( ) section 2(1) of the Emergency Workers (Scotland) Act 2005 (assaulting or impeding certain emergency workers responding to emergency circumstances).>
Kenny MacAskill

33 In section 21, page 14, line 3, leave out <and maintain> and insert <, maintain and administer>

Alison McInnes

72 In section 21, page 14, line 6, after <(asp 8)> insert <and section 1(1) of the Emergency Workers (Scotland) Act 2005.>

Alison McInnes

73 In section 21, page 14, line 6, after <(asp 8)> insert <and section 2(1) of the Emergency Workers (Scotland) Act 2005.>

Kenny MacAskill

34 In section 21, page 14, line 8, at end insert—

<( ) the Scottish Ministers or, with the consent of the Scottish Ministers, a person specified by order by virtue of subsection (5) in respect of outlays incurred in administering the fund.>

Kenny MacAskill

35 In section 21, page 14, line 10, leave out <and maintaining> and insert <, maintaining and administering>

Kenny MacAskill

36 In section 21, page 14, line 12, after <about> insert <the administration of>

Kenny MacAskill

37 In section 21, page 14, leave out lines 14 and 15

Section 22

Margaret Mitchell

87 In section 22, page 16, line 6, leave out from <other> to end of line 8

Margaret Mitchell

88 In section 22, page 16, leave out line 10

Margaret Mitchell

89 In section 22, page 16, line 11, leave out from beginning to <Ministers,> in line 12

Kenny MacAskill

38 In section 22, page 16, line 34, leave out <and maintain> and insert <, maintain and administer>
Kenny MacAskill

39 In section 22, page 16, line 36, leave out <have been the victims of crime ("victims")> and insert <are, or appear to be, the victims of crime and prescribed relatives of such persons.> 

Kenny MacAskill

40 In section 22, page 16, line 38, leave out <victim> and insert <person who is, or appears to be, the victim of crime,> 

(aa) a prescribed relative of a person who is, or appears to be, the victim of crime,> 

Kenny MacAskill

41 In section 22, page 16, line 38, leave out <victim> and insert <person who is, or appears to be, the victim of crime,> 

(aaa) a prescribed relative of a person who is, or appears to be, the victim of crime,> 

Kenny MacAskill

42 In section 22, page 16, line 40, at end insert <or> 

( ) the Scottish Ministers or, with the consent of the Scottish Ministers, a person specified by order by virtue of subsection (5) in respect of outlays incurred in administering the fund.> 

Graeme Pearson

90 In section 22, page 16, line 40, at end insert— 

<( ) A payment out of the fund may not be used to supplement or replace payments to be made out of the Scottish Consolidated Fund.> 

Kenny MacAskill

43 In section 22, page 17, line 2, leave out <and maintaining> and insert <, maintaining and administering> 

Kenny MacAskill

44 In section 22, page 17, line 4, leave out <order> and insert <regulations> 

Kenny MacAskill

45 In section 22, page 17, line 4, after <about> insert <the administration of> 

Kenny MacAskill

46 In section 22, page 17, leave out lines 6 to 9 

Kenny MacAskill

47 In section 22, page 17, line 14, leave out <or (6) is> and insert <and regulations under subsection (6) are>
Kenny MacAskill

49 In section 22, page 17, line 15, after <section> insert—

<“prescribed” means prescribed by the Scottish Ministers by regulations,>

Kenny MacAskill

48 In section 22, page 17, line 15, leave out <victim> and insert <person who is, or appears to be, the victim of crime>

Kenny MacAskill

50 In section 22, page 17, line 17, leave out <victim> and insert <person or a prescribed relative of the person>

Kenny MacAskill

51 In section 22, page 17, line 17, at end insert—

<( ) Regulations under subsections (3), (4) and (8) are subject to the negative procedure.>

Graeme Pearson

91 In section 22, page 18, line 15, at end insert—

<The Victim Surcharge Fund: reports

(1) The Scottish Ministers, or such person to whom they have delegated the duties imposed on them by section 253G(3), must prepare and publish a report in relation to the matters mentioned in subsection (3).

(2) A report under subsection (1) must be published—

(a) before the end of the period of 12 months beginning with the day on which the fund is established, and

(b) as soon as practicable following—

(i) the expiry of the period of 12 months beginning with the day on which a report is published under paragraph (a), and

(ii) each subsequent period of a year.

(3) The matters are—

(a) the sum paid into the fund,

(b) the sum still due to be paid into the fund by persons who the court has ordered to make payment of a victim surcharge,

(c) a list of those persons ordered to make payment of a victim surcharge who are yet to make that payment,

(d) the sum paid out of the fund,

(e) an account and assessment of how the sum paid out of the fund has been used.
(4) The Scottish Ministers may by regulations prescribe information (in addition to that required under subsection (3)) that reports prepared under subsection (1) must contain.

(5) Regulations under subsection (4) are subject to the negative procedure.”.>

Section 23

Margaret Mitchell

92 In section 23, page 18, line 21, at end insert—

<( ) in subsection (1), after paragraph (c), insert—

“(ca) to any period of imprisonment or detention and the following conditions apply—

(i) the person was subject to an indefinite notification period under or by virtue of the Sexual Offences Act 2003, and

(ii) has ceased to be subject to such a notification period.”.>

Graeme Pearson

93 In section 23, page 18, line 22, after <(3),> insert—

<( ) before paragraph (a) insert—

“(za) at the time of sentencing, the date on which the convicted person is, under or by virtue of the 1993 Act, eligible for release;”,

( )>

Kenny MacAskill

52 In section 23, page 18, line 24, leave out <Prisons (Scotland) Act 1989 (c.45)> and insert <1989 Act>

Graeme Pearson

94 In section 23, page 18, line 25, at end insert—

<( ) in subsection (4), after paragraph (a), insert—

“(ab) specify the minimum period of time before the date on which the convicted person is released, under or by virtue of the 1989 Act or the 1993 Act, (other than by being granted temporary release) by which time a person must be notified of that release; or”.>

Section 24

Graeme Pearson

95 In section 24, page 18, line 33, leave out from <if> to <imprisonment,>
Margaret Mitchell

96 In section 24, page 18, line 33, after <imprisonment,> insert <or is, or has at any time been, subject to an indefinite notification period under or by virtue of the Sexual Offences Act 2003 (c.42)> 

Graeme Pearson

97 In section 24, page 18, line 34, after <to> where it second occurs insert—

<( ) the convicted person by way of video link as respects such release and as to the conditions which might be specified in the licence in question, ( )>

Graeme Pearson

98 In section 24, page 18, line 37, at end insert—

<( ) be afforded an opportunity to make oral representations to the convicted person by way of video link as respects such release and as to the conditions which might be specified in the licence in question.”,>

Graeme Pearson

99 In section 24, page 19, line 2, after <made> insert <, including how such representations to the offender may be made by way of video link>

Graeme Pearson

100 In section 24, page 19, line 7, leave out lines 7 to 9

Section 25

Kenny MacAskill

53 In section 25, page 19, line 18, leave out <Prisons (Scotland) Act 1989 (c.45)> and insert <1989 Act>

After section 25

Graeme Pearson

101 After section 25, insert—

<Communications with victims and witnesses

(1) Any communication providing information by a relevant person to a person who is or appears to be a victim or witness in relation to a criminal investigation or criminal proceedings must be in such form as the person reasonably requires.

(2) For the purposes of subsection (1)—

(a) the relevant person must take steps to ascertain the views and wishes of the victim or witness in relation to the form that such communications should take,
(b) a communication includes notification to a victim in respect of the release of a convicted person.

(3) In this section—

“relevant person” means a—

(a) a constable,

(b) a prosecutor (as defined in section 307(1) of the 1995 Act),

(c) a prescribed person providing support services to victims and witnesses,

“victim” includes a prescribed relative of a victim.

(4) In subsection (3), “prescribed” means prescribed by the Scottish Ministers by order.

(5) An order under subsection (4) is subject to the negative procedure.

Section 30

Kenny MacAskill

54 In section 30, page 27, line 33, after <sections> insert <26 so far as it inserts the new section 4ZA, 27(1), 27(2) so far as it inserts paragraphs 1, 2 and 5 of the new schedule 1A, 27(3),>
3rd Groupings of Amendments for Stage 2

This document provides procedural information which will assist in preparing for and following proceedings on the above Bill. The information provided is as follows:

- the list of groupings (that is, the order in which amendments will be debated). Any procedural points relevant to each group are noted;
- a list of any amendments already debated;
- the text of amendments to be debated on the third day of Stage 2 consideration, set out in the order in which they will be debated. **THIS LIST DOES NOT REPLACE THE MARSHALLED LIST, WHICH SETS OUT THE AMENDMENTS IN THE ORDER IN WHICH THEY WILL BE DISPOSED OF.**

**Groupings of amendments**

**Special measures: intermediary**
84

**Victim statements**
29, 86, 30, 68, 31, 32

*Notes on amendments in this group*
Amendment 68 pre-empts amendment 31

**Compensation orders**
69

**Restitution Orders: extension of application of the fund**
70, 71, 72, 73

**The Restitution Fund and Victim Surcharge Fund: establishment and administration**
33, 34, 35, 36, 37, 38, 42, 90, 43, 44, 45, 46, 47

**Victim Surcharge Fund: eligibility**
87, 88, 89

**Victim Surcharge Fund: reports**
91

**Right to release information about offender**
92, 93, 94

**Right to make oral representations**
95, 96, 97, 98, 99, 100
Communication with victims and witnesses
101

Commencement
54

Amendments already debated

Definition of victim
With 74 – 39, 40, 41, 49, 48, 50, 51

Evidence in relation to sexual offences: disclosure of information
With 82 – 85

Minor and technical
With 28 – 52, 53
REFERENDUM (SCOTLAND) BILL COMMITTEE

EXTRACT FROM THE MINUTES

32nd Meeting, 2013 (Session 4)

Tuesday 19 November 2013

Present:
Christian Allard
Roderick Campbell
John Finnie
Christine Grahame (Convener)
Alison McInnes
Margaret Mitchell
Elaine Murray (Deputy Convener)
John Pentland
Sandra White

Also present: Kenny MacAskill, Cabinet Secretary for Justice and Graeme Pearson.

Victims and Witnesses (Scotland) Bill: The Committee considered the Bill at Stage 2 (Day 3).

The following amendments were agreed to (without division): 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 49, 48, 50, 51, 52, 53 and 54.

The following amendments were disagreed to (by division)——
70 (For 4, Against 5, Abstentions 0)
72 (For 4, Against 5, Abstentions 0)
93 (For 4, Against 5, Abstentions 0)
94 (For 4, Against 5, Abstentions 0)
95 (For 3, Against 6, Abstentions 0)
97 (For 3, Against 6, Abstentions 0)
98 (For 3, Against 6, Abstentions 0)
101 (For 4, Against 5, Abstentions 0).

The following amendments were moved and, no member having objected, withdrawn: 84, 69, 87, 91 and 92.

The following amendments were not moved: 85, 86, 68, 71, 73, 88, 89, 90, 96, 99 and 100.
The following provisions were agreed to without amendment: sections 17, 18, 20, 24, 28, 29, 31 and the Long Title.

The following provisions were agreed to as amended: sections 19, 21, 22, 23, 25 and 30.

The Committee completed Stage 2 consideration of the Bill.
Scottish Parliament

Justice Committee

Tuesday 19 November 2013

[The Convener opened the meeting at 09:16]

Victims and Witnesses (Scotland) Bill: Stage 2

The Convener (Christine Grahame): Good morning. I welcome everyone to the 32nd meeting of an extremely hard-working Justice Committee, which will sit again tomorrow. We never get away from one another.

I ask everyone to switch off mobile phones and other electronic devices completely as they interfere with the broadcasting system even when they are switched to silent.

No apologies have been received. Members will be aware that I want—in fact, we all want—to conclude by 12.30 in order to allow those of us who are travelling to Helen Eadie’s funeral to leave.

Item 1 is the continuation of stage 2 proceedings on the Victims and Witnesses (Scotland) Bill, which I hope to complete today. I welcome the Cabinet Secretary for Justice and his officials. As with our previous meeting, the officials are not here to answer questions at this stage.

Members should have with them their copies of the bill and the marshalled list and groupings of amendments for consideration.

After section 16

The Convener: We move straight to the amendments. I hope that John Finnie is sitting comfortably, because he is up first. Amendment 84, in the name of John Finnie, is in a group on its own.

John Finnie (Highlands and Islands) (Ind): Amendment 84 aims to designate as standard special measures in respect of intermediaries. There is significant evidence of the benefits of supporting child victims and witnesses in particular to give best evidence, which we all want. That is the case particularly if there is an additional vulnerability—for example, if the person has communication or special support needs, learning difficulties or a disability. In the current adversarial system, the language and forms of questioning are often confusing, which can be distressing for hardy souls, never mind people in that position.

I understand that ministers have indicated that they intend to use powers under section 15 to assess the effectiveness of intermediaries as a temporary additional special measure, with a view to using section 17 powers to prescribe intermediaries as a further special measure. I would welcome confirmation of that if the cabinet secretary felt able to give it.

I move amendment 84.

The Cabinet Secretary for Justice (Kenny MacAskill): I thank John Finnie for raising the issue, and I am keen to explore further the potential benefits of using intermediaries to assist vulnerable witnesses who have communication and support needs. I urge some caution, however, as it is crucial to cost and pilot additional special measures to allow for a proper evaluation of their effectiveness and benefit to witnesses prior to any wider roll-out.

As John Finnie mentioned, discussions took place with victim support organisations and others during the witness review and the development of the bill with regard to piloting additional special measures. Section 15 allows that to happen, and I am happy to commit to holding further detailed discussions with stakeholders and our justice partners following the bill’s passage in order to explore the establishment of pilot schemes.

I know that Children 1st and the Royal College of Speech and Language Therapists are particularly interested in the issue, and their involvement will be invaluable. I invite John Finnie to withdraw amendment 84, and give my commitment to hold further discussions on the issue and to consider piloting the use of intermediaries as a special measure once the bill is passed.

John Finnie: Thank you, cabinet secretary—I am grateful for those words. That being the case, I will not press my amendment.

Amendment 84, by agreement, withdrawn.

Section 17 agreed to.

After section 17

Amendment 85 not moved.

Section 18 agreed to.

Section 19—Victim statements

The Convener: Amendment 29, in the name of the cabinet secretary, is grouped with amendments 86, 30, 68, 31 and 32. If amendment 68 is agreed to, amendment 31 will be pre-empted.

Kenny MacAskill: I speak first to amendment 32, which is in my name. Victims of crime should clearly have the opportunity to communicate to the court the physical, emotional and economic impact of crime. That is why I introduced the victim
statement scheme, which allows victims to give a written statement describing how the offence has affected them. However, I have heard first hand from victims of crime who struggle to fully convey in writing the impact that the crime has had on them. I have been asked why it is not possible to make a victim statement by way of a pre-recorded video. In this day and age, we should explore whether such alternative means of making statements are viable; we should also ensure that we have the flexibility to utilise new technologies as they become available.

Amendment 32 introduces an order-making power into section 14 of the Criminal Justice (Scotland) Act 2003 to allow the Scottish ministers to specify the format in which victim statements can be made. Crucially, that allows formats to be piloted for specific periods of time and in specific areas. Taking a power to pilot new formats will allow for a full evaluation of any new approach to be carried out, taking into consideration the views of victims, the courts, the Crown and the defence. If pilots are successful, any new statement formats can be extended more widely.

The new power will enable the Scottish ministers and criminal justice partners to take a balanced and considered approach to extending the format in which victim statements can be delivered, while allowing for the development of new formats in response to advances in technology.

In amendment 86, Graeme Pearson has made a suggestion in the same vein that allows for different means by which a victim statement can be made. I welcome his attention to the matter. I have concerns, however, regarding the extent of amendment 86, in that victims would be able to read their victim statement live in court. I am not sure how well that would work in practice, nor am I persuaded of the benefits of such a measure. I have concerns about the potential impact on the victim.

That said, I would not want to rule out that proposal altogether and would be happy to revisit it once greater consideration has been given to how such a measure would operate in practice and the benefits and risks to the victim have been explored in more detail, which will also be informed by any pilots of alternative forms of victim statement.

Amendments 30 and 31 in my name amend section 19 of the bill. The effect is that children over the age of 12, rather than 14, will be able to make victim statements in their own right. At present, children over 14 are able to make victim statements. However, as a number of victim support groups, including Children 1st and Scottish Women’s Aid, have pointed out, the age of 14 is inconsistent with other legislation relating to children, primarily the Age of Legal Capacity (Scotland) Act 1991, which provides that children over the age of 12 have testamentary capacity and are able to make decisions about many things, including instructing a solicitor.

I agree that it is appropriate to align the provisions around victim statements with existing legislation as far as possible and therefore I am taking this opportunity to introduce an amendment at stage 2 to lower the minimum age from 14 to 12. However, I am not persuaded that there is a need to totally remove the minimum age limit at which children may make a statement in their own right, as proposed by Elaine Murray in amendment 68.

Basing a decision on whether a child is capable of making a statement solely on the age and maturity of the child would involve additional delays in the process by requiring an assessment by a psychologist. That delay and additional process could cause further stress to the child. It is more appropriate that statements should be prepared by a parent or carer on the child’s behalf, taking into account the views of the child, as proposed in the bill and by amendments 30 and 31.

I consider that requiring the court to make a decision on which carer should make the statement, where there is more than one possible candidate, as set out in amendment 68, is an unnecessary requirement. Again, that step will cause additional delays and prolong the process for the child. Where more than one person is eligible to make a statement on behalf of the child, there is existing provision in section 19 to provide for agreement to be reached by the carers themselves. It also sets out that the child must be allowed to express their views and that those views must be taken into account when the decision is made. That less formal approach does not require the involvement of the court, thereby reducing the possibility of delays and additional stress on the child.

Amendment 29 is a minor drafting amendment that does not alter the overall effect of section 19 and is in consequence of amendment 32.

I urge Elaine Murray and Graeme Pearson not to move amendments 68 and 86 respectively.

I move amendment 29.

Graeme Pearson (South Scotland) (Lab): When we considered amendments to the bill at our previous meeting, I rehearsed for the committee the evidence that we had received from victims and the general wisdom out there about the treatment that many—although not all—victims and witnesses currently receive in our courts.
This is perhaps a coincidence—although I think that such experiences are probably a regular occurrence—but in The Courier this week, there is an article about the treatment of children in the Dundee courts. A parent of children involved in a particular case feels that they received unhappy treatment at the hands of the court and that they were treated badly. I think that the amendments that we are discussing are absolutely vital to the wellbeing of children in our criminal justice system.

I welcome the fact that the cabinet secretary is at least prepared to consider the proposal that an oral statement can and should be received from a victim in the event that a victim wishes to make such a statement. I am concerned, however, that in the cabinet secretary’s amendment 32, there is no specific mention of oral statements.

I hope that, between now and stage 3, we will be able to discuss the issue further, because there is no doubt that the evidence that we received from victims indicated that some victims want to be heard and to make an oral statement at the completion of a case. It seems unnecessary that we should frustrate such a desire on the part of a victim. Indeed, making an oral statement may allow a victim to achieve some measure of closure at the conclusion of what must be a very difficult process for them. We have to accept that, in the 21st century, courts are not solely about law; they are also about delivering some means of justice and closure.

At this stage, I am happy not to follow through on my amendment 86, but I sincerely hope that the cabinet secretary will indicate that he will engage in some earnest discussion about the proposal.

I will leave it to Elaine Murray to decide her way forward in relation to amendment 68, but I think that it is right that children should have the opportunity to speak if they desire to offer such evidence. It is not necessarily the case that the court process would be unnecessarily delayed, as the court would have made its judgment at an earlier stage as to whether a child was capable of giving evidence and would have assessed the child accordingly before that part of the process was complete.

Presumably, advice could be given to the child as well as to the parent or guardian in relation to making a statement at the end of the process. I think that we should give children the opportunity. They should not be left to live the rest of their lives regretting that they never had the chance to unburden themselves.

09:30

Elaine Murray (Dumfriesshire) (Lab): I welcome the cabinet secretary’s amendments 30 and 31, which lower the age at which a child may automatically make a victim statement to the age of 12. That of course is in line with the presumed age of maturity contained in the Children (Scotland) Act 1995 and in other more recent legislation.

My amendment 68 was drafted after a discussion with Children 1st, which strongly believes that younger children of sufficient age and maturity should be able to make a statement should they wish to do so. The amendment proposes that where a child does not have sufficient age or maturity, a parent or carer may make the statement on their behalf. However, there might be circumstances in which a parent or carer is not able to make such a statement, and the amendment proposes that, in such cases, a qualifying person may do that on the child’s behalf.

Section 6(1) of the Children (Scotland) Act 1995 requires children’s views to be sought where a major decision is involved. The act provides that the relevant person must “have regard so far as practicable to the views (if he wishes to express them) of the child concerned, taking account of the child’s age and maturity.”

The amendment is therefore in line with other legislation.

Amendment 68 also proposes that the age and maturity of a child under 12 would be assessed by a health professional—not necessarily a psychologist—so there would not necessarily be a delay as a result of involving that particular type of health professional. In addition, the amendment proposes that the court must determine which qualifying person should make the statement on the child’s behalf.

Amendment 68 would also require the child concerned to be given the appropriate support either to make the statement themselves or to express their view as to which person does so on their behalf. That is in line with the Children’s Hearings (Scotland) Act 2011, which provides for advocacy to be provided to all children who require such support to make their views known when they are involved in the children’s hearings system. I believe that that is a useful precedent for legislating for children and young people to be supported to make a victim statement whatever their age.

Sandra White (Glasgow Kelvin) (SNP): I seek clarification on amendment 68 with regard to a child who is under 12. I concur with what everyone has said: we are considering victims.

You said that the child would be assessed by a health professional, not a psychologist. Are you thinking of any specific type of health professional? Who would assess what type of health professional would be involved? I have
concerns about the effect on children under 12 of having to go through certain psychological examinations. Can you expand on that a wee bit?

Elaine Murray: Amendment 68 just refers to a health professional; it does not specify which particular type of health professional. It could be a general practitioner who knew the family well, for example.

Roderick Campbell (North East Fife) (SNP): I will deal with Graeme Pearson’s amendment 86 first. It seems to me that there is provision in the Criminal Justice (Scotland) Act 2003 for steps to be taken to allow such oral evidence and that the proper way forward in the first instance is to try some pilot schemes and consider and evaluate how they work.

On Elaine Murray’s amendment 68, I agree that the appropriate age is 12, not 14, which would bring the bill into line with the Age of Legal Capacity (Scotland) Act 1991 and the Children (Scotland) Act 1995. That is common ground. Having reached that view, I again take the view that we should see how that operates. The committee did not take any oral evidence on the question of reducing the age below 12.

I am slightly confused by the reference in amendment 68—in proposed new subsection (11B) of section 14 of the 2003 act—to “where a child is not of sufficient age and maturity.”

Age is not supposed to be a criterion, yet somehow other the amendment is bringing that part back in. Overall, I am confused by the amendment. I do not think that we have given the issue enough consideration. I think that we should just stick to setting the age at 12.

Elaine Murray: The issue is that in other legislation children under the age of 12 who have sufficient age and maturity are enabled to make their wishes known about what happens to them—in this case, they should be able to describe to the court how they feel as a victim. Amendment 68 makes provision for younger children. I was not on the committee at the time, so I accept that you did not take any particular evidence on the issue.

The issue was raised by Children 1st, which has been very much involved in supporting child victims and which thinks that it is important to include in the bill the measures proposed in amendment 68 to enable children under 12, who wish and are able to do so, to make their feelings known, either in person or through an intermediary, such as a parent, guardian or other qualifying person. I do not know whether that provides clarification, but that was the intention behind the amendment.

The Convener: I have a concern that young children might feel that they ought to say something when they do not want to. The existence of such a provision might make them feel that they ought to say something when that might not be the best thing for them to do. I appreciate that an assessment would be done by a health professional such as a psychologist, but—I will be interested to hear what the cabinet secretary says about this—when provision is made to allow something to be done, people sometimes feel that they ought to do it when that might not be in their best interests. Indeed, that might be more damaging than not having closure, to use that awful American expression. I have concerns about amendment 68.

Kenny MacAskill: I will deal first with Graeme Pearson’s amendment 86. The powers that are provided are generic, not specific. They are meant to be inclusive, not exclusive. We cannot predict what technology will be like in five years. Five years ago, we could not have envisaged that someone would be able to get their phone out, take a video and put it before a court, but that is the world that we live in. Such things are perfectly feasible. We want to ensure that, as technology evolves, we can adapt to it.

We are quite open to looking at suggestions, but we must do so with the courts, the defence and the Crown. What would happen? Would the script of a statement have to be checked before it was given? Would it have to be run by the court? If someone went off script, would that nullify the trial? Would there have to be a proof in mitigation? Could a victim who went off beam—if I can put it that way—and beyond what was in the script when giving a statement be challenged? There are situations in which the defence is open to a proof in mitigation as regards the defence statement.

I fully accept the principle that Graeme Pearson is applying, which I think is valid, but, as is always the case with such matters, the devil is in the detail. I give him the assurance that I am happy to have discussions with the judiciary and all parties involved to ensure that, if such an initiative is to be piloted, we know what can be said, the constraints that exist and what would happen in particular circumstances, because the last thing that we want is for the victim to end up in a worse position or for there to have to be a retrial because of something that was said or done.

With regard to Elaine Murray’s amendment 68, I think that we tend to take a societal view of such matters. That is why we have had a debate in the Parliament on the age at which people can vote in the referendum. A very mature 15-year-old cannot vote, because we have decided that people can vote at the age of 16. South of the border, there was a debate at the weekend about lowering the age of consent. I am not persuaded of that—we have decided that 16 is the right age. In this
case—in relation to victim statements—the right age is 12.

As Rod Campbell indicated, if we decide to change the age of legal capacity, we will be more than happy to review the matter, but I think that, broadly, a societal view is taken of such matters on the basis of how we view a child and their capacity. I think that it is appropriate to tie the age at which a victim statement can be made to the age of legal capacity. If a person can instruct a solicitor, I think that they are capable of giving a victim statement.

I fully understand where Elaine Murray is coming from—her view is that there are very mature young people under the age of 12 who might want to make a victim statement. However, we take a general view on the voting age and the age of consent, and I think that we should take such a view on the age at which an individual can give a victim statement.

Amendment 29 agreed to.
Amendment 86 not moved.
Amendment 30 moved—[Kenny MacAskill]—and agreed to.
Amendment 68 not moved.
Amendments 31 and 32 moved—[Kenny MacAskill]—and agreed to.
Section 19, as amended, agreed to.

Section 20—Duty to consider making compensation order

The Convener: Amendment 69, in the name of Elaine Murray, is in a group on its own.

Elaine Murray: Amendment 69 would require the court to ascertain the views of the victim prior to making a compensation order and would prohibit the making of such an order when the victim has notified the court that they do not wish to receive compensation from the offender. I believe that evidence was taken on the issue at stage 1. The victims of sexual offences, for example, may find payment of compensation for the offence that was perpetrated against them quite abhorrent.

I move amendment 69.

Margaret Mitchell (Central Scotland) (Con): Amendment 69 seems to be sensible. I am minded to support it, after I have heard what the cabinet secretary has to say.

Roderick Campbell: We should be slightly careful about going too far. It is right that courts ought to “consider” things, but we should not be perceived to be tying the hands of the courts and trying to tailor their discretion.

Graeme Pearson: Every time we try to move forward in any way that could be described as radical, we find a million reasons why we need to be careful, or whatever. At the end of the day, it would do no harm to allow a victim to say to the court, “I don’t want this person’s money”. That seems not to be radical and would give some power to victims in situations in which they often feel completely powerless.

Kenny MacAskill: At the moment, courts may consider imposing a compensation order on an offender, but are under no obligation to do so. The intention behind section 20 of the bill is simply to ensure that the court considers imposing compensation orders in relevant cases; that is not to remove its direction to consider all the circumstances. Courts already consider whether it is appropriate in the circumstances to make a compensation order, and the factors that are considered rightly include views that are expressed by the victim.

I am aware that Rape Crisis Scotland and Scottish Women’s Aid have expressed particular concern about compensation orders being imposed in domestic abuse or sexual assault cases; victims often do not wish such orders to be made in such cases. I assure the committee that the bill will do nothing to preclude the court from using its discretion and imposing compensation orders only when it considers that to be appropriate. I therefore consider that amendment 69, although well-intentioned, is unnecessary.

I urge the committee to consider the practical implications of amendment 69. It would require the court to seek the views of victims in every case in which compensation might be applicable. That would be an onerous undertaking that seems hardly to be proportionate, especially given that the concerns relate to a specific group of offences. Furthermore, it is unusual for a compensation order to be awarded for offences in this group. To ask every victim whether they want a compensation order could also have the unintended consequence of raising expectations. When victims express a desire to receive compensation and an order is not granted by the court following consideration of all the circumstances of the case, the fact that views have been actively sought might leave victims feeling less empowered, rather than more so.

In summary, the matter can be better dealt with through guidance and training. I ask Elaine Murray to consider withdrawing amendment 69, with my assurance that we will continue discussions with the Judicial Office for Scotland and the Crown Office and Procurator Fiscal Service to ensure that the concerns that have rightly been raised by Scottish Women’s Aid and others are addressed.
Elaine Murray: I appreciate that the cabinet secretary and Roderick Campbell have far more experience in matters of the law than I do, but I am slightly confused by their interpretation. Amendment 69 says that

“In considering whether to make a compensation order, the court must take steps to ascertain the views of the victim.”

The victim would therefore be asked only when a compensation order was being considered—not in every single case. Victims are given the opportunity to make victim statements and so on, so they are communicated with anyway. Surely being asked about compensation could be part of that communication.

I am not seeking to tie the hands of courts in any way. All we are saying is that if a victim does not want to have a compensation order, one will not be awarded. That might be seen to be unlikely, but the fact that it would be in the legislation would mean that the victim of sexual or domestic abuse would not have to fear that it might happen; they would not need to fear that they would in some way be being paid off for the crime that had been committed against them. I am sure that we can all understand how that could be extremely offensive.

I am not therefore quite sure that I accept the arguments from Roderick Campbell or the cabinet secretary. I am prepared to seek to withdraw amendment 69 at this time, although I have every intention of considering the matter further at stage 3 in order to ensure that the wording is as good as it can be.

The Convener: Elaine Murray seeks to withdraw amendment 69. Are members content with that?

Amendment 69, by agreement, withdrawn.

Section 20 agreed to.

Section 21—Restitution order

09:45

The Convener: We turn to restitution orders. Amendment 70, in the name of Alison McInnes, is grouped with amendments 71 to 73.

Alison McInnes (North East Scotland) (LD): Amendments 70 to 73 would extend restitution orders and the associated fund to all emergency workers. That would mean that an assault on any emergency worker—not just a police officer or staff member—could lead to the offender’s being required to make a payment to the restitution fund. In turn, those emergency workers would be able to access the facilities and services that the fund would establish.

Amendments 70 and 72 go together and would extend the bill so that anyone who is convicted of assaulting or impeding ... providers of emergency services under section 1(1) of the Emergency Workers (Scotland) Act 2005 could be the subject of a restitution order. That would cover people acting for the Scottish Ambulance Service and members of the fire brigade as well as the police.

Sadly, such incidents are not rare. The Scottish Ambulance Service tells me that there are more than 200 incidents of physical assault every year, and there were 80 attacks on fire service personnel in 2011-12, so across the board our emergency services personnel too often encounter threatening or violent behaviour.

I propose further, through amendments 71 and 73, to extend the order and the fund to those who are named in section 2 of the 2005 act, which would widen the provision to include prison officers, members of the Maritime and Coastguard Agency, the Royal National Lifeboat Institution, medical practitioners, nurses, midwives, social workers and mental health officers, but only if they were assaulted or impeded when responding to emergency circumstances.

The Law Society of Scotland supports extending restitution orders to a broader group of emergency workers. It strikes me as being unfair and inequitable that only an assault on a police officer should merit a restitution order, and that only that segment of our emergency services personnel should be able to access the specialist victim support services that the fund will establish.

I move amendment 70.

Roderick Campbell: I absolutely agree with Alison McInnes in theory. It seems to me that there ought not to be a distinction in theory between police officers and other emergency workers, but it is a question of practicalities. The committee had a fairly uniform view at stage 1, and the Government’s response was that it is not always easy to identify appropriate beneficiaries for all emergency workers. It is because of the practicalities of doing so that I cannot support amendment 70, although I agree with it in principle.

Margaret Mitchell: I am sympathetic to the intention behind the amendments, but I will listen with interest to what the cabinet secretary says about the practical difficulties that may or may not arise.

Kenny MacAskill: Roderick Campbell has already said a lot of what I would have said. As I have said before, we are sympathetic to the idea of extending restitution orders to workers other than the police. However, we must consider what would actually work. What makes restitution orders workable is the existence of an offence that
is defined in terms of a group of workers—the police—for whom there are specific support services already in place, including the Scottish Police Benevolent Fund and the Police Treatment Centres.

Although offences of assault on emergency workers are defined in the Emergency Workers (Scotland) Act 2005, there is no specific support service or organisation that corresponds to those offences. Respondents to the consultation, and those who have commented subsequently, have not been able to suggest a suitable beneficiary to whom moneys could be paid from the restitution fund. There are some benevolent funds for distinct groups of emergency workers, such as the Fire Fighters Charity, the Ambulance Services Benevolent Fund and the Social Workers Benevolent Trust. Those organisations may or may not be suitable beneficiaries, but in any case they cover only limited categories of workers, and not all of those who are set out in the 2005 act.

Would it be appropriate to hand moneys that were recovered in respect of an assault on a social worker to the Fire Fighters Charity? In theory, the administrators of the restitution fund might ensure that moneys that were received following an assault on a social worker would go to the appropriate trust. However, that would greatly increase the burden on the Scottish Court Service, which would have to split the charges in the 2005 act into categories of worker in order to ensure that money could be appropriately ring fenced when it was paid in to the restitution fund. There would also be a burden on the operator of the fund to ensure that the moneys that were received for certain offences were disbursed to organisations that support victims of those specific offences. We have to question whether such effort would be, or could be, proportionate.

To put the situation into perspective, in 2011-12, there were 3,357 persons with a charge proved under section 41(1A) of the Police (Scotland) Act 1967, and 193 persons with a charged proved in respect of all emergency workers under sections 1 and 2 of the Emergency Workers (Scotland) Act 2005. Splitting down those 193 offenders into categories according to type of emergency worker—there are 12 categories in the act—will produce very low returns. In the two years from January 2010 to February 2012, fines worth £330,000 were levied in respect of the offence in the Police (Scotland) Act 1967, which has been replaced by section 90 of the Police and Fire Reform (Scotland) Act 2012. The Scottish Court Service advises, on the other hand, that there was no fine income at all in 2011-12 and 2012-13 from the charges under the 2005 act because those sentences were all dealt with by community payback orders or imprisonment. It is clear from that that the sums that would be raised from fines arising from assault on emergency workers would struggle to cover the cost of administration.

If it were broken down into the dozen or more funds that might prove to be necessary, such a provision would be far more likely to be an administrative cost rather than offer any benefit. It is open to the courts, where appropriate, to impose a compensation order to benefit a specific victim, which includes emergency workers and other people in public-facing roles, just as it is open to the court to make individual compensation payments to police officers in such circumstances. Although to some extent I recognise—I think that we all do—the justness of Alison McInnes’s argument, the practical implications mean that although we can deal with section 41(1A) of the Police (Scotland) Act 1967 on charges because we have volume, crime and a beneficiary, for the other offences we have limited numbers and we do not know who we are dealing with or to whom we would send the compensation—that is even before we consider the costs that we would impose on organisations to administer the fund.

I invite the committee to reject Alison McInnes’s amendments.

**Alison McInnes:** I have listened to the minister’s response. It does not seem to me to be beyond the wit of man to find out whether there are union or benevolent funds. That could be done. It is divisive and inequitable to single out the police. I will press amendments 70 and 72, which would extend restitution orders to the Ambulance Service and members of the fire brigade. I will not press amendments 71 and 73.

**The Convener:** You have moved only one amendment; you are pressing amendment 70. We will deal with the others as we reach them.

The question is, that amendment 70 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**
- McInnes, Alison (North East Scotland) (LD)
- Mitchell, Margaret (Central Scotland) (Con)
- Murray, Elaine (Dumfriesshire) (Lab)
- Pentland, John (Motherwell and Wishaw) (Lab)

**Against**
- Allard, Christian (North East Scotland) (SNP)
- Campbell, Roderick (North East Fife) (SNP)
- Finnie, John (Highlands and Islands) (Ind)
- Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
- White, Sandra (Glasgow Kelvin) (SNP)

**The Convener:** The result of the division is: For 4, Against 5, Abstentions 0.

Amendment 70 disagreed to.
Amendment 71 not moved.

The Convener: Amendment 33, in the name of the cabinet secretary, is grouped with amendments 34 to 38, 42, 90 and 43 to 47.

Kenny MacAskill: Amendments 33 and 35 to 37 are technical drafting amendments relating to the terminology that is used in reference to operation of the restitution fund. They have been lodged in order to clarify that the Scottish ministers have the power to administer the fund, which they may delegate, and that they may make provision by order for the fund’s administration.

The operation of the restitution fund—which will receive money that is raised from restitution orders that are imposed for police assault, and will disburse them to the designated recipients—will necessarily involve administrative expenses. Amendment 34 will ensure that those expenses may be defrayed from the fund by adding the Scottish ministers and those administering the fund to the persons to whom payments may be made out of the fund.

Amendments 38 and 43, 45 and 46 are mostly technical amendments to the subordinate legislation-making powers relating to the victims surcharge; they would slightly alter the terminology. As with my amendments on the restitution fund, the amendments clarify that the Scottish ministers have the power to administer the fund, which they may delegate, and that they may make provision for the fund’s administration.

Amendment 46 will also remove the reference in new section 253G(6) of the Criminal Procedures (Scotland) Act 1995 to the regulation-making power being used and, in particular, to make provisions specifying persons or classes of person to whom, or in respect of whom, payments may be made out of the fund. I consider that the restrictions in the bill relating to the persons to whom payments can be made are sufficient and that such provisions are therefore highly unlikely to be made.

As with the restitution fund, the operator of the victim surcharge fund will inevitably incur administrative costs. It would be unreasonable to expect the operator to bear the cost of administering the fund himself. Amendment 42 therefore provides that operational expenses may be taken from the fund. Where administration of the fund is delegated to a third party—which is our intention—the Scottish ministers must consent to such expenses being taken from the fund.

Amendments 44 and 47 are minor technical amendments that will allow subordinate legislation under proposed new sections 253F and 253G of the 1995 act to be made in a single instrument.

Amendment 90, in the name of Graeme Pearson, seeks to prevent the victim surcharge fund from being used to supplement or replace other payments that are made out of the Scottish consolidated fund. As I have stated previously, the victim surcharge fund is being established for the specific purpose of providing immediate and practical assistance to victims of crime; it is not intended to be used to replace the current or future Government funding of victim support services. Indeed, it is our intention to delegate administration of the fund to Victim Support Scotland and for it to distribute funds as appropriate, with the Scottish Government having no role in the day-to-day operation of the fund. In those circumstances, payments out of the fund would be made not by the Scottish ministers but by the operator to whom administration of the fund has been delegated. Amendment 90 would be of no effect in those circumstances, because the operator will have no say on how or to whom payments are made out of the Scottish consolidated fund.

In addition, the Scottish ministers currently support a number of victims organisations through payments from the consolidated fund. Amendment 90 could have the effect of preventing payments being made to those organisations from the victim surcharge fund, because they could be seen as supplementary payments to those that were being made from the consolidated fund. There is also a risk that the inclusion of such a provision in the bill would create an implication that the absence of such a provision elsewhere in the bill or other statutes would mean that funds such as the victim surcharge fund could be used to relieve the pressure on the Scottish consolidated fund. I therefore consider amendment 90 to be completely unnecessary, and I ask Graeme Pearson not to move it.

I move amendment 33.

The Convener: So, Graeme Pearson’s amendment is “completely unnecessary”. That is his cue to speak to amendment 90 and the other amendments in the group.

Graeme Pearson: Amendment 90 has achieved its desired effect—it would be best described as a probing amendment. I was seeking to achieve assurances from the cabinet secretary that the proposed measures are not a means of siphoning funds into mainstream Government budgets. I accept the assurances that the cabinet secretary has given the committee in that regard. It would be helpful if the cabinet secretary could, in concluding—

The Convener: He has concluded.

Graeme Pearson: In his response.

The Convener: You are winding up, eventually.
I beg your pardon—the cabinet secretary has not concluded.

Graeme Pearson: Amendment 46 aims to ensure that future changes to maintenance and to eligibility for payment from the fund are dealt with under negative procedure. I ask the cabinet secretary to explain why he proposed the use of negative procedure.

I have no comment on the other amendments in the group.

The Convener: Does anyone else wish to contribute? If not, then the cabinet secretary may wind up.

Elaine Murray: Convener?

The Convener: I beg your pardon, Elaine. I could not see you—you are out of my sights. You will have to poke me.

Elaine Murray: Do not tempt me.

I have some comments about amendment 34. Scottish Women’s Aid, or one of the other victims organisations, had raised some concerns about the amendment. I am not necessarily disagreeing with the amendment, but I would like a little bit of clarification about it. The aim is to ensure that the fund washes its own face, as it were. Is it correct that there are no implications of the amendment greater than ensuring that the fund supports itself?

The Convener: The cabinet secretary now gets to wind up.

Kenny MacAskill: I can give assurances to both Graeme Pearson and Elaine Murray. There is no hidden agenda; the negative procedure is being used because that is normal and standard for such matters. If there was anything untoward in that, the Delegated Powers and Law Reform Committee would have been in touch. What we have proposed is simply the normal procedure.

I can also confirm to Elaine Murray that the provisions are to deal with matters that we perhaps cannot envisage, although there may be some cost involved. There is certainly no intention that we or anybody acting on our behalf, would seek to view the fund as a cash cow.

We want the money that has been taken from people who have offended to go to the victims of the offence, and we are working with Victim Support Scotland because it is the best organisation to deal with this matter. We are also aware that victims need money immediately; after all, although money can be allocated from Victim Support’s fund, people who make criminal injuries compensation claims tend to receive the money two and a half years after the claim was instigated and perhaps three and a half years after the offence. The measure is about giving a pot of money to Victim Support for the people who need it. I remember being at a meeting of a previous justice committee at which Margaret Smith highlighted the case of a constituent who did not live in a council house and so had to pay for the blood of her son to be cleaned up because there was no provision for that. There is something manifestly wrong in such situations, so we have to resource the likes of Victim Support Scotland.

Amendment 33 agreed to.

Amendment 72 moved—[Alison McInnes].

The Convener: The question is, that amendment 72 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)

Against
Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

The Convener: The result of the division is: For 4, Against 5, Abstentions 0.

Amendment 72 disagreed to.

Amendment 73 not moved.

Amendments 34 to 37 moved—[Kenny MacAskill]—and agreed to.

Section 21, as amended, agreed to.

Section 22—Victim surcharge

The Convener: The next group of amendments is on victim surcharge fund: eligibility. Amendment 87, in the name of Margaret Mitchell, is grouped with amendments 88 and 89.

Margaret Mitchell: Amendments 87 to 89 seek to make the victim surcharge applicable to all offenders, rather than being implemented in the kind of piecemeal way that the Government has proposed. Section 22 requires the court to impose a victim surcharge on offenders in certain circumstances to be set out in secondary legislation, and the funds raised through the surcharge will go into a central victim surcharge fund to provide practical assistance and support to victims who have immediate and unmet needs.

The surcharge is a good idea that is supported by victims organisations and which already...
operates in England, Wales and Northern Ireland. However, the Scottish Government could and should be more ambitious. It has made it clear that, in the first instance, the surcharge will be imposed only in cases relating to court fines, but that means that individuals who have been convicted of motoring offences will have to contribute to a fund that is designed to help victims, while rapists, murderers and violent criminals will not be asked to pay anything. That strikes me as a lost opportunity, not to mention a bit of a travesty of justice.

The victim surcharge has been in force in England and Wales since 2007 and, since last year, applies to all forms of sentences, including custodial, community and suspended sentences. Given that the experience of implementing the surcharge south of the border has been good, I see no reason why the Government should delay in rolling it out and ensuring that it applies to more serious criminals as a matter of priority. Amendments 88 and 89 are consequential.

I move amendment 87.

Elaine Murray: I am slightly confused by these amendments, although that might be because I do not have sufficient understanding of how the surcharge works in England. I was not aware, for example, that it applied to all offences. If someone nicks something out of a supermarket, does the supermarket get some sort of compensation? Equally, does someone who offends against the state automatically have to pay a surcharge to the state as victim? I am therefore slightly confused about the intention behind the amendment and how it would apply in very minor crimes and so on.

Roderick Campbell: Like Elaine Murray, I am a bit confused about that position. I am not sure that these amendments would give much flexibility, so I am inclined to resist them.

Kenny MacAskill: I welcome Margaret Mitchell’s support for the introduction of a victim surcharge, but I am concerned that amendments 87, 88 and 89 would remove the flexibility for us to test the waters in relation to how the surcharge is applied, which should react to changing circumstances. The provisions on the victim surcharge have been purposely designed to allow us to apply the surcharge in the first instance only to cases that result in a court fine. However, through the very powers that Margaret Mitchell wishes to remove, we will be able to extend the surcharge to apply to other types of sentence in the future, if appropriate. That phased approach will allow the scheme to bed in and its successes to be evaluated before any extension to incorporate other sentences.

It is difficult to describe now the exact circumstances in which we might wish further to restrict the application of the surcharge—for instance, in respect of particular offences—until it has been put in place. However, the powers in section 22 provide us with the flexibility to react to any issues that might arise or to the creation of new offences or changes to criminal procedure. I have particular concerns about the effect of amendment 88, because what it proposes would mean that a conviction would be all that would be needed for a victim surcharge to be imposed, even if no sentence was given to the offender; an offender who was admonished would therefore have to pay a victim surcharge. I think that that is a step too far. Further, the administration of a scheme that had to cover every conviction, regardless of sentence, would be complex, to say the least.

The powers in section 22 allowing Scottish ministers to prescribe offences, sentences and circumstances to which the victim surcharge is not applied were included for a specific reason: to provide us with the flexibility to take a measured and sensible approach to implementing the surcharge in the first instance and to enable us to respond to the evolving nature of the criminal justice system in the future—I think that Elaine Murray touched on that. I therefore urge Margaret Mitchell to withdraw amendment 87 and not to move amendments 88 and 89. I give her the assurance that, whether it is done by me or by a successor justice secretary, some of the points that she has raised will be considered once we have bedded in the scheme.

Margaret Mitchell: I am content to leave amendment 87 as a probing amendment at this stage, with the proviso that what it proposes can be looked at again at stage 3, because there is an important point of principle here. I therefore seek to withdraw amendment 87.

Amendment 87, by agreement, withdrawn.

Amendments 88 and 89 not moved.

Amendments 38 to 42 moved—[Kenny MacAskill]—and agreed to.

Amendment 90 not moved.

Amendments 43 to 47, 49, 48, 50 and 51 moved—[Kenny MacAskill]—and agreed to.

The Convener: The next group is on the victim surcharge fund. Amendment 91, in the name of Graeme Pearson, is the only amendment in the group.

Graeme Pearson: Amendment 91, which I hope is a reasonable amendment, proposes the creation of a report, instigated by Scottish ministers or such persons as they have delegated, which should be completed by the end of the 12-month period following the establishment of the fund, and thereafter as soon as practicable after
each subsequent period of 12 months. The report will include information on

“the sum paid into the fund”

and

“the sum still due to be paid into the fund by persons who the court has ordered to make payment of a victim surcharge ... a list of those persons ordered to make payment of a victim surcharge who are yet to make that payment .. the sum paid out of the fund”

and

“an account and assessment of how the sum paid out of the fund has been used.”

I think that the general public would be keen to know how such a surcharge fund had developed and what benefits had been achieved in connection with it. Equally, a list of those persons who had yet to make their payment would provide a useful encouragement for those who might otherwise avoid paying the surcharge as ordered by the court.

I move amendment 91.

Kenny MacAskill: I welcome the general principle behind amendment 91 and agree that there should be transparency and accountability in the administration of the victim surcharge fund. Members of the committee will note that the draft regulations relating to the surcharge, which I supplied last week, include provision for the making of quarterly reports to the Scottish ministers. Those reports will include some of the information that Graeme Pearson’s amendment mentions, such as the payments that are made into and out of the fund and an indication of how that money has been used. The regulations will not be finalised for some months, and I am happy to consider any suggestions from Graeme Pearson or other members as to what else might usefully be covered in reports from the operator of the fund.

Indeed, discussions are on-going between my officials and VSS—to which we intend to delegate the fund’s administration—with regard to what further detail may be necessary, I am happy to consider whether such reports should be published; although that was not specified in the draft regulations, it is a sensible suggestion.

However, I consider that such matters are best covered in regulations rather than in the text of the bill. Section 22 sets out the broad parameters of the fund and leaves the administrative details to subordinate legislation, which will enable more flexibility and allow the detailed operation of the fund to be more easily altered in the light of experience. I see no reason to alter that approach in relation to reporting requirements.

I have specific concerns about some of the areas that amendment 91 says are to be reported on, particularly the requirement under proposed section 22(3)(c) to list those persons who are ordered to make payments of a victim surcharge and are yet to make that payment. It is common practice that those who have been fined and will be subject to a victim surcharge are able to make payments by instalments. At what point would it be considered appropriate that they be included in a list?

There will also be cases in which someone is in arrears for a short period of time but quickly makes up those arrears. The requirement would put a fairly onerous burden on the Scottish Court Service, and all to compile a snapshot that may not be representative of the overall success in collecting the surcharge.

Finally, I have concerns that the publication of the names of individuals who have committed offences and are still to pay into the victim surcharge fund could have significant implications for the rights of the offender under article 8 of the European convention on human rights.

In summary, I support the intention behind amendment 91 but feel that the area would be more appropriately covered in subordinate legislation. I invite Graeme Pearson to withdraw amendment 91, with my assurance that I am happy to consult him and others further on what should be covered in regulations relating to the victim surcharge, and to consider his suggestion that reports be published regularly to ensure transparency in the administration of the fund.

Graeme Pearson: I have heard everything that the cabinet secretary has to say with regard to amendment 91. I am pleased that he is happy to discuss further the intentions behind the amendment and, as a result, I will seek to withdraw it.

Amendment 91, by agreement, withdrawn.

Section 22, as amended, agreed to.

Section 23—Victim’s right to receive information about release of offender etc

The Convener: Amendment 92, in the name of Margaret Mitchell, is grouped with amendments 93 and 94.

Margaret Mitchell: Prior to the stage 1 debate, the Sunday Post ran an article reporting that sex offenders who had been placed on the register for life but who now, as a result of a United Kingdom Supreme Court decision, have a right to challenge that were being taken off the sex offenders register without their victims being informed.

The bill already gives victims of offenders who are sentenced to 18 months or more in prison the right to receive information relating to the release of the offender. Amendment 92 explicitly states
that victims of sex offenders are able to receive information about the release of an offender who was subject to an indefinite period of notification but who is so no longer as a result of appeal or review.

Section 24 establishes a new right to allow the victims of persons who are given life sentences to make oral representation before the person is released on licence.

I move amendment 92.

10:15

Graeme Pearson: Amendment 93 seeks to ensure that, at the time of sentencing in the courts, victims and their families are made aware of the earliest date of release for the prisoner.

Evidence from victims and witnesses at stage 1 indicated the confusion that they faced when they heard an accused being sentenced to a period of imprisonment but learned later that week or later in the process that a formula was open to the prisoner that allowed discount and changed what the victim understood to be the earliest date of release to a much earlier time. There is no doubt from the evidence that I have heard and the approaches that have been made to me during consideration of the bill that victims and witnesses would value knowing on the date of sentence what the earliest date of release would be. It would not be beyond the courts’ power to identify that date, as the prisoner receives it when he enters the prison system later the same day.

Amendment 94 would require the Scottish ministers to provide a minimum period before the release of a prisoner by which a family must be notified of the release. That particularly pertains to those who have been involved in the victim notification scheme. Under that scheme, a letter can often arrive unannounced on a doorstep indicating that a prisoner is being released that day or has been released days before. That has an impact on victims and their families by taking them right back to the original crime and increasing the stress and anxieties that they face.

Amendment 94 seeks to bring some humanity into the process and to empower victims and their families as they seek to play their part in the justice system.

I have no comment to make on amendment 92.

Elaine Murray: I will listen to what the cabinet secretary has to say, but I have considerable sympathy for all three amendments in the group.

All of us who have worked over the years with constituents who have been victims of crime have heard distressing stories about how victims sometimes find out through Facebook that someone is out on parole, as happened to one constituent of mine. In another case, a woman whose young daughter had been sexually abused came round the corner to see her daughter’s abuser in the street in front of her. Equally, it is extremely distressing for victims of serious sexual offences not to be advised that somebody is no longer on the sex offenders register.

It feels right that victims should be kept informed when decisions of that type are taken. Indeed, victims should be informed about when somebody is likely to get out rather than believing that the offender has a 10-year sentence and finding that they are out a lot sooner than that without the victim and their family knowing at the time.

The Convener: Do any other members want to comment? I do not know whether Roderick Campbell wants in. He made a little flicker of the hand. It is so subtle.

Roderick Campbell: I am a wee bit confused by it now, so I will leave it to others to comment.

The Convener: I should not have identified Roderick. He is confused.

Cabinet secretary, please deconfuse Mr Campbell, if there is such a word. That would be handy.

Kenny MacAskill: Amendment 92 seeks to amend section 16 of the Criminal Justice (Scotland) Act 2003, which established the system whereby victims can, on request, receive information about the relevant offender. That system is known as the victim notification scheme and applies in relation to offenders who have been sentenced to imprisonment for 18 months or more and in relation to certain sentences imposed on those under the age of 18.

Amendment 92 would extend the categories of prisoner to whom the VNS applies by including prisoners who were given a prison sentence of any length and had previously been subject to an indefinite notification period under the Sexual Offences Act 2003 but had been discharged from that notification period.

There are a number of issues with the amendment. First, it is worded so as to include all persons sentenced to a period of imprisonment or detention who have, at any time, been subject to an indefinite notification period under the Sexual Offences Act 2003 but are no longer subject to it. There is no requirement for the notification period from which the offender has been discharged to be linked to the offence for which the offender is currently imprisoned. It may be that the victim who is seeking information about the offender would be eligible to receive that information due to the fact that the offender has at some time in the past been subject to a notification period imposed for a
completely unrelated offence. That seems hard to justify. Why should the victim of an assault be entitled to information about the offender purely because they have a previous conviction for a sexual offence, while other victims of assault would have no such entitlement solely because of their assailant’s differing criminal history?

Secondly, the amendment requires that the offender must have been subject to an indefinite notification period under the Sexual Offences Act 2003. If the intention behind the amendment is to ensure that victims of this category of offender are automatically eligible for the VNS, it appears to be unnecessary. Indefinite notification periods are imposed where an offender has been convicted of a sexual offence and is sentenced to imprisonment for 30 months or more, given an order for lifelong restriction or admitted to hospital under a restriction order for the offence. Accordingly, it is unlikely that any offender who is subject to an indefinite notification period under the Sexual Offences Act 2003 would not be caught by section 16 of the Criminal Justice (Scotland) Act 2003, as all offenders serving sentences of 18 months or more are included by virtue of section 16(1)(a) of that act.

Amendment 93 raises a number of practical questions. To provide clear information to victims about the release of offenders and to ensure transparency in sentencing more generally are worthy aims. However, at the point of sentencing, it will not always be immediately apparent when the offender in question will be eligible for release. For example, some offenders will be eligible for release at the Scottish ministers’ discretion on home detention curfew before the halfway stage, and some will be eligible for release on Parole Board recommendation at the halfway stage. Also, some prisoners will need to have their time on remand taken into account before a date of release can be calculated. In most cases where prisoners are serving multiple prison sentences, all the sentences will require to be considered before their date of release is calculated. The system of sentencing can therefore be seen as complex.

Under current arrangements, it is the Scottish Prison Service that calculates the earliest release date for offenders who receive custodial sentences. It does so as offenders are taken into custody following sentence being imposed. Putting in place arrangements that would allow the information to be available at the point of sentence would require the establishment of new processes, which would inevitably have cost implications. At a time of scarce resources, I am not persuaded that establishing a new mechanism to allow this information to be available at the point of sentence would be a sensible or necessary step, so long as we can ensure that the information that is currently provided through the VNS is delivered effectively and timeously.

Members will be aware that we have legislated for a Scottish sentencing council, and one member of the council will represent the views of victims. We are working with the judiciary to establish a sentencing council in the current session of Parliament, and it will be ideally placed to consider and make specific recommendations on how victims understand the impact of individual sentences on offenders, including when individual offenders are first to be considered for early release.

As I have said, the VNS is long established and it allows victims to receive information about release dates. I consider that it is preferable to ensure that the information that is currently available to victims, including notification of the date on which the prisoner is released, continues to be provided consistently and accurately through existing processes without any additional costs arising. In addition, the sentencing council could consider looking at this general area as part of its work programme to assess whether the additional costs of introducing a system would be justified.

Amendment 94, which is also in the name of Graeme Pearson, seeks to set a minimum period for notifying victims before a convicted person is released. At present, when a victim registers on the VNS, the Scottish Prison Service informs them of various critical dates including the earliest date of release. Victims can also make representations under section 17 of the 2003 act if a prisoner is being considered for release on licence. That enables victims to inform the Scottish ministers and, where appropriate, the Parole Board of any concerns with regard to the release of the prisoner and allows the potential impact on the victim to be considered when licence conditions are set.

Victims who are registered on the VNS are contacted about six months before a prisoner is eligible for release and are invited to make written representations. The minimum sentence threshold for registering on the VNS is 18 months, although I have already expressed my intention to lower it further using existing order-making powers.

There will be cases in which the victim registers on the VNS but the prisoner is released fairly quickly because, for example, of the time they spent on remand. Given the vast range of sentence lengths, it makes little sense to set an arbitrary minimum period by which point a victim must be informed of release. I consider, therefore, that the matter is better dealt with administratively through the VNS and am open to considering any improvements that might be made through that route. As the changes in the bill as drafted will ensure that more victims are eligible to register on the VNS, I consider the amendments in question
to be unnecessary and invite Margaret Mitchell to withdraw amendment 92 and Graeme Pearson not to move amendments 93 and 94.

Margaret Mitchell: I am disappointed that the cabinet secretary has not even suggested that there be further discussion on how we can make the victims of sex offenders aware that someone is being released earlier and, indeed, make them a special category. There are ways in which amendment 92 could be improved, but I would hope that the cabinet secretary would seek to work with me on whether an amendment covering the victims of sex offenders could be brought forward.

Kenny MacAskill: I am always happy to work to improve the scheme. Indeed, I have experienced some of the examples that Elaine Murray highlighted. Sometimes these things happen because people get compassionate release to see, say, a loved one who might be dying and those sorts of events cannot be indicated through the scheme. Certain aspects have to be improved; the principle, however, is that we should seek to improve the VNS and I am happy to engage with Margaret Mitchell on that matter.

Amendment 92, by agreement, withdrawn.

Amendment 93 moved—[Graeme Pearson].

The Convener: The question is, that amendment 93 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)

Against
Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

The Convener: The result of the division is: For 4, Against 5, Abstentions 0.

Amendment 93 disagreed to.

Amendment 52 moved—[Kenny MacAskill]—and agreed to.

Amendment 94 moved—[Graeme Pearson].

The Convener: The question is, that amendment 94 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)

Against
Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

The Convener: The result of the division is: For 4, Against 5, Abstentions 0.

Amendment 94 disagreed to.

Section 23, as amended, agreed to.

Section 24—Life prisoners: victim’s right to make oral representations before release on licence

The Convener: Amendment 95, in the name of Graeme Pearson, is grouped with amendments 96 to 100.

Graeme Pearson: Amendment 95 and the other amendments in the group seek to ensure that the victim’s emotions and needs are taken into consideration when offenders are considered for release. Amendment 95 seeks to allow all victims of serious crime and those who fall under the victim notification scheme an opportunity to make an oral representation when it comes to considering offenders for release.

Amendment 96, in the name of Margaret Mitchell, seeks to extend the right to make oral representation to victims of sex offenders; however, if the committee were minded to support amendment 95, amendment 96 would fall.

The Convener: Not according to my script, Mr Pearson. You might know better than me, but I suspect not.

Graeme Pearson: We will let the thing roll, convener.

The Convener: How very kind.

Graeme Pearson: Amendment 97 seeks to give victims the opportunity to give oral representation directly to the offender via videolink ahead of release if they so wish. However, that would apply only in cases of life imprisonment if amendment 95 is not agreed to. As I understand it, victims are allowed to make oral representations only to an independent member of the Parole Board, who then reports the outcome of that remote representation to the board; however, victims see that as a hurdle in getting their views heard at first hand. Amendment 98 seeks to give the victim the opportunity to make oral representation to the offender and would apply only in cases of life imprisonment. Amendment 99 is technical in...
nature and relates to amendment 97, and amendment 100, which is also technical, is linked to amendment 95.

I move amendment 95.

10:30

Margaret Mitchell: Amendment 96 provides that, in cases where a registered sex offender who is or has been subject to an indefinite notification period under the Sexual Offences Act 2003 is eligible for release, the victim can make oral representation to the Parole Board when the life registration is challenged or comes up for review. Basically, the amendment seeks to achieve parity between victims of sexual offences and victims of other serious crime, as there appears to be no good reason why victims of sexual offences should be overlooked in the bill. There is an opportunity here to strengthen the bill. The need for that was highlighted recently in the figures in the “Scottish Policing Performance Framework—Annual Report 2012-13”, which show that there are now 3,314 registered sex offenders in Scotland.

Elaine Murray: As with the previous group, I have considerable sympathy with the amendments in this group. We all appreciate that victims of serious crime may themselves serve a very long sentence, so it is appropriate that their feelings and rights are taken into consideration when the perpetrators of such crimes are considered for release.

Roderick Campbell: As with the previous amendments that we discussed, there seems to be a difference of view between those who would opt for a big-bang approach and those of us who would see how things operate before extending the scheme. Under the bill as drafted, the right to make oral representations will apply only to the victims of life prisoners. I tend to the view that we should see how that works before considering whether to extend it further.

Kenny MacAskill: Amendments 95 and 100, in the name of Graeme Pearson, seek to make significant changes to the right to make oral representations to the Parole Board, which is covered in section 24 of the bill. The amendments would remove any restriction on the categories of victims who could make oral representations and would allow that option for all those who can currently make written representations.

The approach taken in section 24 of the bill is to enable oral representations to be made only by victims of life sentence prisoners in the first instance, but the bill includes an order-making power to allow that to be extended to other categories of prisoner, if appropriate, in future. Life sentence cases have been selected initially to reflect the higher likelihood that victims of such prisoners will wish to make representations and to allow the system to bed in before consideration is given to whether it should be extended. Once the uptake and effectiveness of oral representations in life prisoner cases have been evaluated, proper consideration can be given to the inclusion of other categories.

The Parole Board currently has 28 members and deals with approximately 800 cases every year. The provisions in the bill require that a member of the Parole Board who is not involved in the tribunal hears the oral representations. Therefore, it is not difficult to see that extending the right to all victims immediately would most likely render the proposed scheme unworkable and unmanageable within current budgets and staffing levels. I consider that it would be far more sensible to introduce the right to make oral representations using a phased approach, as that would allow for operational problems to be identified and rectified and for the feasibility and desirability of extending the scheme to be considered properly.

Amendment 96, in the name of Margaret Mitchell, would allow victims to make representations about release in cases where a prisoner has been subject at any time to an indefinite notification period under the Sexual Offences Act 2003. I consider that the amendment is too far reaching. It is questionable whether, for example, a victim of an assault should be able to make representations about a prisoner based on a previous offence that had nothing to do with the victim making the representations. Why should victims who have suffered exactly the same harm be treated differently with respect to the representations that they can make simply because one of the offenders committed an unrelated crime previously? As I have said, I am happy to consider extending the availability of oral representations in due course, but we must ensure that any extension is appropriate and workable and that the scheme has had a chance to establish itself first.

Amendments 97, 98 and 99, in the name of Graeme Pearson, would allow victims to make oral representations about release and licence conditions directly to the prisoner via videolink, although it is not clear at what stage in the process that would be done. I consider that proposal to be flawed. The prisoner has no involvement in decisions about his release and any licence conditions that may be attached, so what purpose would there be in the victim speaking directly to the offender about such matters? Furthermore, I fail to see what benefit that would have for the victim. Indeed, it may be counterproductive, giving the victim unrealistic expectations about what could be achieved through such a process, and
could prove to be a traumatic experience, to say the least.

Decisions on release and licence conditions are rightly made by the Parole Board, taking into consideration all the reports on the prisoner’s conduct and progress. The victim is invited to make representations to the Parole Board about the release and possible licence conditions, and the bill will extend that to include oral representations for life sentence prisoners.

The prisoner already sees—and will continue to see—the representations that are made by the victim, unless there is good reason to withhold those from them. The amendments will add nothing to the effectiveness of the parole process. The Parole Board’s primary concern is to consider the risk of releasing a prisoner, and that risk is best assessed by considering relevant representations by the victim to the Parole Board, alongside other reports on the prisoner that have been prepared.

I therefore urge Graeme Pearson to withdraw amendment 95, and not to move amendments 97 to 100. I invite Margaret Mitchell not to move amendment 96.

Graeme Pearson: I have heard all that the cabinet secretary has to say on the issues, and I am not persuaded by his arguments. We should be seeking to place the victim at the heart of the system and giving them an opportunity to feel that they count and have some say in the way in which justice plays out.

The reason for suggesting that the victim should be able to give oral evidence directly is that any submission from a victim in those circumstances would, rightly, be played out to the prisoner’s knowledge. The prisoner should be aware of what is being considered by the Parole Board in making a decision. Any videolink would be viewed by the prisoner in the presence of the Parole Board, which would highlight the openness of the process.

I understand the challenges that such a change in culture would deliver, but there would be a dramatic improvement from the victim’s point of view. The evidence that we heard from victims in committee, and in the representations that have been made to me since those evidence sessions, suggests that such a change would be a big and very positive improvement to the system.

I press amendment 95.

The Convener: The question is, that amendment 95 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)

Against
Allard, Christian (North East Scotland) (SNP)
McInnes, Alison (North East Scotland) (LD)
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

The Convener: The result of the division is: For 3, Against 6, Abstentions 0.

Amendment 95 disagreed to.

Amendment 96 not moved.

Amendment 97 moved—[Graeme Pearson].

The Convener: The question is, that amendment 97 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)

Against
Allard, Christian (North East Scotland) (SNP)
McInnes, Alison (North East Scotland) (LD)
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

The Convener: The result of the division is: For 3, Against 6, Abstentions 0.

Amendment 97 disagreed to.

Amendment 98 moved—[Graeme Pearson].
Amendments 99 and 100 not moved.
Section 24 agreed to.

Section 25—Temporary release: victim’s right to make representations
Amendment 53 moved—[Kenny MacAskill]—and agreed to.
Section 25, as amended, agreed to.

After section 25
The Convener: Amendment 101, in the name of Graeme Pearson, is in a group on its own.

Graeme Pearson: Amendment 101 relates to section 25 on “Temporary release: victim’s right to make representations”. It seeks to create an opportunity for victims to indicate the means by which they receive intimation of any proposal for temporary release of a designated prisoner. It provides that

“Any communication providing information by a relevant person to a person who is or appears to be a victim or witness in relation to a criminal investigation or criminal proceedings must be in such form as the person reasonably requires”,

and it outlines the detail of how that requirement can be delivered.

Amendment 101 seeks to create an opportunity for the system to communicate with the victim or the victim’s family in a more compassionate way through a means that can be intimated by them at the outset of the process.

I move amendment 101.

Kenny MacAskill: I thank Graeme Pearson for raising the issue. I think that we would all agree that information should be provided to victims and witnesses in a format that suits their needs and in appropriate language that they can understand.

In its stage 1 report, the committee suggested that criminal justice organisations must

“take better care to ensure that the written information they provide to victims and witnesses is in plain English.”

In my response, I agreed with that view and advised the committee that I would be happy to work with our justice partners to improve the language that is used in communications.

However, amendment 101 goes considerably further than that by requiring the police, prosecutors and others to communicate in whatever form is reasonably required by a victim or witness, and to take steps to determine the preferred form of communication, presumably prior to the substantive communication.

Although that is a laudable aim, it strikes me that imposing such a strict statutory duty would be fairly impractical and could have potentially significant resource implications. Making a phone call to a victim might be viewed as a reasonable requirement under subsection (1) of the section that amendment 101 seeks to insert and, in many cases, I agree that that would be a reasonable requirement, but it would put a significant burden on any organisation if a high volume of correspondence suddenly had to be dealt with by phone or in face-to-face meetings, if such meetings were requested. The proposed obligation to seek the views of victims and witnesses before communicating with them, regardless of how routine the information that is to be provided is, seems unworkable in practice.

I believe that better training and guidance for those involved would be a more appropriate way of improving communication with victims and witnesses than an impractical statutory obligation. We are already working with organisations from across the justice system, including those mentioned in amendment 101, to look at the victim’s journey through the system and how it might be improved through effective implementation of the proposals in the bill and other practical measures. I see the improvement of communications as being part of that wider work. In particular, I would expect it to be considered when organisations develop their standards of service under section 2 of the bill.

Therefore, I urge Graeme Pearson to withdraw amendment 101. I give a commitment that the Scottish Government will continue to work with our justice partners in the area to ensure that any information that is provided to victims and witnesses is clear and easy to understand.

Graeme Pearson: I welcome the fact that the cabinet secretary seeks to improve the current arrangements, but the evidence that the committee received suggests that an amendment such as amendment 101 is required. I received evidence from a member of the public in the north-east who indicated that in her case, many years after the offender’s conviction, she received—a letter that took her right back to grade 1. Because the letter intimated the detail of what was to happen in technical language, it took her some days to find out what it meant under the current arrangements and how it applied.

Amendment 101 seeks to place an onus on the relevant services to ensure that they understand the needs of victims who are registered for notification and that they provide such notification by suitable means, whether that is by email, by telephone, by notifying Victim Support or by a letter, if that is what the victim seeks. My amendment would open up the door to a more humane approach to re-engaging with a victim when the circumstance arises.
I press amendment 101.

The Convener: The question is, that amendment 101 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)

Against
Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

The Convener: The result of the division is: For 4, Against 5, Abstentions 0.

Amendment 101 disagreed to.

Sections 28 and 29 agreed to.

Section 30—Commencement

10:45

The Convener: Amendment 54, in the name of the cabinet secretary, is in a group on its own.

Kenny MacAskill: Amendment 54 relates to the provisions in the bill establishing a national confidential forum. While the relevant sections on that were scrutinised separately by the Health and Sport Committee on 5 November, an amendment is necessary to section 30, which this committee is considering, as it affects commencement of the bill as a whole, hence the need to address this today.

The amendment arises from concerns expressed by survivors and other stakeholders in the consultation on the national confidential forum provisions of the bill at stage 1 about the need for the forum to begin work as quickly as possible. The Scottish ministers are also very keen for that to happen, particularly so that older and ill survivors and other former residents are given the opportunity to participate in the forum.

Amendment 54 will enable the appointments process to begin directly after royal assent. The committee will be aware that there is a convention that commencement should not take place until at least two months after royal assent. Therefore, the usual timing would make it unlikely that the NCF could begin to hear the testimonies of survivors and other former residents until 2015, given the time taken for the public appointments process to run its course. Early commencement, on the other hand, would enable the NCF to begin hearings in 2014.

The Scottish Government has considered carefully whether early commencement would adversely affect the rights of any individual or groups of individuals. Our conclusion is that survivors and other former residents will benefit from early commencement and no other parties will suffer a detriment as a result.

I move amendment 54.

Sandra White: I am pleased about the amendment. Having listened to evidence many years ago, we now have a national confidential forum and we are moving even further. It will be excellent if the forum goes forward as quickly as possible.

Amendment 54 agreed to.

Section 30, as amended, agreed to.

Section 31 agreed to.

Long title agreed to.

The Convener: That ends stage 2 consideration of the bill. With a large sigh of relief, I thank the cabinet secretary and his officials and the committee. I suspend the meeting until 11.

10:47

Meeting suspended.
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31 Short title
Victims and Witnesses (Scotland) Bill
[AS AMENDED AT STAGE 2]

An Act of the Scottish Parliament to make provision for certain rights and support for victims and witnesses, including provision for implementing Directive 2012/29/EU of the European Parliament and the Council; and to make provision for the establishment of a committee of the Mental Welfare Commission with functions relating to persons who were placed in institutional care as children.

General principles

1 General principles

(1) Each person mentioned in subsection (2) must have regard to the principles mentioned in subsection (3) in carrying out functions conferred on the person by or under any enactment in so far as those functions relate to a person who is or appears to be a victim or witness in relation to a criminal investigation or criminal proceedings.

(2) The persons are—
- the Lord Advocate,
- the Scottish Ministers,
- the chief constable of the Police Service of Scotland,
- the Scottish Court Service,
- the Parole Board for Scotland.

(3) The principles are—
- that a victim or witness should be able to obtain information about what is happening in the investigation or proceedings,
- 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 and 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.

(4) The Scottish Ministers may by order modify subsection (2).

(5) An order under subsection (4) is subject to the affirmative procedure.
Standards of service

2 Standards of service

(1) Each person mentioned in subsection (2) must set and publish standards in relation to—
   (a) the carrying out of the functions of the person mentioned in subsection (3) in relation to a person who is or appears to be a victim or witness in relation to a criminal investigation or criminal proceedings,
   (b) the person’s procedure for making and resolving complaints about the way in which the person carries out those functions.

(2) The persons are—
   (a) the Lord Advocate,
   (b) the Scottish Ministers,
   (c) the chief constable of the Police Service of Scotland,
   (d) the Scottish Court Service,
   (e) the Parole Board for Scotland.

(3) The functions are—
   (a) in the case of the Lord Advocate, functions relating to the investigation and prosecution of crime,
   (b) in the case of the Scottish Ministers, functions relating to prisons and young offenders institutions and persons detained in them,
   (c) in the case of any other person mentioned in subsection (2), any functions.

(3A) Before a person mentioned in subsection (2) (“the publisher”) publishes standards under subsection (1), the publisher must consult—
   (a) every other person mentioned in subsection (2), and
   (b) such other persons as appear to the publisher to have a significant interest in the standards.

(4) The Scottish Ministers may by order—
   (a) modify subsection (2),
   (b) so far as is necessary or expedient in consequence of any modification made under paragraph (a), modify subsection (1), (3) or (5).

(5) In this section—
   “prison” and “young offenders institution” have the meanings given by section 307(1) of the 1995 Act,
   “victim” includes a prescribed relative of a victim.

(6) In subsection (5), “prescribed” means prescribed by the Scottish Ministers by order.

(7) An order under subsection (4) is subject to the affirmative procedure.

(8) An order under subsection (5) is subject to the negative procedure.

2A Reports

(1) This section applies where a person publishes standards under section 2(1).
(2) The person must prepare and publish a report in relation to the matters mentioned in subsection (3)—

(a) before the end of the period of 12 months beginning with the day on which standards are first published under section 2(1), and

(b) as soon as practicable following—

(i) the expiry of the period of 12 months beginning with the day on which a report is published under paragraph (a), and

(ii) each subsequent period of a year.

(3) The matters are—

(a) an assessment of how, and the extent to which, the standards have been met during the period of the report,

(b) an explanation of how the person intends to meet the standards during the year after the period of the report,

(c) a description of any modification of the standards made during the period of the report, and

(d) a description of any modification of the standards that the person proposes to make during the year after the period of the report.

(4) The Scottish Ministers may by regulations prescribe information (in addition to that required under subsection (3)) that reports prepared under subsection (2) must contain.

(5) Regulations under subsection (4) are subject to the negative procedure.

Rules: review of decision not to prosecute

2B Rules: review of decision not to prosecute

(1) The Lord Advocate must make and publish rules about the process for reviewing, on the request of a person who is or appears to be a victim in relation to an offence, a decision of the prosecutor not to prosecute a person for the offence.

(2) Rules under subsection (1) may in particular make provision for or in connection with—

(a) the circumstances in which reviews may be carried out,

(b) the manner in which a request for review must be made,

(c) the information that must be included in a request for review,

(d) the matters to be taken into account by the Lord Advocate when carrying out reviews,

(e) the process to be followed by the Lord Advocate when carrying out reviews.

(3) In this section, “prosecutor” means Lord Advocate, Crown Counsel or procurator fiscal.

Restorative justice

2C Restorative justice

(1) The Scottish Ministers must by regulations make provision for the referral of a victim and a person who has or is alleged to have committed an offence to restorative justice processes.

(2) Regulations under subsection (1) must, in particular, make provision for—
(a) the circumstances where referral to restorative justice processes may be appropriate,
(b) the procedure for referral to restorative justice processes,
(c) the conditions for referral to restorative justice processes.

(3) The conditions mentioned in subsection (2)(c) must include—
(a) that such services are used only where they are in the interest of the victim and are based on the victim’s free and informed consent which may be withdrawn at any time,
(b) that provision must be made to ensure the safety of the victim and that the victim is protected from victimisation and retaliation,
(c) that full and impartial information about the process, including information about potential outcomes, is provided in advance to the victim,
(d) that the person who has or is alleged to have committed an offence has acknowledged the basic facts of the case,
(e) that discussions in restorative justice processes that are not conducted in public are confidential and not subsequently disclosed except with the agreement of the parties or as required in the public interest.

(4) For the purposes of this section, “restorative justice” means any process whereby the victim and a person who has or is alleged to have committed an offence are enabled, where they freely consent, to participate actively in the resolution of matters arising from an offence through the assistance of an impartial third party.

(5) Regulations under subsection (1) are subject to the negative procedure.

Disclosure of information

3 Disclosure of information about criminal proceedings

(1) A person mentioned in subsection (2) (a “requester”) may at any time request a qualifying person to disclose to the requester qualifying information in relation to an offence or alleged offence and any criminal investigation or criminal proceedings relating to it.

(2) The persons are—
(a) a person who appears to be a victim of the offence or alleged offence,
(aa) in the case where the death of a person mentioned in paragraph (a) was (or appears to have been) caused by the offence or alleged offence, a prescribed relative of the person,
(b) a person who is to give, or is likely to give, evidence in criminal proceedings which have been, or are likely to be, instituted against a person in respect of the offence or alleged offence,
(c) a person who has given a statement in relation to the offence or alleged offence to a constable or the prosecutor.

(3) Where a request is made under subsection (1), the qualifying person must disclose to the requester any qualifying information which the person holds.
A qualifying person need not comply with a request under subsection (1) in so far as the qualifying person considers that it would be inappropriate to disclose any qualifying information.

In this section—

“prescribed” means prescribed by the Scottish Ministers by order,

“qualifying information” means information that—

(a) falls within subsection (6),

(b) relates to the offence or alleged offence, and

(c) is specified in the request under subsection (1),

“qualifying person” means—

(a) the chief constable of the Police Service of Scotland,

(b) a prosecutor (as defined in section 307(1) of the 1995 Act),

(c) the Scottish Court Service.

Information falls within this subsection if it is—

(a) a decision not to proceed with a criminal investigation and any reasons for it,

(b) a decision to end a criminal investigation and any reasons for it,

(c) a decision not to institute criminal proceedings against a person and any reasons for it,

(d) the place in which a trial is to be held,

(e) the date on which and time at which a trial is to be held,

(f) the nature of charges libelled against a person,

(fa) the place in which the hearing of an appeal arising from a trial is to be held,

(fb) the date on which and time at which the hearing of an appeal arising from a trial is to be held,

(g) the stage that criminal proceedings have reached,

(h) the final decision of a court in a trial or any appeal arising from a trial, and any reasons for it.

The Scottish Ministers may by order modify—

(a) the definition of “qualifying person” in subsection (5),

(b) subsection (6).

An order under—

(a) subsection (2)(aa) is subject to the negative procedure,

(b) subsection (7) is subject to the affirmative procedure.

Interviews

Interviews with children: guidance

Subsection (2) applies where the persons mentioned in subsection (3) are jointly carrying out an interview with a child in relation to—
(a) criminal proceedings which have been instituted against some other person, or
(b) a matter which might result in criminal proceedings being instituted against some other person.

(2) The persons must have due regard to any guidance issued by the Scottish Ministers about the carrying out of interviews with a child in relation to those matters.

(3) The persons are—
(a) a constable,
(b) a social worker (as defined in section 77 of the Regulation of Care (Scotland) Act 2001).

(4) The Scottish Ministers may by order modify subsection (3).

(5) An order under subsection (4) is subject to the negative procedure.

(6) In this section, “child” means a person under 18 years of age.

5  Certain offences: victim’s right to specify gender of interviewer

(1) This section applies where an investigating officer intends to carry out a relevant interview with a person who is or appears to be the victim of an offence of a type mentioned in subsection (5).

(2) Before the relevant interview takes place, the investigating officer must give the person who is to be interviewed the opportunity to specify the gender of the investigating officer who is to carry out the interview.

(3) If the person who is to be interviewed specifies a gender under subsection (2), the relevant interview may be carried out only by an investigating officer of that gender.

(4) The investigating officer need not comply with subsection (2) if—
(a) complying with it would be likely to prejudice a criminal investigation, or
(b) it would not be reasonably practicable to do so.

(5) The types of offence are—
(a) an offence listed in any of paragraphs 36 to 60 of Schedule 3 to the Sexual Offences Act 2003,
(b) an offence under section 22 of the 2003 Act (traffic in prostitution etc.),
(c) an offence under section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (trafficking people for exploitation),
(d) an offence consisting of domestic abuse,
(e) stalking.

(6) Failure to comply with subsection (2) in relation to a particular relevant interview has no effect on any criminal proceedings to which the interview relates.

(7) The Scottish Ministers may by order modify subsection (5).

(8) In this section—
“investigating officer” means—
(a) a constable, or
(b) a person of such other description as the Scottish Ministers may by order prescribe,

“relevant interview” means—

(a) questioning of a person in the course of criminal proceedings which have been instituted in relation to another person, or

(b) questioning of a person with a view to instituting criminal proceedings against another person.

(9) Any reference in this section (other than subsection (10)) to an investigating officer includes a reference to two or more investigating officers acting jointly.

(10) An order under subsection (7) or paragraph (b) of the definition of “investigating officer” in subsection (8) is subject to the negative procedure.

Medical examinations

5A Certain medical examinations: gender of medical examiner

(1) This section applies where a person makes a complaint to a constable alleging that the person is the victim of an offence listed in any of paragraphs 36 to 60 of Schedule 3 to the Sexual Offences Act 2003.

(2) Before a medical examination of the person in relation to the complaint is carried out by a registered medical practitioner in pursuance of section 31 of the Police and Fire Reform (Scotland) Act 2012, the constable must give the person an opportunity to request that any such medical examination be carried out by a registered medical practitioner of a gender specified by the person.

(3) If the person makes such a request, the constable must ensure that the registered medical practitioner who is to (or, but for the request, would) carry out the examination is informed of the nature of the request.

(4) In this section, references to a registered medical practitioner include references to a person of such other description as the Scottish Ministers may by order prescribe.

(5) An order under subsection (4) is subject to the negative procedure.

Vulnerable witnesses

6 Vulnerable witnesses: main definitions

In section 271 of the 1995 Act (vulnerable witnesses: main definitions)—

(a) for subsection (1), substitute—

“(1) For the purposes of this Act, a person who is giving or is to give evidence at, or for the purposes of, a hearing in relevant criminal proceedings is a vulnerable witness if—

(a) the person is under the age of 18 on the date of commencement of the proceedings in which the hearing is being or is to be held,

(b) there is a significant risk that the quality of the evidence to be given by the person will be diminished by reason of—

(i) mental disorder (within the meaning of section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003), or

(ii) fear or distress in connection with giving evidence at the hearing,
(c) the offence is alleged to have been committed against the person in proceedings for—

(i) an offence listed in any of paragraphs 36 to 60 of Schedule 3 to the Sexual Offences Act 2003,

(ii) an offence under section 22 of the Criminal Justice (Scotland) Act 2003 (traffic in prostitution etc.),

(iii) an offence under section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (trafficking people for exploitation),

(iv) an offence consisting of domestic abuse, or

(v) an offence of stalking, or

(d) there is considered to be a significant risk of harm to the person by reason only of the fact that the person is giving or is to give evidence in the proceedings.”;

(b) after subsection (1), insert—

“(1AA) The Scottish Ministers may by order subject to the affirmative procedure modify subsection (1)(c).”;

(c) subsection (1A) is repealed,

(d) in subsection (2), after “(1)(b)” insert “or (d)”, and

(e) after subsection (4), insert—

“(4A) In determining whether a person is a vulnerable witness under subsection (1)(b) or (d), the court must—

(a) have regard to the best interests of the witness, and

(b) take account of any views expressed by the witness.”.

7 Child and deemed vulnerable witnesses

(1) In section 71(2XA) of the 1995 Act (first diet), for “child” substitute “vulnerable”.

(2) In section 72(6)(b)(ii) of the 1995 Act (preliminary hearing procedure), for “child” substitute “vulnerable”.

(3) In section 271(5) of the 1995 Act (definitions for sections 271A to 271M of the 1995 Act)—

(a) before the definition of “court”, insert—

“‘child witness’ means a vulnerable witness referred to in subsection (1)(a),”;

(b) after that definition, insert—

“‘deemed vulnerable witness’ means a vulnerable witness referred to in subsection (1)(c).”.

(4) In section 271A of the 1995 Act (child witnesses)—

(a) in subsection (1)—

(i) after “child witness”, where it first occurs, insert “or a deemed vulnerable witness”; and
(ii) the word “child”, where it second occurs, is repealed,

(b) in subsection (2)—
   (i) after “child witness”, where it first occurs, insert “or a deemed vulnerable witness”,

   (ii) for “child”, where it second occurs, substitute “vulnerable”, and

   (iii) in each of paragraphs (a) and (b), the word “child” is repealed,

(c) in each of subsections (3) and (4), for “child” substitute “vulnerable”,

(d) in subsection (5)—
   (i) for “child”, where it first occurs, substitute “vulnerable”, and

   (ii) in paragraphs (a), (b) and (c), the word “child”, in each place where it occurs, is repealed,

(e) in subsection (5A)—
   (i) in paragraph (a), for “child” substitute “vulnerable”, and

   (ii) in paragraph (b), for “child” substitute “vulnerable”,

(f) in subsection (6)—
   (i) in paragraph (a), after “child witness” insert “or a deemed vulnerable witness”,

   (ii) in paragraph (b), for “child”, where it first occurs, substitute “vulnerable”,

   (iii) in paragraph (b), the word “child”, where it second occurs, is repealed,

   (iv) in paragraph (c), for “child”, where it first occurs, substitute “vulnerable”, and

   (v) in paragraph (c), the word “child”, where it second occurs, is repealed,

(g) in subsection (7)(a)—
   (i) for “child”, where it first occurs, substitute “vulnerable”, and

   (ii) the word “child”, where it second occurs, is repealed,

(h) in subsection (8A)(a)—
   (i) in sub-paragraph (i), for “child” substitute “vulnerable”, and

   (ii) in paragraph (ii), the word “above”, where it second occurs, is repealed,

   (i) in subsection (9), the word “child”, in each place where it occurs, is repealed,

   (j) in subsection (10), the word “child”, in each place where it occurs, is repealed,

   (k) in subsection (11)(a), the word “child” is repealed, and

   (l) in subsection (13), for “child” substitute “vulnerable”.


(6) The title of section 271C of the 1995 Act becomes “Vulnerable witness application”.

(7) In section 271E(1)(a) of the 1995 Act (party considering vulnerable witness notice or application), for “child” substitute “vulnerable”.
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(8) In section 271F(2)(a) of the 1995 Act (modifications of section 271 in relation to accused giving evidence as a child witness)—

(a) in paragraph (a)(i), for “child witness (except in the phrase “child witness notice”)” substitute “witness”, and

(b) in paragraph (a)(ii), the word “child” is repealed.

(9) In section 288E of the 1995 Act (prohibition of personal conduct of defence in certain cases involving child witnesses under the age of 12), in each of subsections (5) and (7) for “child” substitute “vulnerable”.

8 Child and deemed vulnerable witnesses: standard special measures

In section 271A of the 1995 Act (the standard special measures)—

(a) in subsection (14)—

(i) in paragraph (a), the words from “where” to the end are repealed, and

(ii) in paragraph (c), the words from “in”, where it second occurs, to the end are repealed, and

(b) after that subsection, insert—

“(15) The Scottish Ministers may, by order subject to the affirmative procedure—

(a) modify subsection (14),

(b) in consequence of any modification made under paragraph (a)—

(i) prescribe the procedure to be followed when standard special measures are used, and

(ii) so far as is necessary, modify sections 271A to 271M of this Act.”.

9 Objections to special measures: child and deemed vulnerable witnesses

In section 271A of the 1995 Act (child witnesses)—

(a) after subsection (4), insert—

“(4A) Any party to the proceedings may, not later than 7 days after a vulnerable witness notice has been lodged, lodge with the court a notice (referred to in this section as an “objection notice”) stating—

(a) an objection to any special measure (other than a standard special measure) specified in the vulnerable witness notice that the party considers to be inappropriate, and

(b) the reasons for that objection.

(4B) The court may, on cause shown, allow an objection notice to be lodged after the period referred to in subsection (4A).

(4C) If an objection notice is lodged in accordance with subsection (4A) or (4B)—

(a) subsection (5)(a)(ii) does not apply to the vulnerable witness notice, and

(b) the court must make an order under subsection (5A).”.

(b) in subsection (5), for “later than 7” substitute “earlier than 7 days and not later than 14”, and
(c) in subsection (13), after “notice” insert “or an objection notice”.

10 Child witnesses

(1) In section 271B of the 1995 Act (further special provision for child witnesses under the age of 12), for subsection (3), substitute—

“(3) Subsection (4) applies if the child witness expresses a wish to be present in the court-room for the purpose of giving evidence.

(4) The court must make an order under section 271A or, as the case may be, 271D which has the effect of requiring the child witness to be present in the court-room for the purpose of giving evidence unless the court considers that it would not be appropriate for the child witness to be present there for that purpose.

(5) Subsection (6) applies if the child witness—

(a) does not express a wish to be present in the court-room for the purpose of giving evidence, or

(b) expresses a wish to give evidence in some other way.

(6) The court may not make an order under section 271A or 271D having the effect mentioned in subsection (4) unless the court considers that—

(a) the giving of evidence by the child witness in some way other than by being present in the court-room for that purpose would give rise to a significant risk of prejudice to the fairness of the trial or otherwise to the interests of justice, and

(b) that risk significantly outweighs any risk of prejudice to the interests of the child witness if the order were to be made.”.

(2) In section 271A(5) of the 1995 Act (orders authorising special measures), for “271B(3)” substitute “271B”.

(3) In section 271D of the 1995 Act (review of arrangements for child witnesses and certain other witnesses), after subsection (6), add—

“(7) This section is subject to section 271B.”.

11 Reporting of proceedings involving children

In section 47 of the 1995 Act (restriction on report of proceedings involving children), in each of subsections (1), (2) and (3)(a), for “16”, wherever it occurs, substitute “18”.

12 Other vulnerable witnesses: assessment and application

(1) After section 271B of the 1995 Act, insert—

“271BA Assessment of witnesses

(1) This section applies where a party intends to cite a witness other than a child witness or a deemed vulnerable witness to give evidence at, or for the purposes of, a hearing in relevant criminal proceedings.

(2) The party intending to cite the witness must take reasonable steps to carry out an assessment under subsection (3).

(3) An assessment must determine whether the person—
(a) is likely to be a vulnerable witness, and
(b) if so, what special measure or combination of special measures ought to be used for the purpose of taking the person's evidence.

(4) In determining under subsection (3)(a) whether a person is likely to be a vulnerable witness the party must—

(a) take into account the matters mentioned in section 271(2),
(b) have regard to the best interests of the person, and
(c) take account of any views expressed by the person.”.

(2) In section 271C(1) of the 1995 Act (citation of vulnerable witnesses)—

(a) after “witness”, where it first occurs, insert “or a deemed vulnerable witness”, and
(b) before “considers” insert “and, having carried out an assessment under section 271BA,”.

13 Objections to special measures: other vulnerable witnesses

In section 271C of the 1995 Act (other vulnerable witnesses)—

(a) after subsection (4), insert—

“(4A) Any party to the proceedings may, not later than 7 days after a vulnerable witness application has been lodged, lodge with the court a notice (referred to in this section as “an objection notice”) stating—

(a) an objection to any special measure specified in the vulnerable witness application that the party considers to be inappropriate, and
(b) the reasons for that objection.

(4B) The court may, on cause shown, allow an objection notice to be lodged after the period referred to in subsection (4A).

(4C) If an objection notice is lodged in accordance with subsection (4A) or (4B)—

(a) subsection (5) does not apply to the vulnerable witness application, and
(b) the court must make an order under subsection (5A).”,

(b) in subsection (5), for “later than 7” substitute “earlier than 7 days and not later than 14”, and
(c) in subsection (11)—

(i) after “application”, where it first occurs, insert “or an objection notice”,
(ii) after “application”, where it second occurs, insert “or, as the case may be, the notice”.

14 Review of arrangements for vulnerable witnesses

In section 271D(1)(a) of the 1995 Act (application for review of arrangements for vulnerable witnesses), for “the party citing or intending to cite the witness” substitute “any party to the proceedings”.
15  **Temporary additional special measures**

After section 271H of the 1995 Act, insert—

**“271HA Temporary additional special measures**

(1) The Scottish Ministers may, by order subject to the affirmative procedure, specify additional measures which for the time being are to be treated as special measures listed in section 271H(1).

(2) An order under subsection (1) may make different provision for different courts or descriptions of court or different proceedings or types of proceedings.

(3) An order under subsection (1) must specify—

(a) the area in which the additional measures may be used,

(b) the period during which the additional measures may be used, and

(c) the procedure to be followed when the additional measures are used.”.

16  **Special measures: closed courts**

(1) In section 271H(1) of the 1995 Act (the special measures), after paragraph (e) insert—

“(ea) excluding the public during the taking of the evidence in accordance with section 271HB of this Act,”.

(2) After section 271HA of the 1995 Act (inserted by section 15 of this Act), insert—

**“271HB Excluding the public while taking evidence**

(1) This section applies where the special measure to be used in respect of a vulnerable witness is excluding the public during the taking of the evidence of the vulnerable witness.

(2) The court may direct that all or any persons other than those mentioned in subsection (3) are excluded from the court during the taking of the evidence.

(3) The persons are—

(a) members or officers of the court,

(b) parties to the case before the court, their counsel or solicitors or persons otherwise directly concerned in the case,

(c) *bona fide* representatives of news gathering or reporting organisations present for the purpose of the preparation of contemporaneous reports of the proceedings,

(d) such other persons as the court may specially authorise to be present.”.

(3) In section 271F(8)(a) of the 1995 Act (special measures not applying in relation to a vulnerable witness who is the accused), after “271H(1)(c)” insert “and (ea)”.

17  **Power to prescribe further special measures**

In section 271H of the 1995 Act (the special measures)—

(a) in subsection (1), paragraph (f) is repealed,

(b) after subsection (1), insert—
“(1A) The Scottish Ministers may, by order subject to the affirmative procedure—

(a) modify subsection (1),

(b) in consequence of any modification made under paragraph (a)—

(i) prescribe the procedure to be followed when special measures are used, and

(ii) so far as is necessary, modify sections 271A to 271M of this Act.”,

and

(c) subsection (2) is repealed.

18 Vulnerable witnesses: civil proceedings

In section 11(1) of the Vulnerable Witnesses (Scotland) Act 2004 (vulnerable witnesses: civil proceedings)—

(a) in paragraph (a), for “16” substitute “18”,

(b) the word “or” immediately after that paragraph is repealed, and

(c) after paragraph (b), insert “, or

(e) the person is of such description or is a witness in such proceedings as the Scottish Ministers may by order subject to the affirmative procedure prescribe.”.

Victim statements

19 Victim statements

(1) Section 14 of the 2003 Act (victim statements) is amended in accordance with subsections (2) to (7).

(2) In subsection (5)—

(a) in paragraph (a)—

(i) after “when”, insert “or after”, and

(ii) after “offence”, insert “but before sentence is imposed”,

(b) in paragraph (b)—

(i) after “when”, insert “or after”, and

(ii) after “offence”, insert “but before sentence is imposed”.

(3) In subsection (6)(b)—

(a) in sub-paragraph (i), after “subsection (10)” insert “(taking no account of qualifying persons who have not attained the age of 12 years)”,

(b) the word “or” immediately after sub-paragraph (i) is repealed,

(c) sub-paragraph (ii) is repealed, and

(d) after that sub-paragraph, the words “or as the case may be to the child” are repealed.

(4) In subsection (8)—

(a) for “neither” substitute “not”, and
(b) the words “nor a child such as is mentioned in sub-paragraph (ii) of that paragraph” are repealed.

(5) After subsection (11), insert—

“(11A) Where a child who has not attained the age of 12 years has (but for this subsection) the opportunity to make a statement by virtue of subsection (2), (3) or (6)(a)(i)—

(a) any statement made by virtue of the subsection must instead be made by a carer of the child, but

(b) those subsections otherwise apply as if references in them to a person and to the maker of a statement are to the child.

(11B) For the purposes of subsection (11A), “carer of the child” means—

(a) a person who cared for the child when the offence (or apparent offence) was perpetrated,

(b) a person who cares for the child when the statement is made,

(c) a person who has cared for the child at any other time.

(11C) If more than one person comes within the meaning of “carer of the child” the persons may agree which carer is to make the statement after, so far as practicable and having regard to the age and maturity of the child—

(a) giving the child an opportunity to express any views on which carer is to make the statement, and

(b) taking account of any views expressed by the child.

(11D) If no agreement is reached in accordance with subsection (11C)—

(a) the statement may be made by each person coming within the description in subsection (11B)(a), and

(b) if there is no such person, the statement may be made by each person coming within the description in subsection (11B)(b).

(11E) In subsection (11B), the expressions “cared for” and “cares for” are to be construed in accordance with the definition of “someone who cares for” in paragraph 20 of schedule 12 to the Public Services Reform (Scotland) Act 2010.”.

(6) In subsection (12)(a)—

(a) for “subsection (6)(b)(ii)” substitute “this section”, and

(b) for “there” substitute “in any part of this section”.

(7) After subsection (12), insert—

“(13) A victim statement, or a statement made by virtue of subsection (3) in relation to a victim statement, may be made in such form and manner as may be prescribed.

(14) An order under subsection (13) may—

(a) include such incidental, supplementary or consequential provision as the Scottish Ministers consider appropriate,

(b) modify any enactment (including this Act).
(15) An order under subsection (13) may be made so as to have effect for a period specified in the order.

(16) An order under subsection (13) containing provision of the type mentioned in subsection (15) may provide that its provisions are to apply only in relation to one or more areas specified in the order.”.

(8) In section 88(2) of the 2003 Act (orders), at the beginning of paragraph (b) insert “14(13) or”.

Sentencing

Duty to consider making compensation order

In section 249 of the 1995 Act (compensation order against convicted person), after subsection (4) insert—

“(4A) In any case where it would be competent for the court to make a compensation order, the court must consider whether to make a compensation order.”.

Restitution order

After section 253 of the 1995 Act, insert—

“Restitution order

253A Restitution order where conviction of police assault etc.

(1) This section applies where a person (“P”) is convicted of an offence under section 90(1) of the Police and Fire Reform (Scotland) Act 2012 (police assault etc.).

(2) The court, instead of or in addition to dealing with P in any other way, may make an order to be known as a restitution order requiring P to pay an amount not exceeding the prescribed sum (as defined in section 225(8)).

(3) The Scottish Ministers may by regulations amend subsection (2) so as to substitute for the amount for the time being specified such other amount as may be prescribed by, or determined in accordance with, the regulations.

(4) Any amount paid in respect of a restitution order is to be paid to the clerk of any court or any other person (or class of person) authorised by the Scottish Ministers for the purpose.

(5) Regulations under subsection (3) are subject to the negative procedure.

253B The Restitution Fund

(1) A person to whom any amount is paid under section 253A in respect of a restitution order must pay the amount to the Scottish Ministers.

(2) The Scottish Ministers must pay any amount received by virtue of subsection (1) into a fund to be known as the Restitution Fund.

(3) The Scottish Ministers must establish, maintain and administer the Restitution Fund for the purpose of securing the provision of support services for persons who have been assaulted as mentioned in section 90(1) of the Police and Fire Reform (Scotland) Act 2012 (“victims”).

(4) Any payment out of the fund may be made only to—
(a) a person who provides or secures the provision of support services for victims,

(b) the Scottish Ministers or, with the consent of the Scottish Ministers, a person specified by order by virtue of subsection (5) in respect of outlays incurred in administering the fund.

(5) The Scottish Ministers may delegate to such person as they may specify by order the duties imposed on them by subsection (3) of establishing, maintaining and administering the Restitution Fund.

(6) The Scottish Ministers may by order make further provision about the administration of the Restitution Fund including provision for or in connection with—

(c) specifying persons or classes of person to or in respect of whom payments may be made out of the fund (but subject to subsection (4)),

(d) the making of payments out of the fund,

(e) requiring financial or other records to be kept,

(f) the making of reports to the Scottish Government containing such information and in respect of such periods as may be specified.

(7) An order under subsection (5) or (6) is subject to the affirmative procedure.

(8) In this section, “support services”, in relation to a victim, means any type of service or treatment which is intended to benefit the physical or mental health or well-being of the victim.

253C Restitution order, fine and compensation order: order of preference

(1) Subsection (2) applies where a court considers in relation to an offence that it would be appropriate—

(a) to make a restitution order,

(b) to impose a fine, and

(c) to make a compensation order.

(2) If the person convicted of the offence (“P”) has insufficient means to pay an appropriate amount under a restitution order, to pay an appropriate fine and to pay an appropriate amount in compensation, the court should prefer a compensation order and then a restitution order over a fine.

(3) Subsection (4) applies where a court considers in relation to an offence that it would be appropriate—

(a) to make a restitution order, and

(b) to impose a fine or make a compensation order.

(4) If P has insufficient means to pay an appropriate amount under a restitution order and to pay an appropriate fine or, as the case may be, an appropriate amount in compensation, the court should prefer a compensation order and then a restitution order over a fine.
253D Application of receipts

(1) This section applies where the court makes a restitution order in relation to a person ("P") convicted of an offence and also in respect of the same offence or different offences in the same proceedings—

(a) imposes a fine and makes a compensation order, or
(b) imposes a fine or makes a compensation order.

(2) A payment by P must be applied in the following order—

(a) the payment must first be applied in satisfaction of the compensation order,
(b) the payment must next be applied in satisfaction of the restitution order,
(c) the payment must then be applied in satisfaction of the fine.

253E Enforcement: application of certain provisions relating to fines

(1) The provisions of this Act specified in subsection (2) apply in relation to restitution orders as they apply in relation to fines but subject to the modifications mentioned in subsection (2) and to any other necessary modifications.

(2) The provisions are—

(a) section 211(3) and (7),
(b) section 212,
(c) section 213 (with the modification that subsection (2) is to be read as if the words “or (4)” were omitted),
(d) section 214(1) to (4) and (6) to (9) (with the modification that subsection (4) is to be read as if the words from “unless” to “decision” were omitted),
(e) sections 215 to 217,
(f) subject to subsection (3) below, section 219(1)(b), (2), (3), (5), (6) and (8),
(g) sections 220 to 224,
(h) section 248B.

(3) In the application of the provisions of section 219 mentioned in subsection (2)(f) for the purposes of subsection (1)—

(a) a court may impose imprisonment in respect of a fine and decline to impose imprisonment in respect of a restitution order but not vice-versa,
(b) where a court imposes imprisonment both in respect of a fine and a restitution order, the amounts in respect of which imprisonment is imposed are to be aggregated for the purposes of section 219(2).”.

22 Victim surcharge

After section 253E of the 1995 Act (inserted by section 21), insert—
"Victim surcharge"

253F  Victim surcharge

(1) This section applies where—

(a) a person ("P") is convicted of an offence other than an offence, or an offence of a class, that is prescribed by regulations by the Scottish Ministers,

(b) the court does not make a restitution order, and

(c) the court imposes a sentence, or sentence of a class, that is so prescribed.

(2) Except in such circumstances as may be prescribed by regulations by the Scottish Ministers, the court, in addition to dealing with P in any other way, must order P to pay a victim surcharge of such amount as may be so prescribed.

(3) Despite subsection (2), if P is convicted of two or more offences in the same proceedings, the court must order P to pay only one victim surcharge in respect of both or, as the case may be, all the offences.

(4) Any sum paid in respect of a victim surcharge is to be paid to the clerk of any court or any other person (or class of person) authorised by the Scottish Ministers for the purpose.

(5) Regulations under this section may make different provision for different cases and in particular may include provision—

(a) prescribing different amounts for different descriptions of offender,

(b) prescribing different amounts for different circumstances.

(6) Where provision is made by virtue of subsection (5), the Scottish Ministers may by regulations make provision for determining which victim surcharge is payable in the circumstances mentioned in subsection (3).

(7) Regulations under this section are subject to the affirmative procedure.

253G  The Victim Surcharge Fund

(1) A person to whom any sum is paid under section 253F(4) in respect of a victim surcharge must pay the sum to the Scottish Ministers.

(2) The Scottish Ministers must pay any sum received by virtue of subsection (1) into a fund to be known as the Victim Surcharge Fund.

(3) The Scottish Ministers must establish, maintain and administer the Victim Surcharge Fund for the purpose of securing the provision of support services for persons who are, or appear to be, the victims of crime and prescribed relatives of such persons.

(4) Any payment out of the fund may be made only to—

(a) a person who is, or appears to be, the victim of crime,

(aa) a prescribed relative of a person who is, or appears to be, the victim of crime,

(b) a person who provides or secures the provision of support services for persons who are, or appear to be, victims of crime, or
(c) the Scottish Ministers or, with the consent of the Scottish Ministers, a person specified by order by virtue of subsection (5) in respect of outlays incurred in administering the fund.

(5) The Scottish Ministers may delegate to such person as they may specify by order the duties imposed on them by subsection (3) of establishing, maintaining and administering the Victim Surcharge Fund.

(6) The Scottish Ministers may by regulations make further provision about the administration of the Victim Surcharge Fund including provision for or in connection with—

(d) the making of payments out of the fund,

(e) the keeping of financial and other records,

(f) the making of reports to the Scottish Government containing such information and in respect of such periods as may be specified.

(7) An order under subsection (5) and regulations under subsection (6) are subject to the affirmative procedure.

(8) In this section—

“prescribed” means prescribed by the Scottish Ministers by regulations,

“support services”, in relation to a person who is, or appears to be, the victim of crime, means any type of service or treatment which is intended to benefit the physical or mental health or well-being of the person or a prescribed relative of the person.

(9) Regulations under subsections (3), (4) and (8) are subject to the negative procedure.

253H Application of receipts

(1) This section applies where the court orders the payment of a victim surcharge in relation to a person (“P”) convicted of an offence and also in respect of the same offence or different offences in the same proceedings—

(a) imposes a fine and makes a compensation order, or

(b) imposes a fine or makes a compensation order.

(2) A payment by P must be applied in the following order—

(a) the payment must first be applied in satisfaction of the compensation order,

(b) the payment must next be applied in satisfaction of the victim surcharge,

(c) the payment must then be applied in satisfaction of the fine.

253J Enforcement: application of certain provisions relating to fines

(1) The provisions of this Act specified in subsection (2) apply in relation to victim surcharges as they apply in relation to fines but subject to the modifications mentioned in subsection (2) and to any other necessary modifications.

(2) The provisions are—

(a) section 211(3) and (4),
(b) section 212,
(c) section 213 (with the modification that subsection (2) is to be read as if the words “or (4)” were omitted),
(d) section 214(1) to (4) and (6) to (9) (with the modification that subsection (4) is to be read as if the words from “unless” to “decision” were omitted),
(e) sections 215 to 218,
(f) subject to subsection (3) below, section 219(1)(b), (2), (3), (5), (6) and (8),
(g) sections 220 to 224,
(h) section 248B.

(3) In the application of the provisions of section 219 mentioned in subsection (2)(f) for the purposes of subsection (1)—
(a) a court may impose imprisonment in respect of a fine and decline to impose imprisonment in respect of a victim surcharge but not vice-versa,
(b) where a court imposes imprisonment both in respect of a fine and a victim surcharge, the amounts in respect of which imprisonment is imposed are to be aggregated for the purposes of section 219(2).”.

Release of offender: victim’s rights

Victim’s right to receive information about release of offender etc.

In section 16 of the 2003 Act (victim’s right to receive information about release of offender etc.)—
(a) in subsection (1), for the words from “a”, where it first occurs, to “offence)” substitute “an offence”, and
(b) in subsection (3), for paragraph (d) substitute—
“(d) that the convicted person is for the first time entitled to be considered for temporary release by virtue of rules under section 39(6) of the 1989 Act,”.

Life prisoners: victim’s right to make oral representations before release on licence

In section 17 of the 2003 Act (release on licence: right of victim to receive information and make representations)—
(a) in subsection (1)—
(i) the words from “be”, where it first occurs, to the end become paragraph (a) of the subsection, and
(ii) after that paragraph, add—
“(b) if the convicted person is serving a sentence of life imprisonment, be afforded an opportunity to make oral representations to a member of the Parole Board for Scotland who is not dealing with the convicted person’s case as respects such release and as to conditions which might be specified in the licence in question.”,
(b) in subsection (4)—

(i) after “how” insert “written”, and

(ii) at the end add “and how oral representations under that subsection should be made”,

(c) after subsection (10), insert—

“(10A) In complying with the duty imposed on them by subsection (5), the Scottish Ministers may fix different times in relation to written and oral representations respectively.”, and

(d) after subsection (12), add—

“(13) The Scottish Ministers may by order modify the description or descriptions of convicted person for the time being specified in subsection (1)(b).”.

25 **Temporary release: victim’s right to make representations**

After section 17 of the 2003 Act, insert—

“17A **Temporary release: victim’s right to make representations about conditions**

(1) This section applies where by virtue of subsection (1) or (5) of section 16 a person (the “victim”) is given the information mentioned in subsection (3)(d) of that section as respects a convicted person.

(2) On the first occasion on which the convicted person is entitled to be considered for temporary release by virtue of rules under section 39(6) of the 1989 Act, the Scottish Ministers must give the victim an opportunity to make written representations to them about any conditions that the victim considers should be imposed in relation to the temporary release.

(3) Subsection (2) applies only if the victim has notified the Scottish Ministers that the victim wishes to be given the opportunity to make representations under that subsection.

(4) The Scottish Ministers must—

(a) fix a time within which any written representations under subsection (2) require to be made to them if they are to be considered by them, and

(b) notify the victim of the time fixed.”.

26 **National Confidential Forum**

After section 4 of the Mental Health Act, insert—

“4ZA **National Confidential Forum**

(1) The Commission must establish and maintain a committee to be known as the National Confidential Forum (“NCF”) for the purpose of carrying out the following functions (referred to in this Act as “NCF functions”—

(a) the general functions mentioned in section 4ZB,

(b) the functions conferred on NCF in schedule 1A.

(2) Schedule 1A makes further provision about NCF.
4ZB  **General functions of NCF**

The general functions of NCF are—

(a) to provide means for persons who were placed in institutional care as children to describe in confidence (such descriptions being referred to in this Act as “testimony”)—

(i) experiences of that care,

(ii) any abuse experienced during the period spent in that care,

(b) to acknowledge testimony by enabling it to be given at hearings established by NCF or by written or other means,

(c) based on testimony received—

(i) 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), and

(ii) to make recommendations about policy and practice which NCF considers will improve institutional care (including by protecting children from, and preventing or reducing the incidence of, abuse),

(d) 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 them,

(e) to provide information about advice and assistance available to persons giving, or proposing to give, testimony.

4ZC  **Carrying out NCF functions**

(1) The Commission must delegate the NCF functions to NCF.

(2) The person appointed to chair NCF (the “NCF Head”) must account to the Commission for the carrying out of the NCF functions.

(3) Subsections (1) and (2) do not affect the responsibility of the Commission for the carrying out of the NCF functions.

4ZD  **Modifications in relation to NCF**

(1) The following modifications of this Part apply in relation to the NCF functions—

(a) sections 5, 6, 9, 9A, 10, 16 and 19 do not apply,

(b) in section 17(1), references to the Commission (except in the phrase “Commission Visitor”) are to be read as if they were references to NCF,

(ca) sub-paragraph (2) of paragraph 11 of schedule 1A applies in relation to the Commission’s annual report mentioned in section 18(1) as it applies in relation to a report prepared under that paragraph,

(d) section 20 is to be read as if after subsection (1) there were inserted—

“(1A) For the purposes of the law of defamation—

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(a) any statement made in good faith by NCF, its members or NCF staff in carrying out any of the NCF functions is privileged,

(b) any statement made by an eligible person in accordance with arrangements made by NCF under paragraph 8(2) of schedule 1A is privileged.

(1B) A word or expression used in subsection (1A) has the same meaning as it has in schedule 1A.”.

(2) Section 1 of the Public Records (Scotland) Act 2011 is to be read as if after subsection (8) there were inserted—

“(8A) The Mental Welfare Commission for Scotland must have a separate records management plan in relation to the public records created in carrying out the NCF functions (within the meaning of section 4ZA(1) of the Mental Health (Care and Treatment) (Scotland) Act 2003).”.”.

27 NCF: constitution and operation

(1) In schedule 1 to the Mental Health Act—

(a) in paragraph 2A(1)(b), for “6 nor more than 8” substitute “7 nor more than 9”,

(b) omit the word “and” immediately preceding paragraph 2B(2)(b), and

(c) at the end of that paragraph, insert “and

(c) one person who has such skills, knowledge and experience as the Scottish Ministers consider to be relevant in relation to the carrying out of the NCF functions.”.

(2) After schedule 1 to the Mental Health Act, insert—

“SCHEDULE 1A
(introduced by section 4ZA(2))

NATIONAL CONFIDENTIAL FORUM

PART 1

MEMBERS OF NCF ETC.

Membership

1 (1) NCF is to consist of—

(a) the NCF Head, appointed by the Scottish Ministers, and

(b) at least 2 other members, appointed by the Scottish Ministers.

(2) The Scottish Ministers must, when appointing a person under sub-paragraph (1)(a) or (b), have regard to the recommendation of the selection panel mentioned in paragraph 2(1).

(3) Each member—

(a) is to be appointed for such period as the Scottish Ministers think fit, and

(b) holds and vacates office in accordance with the terms of appointment.

(4) A member may by written notice to the Scottish Ministers resign office as a member.
(5) The Scottish Ministers must, as soon as practicable after receiving a resignation notice, inform the Commission of the notice.

Membership selection panel

2 (1) The selection panel is to consist of—

(a) a representative of the Scottish Ministers,

(b) the person appointed in accordance with paragraph 2A(1)(a) of schedule 1 to chair the Commission, and

(c) other persons of such number and description as may be determined by the Scottish Ministers.

(2) The selection panel may recommend for appointment only persons who the panel consider to have such skills, knowledge and experience as the panel consider to be relevant to the carrying out of the NCF functions.

(3) The selection panel may not recommend for appointment persons who are members of the Commission.

(4) The selection panel is to determine the selection process to be applied in determining persons to be recommended for appointment.

NCF staff

3 (1) This paragraph applies where—

(a) the Commission proposes, in accordance with paragraph 7(1)(b) of schedule 1, to appoint a member of staff, and

(b) the employment of that person is to relate to the carrying out of NCF functions.

(2) The person may be appointed only if—

(a) the person has been recommended for appointment by the NCF Head,

(b) the terms of the person’s appointment would prevent the person from carrying out any other function conferred on the Commission during the period when the Commission is required to establish and maintain NCF.

NCF powers and procedure

4 (1) NCF may do anything which appears to it to be necessary or expedient for the purposes of, or in connection with, the carrying out of the NCF functions.

(2) It is for the NCF Head to determine NCF’s procedure, having regard to the views of the other NCF members.

(3) In carrying out its functions and in determining its procedure, NCF must have regard to the need to avoid any unnecessary costs to public funds, eligible persons and others.

(4) The validity of any proceedings of NCF is not affected by—

(a) any vacancy in its membership,

(b) any defect in the appointment of a member.
(5) Members of the Scottish Government and persons authorised by the Scottish Government may not attend or take part in meetings of NCF.

Application of schedule 1 to NCF

5 (1) The provisions of schedule 1 mentioned in sub-paragraph (2) do not apply in relation to NCF.

(2) The provisions are—
   (a) paragraph 7D,
   (b) paragraph 7E,
   (c) paragraph 7G.

PART 2
DELEGATION OF FUNCTIONS

Delegation by NCF

6 (1) NCF must delegate the NCF functions to the persons mentioned in sub-paragraph (3), to the extent determined by the NCF Head.

(2) NCF may otherwise delegate the NCF functions to those persons, to the extent determined by NCF.

(3) Those persons are—
   (a) the NCF Head,
   (b) any other member of NCF,
   (b) any member of NCF staff.

(4) This paragraph does not affect—
   (a) NCF’s responsibility for the delegated functions, or
   (b) the NCF Head’s accountability for the carrying out of the NCF functions under section 4ZC(2).

PART 3
ELIGIBILITY TO PARTICIPATE IN FORUM

Eligibility

7 (1) NCF may receive testimony from any eligible person whose application to provide testimony has been accepted by NCF.

(2) An “eligible person” is a person who—
   (a) is 16 years of age or over,
   (b) was placed in an establishment providing institutional care during the person’s childhood, and
   (c) is no longer in that care.
(3) In this schedule “institutional care” means a care or health service which meets the conditions in sub-paragraph (4) and is of a description or type prescribed by order made by the Scottish Ministers.

(4) The conditions are that the care or health service—
   (a) was provided to children in Scotland at some time (whether or not the service is still provided),
   (b) included residential accommodation for the children, and
   (c) was provided by a body corporate or unincorporated.

(5) An order under sub-paragraph (3) may not prescribe a service provided at premises used wholly or mainly as a private dwelling.

(6) An order under sub-paragraph (3) is subject to the affirmative procedure.

PART 4
CONDUCT OF HEARINGS ETC

Testimony given to NCF

8 (1) NCF must make provision for receiving testimony under paragraph 7(1).

(2) NCF must make arrangements for testimony to be given—
   (a) at a hearing established by NCF (a “forum hearing”), or
   (b) by other means of communication (whether oral or written).

(3) Where NCF receives testimony at a forum hearing it must ensure that—
   (a) at least 2 members of NCF are present while the forum hearing is receiving the testimony, and
   (b) the forum hearing is held in private.

(4) For the purposes of sub-paragraph (3), a forum hearing is held in private if the only persons present are—
   (a) the person giving the testimony,
   (b) any person accompanying that person whose attendance has been approved by NCF,
   (c) members of NCF,
   (d) NCF staff.

(5) It is otherwise for NCF to determine procedures for receiving testimony, taking account of—
   (a) any procedures determined under paragraph 4(2), and
   (b) the duty in paragraph 4(3).

Recording of testimony

9 (1) NCF may record testimony and any other information received from eligible persons in such manner as it thinks fit.
(2) NCF must as soon as reasonably practicable after receiving any information from an eligible person take such steps as it thinks fit to organise the information in such a way as to preserve the anonymity of—

(a) the person providing the information,

(b) any individual mentioned in the testimony, and

(c) any establishment providing institutional care mentioned in the testimony.

Payment of expenses

10 NCF may require the Commission to pay such expenses as NCF considers reasonable—

(a) to eligible persons, and

(b) to persons accompanying eligible persons to forum hearings.

PART 5

REPORTING

Reports by NCF

11 (1) NCF may prepare—

(a) reports based on testimony received,

(b) reports setting out, in relation to the testimony, matters it identifies and recommendations made by virtue of section 4ZB(c).

(2) A report prepared under this paragraph must not identify or include information which creates a real risk of identifying—

(a) a person who has been in institutional care during childhood,

(b) a person alleged to have experienced or committed abuse,

(c) an establishment providing institutional care.

(2A) Sub-paragraph (2) does not prevent a report from including information which is otherwise in the public domain.

(3) It is otherwise for NCF to determine the form and content of a report prepared under this paragraph.

Annual NCF reports

12 (1) As soon as practicable after 31 March in each year, NCF must submit to the Scottish Ministers a report on the discharge of the NCF functions during the period of 12 months ending on 31 March.

(2) NCF must consult the Commission before preparing a report under this paragraph.

(3A) Sub-paragraph (2) of paragraph 11 applies in relation to a report prepared under this paragraph as it applies in relation to a report prepared under that paragraph.
(4) NCF must send a copy of each report prepared under this paragraph to the Commission.

(5) The Scottish Ministers must lay before the Scottish Parliament a copy of each report submitted to them under sub-paragraph (1).

PART 6
CONFIDENTIALITY

Disclosure of information

13(1) This paragraph applies to—
(a) the Commission,
(b) a person who is or has been a member of the Commission,
(c) NCF,
(d) a person who is or has been a member of NCF,
(e) a person who is or has been an employee of the Commission,
(f) a person who has been given information by a person carrying out NCF functions for the purpose of storing or preserving that information.

(2) A person must not disclose any information which—
(a) has been provided to the person in connection with the carrying out of the NCF functions, and
(b) is not otherwise in the public domain.

(3) Sub-paragraph (2) does not prevent disclosure of any information by the person in so far as—
(a) the disclosure is to another person mentioned in sub-paragraph (1) and is necessary for the purpose of enabling or assisting the carrying out by NCF or the Commission of any of its functions under this Act,
(b) the disclosure is necessary for the purpose of enabling—
(i) NCF to prepare a report in accordance with paragraph 11 or 12, or
(ii) the Commission to prepare its annual report mentioned in section 18(1),
(c) the disclosure is in accordance with sub-paragraph (4), (5) or (6).

(4) A member of NCF must disclose to a constable information received by that member to the extent that it is, in the opinion of the member acting in good faith, reasonably necessary to prevent the commission of an offence involving the abuse of a child.

(5) A member of NCF may disclose to a constable information received by that member to the extent that—
(a) it relates to an allegation made by a person who has given testimony that an offence involving the abuse of a child has been committed, and
(b) it is, in the opinion of the member acting in good faith, in the public interest to do so.
A court may order disclosure of information in, or for the purposes of, civil or criminal proceedings (including the purposes of the investigation of any offence or suspected offence) if it is satisfied that—

(a) the disclosure is necessary in the interests of justice, and

(b) the extent of the disclosure is necessary in the interests of justice.

**PART 7**

**GENERAL**

14 In this schedule—

“child” means a person who is under 18 years of age,

“childhood” means the period when a person is under 18 years of age,

“eligible person” has the meaning given by paragraph 7(2),

“forum hearing” has the meaning given by paragraph 8(2),

“institutional care” has the meaning given by paragraph 7(3),

“NCF staff” means persons appointed in accordance with paragraph 3.”.

15 (3) In schedule 2 to the Public Appointments and Public Bodies etc. (Scotland) Act 2003 (specified authorities), before the entry for “Accounts Commission for Scotland” (and the italic cross-heading immediately preceding it), insert—

“NCF Head and any other member of the National Confidential Forum established under section 4ZA(1) of the Mental Health (Care and Treatment) (Scotland) Act 2003”.

28 **Interpretation**

In this Act—

“the 1995 Act” means the Criminal Procedure (Scotland) Act 1995,

“the 2003 Act” means the Criminal Justice (Scotland) Act 2003, and

“the Mental Health Act” means the Mental Health (Care and Treatment) (Scotland) Act 2003.

29 **Ancillary provision**

(1) The Scottish Ministers may by order make such supplementary, incidental, consequential, transitional, transitory or saving provision as they consider appropriate for the purposes of, in consequence of, or for giving full effect to, any provision of this Act.

(2) An order under this section may modify any enactment (including this Act).

(3) An order under subsection (1) containing provisions which add to, replace or omit any part of the text of an Act is subject to the affirmative procedure.

(4) Otherwise, an order under subsection (1) is subject to the negative procedure.
30 **Commencement**

(1) This section and sections 26 so far as it inserts the new section 4ZA, 27(1), 27(2) so far as it inserts paragraphs 1, 2 and 5 of the new schedule 1A, 27(3), 28, 29 and 31 come into force on the day after Royal Assent.

(2) The other provisions of this Act come into force on such day as the Scottish Ministers may by order appoint.

(3) An order under subsection (2) may contain transitory or transitional provision or savings.

31 **Short title**

The short title of this Act is the Victims and Witnesses (Scotland) Act 2013.
Victims and Witnesses (Scotland) Bill
[AS AMENDED AT STAGE 2]

An Act of the Scottish Parliament to make provision for certain rights and support for victims and witnesses, including provision for implementing Directive 2012/29/EU of the European Parliament and the Council; and to make provision for the establishment of a committee of the Mental Welfare Commission with functions relating to persons who were placed in institutional care as children.

Introduced by: Kenny MacAskill
On: 6 February 2013
Bill type: Government Bill
CONTENTS

1. As required under Rule 9.7.8A of the Parliament’s Standing Orders, these revised Explanatory Notes are published to accompany the Victims and Witnesses (Scotland) Bill (introduced in the Scottish Parliament on 6 February 2013) as amended at Stage 2. Text has been added or amended as necessary to reflect amendments made to the Bill at Stage 2 and these changes are indicated by sidelining in the right margin.

INTRODUCTION

1. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

2. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

OVERVIEW OF THE BILL

3. 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 (NCF) for persons aged 16 years or over who were placed in institutional forms of care as children.

4. The proposed reforms relating to victims and witnesses will improve the support available for such individuals. Key proposals include:
   - giving victims and witnesses a right to certain information about their case;
   - creating a duty on organisations within the 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 certain special measures when giving evidence;
   - requiring the court to consider compensation to victims in relevant cases;
• introducing a victim surcharge so that offenders contribute to the cost of supporting victims; and
• introducing restitution orders, allowing the court to require that offenders who assault police officers pay to support the specialist non-NHS services which assist in the recovery of such individuals.

5. The establishment of the NCF will provide an opportunity for those 16 years of age or over who were placed in institutional care as children to recount their experiences of being in care in a confidential, non-judgemental and supportive setting.

6. The key proposals in the Bill which relate to the NCF are as follows:
   • The functions of the NCF are set out in a clear and distinct way, the main function being to offer those aged 16 years or over who were placed in institutional care the opportunity of acknowledgement of their experiences, in particular those of abuse;
   • The scope of the NCF is defined to enable all those aged 16 years or over who were placed in institutional care as children the opportunity to participate in hearings;
   • The testimony of persons who participate in the NCF is protected from disclosure and those persons will be protected from the threat of defamation as a result of testimony they give. Members of the NCF who will conduct hearings, receive testimony and offer acknowledgement, and its staff, will also be protected from the threat of action for defamation where they have acted in good faith in discharging the functions of the Forum;
   • The arrangements by which the NCF is to be hosted by an existing public body, specifically the Mental Welfare Commission, are set out, including the mechanisms to safeguard the respective operational autonomy of the Forum and Commission.

COMMENTARY ON SECTIONS

General principles

Section 1 - General principles

7. Section 1 provides that certain identified persons must take account of four general principles whilst carrying out any statutory functions they have in relation to victims and witnesses. The persons so identified in subsection (2) are the Lord Advocate, the Scottish Ministers, the chief constable of the Police Service of Scotland, the Scottish Court Service (SCS), and the Parole Board for Scotland (PBS).

8. In relation to the Scottish Ministers, the duty to have regard to the principles will primarily fall on the Scottish Prison Service (SPS), which routinely deals with victims and witnesses. SPS is not named specifically in subsection (2) and, as a result of its legal status as an Executive Agency, the duty is to be placed on the Scottish Ministers generally.

9. The principles listed set out that victims and witnesses should be able to obtain information about what is happening in their cases; should have their safety ensured; should be able to access appropriate support; and should be able to participate effectively where that is appropriate.
10. Subsection (4) enables the Scottish Ministers to modify by order the list of persons to whom the duty applies.

**Standards of service**

**Section 2 - Standards of Service**

11. Section 2 provides that certain persons must set and publish standards in relation to the services which those bodies provide to victims and witnesses, and set out their complaints procedure. The persons are the Lord Advocate, the Scottish Ministers, the chief constable of the Police Service of Scotland, SCS, and PBS.

12. Subsection (3)(a) provides that the duty on the Lord Advocate only applies in relation to functions relating to the investigation and prosecution of crime. Subsection (3)(b) provides that 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 Crown Office and Procurator Fiscal Service (COPFS) and SPS as the particular bodies to which this duty is intended to apply. As described in relation to section 1, the duty cannot be placed specifically on SPS, and the same is true of COPFS, which is a Ministerial Department. Both COPFS and SPS will be expected to set out distinct standards of service. Subsection (3)(c) provides that, in relation to the other persons named in subsection (2), the duty applies to any functions.

13. Subsection (3A) places a duty on the persons named in subsection (2) to consult with each other and with such other persons who appear to have a significant interest in the standards of service, publishing standards under subsection (1).

14. Subsection (4) enables the Scottish Ministers to modify the list of persons to whom the obligation to set and publish standards applies and to modify subsections (1), (3) and (5) if it is necessary or expedient as a consequence of any modification of subsection (2). Subsection (5) provides that the term “victim” includes a prescribed relative of a victim, and subsection (6) enables the Scottish Ministers to prescribe by order those relatives to be included in the definition of victim in this context.

**Section 2A – Reports**

15. Section 2A requires the persons named in section 2(2) to prepare and publish a report within twelve months of the initial publication of their standards of service, then on a yearly basis. Under subsection (3), the report must contain an assessment of how the standards have been met, how the person intends to continue to meet them, any modifications made during the reporting period and any proposed modifications the person intends to make during the following reporting period. Subsection (4) enables the Scottish Ministers, by regulations, to specify additional information to be included in such reports, in addition to that set out in subsection (3).

**Rules: review of decision not to prosecute**

**Section 2B – Rules: review of decision not to prosecute**
16. Section 2B(1) provides that the Lord Advocate must prepare and publish rules about the process for carrying out a review of a decision not to prosecute someone for an offence, when a person who is a victim, or appears to be a victim, of the offence requests such a review.

17. Section 2B(2) sets out that the rules may, in particular, detail the circumstances in which a review may be carried out, the manner in which a request for a review must be made and the information to be included in such a request. Rules may also detail what information should be taken into account and the process that should be followed by the Lord Advocate when carrying out a review.

18. Section 2B(3) sets out that the definition of “prosecutor” for the purposes of this section means the Lord Advocate, Crown Counsel or Procurator Fiscal.

Restorative Justice

Section 2C – Restorative justice

19. Section 2C provides that the Scottish Ministers must make provision, by way of regulations, for the referral of a victim and a person who has or is alleged to have committed an offence to restorative justice processes. The regulations must, in particular, make provision for the circumstances where such a referral may be appropriate and the procedure and conditions for such a referral, and must include the specific conditions set out in subsection (3).

20. Subsection (4) provides a definition of “restorative justice” for the purposes of section 2C.

Disclosure of information

Section 3 – Disclosure of information about criminal proceedings

21. Section 3 requires the chief constable of the Police Service of Scotland, SCS, and any prosecutor to disclose certain information to victims and witnesses of criminal offences (or alleged criminal offences) on request.

22. The persons who can seek information are: a person who appears to be a victim of the offence or alleged offence; prescribed relatives of such a person where the person’s death was caused, or appears to have been caused, by the offence or alleged offence; those who are to give, or are likely to give, evidence in criminal proceedings in relation to the offence or alleged offence; and those who have given a statement to a police officer or prosecutor in relation to the offence or alleged offence. The information to be disclosed is set out in subsection (6).

23. The exception to this obligation to provide information to those detailed in subsection (2) is set out in subsection (4). Subsection (4) provides that information need not be disclosed in so far as the person on whom the obligation falls (the qualifying person) considers that disclosure would be inappropriate.
24. Subsection (5) provides that the information which can be requested (referred to as “qualifying information”) must fall within the types of information set out in subsection (6); relate to the offence or alleged offence; and be specified in a request under subsection (1). It also specifies the persons on whom this obligation falls (referred to as “qualifying persons”) and states that “prescribed” where it appears in subsection (2)(aa) means prescribed by the Scottish Ministers by order.

25. The Scottish Ministers may, under subsection (7), modify the list of information which must be provided under subsection (6) and the list of persons who must provide such information detailed in subsection (5).

Interviews

Section 4 - Interviews with children: guidance

26. This section provides that police officers and social workers must have due regard to guidance issued by the Scottish Ministers when carrying out joint investigative interviews with a child witness under the age of 18 in relation to criminal proceedings or a matter which may lead to criminal proceedings. Subsection (4) allows the Scottish Ministers to modify by order the list of persons to whom the obligation applies. Defining “child” as anyone under 18 is in line with the EU Directive establishing minimum standards on the rights, support and protection of victims of crime (2012/29/EU) (which defines “child witness” for the purposes of criminal proceedings as any person below 18 years of age) and various other Directives (e.g. on trafficking of human beings and child sexual exploitation). Lord Carloway’s Report into criminal law and practice also recommends that “for the purposes of arrest, detention and questioning, a child should be defined as anyone under the age of 18 years.”

Section 5 – Certain sexual offences: victim’s right to specify gender of interviewer

27. This section allows victims or alleged victims of certain types of offence to specify the gender of the investigating officer who is to carry out the interview. The types of offences are sexual offences; human trafficking; domestic abuse and stalking.

28. Subsection (4) provides that the investigating officer need not comply with a request for a specified gender of interviewer if doing so would be likely to prejudice the criminal investigation (for example, if the investigation is time critical and no officers of the specified gender are currently available), or if doing so would not be reasonably practicable. Subsection (6) provides that any failure to comply has no effect on any relevant criminal proceedings.

29. The section also allows the Scottish Ministers to modify by order the list of types of offences to which this section applies and the persons carrying out the interview.

Medical Examinations

Section 5A - Certain medical examinations: gender of medical examiner

30. This section places a duty on police officers, under subsection (2), to make victims or alleged victims of an offence listed in paragraphs 36 to 60 of the Sexual Offences Act 2003, who report that offence to the police, aware that they can request that any forensic medical
This document relates to the Victims and Witnesses (Scotland) Bill (SP Bill 23) as amended at Stage 2 (SP Bill 23A)

examination be carried out by a doctor of a gender specified by the person. Subsection (3), places a duty on the police officer in question to ensure that the doctor who is to carry out the examination (or the doctor who would carry out the examination but for the request) is informed of any such request made.

31. Subsection (4) allows the Scottish Ministers, by order, to prescribe other persons to be included in the reference to “registered medical practitioner” in subsections (2) and (3).

Vulnerable witnesses

Section 6 – Vulnerable witnesses: main definitions

32. This section, along with sections 7-9 and 11-17, amends the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”). These sections redefine vulnerable witness, including child witness, to improve the identification and the support available to enable them to give their best evidence and sets out the special measures available to these witnesses along with the procedure to be followed in criminal proceedings to enable such special measures to be used.

33. Section 6(a) replaces section 271(1) of the 1995 Act, and provides that the following categories of person are to be regarded as vulnerable witnesses:

- children (i.e. those under age 18 at the date of the commencement of the proceedings in which the hearing is being or to be held);
- adult witnesses whose quality of evidence (as defined in section 271(4) of the 1995 Act) is at significant risk of being diminished either as a result of a mental disorder (as defined by section 328 of the Mental Health (Care and treatment) (Scotland) Act 2003), or due to fear or distress in connection to giving evidence;
- victims of alleged sexual offences, human trafficking, domestic abuse or stalking who are giving evidence in proceedings which relate to that particular offence;
- witnesses who are considered by the court to be at significant risk of harm by reason of them giving evidence.

34. Section 6(b) inserts subsection (1AA) which gives the Scottish Ministers an order-making power to modify the categories of witness to be presumed vulnerable (in addition to victims of sexual offences (paragraph (c)(i)), human trafficking (paragraphs (c)(ii) and (c)(iii)), domestic abuse (paragraph (c)(iv)), and stalking (paragraph (c)(v))).

35. Section 6(c) removes subsection (1A), which currently provides that those under the age of 18 are to be considered child witnesses for the purposes of human trafficking cases. Given that section 6(a) provides that all those under 18 are to be considered child witnesses, this is no longer necessary.

36. Section (6)(e) inserts subsection (4A) which requires the court to consider the best interests and views of the witness in deciding whether they are vulnerable either because the quality of their evidence is likely to be diminished (subsection (1)(b)) or they are likely to be at significant risk from harm in giving their evidence (subsection (1)(d)).
This document relates to the Victims and Witnesses (Scotland) Bill (SP Bill 23) as amended at Stage 2 (SP Bill 23A)

Section 7 – Child and deemed vulnerable witnesses

37. This section inserts the definitions of “child witness” (a witness under the age of 18) and “deemed vulnerable witness” (a witness who is considered vulnerable as a result of being an alleged victim of a sexual offence, human trafficking, domestic abuse or stalking) into section 271(5) of the 1995 Act. It makes various changes to section 271A (which currently details how child witnesses are to be treated in relation to special measures) and other parts of the 1995 Act which currently relate only to child witnesses to ensure that deemed vulnerable witnesses are subject to the same provisions as child witnesses are at present.

38. In particular, deemed vulnerable witnesses will be automatically entitled to the use of certain special measures known as standard special measures (as only child witnesses are currently). These standard special measures are the use of a television link, a screen (to avoid the witness seeing the accused), and a supporter. In addition, the procedures for child witnesses are expanded to encompass deemed vulnerable witnesses.

Section 8 – Child and deemed vulnerable witnesses: standard special measures

39. This section amends section 271A of the 1995 Act to remove the current restriction that a live television link has to be in another room within the court and a supporter has to be used in conjunction with either a live television link or a screen when being used as standard special measures (under section 271A(14) of the 1995 Act). It also gives the Scottish Ministers an order making power so that they can add new standard special measures, amend or delete existing standard special measures and also modify sections 271A – 271M. Sections 271A - 271G set out the process to be followed in applying for special measures, and some related matters, while 271H - 271M specify what the special measures are and how they are to be used (e.g. 271K specifies that if a screen is to be used so that a vulnerable witness cannot see the accused, the accused should still be able to see and hear the vulnerable witness).

Section 9 – Objections to special measures; child and deemed vulnerable witnesses

40. This section amends the 1995 Act to allow any party to criminal proceedings to object to a notice requesting special measures for a child witness or deemed vulnerable witness. Objections cannot be made in relation to standard special measures, which are listed in section 271A(14) of the 1995 Act, and to which child witnesses and deemed vulnerable witnesses are automatically entitled. Such an “objection notice” 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 reason for their objection.

41. If a notice under this section is lodged, the court must make an order that the notice must be considered at the appropriate diet (depending on the level of the court). Subsections (b) and (c) make the necessary consequential changes to section 271A(5) of the 1995 Act so that the time limit for the court’s consideration of a vulnerable witness application is extended to take account of the possibility of an objection notice being lodged and to section 271A(13) of the 1995 Act to include intimation by the party lodging the objection notice to special measures to other parties to the proceedings as they do at present in relation to an application for special measures.
Section 10 – Child witnesses

42. This section amends the current procedures about children giving evidence in the court, set out in section 271B of the 1995 Act, to place greater emphasis on the wishes of the child. Where a child wishes to be present in the court to give evidence, the court must make an order requiring the child to be present, unless the court considers that would not be appropriate. Where a child does not express a wish to give evidence in the court, or expresses a wish to give evidence from some other location, the court may not make an order requiring the child to give evidence in the court, unless this would prejudice the fairness of the trial or the interests of justice.

Section 11 – Reporting of proceedings involving children

43. This section amends restrictions on reporting proceedings involving children in section 47 of the 1995 Act so that they apply to a person under 18, rather than under 16. Section 47 of the 1995 Act puts certain restrictions on newspapers to prevent them revealing the identity of persons under 16 who are involved in criminal proceedings (as the person against or in respect of whom the proceedings are taken, or as a witness). However, the court has discretion to dispense with these requirements if it is satisfied that it is in the public interest to do so. The provisions also apply to sound and television programmes.

Section 12 – Other vulnerable witnesses: assessment and application

44. The section provides that any party intending to cite a witness, other than a child or deemed vulnerable witness, must take reasonable steps to determine whether they are likely to be vulnerable and if so, what special measures should be used in order to take that person’s evidence. It also sets out the matters to be considered in making an assessment of vulnerability which include the nature and circumstances of the alleged offence, the nature of the evidence likely to be given, the person’s age and maturity, along with any other matters the court considers relevant including, social and cultural background and ethnic origins, sexual orientation and any physical disability or impairment.

Section 13 – Objections to special measures: other vulnerable witnesses

45. This section amends the 1995 Act to allow any party to criminal proceedings to object to a vulnerable witness application requesting special measures for a witness who is not a child witness or deemed vulnerable witness. The process involved is similar to that set out for objection notices in section 9. An “objection notice” must be lodged with the court within seven days (or later with the permission of the court) of a vulnerable witness application being lodged, setting out any objection to the special measures in the application that the party considers inappropriate and the reason for their objection.

46. If a notice under this section is lodged, the court must make an order that the notice must be considered at the appropriate diet (depending on the level of the court). Subsections (b) and (c) make the necessary consequential changes to sections 271C(5) of the 1995 Act so that the time limit for the court’s consideration of a vulnerable witness application is extended to take account of the possibility of an objection notice being lodged and to section 271C(11) of the 1995 Act to include intimation by the party lodging the objection notice to special measures to other parties to the proceedings as they do at present in relation to an application for special measures.
Section 14 – Review of arrangements for vulnerable witnesses

47. Section 271D(1)(a) of the 1995 Act currently allows a party citing or intending to cite a witness to request that the court review the arrangements for taking the witnesses evidence. Section 14 expands this ability to any party to the proceedings so that the non-citing party (normally the defence) can also request the court to review these arrangements.

Section 15 – Temporary additional special measures

48. Section 271H of the 1995 Act specifies a range of special measures that may be used to assist vulnerable witnesses to give their evidence to the court. Section 15 allows the Scottish Ministers to create additional special measures by order for a temporary period. This may be used to pilot additional special measures before any decision on whether or not to introduce these more widely (section 17 deals with order making powers to prescribe further special measures). The order must specify where the temporary special measure should take place, the procedures to be used, and for how long it should operate. The order can also set out in what type of proceedings and in what circumstances the additional special measures are to be used.

Section 16 – Special measures: closed court

49. This section amends the list of special measures in section 271H(1) of the 1995 Act, to add an additional special measure of having a closed court (i.e. excluding the public during the taking of evidence from the vulnerable witness). Section 16 also inserts a description of how this new special measure is to operate, providing that members or officers of the court, parties to the case before the court, counsel or solicitors or other persons otherwise directly concerned in the case, bona fide representatives of news gathering or reporting organisations present or such other persons as the court may specially authorise to be present should not be excluded from the court.

50. Section 16 also amends section 271F(8) of the 1995 Act so that this special measure does not apply where the vulnerable witness is the accused.

Section 17 – Power to prescribe further special measures

51. This section repeals the existing order making power in section 271H which allows the Scottish Ministers to prescribe further special measures. It inserts section 271H(1)(1A) which enables the Scottish ministers to add new special measures, amend or delete existing special measures and also modify sections 271A – 271M which detail how such special measures are to operate (see explanation of these sections under section 8).

Section 18 – Vulnerable witnesses: civil proceedings

52. This section amends the definition of a “child witness” in civil proceedings in section 11 of the Vulnerable Witnesses (Scotland) Act 2004 to include anyone under the age of 18 (currently this definition only includes those under 16). It also inserts an order making power to allow the Scottish Ministers to extend the definition of vulnerable witness to include specified types of witnesses, and witnesses in specified types of actions. This is the only section in the Bill which relates to civil proceedings, rather than criminal proceedings.
Victim statements

Section 19 – Victim statements

53. Victim statements allow victims and close relatives to tell the court about the way in which, and the degree to which, an offence (or apparent offence) has affected and, as the case may be, continues to affect them. Section 14 of the Criminal Justice (Scotland) Act 2003 (“the 2003 Act”) sets out the arrangements for the submission of victim statements in court. In solemn proceedings, a victim statement is laid before the court when moving for sentence. Section 19 of the Bill allows victim statements to be submitted to the court at any time after the prosecutor moves for sentence (or the accused pleads guilty or is found guilty), but before sentence is passed. This is to ensure that, if the statement is not available at the time of moving for sentence or at the time of the guilty plea, this does not prejudice the victim in the case.

54. This section also makes a number of changes to the arrangements for victim statements in relation to children. At present, children aged 14 and over may make a victim statement in their own right. This section lowers this minimum age to allow children aged 12 and over to make such statements in their own right. Furthermore, under the 2003 Act, children under the age of 14 cannot have a statement made on their behalf by a carer in the event that their relative was the victim of an offence but has subsequently died. This is because children under the age of 14 are excluded from being classed as qualifying persons in terms of section 14(8) of the 2003 Act. Section 19 amends section 14(8) of the 2003 Act to remove the provision which excludes children from being classed as qualifying persons.

55. Section 19 also adds new subsections (11A) to (11E) to section 14 of the 2003 Act to provide for the case where a child under the age of 12 has an opportunity to make a victim statement, either as the victim of an offence or as a qualifying person in relation to a victim of an offence. In those circumstances, the statement must be made by a carer of the child on behalf of the child. Subsections (11B) and (11E) provide definitions of “carer of the child”, “cared for” and “cares for”. Subsections (11C) and (11D) provide for the situation where more than one person comes within the meaning of “carer of the child”.

56. Victim statements under section 14 of the 2003 Act are currently made in writing. Section 19(7) provides for alternative formats of victim statement to be piloted, and then extended more widely if appropriate, by inserting new subsections (13) to (16) into section 14 of the 2003 Act. New subsection (13) allows the Scottish Ministers to prescribe the form and manner in which victim statements may be made. New subsection (14) allows the Scottish Ministers, in an order under subsection (13), to made incidental, supplementary or consequential provision and to modify any enactment (including the 2003 Act). New subsection (15) sets out that an order make under subsection (13) can have effect for a specified period of time. New subsection (16) states that an order under subsection (13) which is to have effect for a specified period of time under subsection (15) may be restricted so that it applies only in relation to specified geographic areas. Any order under new subsection (13) of section 14 of the 2003 Act is subject to the negative procedure unless it amends or repeals an Act (see section 88 of the 2003 Act, as amended by subsection (8)).
Sentencing

Section 20 – Duty to consider making compensation order

57. This section amends section 249 of the 1995 Act to provide that, in cases where the court could make a compensation order, it must consider whether to do so. Currently, there is no obligation for the court to consider doing so in relevant cases. Relevant cases include, as defined in section 249 of the 1995 Act, those where the offender has caused any personal injury, loss or damage either directly or indirectly to the victim (but not cases which result in death or are linked to a motoring accident, unless the offender was using the vehicle unlawfully).

Section 21 – Restitution order

58. This section inserts new sections 253A to 253E into the 1995 Act, to deal with the establishment and operation of restitution orders.

59. Subsection (1) of new section 253A establishes that that section shall apply to persons who are convicted of assault on police or police staff, as provided for in the offence in section 90(1) of the Police and Fire Reform (Scotland) Act 2012 (“the 2012 Act”).

60. Subsection (2) establishes the restitution order alongside other penalties (such as imprisonment, fines, Community Payback Orders etc) as a penalty to which persons convicted under section 90(1) of the 2012 Act are liable. It also sets the upper limit of these orders in line with the prescribed sum (as defined in section 225(8) of the 1995 Act). Subsection (3) establishes that the Scottish Ministers have the power to vary this upper limit. This power is to be exercised, in terms of subsection (5), through the negative procedure.

61. Subsection (4) requires that the proceeds of restitution orders are to be paid to the clerk of court or any other person authorised by the Scottish Ministers. This is the same as for fines.

62. Subsection (1) of new section 253B establishes that the person to whom, under new section 253A(3) the proceeds of a restitution order are paid, must pass those proceeds on to the Scottish Ministers. Subsection (2) provides that, in turn, the Scottish Ministers must pass on the proceeds to a new fund, to be called the Restitution Fund.

63. Subsection (3) provides for the establishment, maintenance and administration of the Restitution Fund for the purpose of securing the provision of support services to persons who have been assaulted as mentioned in section 90(1) of the 2012 Act. Subsection (4) ensures that payments may be made only to persons providing or securing the provision of support services for victims of the section 90(1) offence or to the operator of the Restitution Fund in respect of the costs of administering the Fund. Subsection (8) provides a definition of “support services”.

64. Subsection (5) allows the Scottish Ministers to delegate the establishment, maintenance and administration of the Restitution Fund to another individual or body. Subsection (6) allows the Scottish Ministers to make further provision for the administration of the Restitution Fund, including who may benefit from it, how payments can be made from it, and the keeping of records and the making of reports by the operator. Both these powers are to be exercised, in terms of subsection (7), through the affirmative procedure.
65. Subsection (1) of new section 253C introduces the possibility that a person found guilty of an offence under section 90(1) of the 2012 Act may have a sentence imposed which could include three different financial penalties: a restitution order, a fine and a compensation order. The convicted person may have insufficient means to pay all three. In this case, in accordance with subsection (2), the court is to prefer imposing a compensation order, then a restitution order, and finally a fine.

66. Subsection (3) deals with the situation where a court considers it would be appropriate to impose two financial penalties; a restitution order and either a compensation order or a fine. In this case, under subsection (4), where the convicted person may have insufficient means to pay both, again the court should consider imposing a compensation order before a restitution order, and a restitution order before a fine.

67. Subsection (1) of new section 253D applies where a court has actually imposed a restitution order and either or both of a compensation order and a fine. Subsection (2) adopts the same logic as in new section 253C, and ensures 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.

68. Subsection (1) of new section 253E states that a number of provisions in the 1995 Act shall apply to restitution orders in the same way as they do to fines. The provisions in question are listed in subsection (2). These include matters to do with the enforcement (sections 211 and 212 of the 1995 Act, remission (section 213), part-payment (section 220), recovery (section 221), transfer (sections 222 and 223) and mutual recognition of fines (sections 223A-T), as well as what to do in the case of default (section 216) and provisions about time for their payment (sections 214 and 215), disqualification from driving (section 248B) and imprisonment as means of enforcement or punishment for default (section 219), and discharge (section 224). All these are to apply to restitution orders as well as to fines. Subsection (3), moreover, provides that a court may impose imprisonment as a means of punishing default on payment of a fine, but decline to do so for a restitution order but not vice versa. In addition, by virtue of that subsection, where imprisonment is used to punish default on payment of both a fine and a restitution order their amounts shall be aggregated to establish the appropriate duration of that imprisonment.

Section 22 – Victim surcharge

69. This section inserts sections 253F to 253J into the 1995 Act, establishing a victim surcharge and providing for its operation.

70. Section 253F provides that the court must impose a victim surcharge on offenders who are subject to any sentence prescribed by the Scottish Ministers by regulations. However, a victim surcharge is not to be imposed where a restitution order has been imposed, or in relation to an offence or offence of a class prescribed by the Scottish Ministers. The Scottish Ministers may, by regulations, set out the amount of the victim surcharge, which can be different for different types of offender or for different circumstances (for example, this would allow a scale of surcharge amounts to be established, to reflect different sentences imposed). The Scottish Ministers may also, by regulations, set out circumstances in which the court is not to impose a victim surcharge. Subsection (3) sets out that if a person is convicted of multiple offences in the same proceedings, there will only be one surcharge imposed. Subsection (4) sets out that the
surcharge is to be paid to the clerk of court or any other person authorised by the Scottish Ministers.

71. Section 253G establishes the Victim Surcharge Fund (VSF). Subsections (1) and (2) provide that the person who collects the victim surcharge (SCS, unless the Scottish Ministers authorise anyone else for this purpose under section 253F(4)) must pass the sum collected to the Scottish Ministers; and that the Scottish Ministers must then pay this amount into the VSF. Subsection (3) obliges the Scottish Ministers to establish, maintain and administer the VSF for the purpose of securing support services for persons who are or appear to be victims of crime and their prescribed relatives. Subsection (4) sets out that the VSF can only be used to make payments to a person who is or appears to be a victim of crime and prescribed relatives of such a person, or to those who provide or secure the provision of victim support services, or to the operator of the VSF in respect of the costs of administering the VSF. Where the Scottish Ministers have delegated the establishment, maintenance and administration of the VSF, by virtue of subsection (5), the costs of administering the VSF may only be recovered with the consent of the Scottish Ministers.

72. Subsection (5) allows the Scottish Ministers to delegate responsibility for establishing, maintaining and administering the VSF to a third party. The Scottish Ministers are given a regulation making power in section 253G(6) to make further provision about the administration of the VSF. An order under subsection (5) and regulations under subsection (6) are subject to the affirmative procedure by virtue of subsection (7). Subsection (8) provides a definition of “support services”. Subsection (9) provides that any regulations under subsections (3), (4) and (8) (prescribing the relatives of victims who may receive support services funded by the VSF or direct payment from the VSF) are to be subject to the negative procedure.

73. Section 253H details the order in which payments must be made when an offender incurs more than one financial penalty in relation to the same proceedings. Payments must be made firstly towards any compensation order to the victim, then to the victim surcharge, then the fine.

74. Section 253J provides that the provisions in the 1995 Act listed in subsection (2) shall apply to the victim surcharge in the same way as they do to fines. As with restitution orders (see paragraph 69), these include matters to do with the enforcement, remission, part-payment, recovery, transfer and mutual recognition of fines, as well as what to do in the case of default and provisions about time for their payment, disqualification from driving and imprisonment as means of enforcement or punishment for default, and discharge. Subsection (3), moreover, provides that a court may impose imprisonment as a means of punishing default on payment of a fine, but decline to do so for the victim surcharge but not vice versa. In addition, by virtue of that subsection, where imprisonment is used to punish default on payment of both a fine and the victim surcharge their amounts shall be aggregated to establish the appropriate duration of that imprisonment.

Release of offender: victim’s rights

Section 23 – Victim’s right to receive information about release of offender etc.

75. At present, victims of certain prescribed offences can receive information about the release of offenders (and some other relevant information) under section 16 of the 2003 Act. The information mainly relates to the circumstances in which a prisoner leaves prison. This may
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be due to temporary release, an escape, transfer to a prison outwith Scotland, release on licence or parole, death of the prisoner or end of sentence. Section 23 amends section 16 of the 2003 Act to remove the list of prescribed offences. As a result, victims of any offence will be able to receive information under this section. Section 23 also provides that the information to be given to victims under section 16 of the 2003 Act includes information that the prisoner is for the first time entitled to be considered for temporary release.

Section 24 – Life prisoners: victim’s right to make oral representations before release on licence

76. This section amends section 17 of the 2003 Act to enable victims to make oral representations to the Parole Board, as well as written representations as at present, when a prisoner becomes eligible for release on licence. This will only apply to life prisoners initially, but an order making power is also inserted to allow the Scottish Ministers to extend this ability in relation to other categories of prisoner.

77. Subsection (b) amends section 17 of the 2003 Act to provide that the Scottish Ministers can set out, in guidance, how both written and oral representations should be made (currently this power to issue guidance only relates to written representations). Subsection (c) inserts subsection 10A into section 17 of the 2003 Act. This allows the Scottish Ministers, when setting a time limit for representations to be made, to set different time limits for written and oral representations.

Section 25 – Temporary release: victim’s right to make representations

78. This section adds a new section to the 2003 Act to allow victims, who are registered on the Victim Notification Scheme (VNS) and who have expressed the wish to do so, to make written representations about the licence conditions that may be imposed when a prisoner first becomes eligible for temporary release from prison.
National Confidential Forum

Section 26 – 4ZA – National Confidential Forum

79. Section 26 establishes the National Confidential Forum ("the Forum"; "NCF") as part of the Mental Welfare Commission for Scotland ("the Commission").

80. The legislation under which the Commission currently operates (Part 2 and Schedule 1 of the Mental Health (Care and Treatment) (Scotland) Act 2003 ("the 2003 Act") as amended by the Public Services Reform (Scotland) Act 2010) is amended accordingly. Sections 4ZA, 4ZB, 4ZC, 4ZD and schedule 1A, comprising Parts 1-7, are inserted into the 2003 Act.

81. Section 26 inserts section 4ZA into the 2003 Act to require the Commission to establish and maintain a committee of the Commission to be known as the National Confidential Forum.

Section 26 – 4ZB – General functions of NCF

82. Section 26 sets out the general functions of the Forum in a new section 4ZB of the 2003 Act (referred to as the "NCF functions"). The principal function of the Forum is to give people who were placed in institutional care as children the opportunity to describe, in confidence, their experiences of that care, including any abuse experienced during the time spent in care. The descriptions of being in care which people will recount to the members of the Forum are referred to as "testimony".

83. The Forum is to acknowledge the experiences of people placed in institutional care as children by enabling them to give testimony at hearings of the Forum or in other ways, for example, in writing or by video or phone link.

84. A further function of the Forum is to identify patterns and trends in relation to institutional child care provision, including issues concerning abuse, based on the information provided to it by participants and, subsequently, to make recommendations for the improvement of institutional child care provision in the future.

85. The Forum is also empowered to produce reports on its work and any recommendations arising from the information it receives from people placed in institutional care as children. These reports will be available to the public but the identity of participants in the Forum, other persons and institutions will not be disclosed.

86. The final function of the Forum is to provide people who are considering taking part, and those who do take part, in hearings of the Forum information about sources of assistance and advice.

Section 26 – 4ZC – Carrying out NCF functions

87. Section 26 inserts section 4ZC into the 2003 Act to require, in section 4ZC(1), the Commission to delegate the functions, set out above, to the Forum. This requires the NCF functions to be delegated to a distinct entity within the Commission, enabling a significant degree of operational independence for the Forum within the accountability structure of the Commission.
88. Section 4ZC(2) provides that the person appointed to chair the Forum (the “NCF Head”) is to account to the Commission for the work of the Forum in discharging its functions effectively.

89. Section 4ZC(3) makes explicit that, despite the delegation of functions and the accountability of the Head of NCF, the Commission will retain responsibility for ensuring that the Forum carries out its functions.

Section 26 – 4ZD – Further modifications in relation to NCF

90. Section 26 inserts section 4ZD into the 2003 Act.

91. Section 4ZD(1)(a) sets out which functions and duties currently undertaken by the Commission will not apply to the Forum. In particular, the duty to monitor Part 1 of the 2003 Act, to bring to the attention of the Scottish Ministers matters concerning the operation of that legislation and to advise on such matters, do not apply to the Forum. The functions of the Commission relating to the publishing of information (including statistical information), particularly about investigations and inquiries, are also expressly disapplied by section 4ZD(1)(a).

92. Section 4ZD(1)(ca) bars the Commission from publishing anything in any of its reports which creates a real risk of identifying a person in institutional care as a child, a person who experienced or committed abuse or an establishment providing institutional care. This does not apply where the information is already in the public domain.

93. Section 4ZD(1)(d) inserts section 20(1A) into the 2003 Act to offer protection to the Forum, its members and staff, and participants from an action for defamation.

94. The effect of this protection is that the Forum, and its members and staff, will not be able to be sued for defamation as a result of statements they make, in good faith, while carrying out the work of the Forum. This is akin to the protection provided to Commissioners and staff of the Commission.

95. The protection offered to participants in the Forum from an action for defamation is in relation to any statement they make to the Forum and is, therefore, a higher level of protection than that offered to the Forum, its members and staff. This level of protection is to ensure that people who come forward to participate in the Forum can be assured in advance that what they say in information provided to the Forum cannot be used by anyone to found an action of defamation.

96. Section 4ZD(2) amends the Public Records (Scotland) Act 2011 to insert a new subsection (8) into section 1 of that Act to require the Commission to prepare a records management plan in relation to the NCF functions. This is to be separate from the Commission’s records management plan to further safeguard the confidentiality of testimony and other information given to the Forum by people placed in institutional care as children.
Section 27 – NCF: constitution and operation

97. Section 27(1) extends the maximum membership of the Commission from 8 to 9 members to enable the appointment of an additional Commissioner, selected specifically for their skills, experience and knowledge as considered by the Scottish Ministers to be relevant to the work and functions of the Forum.

Section 27 – Schedule 1A

98. Schedule 1A is introduced by section 4ZA(2) and is inserted into the 2003 Act by section 27(2).

Schedule 1A – Part 1 – Members of the National Confidential Forum

99. Part 1 sets out the membership of the Forum, the appointment of its members and staff and the powers and procedure of the Forum.

Membership

100. Paragraph 1(1) provides that the Forum is to consist of the NCF Head and no fewer than two other members, all of whom will be appointed by the Scottish Ministers.

101. Paragraph 1(2) provides that the Scottish Ministers must make these appointments having regard to the recommendation of the selection panel (mentioned in paragraph 2(2)). Each member of the Forum is to be appointed for such period as the Scottish Ministers think fit (paragraph 1(3)).

102. Paragraph 1(4) provides that members of the Forum may resign by providing written notice to the Scottish Ministers, and that the Scottish Ministers must then inform the Commission of any such resignation (paragraph 1(5)).

Membership selection panel

103. Paragraph 2(1) provides that members of the Forum are to be selected by a membership selection panel, the composition of which is set out in that paragraph. The Scottish Ministers are able to determine, in addition to the members of the selection panel set out in paragraph 2(1), that others be included in that selection panel.

104. Paragraphs 2(2), (3) and (4) provide that a membership selection panel is to determine the selection process and can recommend for appointment those who, in the panel’s view, have the skills, knowledge and experience to carry out the work of the Forum (excluding members of the Commission).

National Confidential Forum staff

105. Paragraph 3 provides that the appointment of staff to the Forum requires the recommendation of the Forum Head and that such staff are only to carry out the functions of the Forum.
Powers and procedure of the National Confidential Forum

106. Paragraph 4(1) empowers the Forum to do anything which is necessary or expedient in order for it to carry out its functions.

107. Paragraph 4(2) specifically empowers the Head of the Forum to determine the procedure of the Forum, having regard to the views of the other members of the Forum. This reflects the leadership role held by the NCF Head.

108. Paragraph 4(3) sets out the requirement that the Forum should have regard to the need to avoid any unnecessary cost to public funds, to participants and others in undertaking its work and carrying out its functions.

109. Paragraph 4(4) provides that proceedings of the Forum will not be invalidated because of a vacancy in the membership or a defect in the appointment of a member.

110. Paragraph 4(5) specifically excludes members of the Scottish Government or others authorised by the Scottish Government from taking part in the meetings of the Forum.

Application of schedule 1 to the National Confidential Forum

111. Paragraph 5 disapplies certain powers of the Commission in relation to the Forum.

Schedule 1A – Part 2 – Delegation of functions

112. Part 2 sets out arrangements for the delegation of the NCF functions.

Delegation by the National Confidential Forum

113. Paragraph 6 requires the Forum to delegate its functions to the NCF Head, other members of the Forum or staff, the extent of which is to be determined by the NCF Head.

114. Paragraph 6 also enables the delegation of functions by the Forum to the NCF Head, other members of the Forum or staff, the extent of which is to be determined by the Forum.

115. Paragraph 6 makes explicit that such delegation does not affect the Forum’s responsibility, or the accountability of the NCF Head, for the functions of the Forum.

Schedule 1A – Part 3 – Eligibility to participate in the National Confidential Forum

116. Part 3 sets out who will be eligible to participate in the Forum.

117. Paragraph 7(1) provides that the Forum may hear testimony from people who have made an application to participate in a hearing of the Forum and whose application has been accepted.

118. Paragraph 7(2) provides that any person aged 16 or over, who was placed in an establishment providing institutional care as a child, for any length of time and who is no longer in that care, may apply to participate in the Forum.
119. Paragraph 7(3) provides that the term “institutional care”, for the purposes of the Forum, means a care or health service which meets the conditions set out paragraph in 7(4) and is of a description or type prescribed by order made by the Scottish Ministers.

120. Paragraph 7(5) provides that services provided at premises used mainly or wholly as a private dwelling (which would include the supervision of children at home, foster care and kinship care) cannot be prescribed in an order under paragraph 7(3).

Schedule 1A – Part 4 – Conduct of Hearings

121. Part 4 sets out how the hearings of the Forum will be conducted.

122. Paragraph 8(2) requires the Forum to make arrangements for participants to give testimony, either at a hearing of the Forum or by other means and in writing or orally.

123. Paragraph 8(3) requires that at least two members of the Forum be present at a hearing and that hearings be held in private.

124. Paragraph 8(4) explains that a Forum hearing is defined as being ‘private’ provided no one other than the person giving testimony, anyone accompanying that person and members of the Forum and Forum staff are present.

125. Paragraph 8(5) enables the Forum to determine its own procedures for hearing testimony, otherwise than is provided for in paragraph 8. This is subject to the duty to avoid any unnecessary cost to public funds, to participants and others in undertaking its work and carrying out its functions.

Recording of testimony

126. Paragraph 9 provides that the Forum may decide how it will record testimony and any other information it receives from persons who take part in hearings. In practice, this may include audio recording or recording in writing and could be undertaken with the participant face-to-face or remotely.

127. Paragraph 9(2) sets out a requirement that the Forum take steps, as soon as reasonably practicable, to organise the information it receives so as to preserve confidentiality, in particular the anonymity of the person giving the testimony and any other individuals or institutions mentioned in testimony.

Payment of expenses

128. Paragraph 10 authorises the Forum to require the Commission to pay reasonable expenses to participants, and those who accompany participants, to Forum hearings. This will comprise travel and subsistence associated with participation in the Forum.

Schedule 1A – Part 5 – Reporting

129. Part 5 sets out arrangements by which the Forum may prepare reports and is required to produce an Annual Report.
130. Paragraph 11 empowers the Forum to prepare reports based on the information provided to it at hearings.

131. Paragraph 11(2) requires that a report produced by the Forum must not identify or include information which creates a real risk of identifying persons who were placed in institutional care as children, persons alleged to have committed abuse or institutions where abuse is alleged to have taken place.

132. Paragraph 11(2) does not prevent the Forum from preparing a report which includes information which is already in the public domain.

133. Paragraph 12 requires the Forum to prepare a report each year on progress made in discharging the functions of the NCF (covering the 12 month period up to the end of March) and to submit that report to the Scottish Ministers. Annual Reports of the Forum are subject to the same requirements of confidentiality which apply to the other reports produced by the Forum.

134. Paragraph 12(2) provides that the Forum must consult the Commission before preparing its Annual Report and paragraph 12(4) requires the Forum to send a copy of its Annual Report to the Commission.

135. Paragraph 12(5) provides that the Scottish Ministers must lay before the Scottish Parliament a copy of each Annual Report of the Forum.

Schedule 1A – Part 6 - Confidentiality

Prohibition on disclosure

136. Part 6 sets out arrangements to ensure the confidentiality, as far as possible, of information obtained by the Forum in the course of carrying out its functions.

137. Paragraphs 13(1) and (2) make express provision that certain persons listed are not to disclose information provided to them in connection with the work of the Forum and which is not otherwise in the public domain.

138. Paragraph 13(3) does not prevent the disclosure of information between the persons listed in paragraph 13(1) where this is necessary to carry out the work of the Forum, including the preparation of annual reports by the Forum (in accordance with paragraph 11) and any other reports from the Forum (in accordance with paragraph 12). Under this exception to the duty of confidentiality information from the Forum can also be disclosed to enable preparation of the annual reports of the Mental Welfare Commission.

139. Paragraph 13(4) sets out the circumstances in which a member of the Forum must disclose information to the police. Information must be disclosed to the police 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.

140. Paragraph 13(5) enables a member of the Forum to disclose information to the police where an allegation is made by a person who has given testimony that an offence involving the
This document relates to the Victims and Witnesses (Scotland) Bill (SP Bill 23) as amended at Stage 2 (SP Bill 23A)

abuse of a child has been committed. Disclosure is made to the police in these circumstances where it is, in the opinion of the member of the Forum acting in good faith, in the public interest to do so.

141. Paragraph 13(6) provides that a court may order the disclosure of information held by the Forum for the purposes of legal proceedings, whether civil or criminal (including for the purposes of the investigation of any offence or suspected offence), if it is satisfied that such disclosure is necessary in the interests of justice.

Schedule 1A – Part 7

142. Paragraph 14 sets out definition of terms used in schedule 1A.

General

Section 28 – Interpretation

143. Section 28 provides for the interpretation of various terms used in the Bill.

Section 29 – Ancillary provision

144. This section provides the Scottish Ministers with the power to make, by order, such supplementary, incidental, consequential, transitional, transitory or saving provision as they consider appropriate. It provides that an order under this section may modify this, or any other, enactment.

Section 30 – Commencement

145. This section provides for the commencement of the provisions in the Bill.
VICTIMS AND WITNESSES (SCOTLAND) BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

Purpose

1. This Memorandum has been prepared by the Scottish Government to assist the Delegated Powers and Law Reform Committee in its consideration of the Victims and Witnesses (Scotland) Bill. This Memorandum describes provisions in the Bill conferring power to make subordinate legislation which were either introduced to the Bill or amended at Stage 2. The Memorandum supplements the Delegated Powers Memorandum on the Bill as introduced.

PROVISIONS CONFERRING POWER TO MAKE SUBORDINATE LEGISLATION INTRODUCED OR AMENDED AT STAGE 2

Section 2(4) – Standards of Service

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Affirmative procedure

Provision

2. Section 2 imposes a duty on certain persons to set and publish standards of service relating to the carrying out of functions in relation to victims and witnesses, and the procedure for making and resolving complaints. Amendments at Stage 2 moved references to the functions of the Lord Advocate and the Scottish Ministers covered by the duty to set standards of service from subsection (2) to subsection (3).

3. Section 2(4) gives the Scottish Ministers an order-making power to modify the list of persons to whom the duty applies (as set out in section 2(2)). Amendments at Stage 2 extended the order-making power to allow the Scottish Ministers to also modify sections (1), (3) or (5) if it is necessary or expedient as a consequence of a modification to subsection (2).

Reason for taking power

4. There is no immediate intention to use the power to modify the list of persons covered by the obligation to set out standards of service. It follows that there will, therefore, be no immediate need to amend subsections (1), (3) or (5). However, it may be necessary or desirable to amend this list in the future - for example, to include a body which has been given new functions in relation to victims and witnesses and, as a consequence, to also amend subsections (1), (3) or (5), which are connected to subsection (2) as they relate to the functions of the person
setting the standards. It is considered appropriate to provide for the flexibility to make such relatively limited changes by subordinate legislation, rather than requiring further primary legislation.

**Reason for choice of procedure**

5. The Scottish Government considers the affirmative procedure is appropriate to allow the Scottish Parliament to give a high level of scrutiny to the detail of any changes to primary legislation.

**Section 2A(4) – Reports**

- **Power conferred on:** The Scottish Ministers
- **Power exercisable by:** Regulations made by Scottish statutory instrument
- **Parliamentary procedure:** Negative procedure

**Provision**

6. Section 2A was introduced to the Bill at Stage 2. Section 2A(2) imposes a duty on the persons mentioned in section 2(2) to prepare and publish a report within 12 months of initially publishing their standards of service, then on an annual basis, assessing how standards have been met, how they intend to continue to meet the standards, any modifications made during the reporting period and any proposed modifications they intend to make during the following reporting period.

7. Section 2A(4) gives the Scottish Ministers a regulation making power to prescribe information, in addition to that detailed at subsection (3), which is to be included in the report.

**Reason for taking power**

8. There is no intention to use this power in the short term, as subsection (3) sets out the information which the Scottish Ministers consider should be included in reports under this section. However it is possible that, in the light of experience, there may be a need for further information to be included in such reports. This power will give the Scottish Ministers the flexibility to specify additional information to be contained in the reports without requiring primary legislation.

**Reason for choice of procedure**

9. This power is limited to allowing the Scottish Ministers to specify additional information to be provided in reports relating to the standards of services set out under section 2. Given the narrow scope of this power, the negative resolution procedure is considered appropriate.

**Section 2C(1) – Restorative Justice**

- **Power conferred on:** The Scottish Ministers
- **Power exercisable by:** Regulations made by statutory instrument
- **Parliamentary procedure:** Negative procedure
This document relates to the Victims and Witnesses (Scotland) Bill as amended at Stage 2 (SP Bill 23A)

Provision

10. This provision was inserted into the Bill by way of a non-Government amendment at Stage 2.

11. Section 2C provides that the Scottish Ministers must make provision, by way of regulations, for the referral of a victim and a person who has or is alleged to have committed an offence to restorative justice services. The regulations must, in particular, make provision for the circumstances where such a referral may be appropriate and the procedure and conditions for such a referral.

12. The conditions for referral must include: that such services are used only where they are in the interest of the victim and based on the victim’s free and informed consent, which may be withdrawn at any time; that provision is made to ensure the victim’s safety and to protect the victim from victimisation and retaliation; that full and impartial information about the process is provided in advance to the victim; that the offender, or alleged offender, has acknowledged the basic facts of the case; and, that discussions that are not conducted in public remain confidential and are not subsequently disclosed except with the agreement of the parties or as required in the interests of justice.

Reason for taking power

13. This power has been taken to enable the Scottish Ministers to make regulations which make provision for the referral of victims and offenders, or alleged offenders, to restorative justice processes.

Reason for choice of procedure

14. The Scottish Government understands that the member who lodged this amendment considered negative procedure to be the appropriate level of scrutiny of any exercise of this delegated power.

Section 3(2)(aa) – Disclosure of information about criminal proceedings

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Negative procedure

Provision

15. In the Bill, as introduced, section 3 provides that certain persons (the chief constable of the Police Service of Scotland, a prosecutor, and the Scottish Court Service) must provide certain information to victims and witnesses. Section 3(2)(a) specifies that a person who appears to be the victim of an offence or alleged offence is a “requester” under subsection (1). Amendments at Stage 2 inserted subsection (2)(aa) to provide that, where the death of the person in subsection (2)(a) was or appears to have been caused by the offence or alleged offence, a prescribed relative of that person is also a requester under subsection (1).

16. Section 3(5) provides that the Scottish Ministers may prescribe by order those to be regarded as a relative under subsection (2)(aa).
Reason for taking power

17. Rather than set out a definitive list of those to be regarded as relatives on the face of the Bill, it is considered appropriate to provide such detail in subordinate legislation. This will allow the Scottish Ministers the flexibility to modify the definition of “relative”, which has a fairly narrow application in relation to section 3, without amending primary legislation.

Reason for choice of procedure

18. This power has a narrow focus on the definition of “relative” in section 3. It is limited to defining the categories of relative (of a person who is or appears to be a victim whose death was caused by an offence or alleged offence) who may request certain information from the chief constable of the Police Service of Scotland, a prosecutor or the Scottish Court Service in relation to a criminal investigation or criminal proceedings relating to any offence or alleged offence. It is therefore considered that the negative procedure is appropriate.

Section 5A(4) – Certain medical examinations: gender of medical examiner

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Negative procedure

Provision

19. Section 5A was introduced to the Bill at Stage 2. This section places a duty on a constable (under subsection (2)) to inform alleged victims of certain offences (mentioned in subsection (1)), who have reported the offence to the police, that they may request that their medical examination be carried out by a registered medical practitioner of a specified gender and (under subsection (3)) to inform the registered medical practitioner of any such request.

20. Section 5A(4) gives the Scottish Ministers an order-making power to specify descriptions of other persons to be included in the reference to “registered medical practitioner”.

Reason for taking power

21. The power under section 5A(4) will allow the Scottish Ministers to add persons of other descriptions to the reference “registered medical practitioner” who the constable will be required to notify of a request for a specific gender of examiner. While these examinations will ordinarily be carried out by registered medical practitioners (defined in schedule 1 to the Interpretation and Legislative Reform (Scotland) Act 2010 as “a fully registered person within the meaning of the Medical Act 1983…who holds a licence to practise under that Act”), other healthcare professionals may, in the future, also be qualified to undertake such examinations and this power will provide the flexibility to reflect such changes in practice.

Reason for choice of procedure

22. Any changes made using this power, which is very narrow in scope, will be aimed at reflecting changes in practice, and will be intended to assist in the operational delivery of the provision of forensic medical examinations. It is therefore considered appropriate that the negative procedure is used.
Section 19(7) – Victim statements

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** Order made by Scottish statutory instrument  
**Parliamentary procedure:** Negative procedure (or affirmative procedure where the order amends or repeals any part of an Act)

**Provision**

23. Section 19(7), which was inserted into the Bill at Stage 2, inserts new subsections (13) to (16) into section 14 of the Criminal Justice (Scotland) Act 2003 (“the 2003 Act”), with regard to victim statements. Subsection (13) allows the Scottish Ministers to prescribe, by order, the form and manner in which victim statements can be made. Subsection (14) allows the Scottish Ministers, when making an order under subsection (13), to include such consequential, incidental or supplementary provision as is considered appropriate, and to modify any enactment. Subsection (15) provides that an order under subsection (13) can be made so as to have effect for a period of time as specified in the order. Subsection (16) provides that an order under subsection (13), which applies for a period as specified in subsection (15), can apply to a specific geographic area or areas.

**Reason for taking power**

24. Victim statements under section 14 of the 2003 Act are currently made in writing. The intention of this amendment is to allow alternative formats of victim statement to be piloted, and then extended more widely if appropriate. An order-making power is considered the most appropriate way of achieving this, as it allows for limited pilots to be conducted, and for wider changes to be implemented as necessary, without the need for further primary legislation. This order-making power will allow for flexibility in the types of victim statements that will be piloted and will allow for the length and location of the pilot to be varied.

**Reason for choice of procedure**

25. The negative procedure is considered appropriate, generally, given the power is fairly narrow (in that it only allows for the form and manner of statements to be prescribed). However, where changes to primary legislation are to be made, the additional scrutiny provided by the affirmative procedure is considered appropriate.

**Section 21 (new section 253B(5) and (6) of the Criminal Procedure (Scotland) Act 1995) - The Restitution Fund**

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** Order made by Scottish statutory instrument  
**Parliamentary procedure:** Affirmative procedure

**Provision**

26. The new section 253B, to be inserted into the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”), provides that the Scottish Ministers shall establish a Restitution Fund which shall receive monies realised in respect of restitution orders, and disburse them to appropriate beneficiaries. Subsection (5) of new section 253B allows the Scottish Ministers to delegate, by
order, their functions of establishing and maintaining the Restitution Fund. Subsection (6) grants the Scottish Ministers an order-making power to make further provision relating to the administration of the Fund, including specification of eligible persons and provision regarding the making of payments, the keeping of financial and other records and the making of reports to the Scottish Government.

27. The new section sets out in primary legislation the purpose of payments out of the Restitution Fund. This purpose is to secure the provision of support services for persons who have been assaulted as mentioned in section 90(1) of the Police and Fire Reform (Scotland) Act 2012 (“the 2012 Act”). The new section also grants the Scottish Ministers powers to specify in subordinate legislation the persons or classes of person who shall receive support from the Restitution Fund as a means of achieving that purpose.

28. At Stage 2, a minor amendment was made to subsection (5) to reflect that the functions of the Scottish Ministers, which may be delegated by way of order, include the administration of the Restitution Fund, in addition to the establishment and maintenance of the fund.

29. The provision in subsection (6) was also amended so that the purpose of the order-making power was stated in the introductory text to the subsection explicitly to make further provision about the administration of the Fund. With that having been made clear in the introductory words, there was no longer any need to set out the operation and administration of the fund among the purposes set out later in subsections (a) and (b), and at Stage 2 these purposes were accordingly removed from the list.

Reason for taking power

30. The purposes of the Restitution Fund are to be clearly set out in primary legislation. However, the range of circumstances in which the Fund will operate cannot be foreseen. Some may be beyond the Scottish Ministers’ control, while others may be driven by wider operational concerns of the Scottish Ministers in relation to, for example, efficient and cost-effective administration, whose requirements may change over time. Applicable regulatory regimes may also change over time.

31. It is appropriate that the operation and administration of the Restitution Fund should be able to respond to changes in these circumstances as efficiently as possible. This argues against setting out detailed arrangements in primary legislation.

32. Similarly, such changes in circumstances may make it appropriate or efficient to delegate the Scottish Ministers’ functions of establishing, maintaining and administering the Restitution Fund to a third party (though this is not the Scottish Government’s intention at present).

33. The organisations which provide support services for persons assaulted in terms of section 90(1) of the 2012 Act are also likely to change over time. Organisations will cease to operate, and new organisations will arise. Even where the organisation remains essentially the same, the legal person in which they are embodied may change.
34. Finally, the need to be able to continue to meet the purpose of the Restitution Fund, whatever organisations or persons may exist providing services which meet that purpose, makes setting out recipients of monies from the Restitution Fund in primary legislation impractical.

Reason for choice of procedure

35. Both changes in the circumstances in which the Restitution Fund operates, and in the persons or classes of person who offer the support services which are the purposes of the provision, may occur quickly and without prior warning to the Scottish Ministers.

36. In these circumstances the Scottish Ministers must be able to react quickly to ensure that the purpose of the Restitution Fund is still met. At the same time, these powers are fairly extensive. The joint requirements of speed and flexibility on the one hand, and of proper scrutiny on the other, are best met by the affirmative procedure.

Section 22 (amended section 253G(3), (4) and (8) of the 1995 Act) – The Victim Surcharge Fund

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Negative procedure

Provision

37. Section 22 inserts section 253G into the 1995 Act and deals with the establishment and operation of the Victim Surcharge Fund.

38. Subsection (3) of new section 253G, as introduced, provided that Scottish Ministers must establish and maintain the Victim Surcharge Fund for the purposes of securing the provision of support services for persons who have been the victims of crime. Amendments were made at Stage 2 to extend subsection (3) to refer to a person who is or appears to be the victim of crime and the prescribed relatives of such persons, in order that support services can be secured for victims, those who appear to be victims and prescribed relatives of such persons.

39. Subsection (4) of new section 253G, as introduced, detailed the persons to which payments from the Fund may be made, namely victims and persons who provide or secure the provision of support services for victims. Subsections (4)(a) was amended and (4)(aa) was inserted at Stage 2 to, respectively, replace “victim” with “a person who is or appears to be the victim of crime” and to add prescribed relatives of such persons, so that payments from the Fund can be made to victims, those who appear to be victims and prescribed relatives of such persons.

40. The definition of “support services” in subsection (8) was amended at Stage 2 to refer to the recipients or beneficiaries of such services as a person who is or appears to be the victim of crime and to add the prescribed relatives of such persons as recipients or beneficiaries. Subsection (8), as amended, also allows the Scottish Ministers to prescribe by regulation those to be regarded as a relative under subsections (3), (4) and (8). Amendments at Stage 2 introduced a new subsection (9), which provides that regulations made under subsections (3), (4) and (8) are subject to the negative procedure.
Reason for taking power

41. Rather than set out a definitive list of those to be regarded as relatives on the face of the Bill, it is considered appropriate to provide such detail in subordinate legislation. This will allow the Scottish Ministers the flexibility to modify the definition of “relative”, which has a fairly narrow application in relation to section 22, without amending primary legislation.

Reason for choice of procedure

42. This power has a narrow focus on the definition of “relative” in section 22. It is limited to setting the categories of relatives of persons who are or appear to be the victim of crimes in respect of which the Victim Surcharge Fund relates, to whom payments may be made and to whom support services relate. It is therefore considered that the negative procedure is appropriate.

Section 22 (new section 253G(5) and (6) of the 1995 Act) – The Victim Surcharge Fund

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** Order/regulations made by Scottish statutory instrument  
**Parliamentary procedure:** Affirmative procedure

Provision

43. Section 22 inserts section 253G into the 1995 Act and deals with the establishment and operation of the Victim Surcharge Fund. Subsection 253G(5) allows the Scottish Ministers to delegate, by order, their functions of establishing and maintaining the Victim Surcharge Fund. Subsection (6) grants the Scottish Ministers powers to manage the Fund, by making orders connected with its operation, administration, records and reports, and as to how payments are to be made.

44. A minor amendment was made at Stage 2 to subsection (5) to reflect that the functions of the Scottish Ministers, which may be delegated by way of order, include the administration of the Fund, in addition to the establishment and maintenance of the fund.

45. The provision in subsection (6) was also amended so that the purpose of the order-making power is stated explicitly in the introductory words i.e. that further provision may be made about the administration of the Fund. With that having been made clear in the introductory words, there was no longer any need to mention the operation and administration of the fund in the list of matters set out in the subsection, and at Stage 2 these matters were accordingly removed from the list. Also removed from the list in subsection (6) was the reference to the order-making power being used in particular to make provision specifying persons or classes of person to, or in respect of, whom payments may be made out of the fund. It was considered that the restrictions on the face of the Bill relating to the persons to whom payments can be made (in subsection (4) of 253G) were sufficient and such provision was, therefore, unlikely to be required.

46. Subsection (6), as introduced, provided that subordinate legislation be by way of order. In contrast, new section 253F(2) (also inserted into the 1995 Act by section 22 of the Bill), provided that Scottish Ministers may prescribe by regulations the offences, sentences and
circumstances to which the victim surcharge is applicable. Subsection (6) was amended at Stage 2 to enable the Scottish Ministers to exercise these powers together and for regulations to make provision relating to the offences, sentences and circumstances to which the victim surcharge is applicable under section 253F(2) and the establishment, maintenance and administration of the Fund under section 253G.

Reason for taking power

47. In relation to the amendments to subsections (5) and (6), the Victim Surcharge Fund is a new fund being established for the immediate assistance of victims of crime in the aftermath of that crime and, as such, it is possible that changes to the operation of the Fund will be required as it comes into being and potential issues are identified. The Bill contains the key parameters for the establishment, maintenance and administration of the Fund but it is more appropriate for the Scottish Ministers to be able to provide for its day-to-day operation in secondary legislation, to allow for both speed and flexibility in making any necessary changes.

48. In relation to the amendment changing the order-making power in subsection (6) to a regulation-making power, as described above, this change enables the Scottish Ministers to make one piece of subordinate legislation relating to the Fund rather than a set of regulations under section 253F(2) and a separate order under section 253G(6).

Reason for choice of procedure

49. In relation to orders under subsection (5), the Scottish Government considers the affirmative procedure is appropriate to allow the Scottish Parliament to give a high level of scrutiny to the choice of person to which the Scottish Ministers wish to delegate the establishment, maintenance and administration of the Fund.

50. In relation to regulations made under subsection (6), given the amount of detail which can be set out using the powers in this subsection, and the impact on the Victim Surcharge Fund, the affirmative procedure is considered appropriate. The change in the type of subordinate legislation, from order to regulations, does not affect the level of Parliamentary scrutiny in this respect.
Delegated Powers and Law Reform Committee

60th Report, 2013 (Session 4)

Victims and Witnesses (Scotland) Bill as amended at stage 2

Published by the Scottish Parliament on 4 December 2013
Delegated Powers and Law Reform Committee

Remit and membership

Remit:

1. The remit of the Delegated Powers and Law Reform Committee is to consider and report on—
   (a) any—
   (i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
   (ii) [deleted]
   (iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;
   (b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;
   (c) general questions relating to powers to make subordinate legislation;
   (d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;
   (e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and
   (f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.
   (g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and
   (h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

Membership:

Richard Baker
Nigel Don (Convener)
Mike MacKenzie
Margaret McCulloch
Stuart McMillan (Deputy Convener)
John Scott
Stewart Stevenson
Committee Clerking Team:

Clerk to the Committee
Euan Donald

Assistant Clerk
Elizabeth White

Support Manager
Daren Pratt
Delegated Powers and Law Reform Committee

60th Report, 2013 (Session 4)

Victims and Witnesses (Scotland) Bill as amended at stage 2

The Committee reports to the Parliament as follows—

1. At its meeting on 3 December 2013, the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Victims and Witnesses (Scotland) Bill as amended at Stage 2 (“the Bill”). The Committee submits this report to the Parliament under Rule 9.7.9 of Standing Orders.

2. The Bill was introduced in the Scottish Parliament by the Scottish Government on 6 February 2013.

3. The Bill has two main, general objectives. First, there are reforms to the justice system relating to victims and witnesses. The reforms relate mainly to the criminal system rather than civil. Second, the establishment of a National Confidential Forum (NCF) which will hear testimony from adults who were placed in institutional forms of care as children.

4. The Committee reported on certain matters in relation to the delegated powers provisions in the Bill at Stage 1 in its 20th report of 2013.

5. The Scottish Government has provided the Parliament with a supplementary memorandum on the delegated powers provisions in the Bill, in advance of Stage 3 of the Bill (“the SDPM”).

DELEGATED POWERS PROVISIONS

6. The Committee considered each of the delegated powers provisions which had been amended or added at stage 2. The Committee’s comments on these delegated powers are considered below.

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1 Victims and Witnesses (Scotland) Bill (as amended at stage 2) available here: http://www.scottish.parliament.uk/S4_Bills/Victims%20and%20Witnesses%20(Scotland)%20Bill/b23as4-amend.pdf

2 Victims and Witnesses (Scotland) Bill Supplementary Delegated Powers Memorandum available here: http://www.scottish.parliament.uk/S4_Bills/Victims_and_Witnesses_Bill_-_SDPM.pdf
Section 2(4)(b) – Standards of Service

Power conferred on: The Scottish Ministers
Power exercisable by: Order
Parliamentary procedure: Affirmative procedure

7. Section 2 imposes a duty on certain persons to set and publish standards of service relating to (i) the carrying out of functions in relation to victims and witnesses and (ii) the procedure for making and resolving complaints. This applies to the Lord Advocate, the Scottish Ministers, the chief constable of the Police Service, the Scottish Court Service, and the Parole Board.

8. Amendments at Stage 2 moved references to the functions of the Lord Advocate and the Scottish Ministers covered by the duty to set standards of service, from subsection (2) to subsection (3).

9. Section 2(4) gives the Scottish Ministers an order-making power to modify the list of persons to whom the duty applies. Amendments at Stage 2 have extended that power to allow Ministers to also modify sections (1), (3) or (5), if necessary or expedient as a consequence of a modification to subsection (2).

10. The Committee finds the power in section 2(4)(b) to be acceptable in principle, and is content that it is subject to the affirmative procedure.

Section 2A(4) – Reports

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Negative procedure

11. This section was added at Stage 2. Subsection (2) imposes a duty on the persons mentioned above who require to set and publish standards of service, to prepare and publish a report within 12 months of initially publishing their standards. Then, on an annual basis, a report assessing how standards have been met, how they intend to continue to meet them, any modifications made during the reporting period, and any proposed modifications they intend to make during the following reporting period.

12. Section 2A(4) gives the Scottish Ministers a power to prescribe by regulations information, in addition to that set out in subsection (3), which is to be included in the report.

13. The Committee finds the power in section 2A(4) to be acceptable in principle, given that it is limited to allowing the Ministers to specify only additional information to be provided in reports, beyond the matters set out in subsection (3). As the power is limited to providing information in reports, the Committee considers the negative resolution procedure appropriate for scrutiny of the regulations.
Section 2B - Rules: review of decision not to prosecute

Power conferred on: The Lord Advocate
Power exercisable by: Rules (published, but not in the form of Scottish statutory instrument)
Parliamentary procedure: None

14. This section has been added at Stage 2. By section 2B(1), the Lord Advocate must make and publish the rules about the process for reviewing, on the request of a person who is, or appears to be, a victim in relation to an offence, a decision of the prosecutor not to prosecute a person for the offence. The “prosecutor” may be the Lord Advocate, Crown Counsel or the procurator fiscal.

15. Section 2B(2) provides that the rules in particular may make provision in connection with the circumstances in which reviews may be carried out; the manner in which a request for review must be made; the information to be included in a request; the matters to be taken into account by the Lord Advocate when carrying out reviews; and the process to be followed by the Lord Advocate when carrying out reviews.

16. This power is designed to implement Article 11 of the EU Victims Directive. The proposed rules would concern the internal procedural process of review by the Lord Advocate of decisions not to prosecute.

17. The Committee finds the power in section 2B to be acceptable in principle, and is content that it is not subject to Parliamentary procedure.

Section 2C – Restorative Justice

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Negative procedure

18. This section was inserted into the Bill by way of a non-Government amendment in the name of Alison McInnes MSP at Stage 2.

19. Section 2C provides that the Scottish Ministers must make provision, by way of regulations, for the referral of a victim and a person who has or is alleged to have committed an offence to “restorative justice” services. The regulations must, in particular, make provision for the circumstances where such a referral may be appropriate and the procedure and conditions for such a referral.

20. “Restorative justice” is defined as any process whereby the victim and a person who has or is alleged to have committed an offence are enabled, where they freely consent, to participate actively in the resolution of matters arising from an offence through the assistance of an impartial third party (subsection (4)).
21. The power concerns referral of persons to restorative justice processes, without for instance providing that the regulations may set out any substantive implications for a victim or an offender (or alleged offender). The Committee therefore considers the negative to be an acceptable level of scrutiny of the regulations.

22. The Committee finds the power in section 2C to be acceptable in principle, and is content that it is subject to the negative procedure.

Section 3(5) – Disclosure of information about criminal proceedings

<table>
<thead>
<tr>
<th>Power conferred on:</th>
<th>The Scottish Ministers</th>
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<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Order</td>
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<tr>
<td>Parliamentary procedure:</td>
<td>Negative procedure</td>
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</table>

23. In the Bill as introduced, section 3 provides that certain persons (the chief constable of the Police Service of Scotland, a prosecutor, and the Scottish Court Service) must provide certain information to victims and witnesses. Section 3(2)(a) specifies that a person who appears to be the victim of an offence or alleged offence is a “requester” under subsection (1).

24. An amendment at Stage 2 has inserted subsection (2)(aa), to provide that, where the death of the person in subsection (2)(a) was or appears to have been caused by the offence or alleged offence, a prescribed relative of that person is also a requester under subsection (1).

25. Section 3(5) allows the Scottish Ministers to prescribe by order those to be regarded as a relative under subsection (2)(aa).

26. The SDPM explains that, rather than set out a definitive list of those to be regarded as relatives for this purpose, it is considered appropriate to provide for the detail in subordinate legislation. This will allow some flexibility to modify the definition in future, without amending primary legislation.

27. The Committee finds the power in section 3(5) to be acceptable in principle, and is content that it is subject to the negative procedure.

Section 5A(4) – Certain medical examinations: gender of medical examiner

<table>
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<tr>
<th>Power conferred on:</th>
<th>The Scottish Ministers</th>
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</thead>
<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Order</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>Negative procedure</td>
</tr>
</tbody>
</table>

28. This section, which was inserted at stage 2, places a duty on a constable to inform alleged victims of certain offences, who have reported the offence to the police, that they may request that their medical examination be carried out by a registered medical practitioner of a specified gender. The constable must also
inform the registered medical practitioner of any such request. This applies to various offences listed in Schedule 3 to the Sexual Offences Act 2003.

29. Section 5A(4) gives the Scottish Ministers an order-making power to specify descriptions of other persons to be included in the reference to “registered medical practitioner”.

30. The SDPM explains that while these examinations will ordinarily be carried out by registered medical practitioners (fully registered persons under the Medical Act 1983, who hold a licence to practise under that Act), other healthcare professionals may, in the future, also be qualified to undertake such examinations. This power would provide the flexibility to reflect such changes in practice.

31. The Committee finds the power in section 5A(4) to be acceptable in principle, and is content that it is subject to the negative procedure.

Section 19(7) – Victim statements

<table>
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<tr>
<th>Power conferred on:</th>
<th>The Scottish Ministers</th>
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</thead>
<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Order</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>Negative procedure (affirmative, where the order amends or repeals any part of an Act)</td>
</tr>
</tbody>
</table>

32. Section 19(7) was inserted into the Bill at Stage 2. This inserts new subsections (13) to (16) into section 14 of the Criminal Justice (Scotland) Act 2003 (“the 2003 Act”), with regard to victim statements.

33. Subsection (13) allows the Scottish Ministers to prescribe, by order, the form and manner in which victim statements can be made. Subsection (14) allows the Scottish Ministers, when making such an order, to include such consequential, incidental or supplementary provision as is considered appropriate- and to modify any enactment.

34. Subsection (15) provides that an order under subsection (13) can be made to have effect for a period of time as specified in the order. Subsection (16) provides that an order under subsection (13), which applies for a period as specified in subsection (15), can apply to a specific geographic area or areas.

35. The intention is to allow alternative formats of victim statement to be piloted, and then extended more widely if appropriate. The power will allow for limited pilots to be conducted, and for wider changes to be implemented as necessary, without further primary legislation. It will allow for flexibility in the types of victim statements, and for the length and location of the pilot scheme to be varied.

36. The Committee finds the power in section 19(7) to be acceptable in principle, being restricted in scope to the form and manner of victim statements, and matters supplemental or consequential on that. It is also content that the power is subject to the negative procedure, and the affirmative procedure where an order amends or repeals any part of an Act.
Section 21 (new section 253B of the Criminal Procedure (Scotland) Act 1995) – The Restitution Fund

- **Power conferred on:** The Scottish Ministers
- **Power exercisable by:** Order
- **Parliamentary procedure:** Affirmative procedure

37. The new section 253B, to be inserted into the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”), provides that the Scottish Ministers shall establish a Restitution Fund which shall receive monies realised in respect of restitution orders, and disburse them to appropriate beneficiaries. Subsection (5) allows the Scottish Ministers to delegate, by order, their functions of establishing and maintaining the Restitution Fund. Subsection (6) grants the Scottish Ministers an order-making power to make further provision relating to the administration of the Fund, including specification of eligible persons and provision regarding the making of payments, the keeping of financial and other records and the making of reports to the Scottish Government.

38. The new section sets out the purpose of payments out of the Restitution Fund. This is to secure the provision of support services for persons who have been assaulted as mentioned in section 90(1) of the Police and Fire Reform (Scotland) Act 2012 (“the 2012 Act”). The new section also grants the Scottish Ministers powers to specify in subordinate legislation the persons or classes of person who shall receive support from the Restitution Fund as a means of achieving that purpose.

39. At Stage 2, a minor amendment was made to subsection (5) to reflect that the functions of the Scottish Ministers, which may be delegated by way of order, include the administration of the Restitution Fund, in addition to the establishment and maintenance of the fund.

40. There is also a minor amendment to subsection (6), so the purpose of the order-making power is stated in the introductory text explicitly to be to make further provision about the administration of the Fund.

41. The Committee finds the amendments to the powers in section 21 (new section 253B(5) and (6) of the Criminal Procedure (Scotland) Act 1995) to be acceptable in principle, and is content that the powers are subject to the affirmative procedure.

Section 22 (amended section 253G(3) and (4) of the 1995 Act) – The Victim Surcharge Fund

- **Power conferred on:** The Scottish Ministers
- **Power exercisable by:** Regulations
- **Parliamentary procedure:** Negative procedure

42. Section 22 inserts section 253G into the 1995 Act and deals with the establishment and operation of the Victim Surcharge Fund.
43. Subsection (3) of new section 253G, as introduced, provided that Scottish Ministers must establish and maintain the Victim Surcharge Fund for the purposes of securing the provision of support services for persons who have been the victims of crime. Amendments were made at Stage 2 in the new section 253G(3),(4) and (8) to refer to a person who is, or appears to be, the victim of crime and the prescribed relatives of such persons, so that support services can be secured for victims, those appearing to be victims, and prescribed relatives of such persons. The extension of support services and fund payments to relatives, both of victims and those appearing to be, are therefore proposed as changes of policy.

44. New section 253G(8) allows the Scottish Ministers to prescribe by regulation those to be regarded as a relative under the subsections (3) and (4). Amendments at Stage 2 also introduced a new subsection (9) - which provides that the regulations under subsections (3), (4) and (8) are subject to the negative procedure.

45. The SDPM explains that it has been considered appropriate to provide in subordinate legislation for the detail of who is a “prescribed relative” for these purposes. This allows the Scottish Ministers the flexibility to modify the definition.

46. Given the proposed policy changes that the fund will be extended to relatives of victims, and also of those appearing to be victims at the time, the Committee accepts that this power has a fairly narrow application in relation to section 22.

47. The Committee therefore finds the power in section 22 (amended section 253G(3) and (4) of the Criminal Procedure (Scotland) Act 1995) to be acceptable in principle, and is content that it is subject to the negative procedure.

Section 22 (new section 253G(5) and (6) of the 1995 Act) – The Victim Surcharge Fund

<table>
<thead>
<tr>
<th>Powers conferred on:</th>
<th>The Scottish Ministers</th>
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<tbody>
<tr>
<td>Powers exercisable by:</td>
<td>Order and regulations</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>Affirmative procedure</td>
</tr>
</tbody>
</table>

48. Section 22 inserts section 253G into the 1995 Act and deals with the establishment and operation of the Victim Surcharge Fund. Subsection 253G(5) allows the Scottish Ministers to delegate, by order, their functions of establishing and maintaining the Victim Surcharge Fund.

49. Subsection (6) grants the Ministers powers to manage the Fund, by making orders connected with its operation, administration, records and reports, and as to how payments are to be made.

50. A minor amendment was made at Stage 2 to subsection (5). This reflects that the functions of the Scottish Ministers, which may be delegated by order, include
the administration of the Fund, in addition to the establishment and maintenance of the fund.

51. The provision in subsection (6) was also amended, so that the purpose of the order-making power is stated explicitly in the introductory words i.e. that further provision may be made about the administration of the Fund. This has been viewed as a drafting improvement.

52. A further omission in subsection (6) at Stage 2 has narrowed the scope of the powers to a degree. In the Bill at introduction, the order-making power could be used to make provision specifying persons or classes of person to, or in respect of, whom payments may be made out of the fund. It was considered that the restrictions on the face of the Bill relating to the persons to whom payments can be made (in subsection (4) of 253G) were sufficient and such provision was unlikely to be required.

53. Subsection (6), as introduced, provided that the further provision for the establishment, maintenance and operation of the Surcharge Fund would be by order. In contrast, new section 253F(2) (also inserted into the 1995 Act by section 22 of the Bill), provided that Scottish Ministers may prescribe by regulations the offences, sentences and circumstances to which the victim surcharge is applicable. Subsection (6) was amended at Stage 2 to enable the Scottish Ministers to exercise these powers together, by regulations.

54. The changes made at Stage 2 cover relatively minor amendment to the powers in relation to the Victim Surcharge, or deal with technical and drafting matters.

55. The Committee therefore finds the amendments to the powers in section 22 (new section 253G(5) and (6) of the Criminal Procedure (Scotland) Act 1995) to be acceptable in principle, and is content that the powers are subject to the affirmative procedure.
10 December 2013

Dear Duncan

VICTIMS AND WITNESSES (SCOTLAND) BILL: NATIONAL CONFIDENTIAL FORUM: STAGE 2 CONSIDERATION

I write in response to the Health and Sport Committee’s Stage 2 Official Report of 5 November 2013, on the provisions in the Victims and Witnesses (Scotland) Bill to establish the National Confidential Forum (NCF).

I would like to thank the Committee for its careful consideration of these provisions in the Bill, and welcome the Committee’s agreement to the amendments as proposed.

I would like to take the opportunity prior to the Stage 3 debate in the Parliament on 12 December 2013 to respond to two points that have been raised by the Committee.

Firstly I will respond to Nanette Milne’s question about broadening the remit of the NCF to cover foster care. As the Committee is aware our intention has always been for the NCF to work on the basis of the experience of the ‘Time to be Heard’ pilot, which focused on institutional care. It was evident in testimonies given by participants in the Pilot Forum that there were particular issues for many former residents arising from the experience of having been placed in institutional care as children. I recognise that institutional childcare, particularly in past times, has had very distinctive features – for example, isolation, stigma, and cultures of severe punishment. I also consider that disclosing abuse in institutional childcare may have carried with it specific adverse outcomes for children - a climate of denial and of ‘closing ranks’.

Survivors of abuse in institutional child care have campaigned vigorously and with great courage to improve the situation for adults who were abused as children in institutions. It is extremely important that we respond, specifically and appropriately, to the calls from former residents of institutional care that their particular experiences are recognised and acknowledged. I have always been clear that widening the scope of the NCF to include foster care and other non-institutional care settings could lead to a significant risk to the
effectiveness of the NCF in terms of expertise and resources, and would dilute the intended focus of its work for those who have experienced institutional child abuse.

Following the Committee’s recommendation at Stage 1, I commissioned a report from the Centre for Excellence for Looked-after Children in Scotland (CELCIS). The final version of this report was received on 5 December 2013. A summary of the findings are included in the Annex to this letter. Five completed responses were received from individuals who had been in foster care only as children. It is my view that the low number of respondents is further evidence that widening the scope of the NCF is not required. The findings therefore support our view that the focus of the NCF should remain on institutional care settings as defined in the Bill. Nevertheless, the report contains useful information that can inform the implementation of the NCF and we will seek to ensure that account is taken of this helpful material.

Secondly I will respond to Malcolm Chisholm’s point about the potential for confusion at paragraph 7 of the Bill concerning eligibility. Malcolm Chisholm asked ‘would it not be simpler if the bill said that in the new schedule 1A, “institutional care” means a care or health service of a description or type prescribed by order, and then said what the order must prescribe?’

I have considered this suggestion carefully but take the view that this does not meet the Government’s policy intention. The intention is not that an order made in exercise of the power under paragraph 7(3) of that schedule will prescribe a care or health service which meets only the conditions mentioned in paragraph 7(4). In order to fall within the meaning of “institutional care” for the purposes of the schedule, a care or health service must firstly meet the conditions set out in paragraph 7(4) and secondly be of a description or type which is prescribed by order made by the Scottish Ministers. It may help Committee members to know that we will be consulting stakeholders on how we can best ensure that the order reflects the very wide variety of institutional care establishments for children that offer a care or health service now or offered such a service in the past.

Michael Matheson
1. Consultation with adults in foster care as children – Summary of report

We received the final version of this report on 5 December. The report is also available via this link: http://www.survivorscotland.org.uk/library/item/consultation-with-adults-in-foster-care-as-children/

The consultation survey was widely disseminated to local authority and third sector organisations who provide services to those who were in care as children. Participants were offered the opportunity to attend a local focus group or complete a telephone consultation. Despite this, very few respondents came forward:

Of the 29 people who viewed the survey questionnaire
  8 individuals chose to complete the survey questionnaire
  8 of those individuals had been in care
  5 had been in foster care only
    1 had been in foster care then adopted
    1 had been in foster care and residential placements
    1 had been ‘boarded out’ and in residential care

The report suggests that the low number of respondents can largely be explained by two factors: first, that people may not recognise that they were ‘fostered’ or ‘boarded out’ and the isolated nature of their experience may leave some unaware that the NCF is relevant to them; and, second, that people were experiencing ‘consultation fatigue’ and chose not to participate as they had taken part in other consultations. Another suggestion is that some survivors assume that foster care is already considered to be ‘residential care’, and that eligibility to participate in the NCF was expected as part of their overall ‘in care’ experience.

There was also confusion among the participants about the purpose of the NCF. This highlights the need for the Head of the NCF to ensure correct and appropriate information about its functions is produced and is readily accessible.

Of those who did respond, there were positive statements in relation to the NCF. The report suggests that there is enthusiasm about the NCF and the work it will carry out, for example in raising public awareness, in educating existing childcare service providers, and in the recording of individuals’ experiences in care. Three of the participants also indicated that they would prefer a separate forum for those placed in foster care as children.

Individuals were also asked to comment on the importance of issues raised by those involved in the ‘Time to be Heard’ Pilot Forum, and whether these should be considered by the NCF. Many respondents agreed that access to records, creating a historic record, and apology from agencies should be given consideration.

Finally, other useful responses relating to the purpose of the NCF and its operations were compiled, including the importance of record keeping, assurances of confidentiality, and the type of support needed before, during, and after taking part in the NCF. Many respondents also agreed that issues including access to records, creating a historical record, and apology from agencies were important to consider in a confidential forum.
Victims and Witnesses (Scotland) Bill

Marshalled List of Amendments selected for Stage 3

The Bill will be considered in the following order—

Sections 1 to 31 Long Title

Amendments marked * are new (including manuscript amendments) or have been altered.

Before section 1

Margaret Mitchell

25 Before section 1, insert—

<Definition of victim>

(1) For the purposes of this Act, a victim is a person who has suffered harm—

(a) because an offence has, or is alleged to have, been committed against the person,

(b) because the person is a prescribed relative or dependent of a person who has died because an offence has, or is alleged to have, been committed against that person, or

(c) as a direct result of intervening—

(i) to help another person against whom an offence has, or is alleged to have, been committed, or

(ii) to prevent an offence, or alleged offence, being committed against another person.

(2) For the purposes of subsection (1), “harm” includes—

(a) physical, mental or emotional harm,

(b) economic loss,

(c) loss or damage to tangible or intangible property.

(3) In subsection (1)(b), “prescribed” means prescribed by the Scottish Ministers by order.

(4) An order under subsection (1)(b) is subject to the negative procedure.>

Section 1

Elaine Murray

1 In section 1, page 1, line 26, at end insert—

< ( ) In having regard to the principles mentioned in subsection (3), each person mentioned in subsection (2) must consider the specific needs, rights and wishes of a child who is or appears to be a victim or witness in relation to a criminal investigation or criminal proceedings.>
Elaine Murray

2  In section 1, page 1, line 26, at end insert—
   <( ) In having regard to the principle mentioned in subsection (3)(a), each person mentioned
   in subsection (2) must take steps to provide information to a child who is or appears to
   be a victim or witness in relation to a criminal investigation or criminal proceedings in
   such form as the child may reasonably require.>

Elaine Murray

26  In section 1, page 1, line 28, at end insert—
   <( ) In this section, “child” means a person under 18 years of age.>

Section 2

Elaine Murray

3  In section 2, page 2, line 8, at end insert—
   <( ) Each person mentioned in subsection (2) in setting and publishing standards under
   subsection (1), in so far as the standards could relate to a child, must do so in such a way
   that the welfare of a child is of paramount consideration.>

Elaine Murray

27  In section 2, page 2, line 30, at end insert—
   <“child” means a person under 18 years of age.>

Section 2A

Elaine Murray

4  In section 2A, page 3, line 8, at end insert—
   <( ) In preparing a report under subsection (2), the person must, so far as reasonably
   practicable, ascertain and have regard to the views of persons who are or appear to be
   victims or witnesses in relation to a criminal investigation or criminal proceedings.>

Elaine Murray

5  In section 2A, page 3, line 19, at end insert—
   <( ) Before making regulations under subsection (4), the Scottish Ministers must consult
   those persons mentioned in section 2(2).>

Elaine Murray

6  In section 2A, page 3, line 19, at end insert—
   <( ) The person may in consequence of a report under subsection (2) revise the standards set
   under section 2(1), so as to meet the needs of persons who are or appear to be victims or
   witnesses in relation to a criminal investigation or criminal proceedings.
Where the person revises the standards set under section 2(1) the person must publish those revised standards.

After section 2A

Elaine Murray

After section 2A, insert—

Child witnesses: guidance

(1) Each person mentioned in section 2(2) (“the publisher”) must prepare and publish guidance setting out how, in carrying out the functions of the person, the needs, rights and wishes of a child who is or appears to be a victim or witness (“child witness”) will be considered in relation to a criminal investigation or criminal proceedings.

(2) In particular, such guidance must set out how the needs, rights and wishes of a child witness will be considered in—

(a) having regard to the principles mentioned in section 1(3),
(b) setting and publishing standards under section 2(1),
(c) the provision of information to a child witness in relation to a criminal investigation or criminal proceedings.

(3) Before publishing guidance under subsection (1), the publisher must consult such persons as appear to the publisher to have a significant interest in the guidance.

(4) The publisher must lay a copy of guidance prepared under subsection (1) before the Parliament as soon as reasonably practicable.

(5) The publisher may vary or revoke any guidance published under subsection (1).

(6) In this section, “child” means a person under 18 years of age.

Margaret Mitchell

After section 2A, insert—

Co-ordination of support for victims and witnesses

The persons mentioned in subsection (2) (“the persons”) must take steps to co-ordinate the provision of support to a person who is or appears to be a victim or witness in relation to a criminal investigation or criminal proceedings and, in particular, take steps—

(a) to co-ordinate the provision of information to a victim or witness,
(b) in so far as appropriate, to share information between the persons in relation to a victim or witness,
(c) to offer a victim or witness a single point of contact on behalf of all the persons, with a view to improving the experience of victims and witnesses in relation to criminal investigations and criminal proceedings.

The persons are—

(a) the Lord Advocate, but only in relation to functions relating to the investigation and prosecution of crime,
(b) the chief constable of the Police Service of Scotland,
(c) the Scottish Court Service.>

Section 2C

Kenny MacAskill

8 Leave out section 2C and insert—

<Restorative justice

(1) The Scottish Ministers may issue guidance about—

(a) the referral of a person who is, or appears to be, a victim in relation to an offence
and a person who has, or is alleged to have, committed the offence to restorative
justice services, and

(b) the provision of restorative justice services to those persons.

(2) Any person, or description of person, prescribed by the Scottish Ministers by order must
have regard to any guidance issued by the Scottish Ministers under subsection (1).

(3) In this section, “restorative justice services” means any process in which the persons
such as are mentioned in subsection (1)(a) participate with a view to resolving any
matter arising from the offence or alleged offence with the assistance of a person who is
unconnected with either person or the offence or alleged offence.

(4) An order under subsection (2) is subject to the negative procedure.>

Section 3

Kenny MacAskill

9 In section 3, page 4, line 40, at end insert—

<( ) In the case where the qualifying information falls within paragraph (a), (b) or (c) of
subsection (6), a qualifying person must not comply with a request under subsection (1)
in so far as disclosure of the qualifying information would require disclosure of
information supplied by a Minister of the Crown or a department of the Government of
the United Kingdom that is held in confidence by the person.>

Section 5

Kenny MacAskill

10 In section 5, page 6, line 26, leave out <60> and insert <59ZL>

Kenny MacAskill

11 In section 5, page 6, line 31, leave out <consisting of> and insert <the commission of which
involves>
Section 5A

Kenny MacAskill

13 In section 5A, page 7, line 15, leave out <60> and insert <59ZL>

After section 5A

Graeme Pearson

12* After section 5A, insert—

Disclosure of sensitive personal information

(1) The Lord Advocate must prepare and publish guidance on the circumstances in which sensitive personal information in relation to a person who is or appears to be a victim of an offence listed in any of paragraphs 36 to 59ZL of Schedule 3 to the Sexual Offences Act 2003 (“the victim”) may be requested and disclosed in relation to a criminal investigation or criminal proceedings.

(2) Guidance published under subsection (1) must make provision in particular about—

(a) the circumstances in which it may be considered appropriate to request disclosure of such information,

(b) the manner by which such a request must be made,

(c) subject to paragraph (d), the need to obtain the free and informed consent of the victim to such a disclosure,

(d) the circumstances in which it may be appropriate for such information to be disclosed without the consent of the victim,

(e) the persons to whom such information may be disclosed and how this may vary in different circumstances,

(f) the support that must be made available to the victim where disclosure of such information is requested.

(3) Before issuing guidance under subsection (1), the Lord Advocate must consult such persons as the Lord Advocate considers appropriate.

(4) Guidance published under subsection (1) must be laid before the Parliament as soon as reasonably practicable.

(5) The Lord Advocate may vary or revoke any guidance issued under subsection (1).

(6) In this section, “sensitive personal information” includes information in a health, social work or education record.

Margaret Mitchell

29 After section 5A, insert—

Health and other sensitive information

Evidence relating to sexual offences: health and other sensitive information
(1) This section applies where a relevant person seeks to access health or other sensitive information about a person who is or appears to be the victim of an offence of a type mentioned in subsection (6) in relation to—
   (a) a criminal investigation,
   (b) criminal proceedings.
(2) The person must, in relation to the provision of such information, be given an opportunity to—
   (a) obtain legal advice,
   (b) appoint a legal representative.
(3) Where the person appoints a legal representative under subsection (2)(b), the legal representative must be given an opportunity to submit evidence on whether access to the health or other sensitive information should be provided.
(4) A legal representative appointed under subsection (2)(b) may provide such evidence—
   (a) in writing,
   (b) at any relevant hearing.
(5) The Scottish Ministers may by regulations establish, maintain and administer a fund for the purpose of securing the provision of—
   (a) legal advice under subsection (2)(a),
   (b) legal representation under subsection (2)(b),
   in relation to a person who is or appears to be a victim of an offence of a type mentioned in subsection (6).
(6) The types of offence are—
   (a) an offence under paragraph 36 of Schedule 3 to the Sexual Offences Act 2003,
   (b) an offence under paragraph 59D of Schedule 3 to the Sexual Offences Act 2003,
   (c) an offence listed in any of paragraphs 37 to 59C of Schedule 3 to the Sexual Offences Act 2003,
   (d) an offence listed in any of paragraphs 59E to 59ZL of Schedule 3 to the Sexual Offences Act 2003.
(7) In this section—
   “health information” means information which relates to the physical or mental health or condition of a person,
   “other sensitive information” includes information in a social work record, an education record, a local authority care record and a counselling record.
   “relevant person” means—
   (a) a constable,
   (b) a prosecutor (as defined in section 307(1) of the 1995 Act),
   (c) a person accused of an offence or the legal representative of the person so accused.
(8) Regulations under subsection (5) are subject to the affirmative procedure.
(9) This section comes into force on such day as the Scottish Ministers may by order appoint, but different days may be appointed in relation to the different offences listed in subsection (6).

Margaret Mitchell
30 After section 5A, insert—

<Pilot scheme>

(1) The Scottish Ministers may by order (the “pilot order”) appoint a day on which section (Evidence relating to sexual offences: health and other sensitive information) (1)(b), (2), (3), (4), (5), (6)(a) and (b), (7), (8) and 9 are to come into force in respect of hearings at the High Court of Justiciary sitting at a location specified in the order.

(2) The pilot order may bring section (Evidence relating to sexual offences: health and other sensitive information) (1)(b), (2), (3), (4), (5), (6)(a) and (b), (7), (8) and 9 into force with such modifications as the Scottish Ministers consider appropriate.

(3) The pilot order must be in force for such period as the Scottish Ministers consider appropriate but for no less than a period of six months.

(4) An order under subsection (1) is subject to the affirmative procedure.

Margaret Mitchell
31 After section 5A, insert—

<Report on pilot scheme>

(1) The Scottish Ministers must no later than six months following the completion of the pilot scheme publish a report setting out—

(a) the number of occasions when legal advice was obtained under section (Evidence relating to sexual offences: health and other sensitive information) (2)(a),

(b) the number of occasions when a legal representative was appointed under section (Evidence relating to sexual offences: health and other sensitive information) (2)(b),

(c) a description of the type of information that was sought by a relevant person on each occasion under section (Evidence relating to sexual offences: health and other sensitive information) (1),

(d) the number of occasions when information sought under section (Evidence relating to sexual offences: health and other sensitive information) (1) was admitted as evidence at any relevant hearing.

(2) The Scottish Ministers must lay a copy of the report published under subsection (1) before the Parliament as soon as is reasonably practicable.

Section 6

Kenny MacAskill
14 In section 6, page 8, line 3, leave out <60> and insert <59ZL>
Kenny MacAskill

15 In section 6, page 8, line 10, leave out <consisting of> and insert <the commission of which involves>

Section 7

Kenny MacAskill

16 In section 7, page 9, line 7, at end insert—

<(  ) after subsection (3), insert—

“(3A) In the case where a vulnerable witness notice under subsection (2)(a) specifies only a standard special measure, subsection (3)(a) does not apply.”.>

Section 19

Graeme Pearson

17 In section 19, page 14, line 28, at end insert—

<(  ) After subsection (5), insert—

“(5A) A victim statement or a statement supplementary to, or in amplification of, the victim statement may be made—

(a) in writing,
(b) by way of oral representation,
(c) by such other means as the Scottish Ministers may prescribe by order.

(5B) The Lord President may issue guidance as to how representations under subsection (5A)(b) and (c) may be made.

(5C) Where a person chooses to make a statement under subsection (5A)(b), the person may do so by use of a live television link.

(5D) Where a person chooses to make a statement by way of a live television link the court must make such arrangements as seem to it appropriate for the person to give evidence by means of such a link.

(5E) An order under subsection (5A)(c) must not be made unless a draft of the instrument has been laid before, and approved by a resolution of, the Parliament.”.>

Elaine Murray

32 In section 19, page 14, line 36, at end insert—

<(  ) after “(6)”, insert “and (11B)(b)”,>

Elaine Murray

33 In section 19, page 15, line 4, leave out from beginning to end of line 30 and insert—

“(11A) In so far as is reasonably practicable and taking account of the age and maturity of the child, a child who has not attained the age of 12 years must be given an opportunity to make a victim statement.
(11B) Where a child is not of sufficient age and maturity under subsection (11A)—
   (a) any victim statement must instead be made by a parent or parents of the child, or
   (b) where a statement cannot be made by a person under paragraph (a), the statement may be made by the qualifying person highest listed in subsection (10).

(11C) A child who is given an opportunity to make a victim statement by virtue of this section must be provided with such support as the child needs to enable the child to make the statement.

(11D) In subsection 11B(a), “parent” has the same meaning as in the Education (Scotland) Act 1980”.

Kenny MacAskill

18 In section 19, page 16, line 5, at end insert—

<(7A) Section 16 of the 2003 Act (victim’s right to receive information concerning release etc. of offender) is amended in accordance with subsections (7B) to (7F).

(7B) In subsection (5)—

   (a) in paragraph (a)—
      (i) after “person”, insert “to be given the information”, and
      (ii) after “Act”, insert “(except that, in the case where a qualifying person is a child who has not attained the age of 12 years, paragraph (a)(i) of the said section 14(6) is to be construed as if the reference to the qualifying person were to a person who cares for the child)”,

   (b) in paragraph (b)(ii)—
      (i) after “child”, insert “who has not attained the age of 12 years”,
      (ii) the words from “such” to “paragraph (b)” are repealed,
      (iii) after “person” insert “to be given the information”, and
      (iv) for the words from “mentioned”, where it second occurs, to “cares”, “substitute “references to the person who cares for the child”,

   (c) in paragraph (b)(i), after “sub-paragraph”, where it second occurs, insert “(taking him to be the person “afforded an opportunity”)”, and

   (d) in paragraph (b) the words “(taking him to be the person “afforded an opportunity”)” are repealed.

(7C) In subsection (6)—

   (a) for “and (8) to (12)” substitute “to (11)”, and
   (b) after “relation to”, where it first occurs, insert “paragraphs (a) and (b)(i) of”.

(7D) Subsection (7) is repealed.

(7E) In subsection (8), for “(7)” substitute “(5)(a) and (b)(ii)”.

(7F) After subsection (8), add—

“(9) The Scottish Ministers may by order amend this section by substituting for the age for the time being specified in any part of this section such other age as they think fit.”.

John Finnie

18A As an amendment to amendment 18, line 27, after <for> insert—

(a) the person for the time being specified in any part of this section to whom information may be made available such other person as they think fit,

(b)>

John Finnie

18B As an amendment to amendment 18, line 29, at end insert—

<(10) The Scottish Ministers may issue guidance on the support to be provided to children receiving information under this section.

(11) Before issuing guidance under subsection (10), the Scottish Ministers must consult such persons as they consider appropriate.

(12) The Scottish Ministers may vary or revoke any guidance issued under subsection (10).”.

Section 20

Elaine Murray

19 In section 20, page 16, line 13, at end insert—

<(4B) Before making a compensation order, the court must take steps to ascertain the views and wishes of the victim.

(4C) No compensation order may be made where the victim notifies the court that the victim does not wish to receive compensation from the person convicted of the offence.

(4D) For the purposes of subsections (4B) and (4C), “victim” has the meanings given by subsections (1A) and (1C).”.

Section 21

Alison McInnes

34* In section 21, page 16, line 20, at end insert—

<( ) of assault of a person acting in a capacity mentioned in section 1(3)(zb), (b) or (c) of the Emergency Workers (Scotland) Act 2005 (assaulting certain providers of emergency services) under section (1)(1) of that Act.>

Alison McInnes

35* In section 21, page 16, line 39, insert at end <, and
persons acting in a capacity mentioned in section 1(3)(zb), (b) and (c) of the
Emergency Workers (Scotland) Act 2005 who have been assaulted as mentioned
in section 1(1) of that Act.>

Kenny MacAskill

20 In section 21, page 17, line 2, at end insert <or>

Section 23

Graeme Pearson

21 In section 23, page 21, line 28, at end insert—

<(  ) after subsection (8), insert—

“(9) Subsection (10) applies where a person who is entitled to receive information
under this section as respects a convicted person has intimated a desire to
receive it.

(10) The person to be given the information must be afforded an opportunity to
intimate the form in which that person reasonably requires to receive such
information.”>

Section 24

Graeme Pearson

22 In section 24, page 21, line 37, after second <to> insert—

<(  ) the convicted person by way of video link as respects such release
and as to the conditions which might be specified in the licence in
question,

(  )>

Graeme Pearson

23 In section 24, page 22, line 4, after <made> insert <, including how such representations to the
offender may be made by way of video link>

After section 25

Graeme Pearson

24 After section 25, insert—

<Provision of information to victims in court proceedings: solemn cases>

Guidance on provision of information to victims in court proceedings: solemn cases

(1) The Scottish Ministers may issue guidance to the Scottish Court Service on minimum
standards to apply about the provision of information in relation to solemn proceedings
to a person who is or appears to be a victim in relation to such proceedings.

(2) The Scottish Court Service must have due regard to any guidance issued under
subsection (1).
(3) Before issuing guidance under subsection (1), the Scottish Ministers must consult such persons as they consider appropriate.

(4) The Scottish Ministers must lay a copy of any guidance issued under subsection (1) before the Parliament as soon as is reasonably practicable.

(5) The Scottish Ministers may vary or revoke any guidance issued under subsection (1).
Groupings of Amendments for Stage 3

This document provides procedural information which will assist in preparing for and following proceedings on the above Bill. The information provided is as follows:

- the list of groupings (that is, the order in which amendments will be debated). Any procedural points relevant to each group are noted;
- the text of amendments to be debated during Stage 3 consideration, set out in the order in which they will be debated. **THIS LIST DOES NOT REPLACE THE MARSHALLED LIST, WHICH SETS OUT THE AMENDMENTS IN THE ORDER IN WHICH THEY WILL BE DISPOSED OF.**

Groupings of amendments

**Note:** The time limits indicated are those set out in the timetabling motion to be considered by the Parliament before the Stage 3 proceedings begin. If that motion is agreed to, debate on the groups above each line must be concluded by the time indicated, although the amendments in those groups may still be moved formally and disposed of later in the proceedings.

**Group 1: Definition of victim**
25

**Group 2: Principles, standards of service and provision of information:**
consideration of children
1, 2, 26, 3, 27, 7

**Group 3: Standards of service: reports**
4, 5, 6

**Group 4: Provision of information and support for victims and witnesses**
28, 21, 24

Debate to end no later than 45 minutes after proceedings begin

**Group 5: Restorative justice**
8

**Group 6: Minor and technical**
9, 10, 11, 13, 14, 15, 16, 20
Group 7: Evidence in relation to sexual offences: disclosure of information
12, 29, 30, 31

Group 8: Victim's statements: right to make statements other than written statements
17

Debate to end no later than 1 hour and 25 minutes after proceedings begin

Group 9: Rights of children to make victim statements and receive information on offender release
32, 33, 18, 18A, 18B

Group 10: Compensation orders
19

Group 11: Restitution orders: application of the fund
34, 35

Group 12: Life prisoners: victim’s rights to make oral representations to the convicted person
22, 23

Debate to end no later than 2 hours after proceedings begin
Note: (DT) signifies a decision taken at Decision Time.

Business Motion: Joe FitzPatrick, on behalf of the Parliamentary Bureau, moved S4M-08586—That the Parliament agrees that, during stage 3 of the Victims and Witnesses (Scotland) Bill, debate on groups of amendments shall, subject to Rule 9.8.4A, be brought to a conclusion by the time limit indicated, that time limit being calculated from when the stage begins and excluding any periods when other business is under consideration or when a meeting of the Parliament is suspended (other than a suspension following the first division in the stage being called) or otherwise not in progress:

Groups 1, 2, 3 and 4: 45 minutes,
Groups 5, 6, 7 and 8: 1 hour and 25 minutes,
Groups 9, 10, 11 and 12: 2 hours.

The motion was agreed to.

Victims and Witnesses (Scotland) Bill - Stage 3: The Bill was considered at Stage 3.

The following amendments were agreed to (without division): 8, 9, 10, 11, 13, 14, 15, 16, 18A, 18, 19, 20.

The following amendments were disagreed to (by division)—

25 (For 13, Against 90, Abstentions 0)
1 (For 49, Against 62, Abstentions 0)
2 (For 49, Against 62, Abstentions 0)
3 (For 49, Against 62, Abstentions 0)
4 (For 46, Against 63, Abstentions 0)
5 (For 47, Against 63, Abstentions 0)
6 (For 47, Against 63, Abstentions 0)
7 (For 48, Against 62, Abstentions 0)
28 (For 46, Against 63, Abstentions 0)
12 (For 49, Against 61, Abstentions 0)
29 (For 49, Against 61, Abstentions 0)
30 (For 48, Against 61, Abstentions 0)
31 (For 49, Against 61, Abstentions 0)
32 (For 35, Against 73, Abstentions 0)
33 (For 35, Against 72, Abstentions 0)
18B (For 48, Against 60, Abstentions 0)
34 (For 48, Against 57, Abstentions 0)
Amendment 17 was moved and, with the agreement of the Parliament, withdrawn.

The following amendments were not moved: 26 and 27.

The Presiding Officer and Deputy Presiding Officer extended the time-limits under Rules 9.8.4A(a) and (c).

**Victims and Witnesses (Scotland) Bill:** The Cabinet Secretary for Justice (Kenny MacAskill) moved S4M-08562—That the Parliament agrees that the Victims and Witnesses (Scotland) Bill be passed.

After debate, the motion was agreed to (DT).
On resuming—

**Victims and Witnesses (Scotland) Bill: Stage 3**

*The Presiding Officer (Tricia Marwick):* Good afternoon. The first item of business this afternoon is stage 3 proceedings on the Victims and Witnesses (Scotland) Bill. Members should have the bill as amended at stage 2, which is SP bill 23A; the marshalled list of amendments, which is SP bill 23A-ML; and the groupings list, which is SP bill 23A-G.

The division bell will sound and proceedings will be suspended for five minutes for the first division of the afternoon. The period of voting for the first division will be 30 seconds. Thereafter, I will allow a voting period of one minute for the first division after a debate. Members who want to speak in the debate on any group of amendments should press their request-to-speak buttons as soon as possible after I call the group.

Members should now refer to the marshalled list of amendments.

**Before section 1**

*The Presiding Officer:* Group 1 is on the definition of “victim”. Amendment 25, in the name of Margaret Mitchell, is the only amendment in the group.

**Margaret Mitchell (Central Scotland) (Con):** The bill confers a range of rights on victims but fails to provide a definition of “victim”. Amendment 25 reflects the Justice Committee’s recommendation in its stage 1 report that

“the Scottish Government gives full consideration to including a definition of ‘victim’ on the face of the Bill.”

At stage 2, I lodged an amendment that was similar to amendment 25. The Cabinet Secretary for Justice said that he was open to including a definition in the bill, but he identified areas of my amendment that might benefit from clarification. That was helpful.

In response to the cabinet secretary’s comments, I redrafted the amendment to make a number of changes. Amendment 25 makes it clear that when referring to an alleged crime—that is, one that has not yet been proved in court—the use of the term “victim” would not prejudice the presumption of innocence. The use of the word “alleged” in the proposed definition avoids the risk that referring to a “victim” before a trial or a conviction could prejudice the justice process.

The proposed definition refers to damage to “tangible or intangible property” and extends the
definition of “victim” to a prescribed relative, but only in cases in which a person has died as a result of a crime.

The cabinet secretary expressed concern that the amendment that I lodged at stage 2 was not future proofed, because the nature of crime and victims might change. In reality, no legislation can be drafted to cover every eventuality. As is the case with any piece of legislation, if changes are necessary further amendment can be made. The important point is that by linking the definition to offences we would ensure that it automatically applied to victims as the nature of crime changed and when new offences were legislated for.

Amendment 25 is intended to cover natural persons and legal entities in three sets of circumstances: when a crime is directly committed against the person; when a relative or dependant of a person suffers harm as a result of a crime that was committed against the person; and when a person suffers as a result of intervening to help another person, against whom a crime is being committed.

“Harm” is defined in such a way as to cover physical or emotional harm, economic loss and damage to property.

It seems strange that a bill that confers a range of rights on victims of crime does not include a definition of “victim”. The inclusion of a clear definition would help to provide clarity for individuals in what might be traumatic circumstances, thereby helping them to avoid further distress and anxiety. There is little point in making things easier for victims if we are unclear about who victims are.

A definition would assist the police, the Crown and the Scottish Court Service in determining and complying with their duties and obligations under the bill. The Law Society of Scotland deemed such an amendment necessary and said, as far back as stage 1, that a clear definition would be crucial if the bill is to deliver on its promise to “put victims’ interests at the heart of on-going improvements to the justice system”.

I hope that that, coupled with the fact that the cabinet secretary’s helpful comments at stage 2 have been incorporated into the new definition, will enable the Scottish Government to support amendment 25.

I move amendment 25.

Roderick Campbell (North East Fife) (SNP): While it is true that the Justice Committee drew attention to the fact that the Criminal Procedure (Scotland) Act 1995 does not use the term “victim” in relation to matters that apply pre-conviction, using instead the term “complainer”, nevertheless, for the purposes of the bill, it is appropriate not to be too prescriptive.

Moreover, although subsection (1) of the amendment has the victim as a person

“who has suffered harm—”

including, in subsection (2) of the amendment,

“loss or damage to ... property”—

the rest of the amendment talks about offences against the “person”, implying, at least to me, that where someone has suffered damage to property alone, he would not be a victim. In my view, therefore, the amendment is defectively drafted and should be rejected.

Elaine Murray (Dumfriesshire) (Lab): I, too, would have difficulty in supporting the amendment as it stands. I said at stage 2 that I thought that in order to give it more flexibility, any definition would be better made by regulation than in the bill.

I am also concerned that the definition in amendment 25 is rather tight. For example, a victim can be

“a prescribed relative ... of a person who has died”.

However, it could be argued that the partner of someone who has been raped is also, in some senses, a victim. The definition in amendment 25 is too tight and we are unable to support it.

The Cabinet Secretary for Justice (Kenny MacAskill): Amendment 25 would insert an overarching definition of “victim” into the bill. The amendment is a revised version of an amendment lodged at stage 2. I welcome the consideration that Margaret Mitchell has evidently given to the points raised last month.

That said, I remain of the view that by attempting to insert into the bill an overarching definition of such a clearly understood term, we significantly complicate matters and risk inadvertently excluding individuals who should benefit from the proposals in the bill or including those who would not fall into any reasonable interpretation of “victim”. After all, as I have argued throughout the passage of the bill, the word “victim” is used and understood without definition by justice organisations and victim support organisations throughout Scotland.

In relation to concerns that the word “victim” would negatively impact on the presumption of innocence, I am still of the view that by providing clarity in the context of individual sections, no assumption could be made that the accused is guilty. The relevant sections in the bill refer for example to

“a person who is or appears to be the victim of an offence”
or to circumstances in which an offence
“is alleged to have been committed against the person”, with the reference tailored to the context.

Furthermore, the presumption of innocence is a right of the accused in every criminal case. That is enshrined in article 6(2) of the European convention on human rights and there are no circumstances in which that right can be departed from.

I note that amendment 25 has no consequential amendments. That means that, should it be agreed, it will sit alongside the section-specific definitions of “victim” in the bill, including the power for the Scottish ministers to prescribe relatives of victims in certain sections. To my mind, that will cause uncertainty and confusion.

While there has clearly been an attempt to deal with some of the concerns raised about the amendment lodged at stage 2, there remain similar concerns with amendment 25. There is still an implication that offences against property are not covered by the term “victim”, despite the inclusion of damage to property as a form of harm in subsection (2) of the amendment.

In subsection (1)(a) of the amendment, a person can be considered a victim only where the person has suffered harm

“because an offence has, or is alleged to have, been committed against the person”.

There is no mention of offences against property.

For those reasons, I consider it better to qualify and explain the use of the term “victim” only where necessary and to make it applicable to the circumstances, as in the bill as at present. I invite Margaret Mitchell to withdraw amendment 25.

Margaret Mitchell: I have listened carefully to the points that have been made but there is a point of principle here. It seems to me that including the definition of “victim” in the bill would be helpful to the very people that the bill serves to help, which is the victims themselves. A number of areas of concern have been raised. If someone is intent on finding fault, they will do. Nothing that has been mentioned could not be rectified. For that reason, I will press the amendment.

The Presiding Officer: The question is, that amendment 25 be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division. I suspend the proceedings for five minutes to allow the division bell to be rung and members to return to the chamber.
Section 1—General principles

The Presiding Officer: We move to group 2, on principles, standards of service and the provision of information, taking children into consideration. Amendment 1, in the name of Elaine Murray, is grouped with amendments 2, 26, 3, 27 and 7.

Elaine Murray: Amendments 1 and 2 aim to ensure that the specific needs, wishes and interests of children are taken into account by those persons who are required to fulfil the functions that are set out in section 1. Although much has improved in the experience of children as victims and witnesses in the criminal justice system, and despite there being significant good practice, cases still arise in which children and young people and their families say that their experience of the court case has traumatised them all over again. That could be avoided simply by asking children and young people how best to communicate with them and where they would like to meet.

A lack of active involvement by children and young people in selecting the most appropriate special measures for them is commonplace. Even when that does happen, it is often the case that not enough time is given to enable a child victim or witness to give an informed view of what might work best for them.

One key area of concern is the provision of information. Evidence shows that more than 60 per cent of people in the youth justice estate have difficulties with speech, language or communication. That makes it even more important for information to be made accessible. There is currently no requirement on anyone involved in criminal proceedings to communicate with children and young people in formats and ways that best suit their needs. That might include sending text messages about the date of a trial, sending out leaflets or emailing them links to videos about going to court, rather than just sending out written material.

The purpose of amendment 3 is to require that, in respect of victims and witnesses who are children, that must be done “setting and publishing standards” “in such a way that the welfare of a child is of paramount consideration.”

Many child victims and witnesses complain about the long waits for trial, which are often upwards of 12 months. In some cases, they can even be as long as two years or more. That means a large part of a child's life characterised by waiting in uncertainty. Children do not know whether their case will be in a few weeks or a few months. Court dates are often set and then cancelled at the last minute, which causes disruption and a protracted wait.

The test of a child's welfare as being of "paramount consideration" already exists in Scots law, under section 16 of the Children (Scotland) Act 1995. In any case, the welfare of a child needs to be balanced with other tests and, in particular, with the interests of the accused and those of justice generally. Guidance on the matter already
exists, to be applied in criminal proceedings in which children are involved. Amendment 3 is proportionate and necessary to ensure that the welfare test, which already applies to social work and other agencies working with vulnerable children, also applies to the justice authorities.

Amendments 26 and 27 define the meaning of "child" in the relevant sections.

During stage 2, the cabinet secretary expressed the view that specific reference to the needs of child witnesses should not be contained either in the general principles or indeed in the standards of service. I have therefore also lodged an alternative amendment, amendment 7, which introduces similar provisions in a separate section. After section 2A. I have lodged amendments covering both sets of provisions for Parliament's consideration this afternoon.

In the week when the Parliament has paid tribute to Nelson Mandela, I provide a further quote from him:

"There can be no keener revelation of a society's soul than the way in which it treats its children."

Throughout the bill's passage, we have heard about some shocking experiences of children in our criminal justice system. The Vulnerable Witnesses (Scotland) Act 2004 has made a significant difference, and the enactment of the bill before us, and its principles, will make a further difference. We also seek to improve practice.

Amendment 7, like the previous amendments that I have spoken to, seeks to provide for the needs, interests and wishes of child victims and witnesses through the provision of guidance on how to fulfil duties under sections 1 and 2 in particular. At stage 2, the Cabinet Secretary for Justice argued that the aim is for the bill to have universal application and that it would be inappropriate to single out any specific group, but children are special and they require to be treated specially in our criminal justice system. Had the cabinet secretary's argument held sway, we would not even have had the 2004 act, never mind many of the excellent measures that are being brought into law today.

Amendment 7 seeks to ensure that the legal duties in the bill will be given effect through guidance that tries to take a more child-centred approach. That fits with Scottish ministerial priorities in other policy areas, and we should introduce such an approach in the criminal justice system as well.

I move amendment 1.

Kenny MacAskill: Section 1 sets out a number of general principles that are deliberately both high level and aspirational and are intended to inform the creation of standards of service under section 2. The intention behind the inclusion of a section on general principles was to set out the underlying aim of the bill for the justice system as a whole and to ensure that there is a level of consistency when justice agencies consider how they interact with victims and witnesses.

Elaine Murray's amendments 1, 2 and 26 are identical to amendments that were lodged at stage 2. As I said then, I would expect the bodies that are listed to consider the needs, rights and wishes of children in the same way that we expect them to consider the needs, rights and wishes of all other victims and witnesses who are involved in criminal proceedings. My views on that have not changed.

At stage 2, I also asked whether, if we were to single out child victims and witnesses, as Elaine Murray's amendments propose, we should not also include persons with mental or physical disabilities, older persons—and the list goes on. I think that the point remains valid. I simply reiterate that, while I absolutely agree that organisations should consider children's requirements, I remain of the view that the general principles should be precisely that: general, and equally applicable to all groups of victims and witnesses who come into contact with the criminal justice system.

Section 2 requires various criminal justice organisations to set and publish standards of service for victims and witnesses. Elaine Murray's amendment 3 places a duty on a person who sets and publishes standards under section 2, in so far as they could relate to a child, to do so in such a way that the child's welfare is a paramount consideration. It is identical to an amendment that the member lodged at stage 2. Amendment 27 is consequential to amendment 3.

As I said previously, I welcome Elaine Murray's commitment to child victims and witnesses. However, as with the amendments on the general principles, amendment 3 is simply unnecessary. I expect the bodies that set standards to give due consideration to children, as they would to any other group. Again, if we were to single out child victims and witnesses, should we not also single out other groups of victims and witnesses? The list could be considerable.

On amendment 7, I do not see that there would be any additional benefit from placing an obligation on the organisations that are listed in section 2(2) to prepare and publish guidance as to how they will consider the needs, rights and wishes of children when having regard to the general principles, setting standards of service and providing information. Surely it is better to let those organisations get on and set their standards, which will, no doubt, reference those matters with respect to all victims and witnesses. To put a duty on the organisations to prepare such guidance and lay it before the Parliament, which would
require to be done before any standards of service were prepared and published, would inevitably slow down the setting of standards and remove organisations’ flexibility to change them quickly in the light of experience.

In summary, although I appreciate the intention behind the amendments in the group, they are unnecessary. I therefore invite Elaine Murray to withdraw amendment 1 and not move amendments 2, 26, 3, 27 and 7.

**Elaine Murray:** In order to see justice done, children against whom horrific offences have been committed are required to engage with a system that was designed by and for adults. They are among the most vulnerable children in our society and they deserve to be given the support that they need to give evidence and participate in the process effectively and in a way that minimises the impact of that engagement.

The court process can be confusing and intimidating to adults, never mind to children. It is essential that consideration is given to the most appropriate way in which to provide information to a child victim, whether that be orally, in writing or through other forms of communication. Child victims and witnesses must be empowered to participate as fully as possible and to understand the process and procedures that they will be exposed to during investigation and trial. Our courts are adversarial and the process is combative. Where children who may well already be traumatised by the crime that they witnessed or that was perpetrated against them are involved in the court process, their welfare must be made the highest priority.

Amendments 1 to 3, with the definitions in amendments 26 and 27, remain my preference. I believe that they would enshrine the rights of child witnesses and victims in the most appropriate parts of the bill. However, the cabinet secretary continues to believe that they would not, so if amendments 1 to 3, 26 and 27 are defeated, I will press amendment 7.

**The Presiding Officer:** The question is, that amendment 1 be agreed to. Are we agreed?

**Members:** No.

**The Presiding Officer:** There will be a division.

**For**
- Baillie, Jackie (Dumbarton) (Lab)
- Baker, Claire (Mid Scotland and Fife) (Lab)
- Baker, Richard (North East Scotland) (Lab)
- Beamish, Claudia (South Scotland) (Lab)
- Bibby, Neil (West Scotland) (Lab)
- Boyack, Sarah (Lothian) (Lab)
- Brown, Gavin (Lothian) (Con)
- Buchanan, Cameron (Lothian) (Con)
- Carlaw, Jackson (West Scotland) (Con)
- Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
- Davidson, Ruth (Glasgow) (Con)
- Dugdale, Kezia (Lothian) (Lab)
- Fee, Mary (West Scotland) (Lab)
- Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
- Fergusson, Alex (Galloway and West Dumfries) (Con)
- Findlay, Neil (Lothian) (Lab)
- Fraser, Murdo (Mid Scotland and Fife) (Con)
- Goldie, Annabel (West Scotland) (Con)
- Grant, Rhoda (Highlands and Islands) (Lab)
- Gray, Iain (East Lothian) (Lab)
- Henry, Hugh (Renfrewshire South) (Lab)
- Hume, Jim (South Scotland) (LD)
- Johnstone, Alex (North East Scotland) (Con)
- Johnstone, Alison (Lothian) (Green)
- Lamont, Johann (Glasgow Pollok) (Lab)
- Lamont, John (E'trick, Roxburgh and Berwickshire) (Con)
- Macdonald, Lewis (North East Scotland) (Lab)
- Marra, Jenny (North East Scotland) (Lab)
- McArthur, Liam (Orkney Islands) (LD)
- McCulloch, Margaret (Central Scotland) (Lab)
- McDougall, Margaret (West Scotland) (Lab)
- McInnes, Alison (North East Scotland) (LD)
- McLeod, Aileen (South Scotland) (SNP)
- McMahon, Michael (Uddingston and Bellshill) (Lab)
- McMahon, Siobhan (Central Scotland) (Lab)
- McNeil, Duncan (Greenock and Inverclyde) (Lab)
- McTaggart, Anne (Glasgow) (Lab)
- Milne, Nanette (North East Scotland) (Con)
- Mitchell, Margaret (Central Scotland) (Con)
- Murray, Elaine (Dumfriesshire) (Lab)
- Pearson, Graeme (South Scotland) (Lab)
- Pentland, John (Motherwell and Wishaw) (Lab)
- Rennie, Willie (Mid Scotland and Fife) (LD)
- Scanlon, Mary (Highlands and Islands) (Con)
- Scott, Tavish (Shetland Islands) (LD)
- Smith, Drew (Glasgow) (Lab)
- Smith, Elaine (Coatbridge and Chryston) (Lab)
- Smith, Liz (Mid Scotland and Fife) (Con)
- Stewart, David (Highlands and Islands) (Lab)

**Against**
- Adam, George (Paisley) (SNP)
- Adamson, Clare (Central Scotland) (SNP)
- Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
- Allard, Christian (North East Scotland) (SNP)
- Beattie, Colin (Midlothian North and Musselburgh) (SNP)
- Biagi, Marco (Edinburgh Central) (SNP)
- Brodie, Chic (South Scotland) (SNP)
- Brown, Keith (Clackmannanshire and Dunblane) (SNP)
- Burgess, Margaret (Cunninghame South) (SNP)
- Campbell, Aileen (Clydesdale) (SNP)
- Campbell, Roderick (North East Fife) (SNP)
- Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
- Constance, Angela (Almond Valley) (SNP)
- Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
- Dey, Graeme (Angus South) (SNP)
- Don, Nigel (Angus North and Mearns) (SNP)
- Doris, Bob (Glasgow) (SNP)
- Eadie, Jim (Edinburgh Southern) (SNP)
- Ewing, Fergus (Inverness and Nairn) (SNP)
- Fabianli, Linda (East Kilbride) (SNP)
- Finnie, John (Highlands and Islands) (Ind)
- FitzPatrick, Joe (Dundee City West) (SNP)
- Gibson, Kenneth (Cunninghame North) (SNP)
- Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
- Graham, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
- Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
- Hyslop, Fiona (Linlithgow) (SNP)
- Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
- Keir, Colin (Edinburgh Western) (SNP)
- Kidd, Bill (Glasgow Anniesland) (SNP)
The Presiding Officer: The result of the division is: For 49, Against 62, Abstentions 0.

Amendment 1 disagreed to.

Amendment 2 moved—[Elaine Murray].

The Presiding Officer: The question is, that amendment 2 be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

For
Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Brown, Gavin (Lothian) (Con)
Buchanan, Cameron (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Davidson, Ruth (Glasgow) (Con)
Dugdale, Kezia (Lothian) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Findlay, Neil (Lothian) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West Scotland) (Con)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Henry, Hugh (Renfrewshire South) (Lab)
Hume, Jim (South Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Johnstone, Alison (Lothian) (Green)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
Macdonald, Lewis (North East Scotland) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Miline, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Cunninghame South) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Pearson, Graeme (South Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland Islands) (LD)
Smith, Drew (Glasgow) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, Liz (Mid Scotland and Fife) (Con)
Stewart, David (Highlands and Islands) (Lab)

Against
Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Allean (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Cunningham, Roseanna (Pertshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Finnie, John (Highlands and Islands) (Ind)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Kenneth (Cunningham North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lochhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (Aberdeen Donside) (SNP)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)
Robertson, Dennis (Aberdeenshire West) (SNP)
Robison, Shona (Dundee City East) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Salmor, Alex (Aberdeen North) (SNP)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Swinney, John (Perthshire North) (SNP)
Thompson, Dave (Skye, Lochaber and Badenoch) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (SNP)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gill (Clydebank and Milngavie) (SNP)
Robertson, Dennis (Aberdeenshire West) (SNP)
Robison, Shona (Dundee City East) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Salmond, Alex (Aberdeen East) (SNP)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire North) (SNP)
Thompson, Dave (Skye, Lochaber and Badenoch) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (SNP)

The Presiding Officer: The result of the division is: For 49, Against 62, Abstentions 0.
Amendment 2 disagreed to.
Amendment 26 not moved.

Section 2—Standards of service
Amendment 3 moved—[Elaine Murray].

The Presiding Officer: The question is, that amendment 3 be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.
For
Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Brown, Gavin (Lothian) (Con)
Buchanan, Cameron (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Davidson, Ruth (Glasgow) (Con)
Dugdale, Kezia (Lothian) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Findlay, Neil (Lothian) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West Scotland) (Con)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Henry, Hugh (Renfrewshire South) (Lab)
Hume, Jim (South Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Johnstone, Alison (Lothian) (Green)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Roxburgh and Berwickshire) (Con)
Macdonald, Lewis (North East Scotland) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)

McDougall, Margaret (West Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfries and Galloway) (Lab)
Pearson, Graeme (South Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland Islands) (LD)
Smith, Drew (Glasgow) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, Liz (Mid Scotland and Fife) (Con)
Stewart, David (Highlands and Islands) (Lab)

Against
Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Finnie, John (Highlands and Islands) (Ind)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lochhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (Aberdeen Donside) (SNP)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gill (Clydebank and Milngavie) (SNP)
Robertson, Dennis (Aberdeenshire West) (SNP)
Section 2A—Reports

The Presiding Officer: Amendment 4, in the name of Elaine Murray, is grouped with amendments 5 and 6.

14:30

Elaine Murray: At stage 2, the cabinet secretary lodged an amendment introducing section 2A, which requires the annual publication of a report assessing whether standards have been met and containing a forward look on how they might be met in the year ahead and sets out the ability of ministers to prescribe information by way of a negative instrument. At the same time, I lodged a similar amendment. In our view, Mr MacAskill’s amendment contained a serious omission, not contained in my own, in not requiring consultation as far as is practicable with victims and witnesses in the preparation of that report. Amendments 4, 5 and 6 seek to rectify that omission.

Amendment 4 seeks to require those persons mentioned in section 2 to consult as far as is reasonably practicable victims and witnesses in making a report on the meeting of standards. That was the principal difference between the cabinet secretary’s successful amendment and mine at stage 2.

Amendment 5 seeks to require Scottish ministers to consult the persons required to set and publish standards when making regulations that prescribe the information that must be contained in reports, while amendment 6 seeks to enable standards to be revised to meet the needs of victims and witnesses and to require publication of those revised standards.

These amendments seek to ensure that victims and witnesses are and continue to be involved at all stages of the development of standards and in the reporting on how those standards are met.

After all, victims and witnesses are supposed to be the legislation’s central concern and omitting them from that process seems to fly in the face of its intentions.

I move amendment 4.

Kenny MacAskill: Section 2 requires various criminal justice organisations to set and publish standards of service for victims and witnesses. As a result of a Government amendment that was agreed unanimously by the Justice Committee at stage 2, each of the named organisations in section 2 will be required to consult all the others and those with a significant interest before publishing their standards of service. That will ensure a level of consistency in approach to the standards while still allowing organisations to develop specific standards for the type of service that they provide.

The Justice Committee also agreed at stage 2 to a Government amendment that placed a duty on the named organisations to publish a report assessing how their standards have been met, setting out how they intend to continue to meet them and highlighting any modification that might have been made to the standards during the reporting period or which they propose to make in the following year. That reporting will ensure that the criminal justice organisations not only reflect on how they have met the standards during the period covered in the report but think ahead about how they intend to meet the standards in future.

Amendments 4, 5 and 6, in the name of Elaine Murray, are very similar to elements of the member’s alternative proposal at stage 2 for a reporting mechanism and, although I appreciate the intention behind them, I consider them to be unnecessary. With regard to amendment 4, I find it difficult to imagine how the named organisations could prepare reports on how they have met their standards of service in relation to victims and witnesses without taking into consideration the views of victims and witnesses who have come into contact with the organisation. That does not need to be provided for in legislation.

Amendment 5 seeks to require Scottish ministers to consult the named persons in section 2(2) before adding to the list of information to be covered in reports on standards of service. Although it is clearly sensible to discuss any such changes with those who will be affected by any regulations, I am not persuaded that a statutory duty to consult is necessary. Such consultation would take place as a matter of course. Furthermore, the drafting of the amendment is such that the Scottish ministers would be required to consult themselves as they, too, are among the persons named in section 2(2).
Amendment 6 seeks to provide that the persons named in section 2 can review their standards of service to meet the needs of victims and witnesses following a report and to oblige them to publish any revised standards. That is simply unnecessary. The organisations in question are free to revise their standards at any time under section 2, as section 7(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 provides that

“A duty imposed by an Act of the Scottish Parliament ... may be performed from time to time.”

Indeed, sections 2A(3)(c) and (d) of the bill specifically require the organisations in question to list any modifications made to their standards during the reporting year and any modification that they propose to make in the following year. In any event, I expect those organisations to review their standards regularly to ensure that they remain fit for purpose. In addition, the named organisations are required to publish their standards of service under section 2(1) and the same would apply to any modifications made to the standards.

No explicit provision is necessary to achieve those aims. As they are already provided for, I invite Elaine Murray to withdraw amendment 4 and not to move amendments 5 and 6.

The Presiding Officer: The question is, that amendment 4 be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

For
Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Brown, Gavin (Lothian) (Con)
Buchanan, Cameron (Lothian) (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Dugdale, Kezia (Lothian) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Ferguson, Alex (Galloway and West Dumfries) (Con)
Findlay, Neil (Lothian) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West Scotland) (Con)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Henry, Hugh (Renfrewshire South) (Lab)
Hume, Jim (South Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
Macdonald, Lewis (North East Scotland) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfries and Galloway) (Lab)
Pearson, Graeme (South Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland Islands) (LD)
Smith, Drew (Glasgow) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, Liz (Mid Scotland and Fife) (Con)

Against
Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Eddie, Jim (Edinburgh Southern) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabian, Linda (East Kilbride) (SNP)
Finnie, John (Highlands and Islands) (Ind)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Graham, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Johnstone, Alison (Lothian) (Green)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lochhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAaskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (Aberdeen Donside) (SNP)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)
Robertson, Dennis (Aberdeenshire West) (SNP)
Robison, Shona (Dundee City East) (SNP)
The Presiding Officer: The result of the division is: For 46, Against 63, Abstentions 0.

Amendment 4 disagreed to.

Amendment 5 moved—[Elaine Murray].

The Presiding Officer: The question is, that amendment 5 be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

For

Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Brown, Gavin (Lothian) (Con)
Buchanan, Cameron (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Davidson, Ruth (Glasgow) (Con)
Dugdale, Kezia (Lothian) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Findlay, Neil (Lothian) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West Scotland) (Con)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Henry, Hugh (Renfrewshire South) (Lab)
Hume, Jim (South Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Etrick, Roxburgh and Berwickshire) (Con)
Macdonald, Lewis (North East Scotland) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahan, Siobhan (Central Scotland) (Lab)
McNeill, Duncan (Greenock and Inverclyde) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)

Against

Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Eadier, Jim (Edinburgh Southern) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Finnie, John (Highlands and Islands) (Ind)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Johnstone, Alison (Lothian) (Green)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lochhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (Aberdeen Donside) (SNP)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)
Robertson, Dennis (Aberdeenshire West) (SNP)
Robison, Shona (Dundee City East) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Salmond, Alex (Aberdeenshire East) (SNP)
Stevenson, Stewart (Barnsffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire North) (SNP)
Thompson, Dave (Skye, Lochaber and Badenoch) (SNP)
Torrance, David (Kirkcaldy) (SNP)
The Presiding Officer: The result of the division is: For 47, Against 63, Abstentions 0.

Amendment 6 disagreed to.

The Presiding Officer: The question is, that amendment 6 be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

For
Baille, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Brown, Gavin (Lothian) (Con)
Buchanan, Cameron (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Davidson, Ruth (Glasgow) (Con)
Dugdale, Kezia (Lothian) (Lab)
Fee, Mary (West Scotland) (Lab)
Fergusson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Findlay, Neil (Lothian) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West Scotland) (Con)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Henry, Hugh (Renfrewshire South) (Lab)
Hume, Jim (South Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Edinburgh Ettrick, Roxburgh and Berwickshire) (Con)
Macdonald, Lewis (North East Scotland) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McDouglas, Margaret (West Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Mile, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Pearson, Graeme (South Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland Islands) (LD)
Smith, Drew (Glasgow) (Lab)
Smith, John (Coatbridge and Chryston) (Lab)
Smith, Liz (Mid Scotland and Fife) (Con)

Against
Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Alileen (Clydesdale) (SNP)
Campbell, Rodenick (North East Fife) (SNP)
Coffee, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Cunningham, Roseanna (Pertshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Edie, Jim (Edinburgh Southern) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabian, Linda (East Kilbride) (SNP)
Finnie, John (Highlands and Islands) (Ind)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Graham, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Johnstone, Alison (Lothian) (Green)
Kerr, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lochhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (Aberdeen Donside) (SNP)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Alieen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)
Robertson, Dennis (Aberdeen West) (SNP)
Robison, Shona (Dundee City East) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Salmond, Alex (Aberdeenshire East) (SNP)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire North) (SNP)
Thompson, Dave (Skye, Lochaber and Badenoch) (SNP)
Terrance, David (Kirkcaldy) (SNP)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (SNP)

The Presiding Officer: The result of the division is: For 47, Against 63, Abstentions 0.

Amendment 6 disagreed to.
After section 2A

Amendment 7 moved—[Elaine Murray].

The Presiding Officer: The question is, that amendment 7 be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

For

Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Brown, Gavin (Lothian) (Con)
Buchanan, Cameron (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Davidson, Ruth (Glasgow) (Con)
Dugdale, Kezia (Lothian) (Lab)
Fee, Mary (West Scotland) (Lab)
Fergusson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Ferguson, Alex (Galloway and West Dumfries) (Con)
Findlay, Neil (Lothian) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West Scotland) (Con)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Henry, Hugh (Renfrewshire South) (Lab)
Hume, Jim (South Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Johnstone, Alison (Lothian) (Green)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (ETuick, Roxburgh and Berwickshire) (Con)
Macdonald, Lewis (North East Scotland) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McCollum, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfrieshire) (Lab)
Pearson, Graeme (Scotland South) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland Islands) (LD)
Smith, Drew (Glasgow) (Lab)
Smith, Elaine (Caithness and Chryston) (Lab)
Smith, Liz (Mid Scotland and Fife) (Con)

Against

Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Ailin, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Aliard, Christian (North East Scotland) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabian, Linda (East Kilbride) (SNP)
Finnie, John (Highlands and Islands) (Ind)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Graham, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lochhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (Aberdeen Donside) (SNP)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)
Robertson, Dennis (Aberdeenshire West) (SNP)
Robison, Shona (Dundee City East) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Salmond, Alex (Aberdeenshire East) (SNP)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire North) (SNP)
Thompson, Dave (Skye, Lochaber and Badenoch) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (SNP)

The Presiding Officer: The result of the division is: For 48, Against 62, Abstentions 0.

Amendment 7 disagreed to.

The Presiding Officer: Group 4 is on the provision of information and support for victims and witnesses. Amendment 28, in the name of Margaret Mitchell, is grouped with amendments 21 and 24.

Margaret Mitchell: When scrutinising the bill, the Justice Committee heard that communication between justice organisations is not as good as it could be.
During stage 2, I lodged a similar amendment and the cabinet secretary agreed that there is room for improvement in how justice organisations work together. The committee heard from the Scottish Police Federation that “all partners in the criminal justice system would accept that we have been poor at keeping victims and witnesses informed as to the progress of cases in which they are involved.”—[Official Report, Justice Committee, 30 April 2013; c 2708-09.]

Victims said that correspondence is often complex and difficult to understand, particularly given that they might already be confused and distressed in the aftermath of a crime. Worryingly, and astonishingly, David McKenna of Victim Support Scotland told the committee that victims have to tell their story “around 16 times” to various agencies, which clearly should not be necessary and can only add to victims’ distress.

Amendment 28 seeks to tackle this problem for the first time in legislation, through a requirement that the Lord Advocate, Police Scotland and the Scottish Court Service work together on the provision of information to victims. Crucially, it would require all victims and witnesses to be offered a single point of contact to help them through the justice process. The amendment would provide for properly trained individuals to give much-needed support to victims, who are currently not treated with compassion or given the time that they deserve in all cases. To provide someone who can answer questions and offer support in what can be a very daunting process for someone who can answer questions and offer support in what can be a very daunting process for witnesses does not seem to me to be a particularly arduous requirement—it should be a bare minimum.

If the cabinet secretary is really serious that things should be made easier for victims, amendment 28 is necessary. Justice organisations might be considering or discussing how they can work together, but legislating to require them to do so will certainly focus their minds and make sure that it is a priority.

Furthermore, despite the cabinet secretary having talked consistently about improvements for victims over many years now, little has been achieved. The bill provides us with the opportunity to make sure that the criminal justice system takes meaningful steps to co-ordinate how information is provided to victims now.

On the single point of contact, the cabinet secretary told the committee at stage 2 that the Scottish Government is working

“on an online information hub, to provide easier access for victims and witnesses to case-specific information”.—[Official Report, Justice Committee, 13 November 2013; c 3603.]

However, as yet no details of that online hub are available. Furthermore, the fact that it is an online hub means that it already excludes a large chunk of individuals who do not have access to or knowledge of the internet and it puts the onus on victims to find out information.

Amendments 21 and 24, in the name of Graeme Pearson, appear to be sensible measures, which would similarly improve the provision of information to victims. I believe that they complement amendment 28.

I move amendment 28.

Graeme Pearson (South Scotland) (Lab): I acknowledge and support amendment 28, in the name of Margaret Mitchell.

Throughout the evidence that we heard in the Justice Committee, it became apparent that there were two worlds out there. One of those was the world of victims, who came to speak to the committee in a deeply moving fashion about how they perceived the services that were provided to them as they made their journey through the justice system. I do not think there will be a member here in the chamber who has not spoken to a witness or victim who has echoed the opinions that were given during the evidence that we heard in the committee. That situation demands that we offer a response. Amendment 28 would push services in that direction by requiring the co-ordination of support and the provision of a single point of contact.

The Labour Party had at one stage suggested that a commissioner would be one way to deliver on that, but it soon became apparent that there was no appetite for such a post. However, having a single point of contact or a case companion—whatever nomenclature one would want to use—would be a significant improvement on current arrangements.

14:45

Victims indicated to us that they felt like a parcel being passed through the system. Without taking up too much time in this debate, I will tell members about a lady who travelled from the north-east of Scotland to meet me yesterday, because she knew of this debate. She gave me a letter that she had sent to the authorities. It said:

“I was disappointed with the response as it did not address the issues I raised in my letter ... The vagaries of the criminal justice system are unbelievably difficult to understand for victims whose loved one has died as a result of a criminal act ... I also found it particularly galling to read about the prisoner’s rehabilitation and the support available to her”.

She wanted the needs of victims to be addressed.
Amendment 28 goes a long way towards dealing with those issues.

Amendment 21 would ensure that those who receive the information in respect of a release have intimated that they want that information passed to them, and that they receive that intimation in a reasonable form. Often, they receive an official letter that is written in language that is difficult to understand.

Amendment 24 concerns guidance and provision of information to victims in court proceedings in solemn cases. Victims and witnesses are still going to our courts and being led into a situation with no guidance or support. That leads to them not understanding what is happening and, often, confronting the very accused who they are there to deal with.

I commend the amendments.

The Presiding Officer: Members will note that we have passed the agreed time limit for the debate on this group. I am exercising my power under rule 9.8.4A to allow the debate on the group to continue beyond the limit, in order to avoid the debate being unreasonably curtailed.

Kenny MacAskill: As with a similar amendment lodged by Margaret Mitchell at stage 2, I welcome the underlying principles behind amendment 28. I think that members would agree that encouraging justice organisations to work more closely together to improve the experience of victims and witnesses is a laudable aim. However, I can only reiterate that I do not consider that that requires primary legislation. For the benefit of those who did not follow proceedings at stage 2, I note again that we are already participating in discussions between all justice organisations to explore how they can work more effectively together and deliver a more joined-up experience for victims. I would see the improvement of communications as being part of that wider work and, in particular, I would expect it to be something that is considered when justice organisations are developing their standards of service under section 3. During which process they will be required to consult each other and relevant stakeholders.

In relation to the proposal for a single point of contact, I am still of the view that that does not require a statutory basis. We are currently considering the feasibility of establishing an online information hub to provide easier access for victims and witnesses to case-specific information. Although the establishment of such a system will not happen overnight, given the complexities of sharing potentially sensitive information between various organisations, I think that it will bring great benefits. In the meantime, victims and witnesses will have new rights to access certain information directly from the Crown Office, Police Scotland and the Scottish Court Service, under section 3.

Although amendment 21, in the name of Graeme Pearson, is clearly well intentioned, I fear that it could cause significant practical issues. In certain criminal cases, victims have the right, under section 16 of the Criminal Justice (Scotland) Act 2003, to receive information about the release of an offender, and other relevant details. In practice, that is provided by the Scottish Prison Service through the victim notification scheme.

Section 23 of the bill removes a list of prescribed offences in relation to the VNS so that victims of all offences will potentially be eligible. Further, I have already expressed my intention to lower the sentence threshold for the VNS. Those changes are likely to increase the numbers of victims who are registered with the VNS, and the administrative burden on the SPS. Although a phone call might be viewed as a reasonable method of communication, it would be a significant burden on any organisation if a high volume of correspondence suddenly had to be dealt with by phone or, potentially, through face-to-face meetings, if requested. Moreover, the obligation to seek the views of all victims registered with the VNS before communicating with them would have significant resource implications for the SPS in delivering the scheme. I believe that a more appropriate way of improving communication with victims is not through an impractical statutory obligation but through better training and guidance for those involved.

Amendment 24, also in the name of Graeme Pearson, is completely unnecessary. The bill already establishes in statute essential rights and obligations that will ensure that victims and witnesses have access to important information about criminal proceedings, including in relation to the most serious cases. I therefore cannot see what is to be gained from the Scottish ministers issuing guidance on the matter to the Scottish Court Service specifically in relation to solemn proceedings.

Furthermore, in the unlikely event that any guidance is necessary, no specific provision is required. Under section 69 of the Judiciary and Courts (Scotland) Act 2008, the Scottish ministers can already issue guidance to the Scottish Court Service to which it must have regard in carrying out its functions. Amendment 24 therefore replicates a provision that is already laid out in statute. Although I cannot support amendment 24, I restate the commitment that I made to Graeme Pearson at stage 2. The Scottish Government will continue to work with our justice partners in this area to ensure that any information that is provided to victims is clear and easy to understand.
Although I support the broad principles behind amendment 28, I consider it unnecessary and invite Margaret Mitchell to withdraw it. I also urge Graeme Pearson not to move amendments 21 and 24.

The Presiding Officer: I call Margaret Mitchell to press or withdraw amendment 28. I would be grateful if you could be brief.

Margaret Mitchell: It seems that the much-vaunted but, to date, phantom online hub that the cabinet secretary keeps telling us about is no further forward. The fact of the matter is that the guidance to which he refers is not working. Without primary legislation, victims will have to continue to give their story 16 times over, which is, frankly, unacceptable. The amendment would require it to be a priority that a single point of contact be established to avoid that happening. On that basis, I press amendment 28.

The Presiding Officer: The question is, that amendment 28 be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

For
Baille, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Brown, Gavin (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Davidson, Ruth (Glasgow) (Con)
Dugdale, Kezia (Lothian) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Ferguson, Alex (Galloway and West Dumfries) (Con)
Findlay, Neil (Lothian) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West Scotland) (Con)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Henry, Hugh (Renfrewshire South) (Lab)
Hume, Jim (South Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
Macdonald, Lewis (North East Scotland) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfrieshire) (Lab)
Pearson, Graeme (South Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland Islands) (LD)
Smith, Drew (Glasgow) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, Liz (Mid Scotland and Fife) (Con)

Against
Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aleene (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Cunningham, Roseanna (Pertshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Edie, Jim (Edinburgh Southern) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Finnie, John (Highlands and Islands) (Ind)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Johnstone, Alison (Lothian) (Green)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lochhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (Aberdeen Donside) (SNP)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)
Robertson, Dennis (Aberdeenshire West) (SNP)
Robison, Shona (Dundee City East) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Salmond, Alex (Aberdeenshire East) (SNP)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire North) (SNP)
Thomson, Dave (Skye, Lochaber and Badenoch) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Given the voluntary and case-specific nature of any restorative justice services, there are compelling reasons for adopting a more flexible approach than would be possible through a statutory scheme. In particular, it would be difficult to establish definitive circumstances in which referral would be appropriate, reflecting the very personal and specific circumstances of each case and giving due consideration to issues such as the potential risk to and safety of victims. Similar points were raised with me by victim support groups such as Victim Support Scotland and Scottish Women’s Aid, which agree that further consideration and a more flexible victim-focused approach is required.

My amendment 8, which is supported by both Victim Support Scotland and Scottish Women’s Aid, seeks to allow for a more measured approach to be taken. It would replace the duty in section 2C to make regulations with an ability for the Scottish ministers to issue guidance relating to the referral of individuals to and the provision of restorative justice services. That would allow clear guidelines to be established, taking into consideration any obligations in the recent European Union directive on victims’ rights while retaining more flexibility than would be possible if such detail were set out by statutory instrument. A duty may also be placed on persons who will be specified by order to have regard to the guidance. The order-making power could be used to place such a duty on those persons referring individuals to or providing restorative justice services.

If the bill is passed, I intend to issue guidance with a particular focus on the appropriate use of that measure and on the safeguards that would be in place to ensure that victims are protected if they choose to participate in any available restorative justice services—an issue that Alison McInnes rightly highlighted at stage 2. However, before issuing guidance, we will need to discuss what specific matters should be covered with those who have detailed knowledge and experience. I have signalled to Sacro, Victim Support Scotland, Scottish Women’s Aid and others that we will be seeking their input, and I look forward to constructive discussions on the matter next year.

I assure Alison McInnes that amendment 8 is not intended to negate or weaken section 2C; rather, it is intended to adapt it into a more practical form. I am happy to continue discussions with her at a later date.

I move amendment 8.

Alison McInnes: I welcome the fact that the cabinet secretary has sought to respect the will of the committee and that he has chosen to revise rather than remove the provisions referring to restorative justice. I know that organisations such as Sacro are appreciative of its retention.
Amendment 8, as the cabinet secretary says, softens the provisions significantly. I understand that the cabinet secretary believes that the changes will give the system greater flexibility. I came to the chamber seeking reassurances that, should Parliament agree to amendment 8, the cabinet secretary will proceed to establish guidance. I have heard those assurances. I welcome that and the opportunity to meet him again in due course.

Kenny MacAskil: I am happy to accept Alison McInnes’s points and to meet her to discuss the matter. I think that we share a common view that restorative justice has worked and does good service, but we must ensure that it works for all because there are some for whom it would be counterproductive.

Amendment 8 agreed to.

Section 3—Disclosure of information about criminal proceedings
The Presiding Officer: Group 6 is minor and technical amendments. Amendment 9, in the name of the cabinet secretary, is grouped with amendments 10 to 11, 13 to 16 and 20.

Kenny MacAskil: Section 3 gives victims and witnesses the right to access certain information about their case from various bodies and reflects the requirements of article 6 of the EU victims’ rights directive. Following the introduction of the bill, however, the Office of the Advocate General for Scotland raised concerns that the obligation in section 3 could, in rare cases, lead to disclosure of confidential information supplied by the United Kingdom Government.

An exception to the duty to provide information in section 3 already exists, whereby information does not have to be disclosed if the qualifying person considers that that disclosure would be inappropriate. I consider the level of discretion that the wording of that exemption provides to be essential as it allows the police, the Crown Office and the Scottish Court Service to exercise their professional judgment in response to the individual circumstances of the case. However, I also recognise that that gives the qualifying person discretion about whether to disclose confidential information supplied by the UK Government as there is no obligation to withhold that confidential information.

My amendment 9 therefore obliges qualifying persons to refuse a request relating to a decision not to investigate, a decision to end an investigation or a decision not to prosecute the alleged offender in so far as complying with the request would involve the disclosure of information supplied by the UK Government or a minister of the Crown and held in confidence. It is intended to ensure that, for example, the bodies that are named in section 3(5) of the bill are obliged not to disclose information received from the UK Government in relation to national security and held in confidence.

15:00

I do not expect the exception to be widely applicable, but I hope that members will agree that we should do all that we can to avoid inadvertently revealing confidential information that could prejudice serious investigations.

Amendments 10, 13 and 14 are minor technical amendments to correct a reference to certain offences in the Sexual Offences Act 2003.

Amendments 11 and 15 are also minor technical amendments and substitute references to “an offence consisting of domestic abuse” in sections 5(5)(d) and 6(a) respectively with “an offence the commission of which involves domestic abuse”.

The purpose of those amendments is simply to make it clear that, although domestic abuse is not, in itself, a statutory offence, any offence that contains an element of domestic abuse is covered by the provisions in sections 5 and 6 of the bill.

Amendment 16 relates to the process for submitting vulnerable witness notices to the court containing details of specific measures that are required for vulnerable witnesses. The Crown Office and Procurator Fiscal Service has been examining ways of streamlining the process to increase efficiency and lower costs. Amendment 16 will assist in that process. Where a vulnerable witness notice specifies only standard special measures, the amendment will remove the requirement for a summary of the witness’s views and, where the victim is a child, those of the witness’s parent in relation to the special measures to be contained in, or attached to, the notice.

The party submitting the vulnerable witness notice will still be required to take account of the witness’s views, but as the court has no discretion as to whether to authorise any standard special measures requested—it must grant them—it follows that there is little point in providing it with a summary of views expressed. In all other cases in which the court has discretion to authorise the use of special measures, the requirement for it to be informed of any views expressed by the witness or the witness’s parents will remain.

Amendment 20 is a minor drafting amendment to section 21 of the bill to insert the word “or” to make it clear that the paragraphs in proposed new
section 253B(4) of the Criminal Procedure (Scotland) Act 1995 are intended as alternatives.

I move amendment 9.

Amendment 9 agreed to.

Section 5—Certain offences: victim’s right to specify gender of interviewer

Amendments 10 and 11 moved—[Kenny MacAskill]—and agreed to.

Section 5A—Certain medical examinations: gender of medical examiner

Amendment 13 moved—[Kenny MacAskill]—and agreed to.

After section 5A

The Presiding Officer: Group 7 is on evidence in relation to sexual offences: disclosure of information. Amendment 12, in the name of Graeme Pearson, is grouped with amendments 29, 30 and 31.

Graeme Pearson: The group of amendments arises from significant concerns that were expressed by Rape Crisis Scotland, Scottish Women’s Aid, domestic abuse groups and other associated women’s groups about the application of existing legislation that was designed to ensure that sensitive personal information is disclosed as part of court procedures only in relevant cases, and that it is handled sensitively. The experience of victims as recorded in evidence to the Justice Committee and the lobbying from those groups indicate that the legislation is not being applied effectively.

Subsection (1) of the new section that amendment 12 would insert says that “The Lord Advocate must prepare and publish guidance on the circumstances in which sensitive personal information” about a victim can be used in the public court process. The other subsections in the proposed new section refer to the means by which such guidance could be prepared, produced and disseminated.

In the event that amendment 12 fails, I will support Margaret Mitchell’s amendment 29, which takes a different approach to a similar problem. It seeks the provision of legal advice to victims so that necessary processes can be put in place to protect the interests of the victim in the system. Margaret Mitchell’s accompanying amendments set out the means by which that could be delivered, and I have no comment to offer on them.

I move amendment 12.

Margaret Mitchell: Amendments 29, 30 and 31 seek to tackle the long-standing and vexing problem of use of sexual history and character evidence in sexual offence trials.

An evaluation that was commissioned by the Scottish Government and published in 2007 found that, far from tightening up use of sexual history and character evidence, the legislation that the Government introduced in 2002 had led to an increase in use of such evidence. The key findings of the research make for concerning reading: 72 per cent of trials involved an application to introduce sexual history or character evidence, and only 7 per cent of those applications were refused. Despite the cabinet secretary’s assurance that the Crown Office has comprehensive guidance in place to ensure that victims are given a full explanation of exactly why any sensitive information is sought, the fact of the matter is that, in practice, that guidance is not effective and is failing to protect complainers.

Rape Crisis Scotland’s on-going research on the information that is sought makes compelling reading, too. Nearly 60 per cent of those who have responded said that they felt that they had had no choice but to provide sensitive information, and 35 per cent said that no one had explained to them why the information was being looked at. Less than 15 per cent said that they were clear about why the information had been requested. The concerns about inappropriate use of such evidence, which is designed to play to a jury’s prejudices, are well documented.

Amendments 29, 30 and 31 reflect some of the points that were raised at stage 2. Amendment 29 would allow independent legal advice to be offered to victims of sexual offences as soon as the police, the Crown or the defence sought to access health or other sensitive records. More often than not, that is when the complainer is at their most vulnerable, which is why independent legal representation at that point is so important, especially as complainers and victims feel that they have no choice but to consent.

Therefore, it is the intention that such legal advice will be offered to victims and that some form of financial support will be available for that. Amendment 29 would allow independent legal advice to be offered to victims of sexual offences as soon as the police, the Crown or the defence sought to access health or other sensitive records. More often than not, that is when the complainer is at their most vulnerable, which is why independent legal representation at that point is so important, especially as complainers and victims feel that they have no choice but to consent.

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Therefore, it is the intention that such legal advice will be offered to victims and that some form of financial support will be available for that. Amendment 29 leaves it open for the Scottish Government to set up a dedicated fund, if appropriate. It would, of course, be open for legal aid to be extended to include provision of such independent legal advice, although further amendments would be required to allow that to happen.

Importantly, amendment 30 would allow the Scottish Government to run a pilot to assess how provision of independent legal advice would work in practice and to collect much-needed data. Rape Crisis Scotland has been in touch with Scotland’s
largest law centre, the Legal Services Agency, which tackles the unmet legal needs of disadvantaged people. One of the areas in which the LSA undertakes work is in protecting the rights of refugee and migrant women and children, which it does through its women and young persons department. The proposed pilot would be affiliated to that department and would allocate one specialist solicitor one day a week for six months to provide initial advice regarding access to medical and other sensitive records. The advice could be provided at the premises of the LSA or of Rape Crisis.

During the pilot phase, the specialist solicitor would undertake collation of case outcomes, identify the costs of providing legal support, evaluate the pilot from the point of view of its clients and external parties, including the Crown Office and Procurator Fiscal Service—

The Presiding Officer: I need to ask you to wind up, because you have been speaking for five minutes.

Margaret Mitchell: Amendment 31 would require that a report be published, and the arrangements would satisfy the requirements for that.

I accept that the use of independent legal advice would be uncharted territory, which is why I have provided for a pilot. By limiting the pilot to the most serious sexual offences—to rape—and by providing that it would apply to only one High Court location, we would incur minimal costs. I hope that the Scottish Government will support that commonsense proposal.

The Presiding Officer: I am anxious to fit in more members, so I ask the next three members to keep their comments brief.

Malcolm Chisholm (Edinburgh Northern and Leith) (Lab): I support Graeme Pearson’s amendment 12 and Margaret Mitchell’s amendments. As her amendments may prove to be more controversial, I will speak briefly to them. The amendments might appear to be unusual, but they deal with unusual circumstances.

What complainant or victim, apart from a rape victim, has all her or his personal and medical details revealed in court, as happens in such cases? In the past few days, Rape Crisis Scotland has produced a report that details the information that is routinely and regularly given in Scottish courts in rape cases. For example, one woman said:

“my mental health was all I felt was talked about, not being raped”.

Someone else said that they were put off having therapy and counselling because they knew that that would be used against them in court. Others might not come forward to complain of what has happened to them because they know what might happen in court.

The matter is problematic in relation to the right to privacy, but be that as it may, women have no real choice in such situations. Whatever the guidelines say, such information can routinely be used in court. The least that we can do to protect such women and their rights is to ensure that they have independent legal advice and representation, so that their case can be put in such situations.

Roderick Campbell: On Graeme Pearson’s amendment 12, I have difficulty in considering that any guidance that the Lord Advocate produced could be anything other than general. I am also concerned about whether the amendment would place too much emphasis on the Lord Advocate alone and would not take account of the accused’s interests in the process. Would the amendment provide the right balance? I think not.

I have some sympathy with Margaret Mitchell’s amendments, particularly in relation to sexual history applications under sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995. A common occurrence is that a complainer or victim is confused and takes the view that she should have her lawyer, because she does not understand that the Crown represents the public interest and not her.

A pilot is entirely the wrong approach and we should not put a pilot in legislation. I have some sympathy with Margaret Mitchell and I think that the Government would be wise to update the research and information on sexual history applications, but the amendments are not the right way forward.

Alison McInnes: I support all the amendments in the group. It is important that those who are asked to provide sensitive information, whether it is health, social work or education records, should have the opportunity to have legal advice and representation before doing so. There is no doubt that being required to reveal such information can leave victims feeling exposed and further violated, and feeling that their right to confidentiality has been denied. Some can feel further victimised. I am also concerned that such evidence can prove to be prejudicial in some cases.

During the passage of the bill, I have met many victims, whose stories haunt me. One woman told me that giving evidence was a harrowing and psychologically damaging experience. She was so distressed that the judge halted the court proceedings a number of times. No one had explained to her the amount of detail that she would have to give about the appalling acts of sexual violence against her. She was particularly disturbed that she had not been told that her
medical records, which detailed her injuries, would be read out in full to the court and the jury.

We must strive to ensure that such information is revealed only when it is appropriate. I would therefore welcome additional safeguards and the increased protection for victims of sexual offences that the amendments would provide.

Kenny MacAskill: We all accept that there is an issue, and there is a great deal of sympathy. Work is on-going. However, I am not persuaded that putting a pilot in primary legislation is the best approach, as Rod Campbell said.

I agree that the Crown Office and Procurator Fiscal Service should take an appropriate and consistent approach in seeking access to such information, but amendment 12, in Graeme Pearson’s name, is unnecessary.

15:15

The Lord Advocate has already issued guidance—post publication of the statistics that Margaret Mitchell mentioned—on seeking sensitive information in such cases, which is set out in the publicly available document, “Policy on obtaining and disclosing sensitive personal records in the investigation and prosecution of sexual crime cases”.

Given the range of matters on which the Lord Advocate issues guidance, I would be reluctant to impose a statutory duty in relation to one particular topic, especially one for which guidance already exists. If specific matters are felt to be missing from existing guidance, I know that the Crown Office would be happy to receive and consider any feedback.

Amendment 12 is also unnecessary in relation to disclosure of information about the victim. Disclosure of information that is held by a prosecutor is already provided for in part 6 of the Criminal Justice and Licensing (Scotland) Act 2010, and those statutory provisions will take precedence.

Amendments 29, 30 and 31, in the name of Margaret Mitchell, would result—as I indicated at stage 2—in a major innovation in the law. There are currently no rights for victims to have independent legal representation in criminal proceedings; as Rod Campbell mentioned, the Crown acts not as a prosecutor but in the public interest.

We are being invited to make a major change in a fashion that has not been fully thought through, and which has not been properly explored. The case for such a change has not yet been made. That does not mean that it cannot be, but it certainly has not been to date.

Rape Crisis Scotland acknowledges that since publication of the Crown Office guidance that I mentioned, no additional data have been collected on use of medical histories and other sensitive information. The Crown Office has offered to work with Rape Crisis Scotland in that regard.

In the meantime, it would be irresponsible were we to act despite having no data. In addition, it is entirely unclear how the provisions would operate in practice. Margaret Mitchell’s amendments would enable victims to appoint a legal representative wherever health or other sensitive information was sought. However, that covers a very broad range of information, much of which is not currently subject to any restrictions on its being introduced as evidence. The amendments would not create an application process for the admission of health or other sensitive information, so it is unclear how the process of appointing a legal representative for the victim would commence.

The amendments do not provide for the admissibility of the evidence to be debated at an oral hearing, so it is unclear how submissions on the evidence would be made. If additional hearings were to be arranged, further amendment of the legislation would be required. That is to say nothing of the attendant delays to the court process, which would have an impact on victims and witnesses, and the significant cost that would be involved in arranging those hearings.

The amendments do not provide any guidance for the court or the victim about when health or other sensitive information would be admissible. For example, there is no requirement that the court must carry out a balancing exercise between the interests of the victim and the proper administration of justice.

It is clear that Margaret Mitchell recognises the scale of the innovation that her amendments propose, given the provisions for carrying out a pilot. However, without a great deal more clarity on how the amendments would work in practice, I fail to see the benefit of them.

Moreover, the provisions for terminating a pilot are defectively drafted, with no provision having been made for reversing commencement; regardless of the outcome of the pilot, the provisions would remain in force.

If information is being sought, the reasons should be clearly explained to the victims, but that should be dealt with practically rather than requiring advice from a solicitor. As I have mentioned, the Crown Office has in place comprehensive guidance to ensure that victims are given a full explanation of exactly why any sensitive information is being asked for.

Furthermore, in the event that legal advice is required, current legal aid legislation already
makes that available to victims and witnesses through the advice and assistance scheme, subject to the usual statutory test. On the subject of legal aid, I note that Margaret Mitchell’s amendment 29 proposes that an entirely new fund be established to pay for advice to or representation for alleged victims. Given the complexities that would be involved in setting up a new fund—not to mention the cost, in the current financial situation—I am not convinced that that would be a particularly sensible approach.

I and my officials have already met Rape Crisis Scotland to discuss its concerns, and we recently arranged a meeting between Rape Crisis and the Scottish Legal Aid Board to explore the additional support that might be available under current legal arrangements, beyond what is already available through the advice and assistance scheme. Similarly, colleagues in the Crown Office have discussed those matters in detail and have indicated a willingness to assist Rape Crisis in exploring how such evidence is used.

In summary, I do not believe that a pilot’s being included in the text of primary legislation is the best way to go. There are on-going discussions between Rape Crisis Scotland and the Scottish Legal Aid Board, and I am happy to commit to their working together constructively.

Equally, I am more than happy to engage further with Rape Crisis Scotland regarding other matters that it has raised with me and other members. However, if we are to have a pilot, we should work out the practical details and have the pilot before we embark on primary legislation. I have a great deal of sympathy with where members are coming from, but we have to ensure that we get the approach right; we do not want to make things worse for vulnerable victims. I therefore invite Graeme Pearson to seek to withdraw amendment 12, and I ask Margaret Mitchell not to move amendments 29 to 31.

The Presiding Officer: I call Graeme Pearson to wind up and to indicate whether he wishes to press or withdraw amendment 12. I would be grateful if you could be as brief as possible, Mr Pearson.

Graeme Pearson: I take the hint, Presiding Officer.

I am sorry to disappoint the cabinet secretary, but I will not seek agreement to withdraw amendment 12. In summation, all the words that he has just given us mean no change for women who go through our courts. The bill is largely driven by European legislation, which demands different approaches in member countries. Hence we have the proposals in the bill, but the issue has not been looked at from the point of view of victims. I hope that members will consider the issue, which has been at the centre of a problem in our courts for 10 years. We need to move now.

The Presiding Officer: The question is, that amendment 12 be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

For
Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Brown, Gavin (Lothian) (Con)
Buchanan, Cameron (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Davidson, Ruth (Glasgow) (Con)
Dugdale, Kezia (Lothian) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Findlay, Neil (Lothian) (Lab)
Finnie, John (Highlands and Islands) (Ind)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West Scotland) (Con)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Renfrewshire South) (Lab)
Hume, Jim (South Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Johnstone, Alison (Lothian) (Green)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
Macdonald, Lewis (North East Scotland) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Pearson, Graeme (South Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland Islands) (LD)
Smith, Drew (Glasgow) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, Liz (Mid Scotland and Fife) (Con)

Against
Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghamsouth) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Amendment 12 disagreed to.

Amendment 29 moved—[Margaret Mitchell].

The Presiding Officer: The question is, that amendment 29 be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

For

Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)

Against

Baker, Richard (North East Scotland) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Brown, Gavin (Lothian) (Con)
Buchanan, Cameron (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Davidson, Ruth (Glasgow) (Con)
Dugdale, Kezia (Lothian) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Findlay, Neil (Lothian) (Lab)
Finnie, John (Highlands and Islands) (Ind)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West Scotland) (Con)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Renfrewshire South) (Lab)
Hume, Jim (South Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Johnstone, Alison (Lothian) (Green)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Etrick, Roxburgh and Berwickshire) (Con)
Macdonald, Lewis (North East Scotland) (SNP)
McDougall, Margaret (West Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (SNP)
McNally, Duncan (Greenock and Inverclyde) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Milne, Nanette (North East Scotland) (SNP)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Pearson, Graeme (Central Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland Islands) (LD)
Smith, Drew (Glasgow) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, Liz (Mid Scotland and Fife) (Con)

Against

Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alistair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Cochez, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Cunningham, Roseanna (Pertshire South and Kinross-
shire) (SNP)

Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Graham, Christine (Midlothian South, Tweeddale and
Lauderdale) (SNP)

The Presiding Officer: The result of the division is: For 49, Against 61, Abstentions 0.

Amendment 12 disagreed to.

Amendment 29 moved—[Margaret Mitchell].

The Presiding Officer: The question is, that amendment 29 be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

For

Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Amendment 30 moved.

Amendment 29 disagreed to.

The Presiding Officer: The result of the division is: For 49, Against 61, Abstentions 0.

Amendment 30 moved—[Margaret Mitchell].

The Presiding Officer: The question is, that amendment 30 be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

For

Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Brown, Gavin (Lothian) (Con)
Buchanan, Cameron (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Chisholm, Malcolm (Edinburgh Southern and Leith) (Lab)
Davidson, Ruth (Glasgow) (Con)
Dugdale, Kezia (Lothian) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Ferguson, Alex (Galloway and West Dumfries) (Con)

Findlay, Neil (Lothian) (Lab)
Finnie, John (Highlands and Islands) (Ind)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West Scotland) (Con)
Grant, Rhoda (Highlands and Islands) (Lab)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Renfrewshire South) (Lab)
Humie, Jim (South Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Johnstone, Alison (Lothian) (Green)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
Macdonald, Lewis (North East Scotland) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Milk, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Pearson, Graeme (South Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland Islands) (Lab)
Smith, Drew (Glasgow) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, Liz (Mid Scotland and Fife) (Con)

Against

Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (Mid North East Scotland) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunningham South) (SNP)
Campbell, Alieen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Kenneth (Cunningham North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lochhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (Aberdeen Donside) (SNP)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)
Robertson, Dennis (Aberdeen West) (SNP)
Robinson, Shona (Dundee City East) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Salmond, Alex (Aberdeen East) (SNP)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire North) (SNP)
Thompson, Dave (Skye, Lochaber and Badenoch) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (SNP)
Yousaf, Humza (Glasgow) (SNP)

The Presiding Officer: The result of the division is: For 48, Against 61, Abstentions 0.

Amendment 30 disagreed to.

Amendment 31 moved—[Margaret Mitchell].

The Presiding Officer: The question is, that amendment 31 be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

For
Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Beamish, Claud (South Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Con)
Buchan, Cameron (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Davidson, Ruth (Glasgow) (Con)
Dugdale, Kezia (Lothian) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Findlay, Neil (Lothian) (Lab)
Finnie, John (Highlands and Islands) (Ind)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (East Scotland) (Con)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Renfrewshire South) (Lab)
Hume, Jim (South Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Johnstone, Alison (Lothian) (Green)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Etrick, Roxburgh and Berwickshire) (Con)
Macdonald, Lewis (North East Scotland) (Lab)

Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Pearson, Graeme (South Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland Islands) (LD)
Smith, Drew (Glasgow) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, Liz (Mid Scotland and Fife) (Con)

Against
Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Alieen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Eddie, Jim (Edinburgh Southern) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabian, Linda (East Kilbride) (SNP)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lochhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (Aberdeen Donside) (SNP)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)
Robertson, Dennis (Aberdeen West) (SNP)

For
Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Beamish, Claud (South Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Brown, Gavin (Lothian) (Con)
Buchan, Cameron (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Davidson, Ruth (Glasgow) (Con)
Dugdale, Kezia (Lothian) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Findlay, Neil (Lothian) (Lab)
Finnie, John (Highlands and Islands) (Ind)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (East Scotland) (Con)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Renfrewshire South) (Lab)
Hume, Jim (South Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Johnstone, Alison (Lothian) (Green)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Etrick, Roxburgh and Berwickshire) (Con)
Macdonald, Lewis (North East Scotland) (Lab)
Robison, Shona (Dundee City East) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Salmond, Alex (Aberdeen Central) (SNP)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Perthshire North) (SNP)
Thompson, Dave (Skye, Lochaber and Badenoch) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (SNP)
Yousaf, Humza (Glasgow) (SNP)

The Presiding Officer: The result of the division is: For 49, Against 61, Abstentions 0.

Amendment 31 disagreed to.

Section 6—Vulnerable witnesses: main definitions

The Presiding Officer: Amendments 14 to 16, in the name of the cabinet secretary, have already been debated.

Amendments 14 to 16 moved—[Kenny MacAskill].

The Presiding Officer: Does any member object to a single question being put on amendments 14 to 16?

Members indicated disagreement.

Amendments 14 and 15 agreed to.

Section 7—Child and deemed vulnerable witnesses

Amendment 16 agreed to.

Section 19—Victim statements

The Presiding Officer: As we are nearing the agreed time limit, I am prepared to exercise my power under rule 9.8.4A(a) to allow those with the right to speak in the next group to do so.

We now move to group 8, on victim statements and the right to make statements other than written statements. Amendment 17 is the only amendment in the group.

Graeme Pearson: The current arrangements for making a victim’s feelings known to a hearing is that they can supply a written statement, or they can be interviewed and can give an oral statement to a third party, who will then pass on that information for consideration. Amendment 17 seeks to offer a victim or a nominated person the right to make an oral representation—to be heard first hand. There is no doubt that victims who offered evidence to the committee and elsewhere have indicated that they wish to be able to make an oral representation on behalf of themselves and their family.

I see no reason why the amendment cannot be agreed to. It would be good to allow victims to be heard and the amendment would have an impact on the processes that are being considered. I hope that members will feel able to support it.

I move amendment 17.

Kenny MacAskill: As I have said before, victims of crime should clearly have the opportunity to communicate to the court the physical, emotional and economic impact of crime. That is why I introduced the victim statement scheme, which allows victims to give a written statement describing how the offence has affected them. However, as I explained to the Justice Committee last month, I have heard first hand from victims of crime who have struggled to fully convey in writing the impact that a crime has had on them, and who have asked why they cannot submit statements in other formats, such as a pre-recorded video.

That is why at stage 2 I lodged an amendment introducing an order-making power into section 14 of the Criminal Justice (Scotland) Act 2003, to allow Scottish ministers to specify the format in which victim statements can be made. The Justice Committee agreed to that amendment. Crucially, that will allow alternative formats to be piloted for specific periods of time and in specific areas. Taking a power to pilot new formats will allow for a full evaluation of any new approach to be carried out, taking into consideration the views of victims, the courts, the Crown and the defence. If successful, any new statement formats could then be extended more widely.

In making that amendment at stage 2, my intention was to enable Scottish ministers and criminal justice organisations to take a balanced and considered approach to extending the formats in which victim statements can be delivered, while allowing for the development of new formats in response to advances in technology.

Amendment 17, in the name of Graeme Pearson, is similar to an amendment that he lodged at stage 2. As I said then, I have concerns regarding the extent of the amendment, in that victims would be able to read their victim statement live in court. I am still doubtful about how well that would work in practice and of the benefits of such a measure. I also have concerns about the potential impact on the victim. I note that England and Wales have recently introduced a new victims code, which allows victims to read their own statements in court, but I am told that that system has not yet commenced. As I said at stage 2, I am keen to monitor the progress of that code before I give further consideration to such a measure in Scotland.
Mr Pearson also suggested an additional provision enabling the Lord President to issue guidance as to how such representations may be made. It is unclear why he proposed conferring that power on the Lord President when, under section 305 of the Criminal Procedure (Scotland) Act 1995, the High Court already has the power to regulate practice and procedure in criminal proceedings. Indeed, procedures have been established by act of adjourn to regulate the submission of child witness notices. It would seem strange for the Lord President to issue guidance on something for which the High Court could produce rules and regulations.

Furthermore, the proposed power of the Lord President to issue guidance on how representations under proposed new section 19(5A)(b) might be made does not sit easily with the proposal to confer delegated power on the Scottish ministers under proposed new section 19(5A)(c) to prescribe other means of making a victim statement by order.

In light of the existing provisions in the bill that confer powers to pilot new forms of victim statement, and the specific concerns regarding any guidance on how those statements are to be made, I cannot support amendment 17.

That said, I would not want to rule out the proposal relating to oral victim statements altogether, and I reiterate the commitment that I gave Graeme Pearson at stage 2, which was that I would be happy to revisit the issue once greater consideration has been given to how such a measure would operate in practice, and once the benefits and risks to the victim have been explored in more detail. On that basis, I invite Graeme Pearson to withdraw amendment 17.

Graeme Pearson: In good faith, and given the cabinet secretary’s assurances, I seek leave to withdraw the amendment.

Amendment 17, by agreement, withdrawn.

The Deputy Presiding Officer (Elaine Smith): We move to group 9, on the rights of children to make victim statements and receive information on offender release. Amendment 32, in the name of Elaine Murray, is grouped with amendments 33, 18, 18A, and 18B.

Elaine Murray: Amendments 32 and 33 are similar to amendments that were rejected by the cabinet secretary and the committee at stage 2. I lodged them at the request of Children 1st, which has issued a briefing supporting the amendments; they are also supported by Barnardo’s, Scotland’s Commissioner for Children and Young People, Scottish Women’s Aid, YouthLink and several other organisations that were also unconvinced by the cabinet secretary’s arguments.

The amendments would give a child under the age of 12 the opportunity to make a victim statement should they wish to do so, and should they have sufficient age and maturity. If a child was not able to make a statement, one may be made on their behalf by a parent or other qualifying individual. A child who made a statement under section 19 would have to be provided with whatever support they required to be able to do so.

There is considerable support from a range of organisations for amendment 32, and I thank those organisations for circulating a separate briefing.

The justice secretary suggested that we had set the appropriate age for children making a victim statement in their own right at 12. However, criminal investigations and proceedings might involve children as young as three giving evidence in their own right as victims and witnesses—often with not nearly enough support, I am sorry to say. Surely it is contradictory to allow only children over the age of 12 to give a statement about the impact of crime on them. We could have a situation whereby a child of six gives eloquent and compelling evidence as the victim of sexual abuse that helps to convict an accused, and is then denied the opportunity to tell the sheriff or judge about the impact of that offence on them.

Previous legislation acknowledges both the importance of children making their views known when decisions are being made that affect them and their rights to do so. Examples include the Education (Additional Support for Learning) (Scotland) Act 2004 and the Education (Additional Support for Learning) (Scotland) Act 2009. There is also precedent that provides for children to be supported in doing so: section 122 of the Children's Hearings (Scotland) Act 2011 provides for advocacy for all children and young people who enter the hearings system.

My amendments also seek to define more clearly who should make a victim statement on a child’s behalf. They would ensure that, first, those who have parental rights and responsibilities would do so or, if the parent or carer was unable to do so—or if it would be inappropriate for them to do so—the qualifying person list whose purpose is to determine who would make a victim statement on behalf of an adult who lacks mental capacity would be used.

The definition in the bill of a carer updates that which first featured in the Criminal Justice (Scotland) Act 2003. However, that definition is designed for the specific purpose of distinguishing between those who provide unpaid care as family
members for a person with support needs, and paid carers. To use that definition in this context would be inappropriate.

Children can be affected by horrific crimes both directly and indirectly. They deserve to be allowed to make the court aware of that in their own words and in their own way. Where they need support to do so, whatever their age, it should be provided. My amendments would enable a relatively small number of children who have been impacted—often by a terrible experience—to ensure that what they say about the impact of crime on them is heard and listened to by the justice system.

I move amendment 32.

**Kenny MacAskill:** Amendments 32 and 33, in the name of Elaine Murray, are very similar to amendments that she lodged at stage 2. I appreciate where she is coming from. Clearly, there may be very mature young people who want to make a victim statement but cannot do so. Indeed, at stage 2 I lodged amendments, which the committee supported, to lower the age at which children can give victim statements from 14 to 12.

However, we tend to take a general view on matters such as the age of consent and the voting age, and I think that a similar approach is appropriate with regard to the age at which victim statements can be made. In addition, if it is felt in the future that children under the age of 12 should be allowed to make victim statements, existing order-making powers would enable Scottish ministers to reduce the age limit accordingly. We are more than willing to give further consideration to that in due course.

I also have some concerns about the detail of amendment 33, in that it does not indicate who is to make a decision as to whether a child is of sufficient age and maturity to make a statement, and who is to provide the support mentioned in proposed new subsection 11C. Those are clearly matters of some importance, and a lack of clarity on who those provisions apply to would be confusing.

Amendment 18, in my name, proposes making a number of amendments to section 16 of the Criminal Justice (Scotland) Act 2003. That section established a system—known as the victim notification scheme—whereby victims can, on request, receive information about the relevant offender. Most of the changes proposed by amendment 18 are required as a consequence of amendments that will be made by section 19 of the bill, which will repeal certain parts of section 14 of the 2003 act that are, in turn, referred to in section 16. Those changes will simply ensure that the victim notification scheme will continue to operate as it does at present.

In proposing amendment 18, however, I have also taken the opportunity to seek to lower from 14 to 12 the age at which children can receive information from the victim notification scheme in their own right. At stage 2, the Justice Committee supported my amendments to make a similar change with regard to the making of victim statements. I think that it is only right that that age limit be consistent both with arrangements for making victim statements and with other legislation relating to children, primarily the Age of Legal Capacity (Scotland) Act 1991, which provides that children over the age of 12 have testamentary capacity and are able to make decisions themselves about many issues.

Amendment 18 also provides an order-making power whereby Scottish ministers may in future modify the age limits in section 16 of the 2003 act independently of the age limits in section 14 of that act.

Amendment 18A, in the name of John Finnie, seeks to amend my amendment 18 to introduce an order-making power for Scottish ministers to be able to change the persons eligible to receive information under section 16 of the 2003 act through the victim notification scheme. I appreciate the intention behind the amendment, which is to give Scottish ministers the flexibility to make any further changes if necessary in the future. In light of that, I am happy to support amendment 18A.

Amendment 18B, also in the name of John Finnie, would allow Scottish ministers to issue guidance on the support that should be available to children if they receive information under section 16 of the 2003 act. Again, I appreciate the intention behind the amendment. However, I am not persuaded that there is a need for statutory guidance in relation to such support, and it is not clear who the guidance would be aimed at. I think that a better approach would be to work with our justice partners and with victim support groups to identify what support is available currently and how to improve that if necessary.

I therefore invite Elaine Murray to withdraw amendment 32 and not to move amendment 33. I invite members to support amendments 18 and 18A, and I ask John Finnie not to move amendment 18B.

**The Deputy Presiding Officer:** I call John Finnie to speak to amendment 18A and other amendments in the group—around two minutes, please, Mr Finnie.

**John Finnie (Highlands and Islands) (Ind):** I am grateful for the cabinet secretary’s support for amendment 18A. However, I have been advised of instances in which child victims of very serious offences, such as sexual and domestic abuse,
have found out by accident about the release of an offender. One of the partner agencies that the cabinet secretary is working with is Children 1st, which works with children to help them recover from the traumatic experience of abuse. It knows of situations in which an offender returned to live in the same community on release and the first that the child victim knew of their release was when they literally bumped into them in the street.

Amendment 18 does not make it clear whether, if a child victim does not have the right to be notified, their parent or guardian has that right. A child who is older than 12 might not want to know or might not realise the consequences of not wishing to be notified, but in order to consider how to protect the child from encountering a released offender, the parent or guardian might wish to be notified. How does the amendment provide for such an occurrence?

Moreover, a child might not realise the importance of knowing about the release and they might find the release traumatic. It is important to provide support for a child victim so that they can address the impact of such information and process it as positively as possible. Guidance would help the justice authorities to work out what might be required in different circumstances.

My amendments 18A and 18B would allow for such eventualities. They would allow Scottish ministers, once proper consideration has been given to the effects of amendment 18, to issue appropriate guidance and to continue to finesse the operation and implementation of amendment 18.

The justice secretary has accepted that amendment 18A is within the overall aims of the bill. Amendment 18B is supported by Children 1st and I encourage everyone else to support it too.

Elaine Murray: Amendments 32 and 33 are supported by Aberlour Child Care Trust, Barnardo’s, Children 1st, Clan Childlaw centre, Professor Fiona Raitt, Includem, Janys Scott QC, LGBT Youth Scotland, the National Society for the Prevention of Cruelty to Children, Parenting across Scotland, Scotland’s Commissioner for Children and Young People, Scottish Women’s Aid, Together Scottish Alliance for Children and Young People, Scottish Women’s Rights, the WAVE Trust and YouthLink Scotland. If members do not listen to me, I ask them to please listen to them. They support amendments 32 and 33.

The Deputy Presiding Officer: The question is, that amendment 32 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Dugdale, Kezia (Lothian) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Findlay, Neil (Lothian) (Lab)
Finnie, John (Highlands and Islands) (Ind)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Renfrewshire South) (Lab)
Hume, Jim (South Scotland) (LD)
Johnstone, Alison (Lothian) (Green)
Lamont, Johann (Glasgow Pollok) (Lab)
Macdonald, Lewis (North East Scotland) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)
Pearson, Graeme (South Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Scott, Tavish (Shetland Islands) (LD)
Smith, Drew (Glasgow) (Lab)

Against

Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Gavin (Lothian) (Con)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Buchanan, Cameron (Lothian) (Con)
Burgess, Margaret (Cunningham South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Carlaw, Jackson (West Scotland) (Con)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Davidson, Ruth (Glasgow) (Con)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing,ergusson, Alex (Galloway and West Dumfries) (Con)
FitzPatrick, Joe (Dundee City West) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunningham North) (SNP)
Gibson, Bob (Caithness, Sutherland and Ross) (SNP)
Goldie, Annabel (West Scotland) (Con)
Graeme, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Amendment 33 moved—[Elaine Murray].

Amendment 33 disagreed to.

Amendment 32 disagreed to.

The Deputy Presiding Officer: The result of the division is: For 35, Against 73, Abstentions 0.

Amendment 33 moved—[Elaine Murray].

The Deputy Presiding Officer: The question is, that amendment 33 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Mid Scotland) (Lab)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Dugdale, Kezia (Lothian) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Findlay, Neil (Lothian) (Lab)
Finnie, John (Highlands and Islands) (Ind)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Renfrewshire South) (Lab)
Hume, Jim (South Scotland) (LD)
Johnstone, Alison (Lothian) (Green)
Lamont, Johann (Glasgow Pollok) (Lab)
Macdonald, Lewis (North East Scotland) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Murray, Elaine (Dumfries and Galloway) (SNP)
Pearson, Graeme (South Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Scott, Tavish (Shetland Islands) (LD)
Smith, Drew (Glasgow) (Lab)

Against
Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Alian, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Allard, Christian (North East Scotland) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Gavin (Lothian) (Con)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Buchanan, Cameron (Lothian) (Con)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Carlaw, Jackson (West Scotland) (Con)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Davidson, Ruth (Glasgow) (Con)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Eddie, Jim (Edinburgh Southern) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Fergusson, Alex (Galloway and West Dumfries) (Con)
FitzPatrick, Joe (Dundee City West) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Cathcart, Sutherland and Ross) (SNP)
Goldie, Annabel (West Scotland) (Con)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
Lochhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk East) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (Aberdeen Donside) (SNP)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)
Petronella, Dennis (Aberdeenshire West) (SNP)
Robison, Shona (Dundee City East) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Scanlan, Mary (Highlands and Islands) (Con)
Smith, Liz (Mid Scotland and Fife) (Con)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire North) (SNP)
Thompson, Dave (Skye, Lochaber and Badenoch) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (SNP)
Yousaf, Humza (Glasgow) (SNP)

The Deputy Presiding Officer: The result of the division is: For 35, Against 73, Abstentions 0.

The Deputy Presiding Officer: The question is, that amendment 33 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Dugdale, Kezia (Lothian) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Findlay, Neil (Lothian) (Lab)
Finnie, John (Highlands and Islands) (Ind)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)
Robertson, Dennis (Aberdeenshire West) (SNP)
Robison, Shona (Dundee City East) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Smith, Liz (Mid Scotland and Fife) (Con)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire North) (SNP)
Thompson, Dave (Skye, Lochaber and Badenoch) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (SNP)
Yousaf, Humza (Glasgow) (SNP)

The Deputy Presiding Officer: The result of the division is: For 35, Against 72. Abstentions 0.

Amendment 33 disagreed to.

Amendment 18 moved—[Kenny MacAskill].

Amendment 18A moved—[John Finnie]—and agreed to.

Amendment 18B moved—[John Finnie].

The Deputy Presiding Officer: The question is, that amendment 18B be agreed to. Are we all agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Brown, Gavin (Lothian) (Con)
Buchanan, Cameron (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Davidson, Ruth (Glasgow) (Con)
Dugdale, Kezia (Lothian) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springfield) (Lab)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Findlay, Neil (Lothian) (Lab)
Finnie, John (Highlands and Islands) (Ind)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West Scotland) (Con)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Renfrewshire South) (Lab)
Hume, Jim (South Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Johnstone, Alison (Lothian) (Green)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
Macdonald, Lewis (North East Scotland) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Pearson, Graeme (South Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland Islands) (LD)
Smith, Drew (Glasgow) (Lab)
Smith, Liz (Mid Scotland and Fife) (Con)

Against
Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabian, Linda (East Kilbride) (SNP)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Robin (Caithness, Sutherland and Ross) (SNP)
Graham, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lochhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (Aberdeen Donside) (SNP)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
orders should be considered in every case, the offender. If the intention is that compensation does not make a compensation order against the victim, the deciding factor in whether a court makes or contains any provision for the victim’s views to be consulted even if a compensation order was not notified the court that they do not wish to receive compensation from the offender. Victims of sexual offences, for example, might find payment in compensation order to be made. As I have said before by way of reassurance, the bill will do nothing to preclude the court from using its discretion and will impose an obligation to do so. Section 20 is intended to ensure that the court considers imposing compensation orders in relevant cases but it does not remove its discretion to decide whether such a move is appropriate. In making such a decision, the court considers all the circumstances of the case and would rightly take into account any views expressed by the victim.

At stages 1 and 2, the Justice Committee discussed concerns that had been raised by Rape Crisis Scotland and Scottish Women’s Aid about compensation orders being imposed in domestic abuse or sexual assault cases in which, as Sandra White has suggested, victims do not wish such an order to be made. As I have said before by way of reassurance, the bill will do nothing to preclude the court from using its discretion and will impose compensation orders only where the court considers it appropriate to do so.

Amendment 19, in the name of Elaine Murray, is similar to an amendment that she lodged at stage 2. In light of comments that were made about the practicality of the previous amendment and the potential burden on the court, I welcome the changes that she has made to narrow the circumstances in which views must be sought to...
those situations in which the court actually intends to impose a compensation order.

As I said at stage 2, I have some doubts about whether the amendment is absolutely necessary. The court already considers all the circumstances in making a compensation order. I understand that it is very rare for compensation orders to be awarded in relation to sexual offence or domestic abuse cases, and it is those cases that are at the heart of the concerns raised by Rape Crisis and Scottish Women’s Aid.

That said, I appreciate the concerns that have been raised and, given the changes that have been made to the proposal since stage 2, I am happy to support Elaine Murray’s amendment. It is clear that no one wants to cause further distress to victims and, in the small number of cases in which compensation is not wanted, the proposal will ensure that it is not granted.

We will continue to work with the Crown Office and the Judicial Office for Scotland to ensure that the provision works well in practice and to ensure that no delays are caused in the majority of cases in which victims are happy to receive compensation.

I therefore encourage members to support amendment 19.

Elaine Murray: I thank the cabinet secretary for accepting the amendment and other members for their support.

Amendment 19 agreed to.

Section 21—Restitution order

The Deputy Presiding Officer: Group 11 is on restitution orders: application of the fund. Amendment 34, in the name of Alison McInnes, is grouped with amendment 35.

Alison McInnes: Amendments 34 and 35 would extend restitution orders and the associated fund to fire and ambulance service personnel. It would mean that an assault on those workers—not only on the police—could lead to the offender making a payment to the fund and would, in turn, enable those employees to access the specialist support services that it will provide.

Attacks on emergency services personnel are not limited to attacks on the police. During stage 2, all parties, including the cabinet secretary, were sympathetic to the argument that there ought not to be a distinction, but concerns were expressed that the proposal could prove to be impracticable—that it could be too difficult to identify suitable beneficiaries or that the proposal could be too expensive to administer. However, even the cabinet secretary acknowledged during stage 2 that benevolent funds exist for the distinct groups of emergency workers to whom I wish to extend restitution orders—the Fire Fighters Charity and the Ambulance Services Benevolent Fund. It would be for the administrator of the new fund to decide whether they would be appropriate beneficiaries, and the Scottish ministers would have the power to make further provision for the administration of the restitution fund. Therefore, I maintain that it would be within its gift to ensure that the operator divides and distributes the money in a manner that supports victims of the relevant offence for which it was collected, as would be appropriate in the circumstances.

The Law Society of Scotland supports extending restitution orders to a broader group of workers, and it has been suggested to me that, if the number of assaults under section 1(1) of the Emergency Workers (Scotland) Act 2005 is comparatively low, as the cabinet secretary argued at stage 2, the additional administration costs would be minimal and more readily absorbed into the resources that are necessary for the restitution fund in general.

I move amendment 34.

Margaret Mitchell: There seems to be no good reason why restitution orders should not apply to other emergency workers, and not just the police alone. Given Alison McInnes’s comments, I and the Conservatives are minded to support the amendments in her name.

Kenny MacAskill: As I have said before, I am sympathetic to the idea of extending restitution orders to workers other than the police, provided that the system would actually work. I acknowledge that Alison McInnes has attempted to extend the scope of restitution orders in such a way as to ensure that, for each emergency worker who is the victim of an assault, there could be appropriate beneficiaries who could receive payment from the restitution fund.

The amendments would certainly make the operation of the restitution fund more complex. Payments to the fund would require to be ring fenced according to the type of offence for which the restitution order was imposed. It would be inappropriate to use moneys that were recovered in respect of an assault on one type of emergency worker to make payments to organisations that provide support to different emergency workers. The Scottish Court Service would therefore be left with the burden of splitting the charges in the 2005 act into their component categories of worker to ensure that the money may be appropriately ring fenced when it goes into the restitution fund. The operator of the fund would also require to ensure that moneys that were received for certain offences were disbursed to organisations that support victims of those offences.
Moreover, the amendments do not address the very obvious practical difficulty that I described at stage 2. In 2012-13, the figures for which are now available, there were 3,137 persons with a charge proved under section 41(1)(a) of the Police (Scotland) Act 1967, and only 139 persons with a charge proved in respect of all emergency workers under section 1 of the Emergency Workers (Scotland) Act 2005.

The scale is thus completely different. Crucially, that is reflected in the sums that might be available. While fines for assaults on the police raise six-figure sums every year, as I said at stage 2, the Scottish Court Service advises that there was no fines income at all in 2011-12 and 2012-13 from any of the charges under the 2005 act. Instead, those were dealt with by community payback orders or imprisonment. It is not clear, therefore, that there is any potential income at all for restitution orders for any category of emergency workers.

Amendments 34 and 35 are therefore likely to result in a burden on the operators of the restitution fund. The income received in respect of assaults on emergency workers under the 2005 act may well be insufficient to cover the operating expenses incurred by extending the scope of the restitution fund to include them. Rather than providing benefits for the intended recipients, it is quite possible that the amendments would result only in a burden on the operators of the restitution fund.

Restitution orders would work in respect of assaults on police officers where there is clear evidence that the volume of potential income is there. The use of financial penalties will result in real benefits from the provision of support services. The same, unfortunately, cannot be said in respect of other emergency workers—certainly not at the present moment.

In those circumstances, I urge Alison McInnes to reflect on what I have said and to withdraw amendment 34 and not move amendment 35. These matters can be reviewed and revisited in due course, but at present if we agreed to the amendments we would harm those whom she seeks to benefit.

Alison McInnes: I have listened to what the cabinet secretary said, but it seems perverse and inequitable that only an assault on a police officer, and not on a firefighter or a paramedic responding to an emergency, should merit a restitution order. It is unfair that only one segment of our emergency services personnel should have the benefit of the support services that the funds will provide. I will therefore press amendment 34.

The Deputy Presiding Officer: The question is, that amendment 34 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Brown, Gavin (Lothian) (Con)
Buchanan, Cameron (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Davidson, Ruth (Glasgow) (Con)
Dugdale, Kezia (Lothian) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Findlay, Neil (Lothian) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West Scotland) (Con)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Renfrewshire South) (Lab)
Hume, Jim (South Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Johnstone, Alison (Lothian) (Green)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
Macdonald, Lewis (North East Scotland) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McTaggart, Anne (Glascow) (Lab)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Pearson, Graeme (South Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Scarlet, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland Islands) (LD)
Smith, Drew (Glasgow) (Lab)
Smith, Liz (Mid Scotland and Fife) (Con)

Against

Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Cunninghame) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Coaffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
The Deputy Presiding Officer: The result of the division is: For 48, Against 57, Abstentions 0.

Amendment 34 disagreed to.

Amendment 35 moved—[Alison McInnes].

The Deputy Presiding Officer: The question is, that amendment 35 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Brown, Gavin (Lothian) (Con)
Buchanan, Cameron (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Davidson, Ruth (Glasgow) (Con)
Dugdale, Kezia (Lothian) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Findlay, Neil (Lothian) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West Scotland) (Con)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Renfrewshire South) (Lab)
Hume, Jim (South Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Johnstone, Alison (Lothian) (Green)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
Macdonald, Lewis (North East Scotland) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
McManus, Michael (Uddingston and Bellshill) (Lab)
McManus, Siobhan (Central Scotland) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Mile, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfries and Galloway) (Lab)
Pearson, Graeme (South Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland Islands) (LD)
Smith, Drew (Glasgow) (Lab)
Smith, Liz (Mid Scotland and Fife) (Con)

Against
Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Chris (North East Scotland) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Finnie, John (Highlands and Islands) (Ind)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Graham, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jackie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lochhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
The Deputy Presiding Officer: The result of the division is: For 47, Against 59, Abstentions 0.

Amendment 35 disagreed to.

Amendment 20 moved—[Kenny MacAskill]—and agreed to.

Section 23—Victim’s right to receive information about release of offender etc

Amendment 21 moved—[Graeme Pearson].

16:00

The Deputy Presiding Officer: The question is, that amendment 21 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Brown, Gavin (Lothian) (Con)
Buchan, Cameron (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Davidson, Ruth (Glasgow) (Con)
Dugdale, Kezia (Lothian) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Ferguson, Alex (Galloway and West Dumfries) (Con)
Findlay, Neil (Lothian) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West Scotland) (Con)

Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Henry, Hugh (Renfrewshire South) (Lab)
Hume, Jim (South Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
Macdonald, Lewis (North East Scotland) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
Mctaggart, Anne (Glasgow) (Lab)
Mile, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Pearson, Graeme (South Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland Islands) (LD)
Smith, Drew (Glasgow) (Lab)
Smith, Liz (Mid Scotland and Fife) (Con)

Against

Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Alian, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Finnie, John (Highlands and Islands) (Ind)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Grahame, Christine (Midlothian North, Tweeddale and Lauderdale) (SNP)
Harvie, Patrick (Glasgow) (Green)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Johnstone, Alison (Lothian) (Green)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lochhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Amended Section 24—Life prisoners: victim’s right to make oral representations before release on licence

The Depute Presiding Officer: The result of the division is: For 46, Against 61, Abstentions 0.

Amendment 21 disagreed to.

The Depute Presiding Officer: I inform Parliament that, as we are nearing the agreed time limit, I am prepared to exercise my power under rule 9.8.4A(a) to allow those with a right to speak in the next group to do so.

Section 24—Life prisoners: victim’s right to make oral representations before release on licence

The Depute Presiding Officer: Group 12 is on life prisoners—victim’s rights to make oral representations to the convicted person. Amendment 22, in the name of Graeme Pearson, is grouped with amendment 23.

Graeme Pearson: Amendments 22 and 23 are similar to an approach that I suggested in an amendment that related to oral representations in court.

The evidence that was presented during the processes in the Justice Committee indicated that victims and victims’ relatives felt disenfranchised by the process of criminal justice and that their voices were not heard at key moments in that process.

Amendment 22 would give victims the opportunity to make an oral representation to a board considering the release of someone who had previously been sentenced to life imprisonment. The amendment would have an impact on a discrete number of prisoners.

It was suggested that allowing victims or their relatives to make such representations would cause difficulties in terms of security in the prison and that the person who was trying to make on oral presentation in such circumstances would be under pressure. A range of technical challenges were also mentioned. However, I believe that offering an opportunity to make that representation orally but by closed-circuit television would overcome many of the problems that have been raised.

Issues were raised about whether the prisoner would be able to hear everything that was being said. I suggest that the amendment covers that eventuality and should provide for the right kind of presentation.

Amendment 23 is consequential and concerns the videolink.

Amendment 24 relates to the Scottish ministers issuing guidance to the Scottish Court Service on the minimum standards to apply to the provision of information in relation to solemn procedure. The amendment seeks to ensure that the witnesses and victims who go to court under solemn procedure and wish access to information are guaranteed access to a series of pieces of information.

We have not gone into the detail of what the information might be—I think that that would be subject to discussion—but victims have told us that they appear in court without necessarily ever having been in a court before and without having had the opportunity to visit when it is empty, that they have ended up in situations in which they feel oppressed by being placed too close to an accused person, and that they have had no understanding of procedures before they enter. The amendment would enable advice to be offered, guidelines to be issued and a benchmark to be set.

I move amendment 22.

The Depute Presiding Officer: As I indicated, under the rules I am able to call only those who have a right to speak on the group. I call the cabinet secretary.

Kenny MacAskill: Amendments 22 and 23 would allow victims to make representations about release and licence conditions directly to the prisoner via videolink. As I said at stage 2, I consider the proposal to be seriously flawed.

The prisoner has no involvement in decisions about his release or any licence conditions that may be attached, so there appears to be little purpose in the victim’s speaking directly to the offender about those matters. Decisions on release and licence conditions are rightly made by the Parole Board for Scotland, which takes into consideration all the reports on the conduct and progress of the prisoner.

For the benefit of those members who were not present at stage 2, I reiterate that victims in
relevant cases are invited to make representations to the Parole Board about possible release and licence conditions. The bill extends that to include oral representations for life sentence prisoners. The prisoner already sees and will continue to see the representations that are made by the victim unless there is good reason to withhold them from him or her, and there is nothing to be added to the effectiveness of the parole process by including the amendments.

The primary concern of the Parole Board is the risk attached to releasing a prisoner, and that risk is best assessed by considering relevant representations by the victim to the Parole Board alongside all the other reports that have been prepared on the prisoner.

In summary, I do not think that there would be any benefit to either victims or the parole process in allowing such representations to be made to prisoners. As I have said before, that may even be counterproductive in giving the victim unreal expectations of what can be achieved through such a process. I also have concerns about the effect on the victim of such direct contact, which could be extremely traumatic. I therefore urge Graeme Pearson to withdraw amendment 22 and not to move amendment 23.

The Deputy Presiding Officer: I call Mr Pearson to wind up as briefly as possible and to indicate whether he wishes to press or withdraw amendment 22.

Graeme Pearson: I am disappointed that the cabinet secretary has responded as he has. I am not surprised that he sees little value, as the value would be from the point of view of the victim, who would have the opportunity to express an impact assessment personally and know that they had been heard by the person whom they knew to be the perpetrator. We spoke earlier about restorative justice, and there is no doubt in my mind that, if the victim sees value in it and wants to make an oral representation, the system should be capable of enabling that to happen.

I press amendment 22.

The Deputy Presiding Officer: The question is, that amendment 22 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Brown, Gavin (Lothian) (Con)
Buchanan, Cameron (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Davidson, Ruth (Glasgow) (Con)
Dugdale, Kezia (Lothian) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Findlay, Neil (Lothian) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West Scotland) (Con)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Henry, Hugh (Renfrewshire South) (Lab)
Hume, Jim (South Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
Macdonald, Lewis (North East Scotland) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Pearson, Graeme (South Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland Islands) (LD)
Smith, Drew (Glasgow) (Lab)
Smith, Liz (Mid Scotland and Fife) (Con)

Against
Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabian, Linda (East Kilbride) (SNP)
Finnie, John (Highlands and Islands) (Ind)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Harvie, Patrick (Glascow) (Green)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Johnstone, Alison (Lothian) (Green)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
The Deputy Presiding Officer: The result of the division is: For 46, Against 60, Abstentions 0.

Amendment 22 disagreed to.

Amendment 23 moved—[Graeme Pearson].

The Deputy Presiding Officer: The question is, that amendment 23 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Brown, Gavin (Lothian) (Con)
Buchanan, Cameron (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Davidson, Ruth (Glasgow) (Con)
Dugdale, Kezia (Lothian) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Findlay, Neil (Lothian) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West Scotland) (Con)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Henry, Hugh (Renfrewshire South) (Lab)
Hume, Jim (South Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Lamont, Johann (Glasgow Pollok) (Lab)
Macdonald, Lewis (North East Scotland) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Miles, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Pearson, Graeme (South Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland Islands) (LD)
Smith, Drew (Glasgow) (Lab)
Smith, Liz (Mid Scotland and Fife) (Con)

Against
Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
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Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Ferguson, Alex (Galloway and West Dumfries) (Con)
Finnie, John (Highlands and Islands) (Ind)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Harvie, Patrick (Glasgow) (Green)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Johnstone, Alison (Lothian) (Green)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
Lochhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (Aberdeen Donside) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (Aberdeen Donside) (SNP)
McElwee, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McElduff, Aileen (South Scotland) (SNP)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Swinney, John (Perthshire North) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (SNP)
Yousaf, Humza (Glasgow) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)
Robertson, Dennis (Aberdeenshire West) (SNP)
Robison, Shona (Dundee City East) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Swinney, John (Perthshire North) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (SNP)
Yousaf, Humza (Glasgow) (SNP)

The Deputy Presiding Officer: The result of the division is: For 44, Against 63, Abstentions 0.

Amendment 23 disagreed to.

After section 25

Amendment 24 moved—[Graeme Pearson].

The Deputy Presiding Officer: The question is, that amendment 24 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Brown, Gavin (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Davidson, Ruth (Glasgow) (Con)
Dugdale, Kezia (Lothian) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Ferguson, Alex (Galloway and West Dumfries) (Con)
Findlay, Neil (Lothian) (Lab)
Goldie, Annabel (West Scotland) (Con)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Henry, Hugh (Renfrewshire South) (Lab)
Hume, Jim (South Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Etrimick, Roxburgh and Berwickshire) (Con)
Macdonald, Lewis (North East Scotland) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Milne, Narette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Pearson, Graeme (South Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland Islands) (LD)
Smith, Drew (Glasgow) (Lab)
Smith, Liz (Mid Scotland and Fife) (Con)

Against
Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Finnie, John (Highlands and Islands) (Ind)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Harvie, Patrick (Glasgow) (Green)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Johnstone, Alison (Lothian) (Green)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lochhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAaskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (Aberdeen Donside) (SNP)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)
Robertson, Dennis (Aberdeenshire West) (SNP)
Robison, Shona (Dundee City East) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Swinney, John (Perthshire North) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
The Deputy Presiding Officer: The result of the division is: For 44, Against 61, Abstentions 0.

Amendment 24 disagreed to.

The Deputy Presiding Officer: That ends consideration of amendments.

Victims and Witnesses (Scotland) Bill

The Deputy Presiding Officer (Elaine Smith): The next item of business is a debate on motion S4M-08562, in the name of Kenny MacAskill, on the Victims and Witnesses (Scotland) Bill.

I advise the chamber that we are incredibly tight for time. The cabinet secretary has a maximum of 10 minutes.

16:11

The Cabinet Secretary for Justice (Kenny MacAskill): I am pleased to open the debate. Much time is spent talking about how our criminal justice system works and rightly so. However, in doing so, we must not leave out the discussion of the needs of those arguably most affected by it—the victims and witnesses of crime.

I thank the members and clerks of both the Justice Committee and the Health and Sport Committee for their work over the past year. Their scrutiny and discussion of the bill have been detailed and considered and resulted in the clarification and enhancement of aspects of the bill. I also thank those who have been involved in the bill’s development. In particular, I thank those organisations and individuals who responded to the consultation, including the victim support organisations, such as Victim Support Scotland and Scottish Women’s Aid, that gave evidence to the committees and provided robust and constructive feedback throughout the bill process, as well as to our justice partners. Most important, I express my gratitude and that of the Minister for Public Health to the victims of crimes and survivors of institutional child abuse. They have shown great strength in sharing their views, knowledge and experiences with us all.

The bill contains provisions to improve support for victims and witnesses and to establish a national confidential forum to receive and listen in confidence to the experiences of adults who were placed in institutional care as children, including experiences of abuse.

I turn first to the elements of the bill focused on our criminal justice system. The central aim of our proposals is to put victims and witnesses at the heart of our justice system and to improve the information and support available to them. The bill will ensure that offenders pay towards the support needed by victims through the introduction of a victims surcharge, to be used to help meet the immediate needs of victims of crime.

The bill will make important improvements to the support available for vulnerable witnesses giving evidence. It will require justice agencies to set and
publish standards of service to ensure that victims and witnesses know exactly what to expect when they come into contact with the justice system. Those and other proposals will help ensure that Scotland is compliant with the European Union’s victims rights directive. Earlier this year, the victim support Europe conference was hosted in Edinburgh. That acknowledged the positive progress made in Scotland in meeting the needs of victims and witnesses.

A number of important improvements were made to the bill at stage 2, many of which responded to suggestions raised during the Justice Committee’s stage 1 scrutiny. In response to concerns raised at stage 1, Alison McInnes proposed an amendment providing that an objection should not be possible with regard to those standard special measures that are automatically available to certain categories of vulnerable witness. I gave my support to that. I believe that the provisions and special measures now strike the appropriate balance between the rights of victims and the accused.

The Justice Committee suggested that a reporting mechanism be introduced to ensure accountability with regard to justice organisations meeting the standards of service that will be required to be set out under section 2. We have introduced such a mechanism, requiring organisations not only to reflect on how they have met the standards during the reporting period but to think ahead about how they intend to meet them in the future. We also introduced a requirement for organisations to consult each other in developing their standards to encourage a consistent and joined-up approach.

We introduced a power to pilot alternative formats of victim statements, such as pre-recorded videos, in direct response to calls from victims to consider allowing flexibility in how such statements may be given. I reiterated that commitment today.

Furthermore, we introduced an obligation on the Lord Advocate to make and publish rules about the process for reviewing decisions not to prosecute. That will increase transparency in the justice system and reflects the requirements of article 11 of the EU directive on victims rights.

I turn to those elements of the bill that relate to the establishment of the national confidential forum.

In 2009, the Scottish ministers committed to a pilot forum to test out a model for enabling adults who were placed in institutional care as children to describe their experiences, including, sadly, abuse and neglect. The outcome of that was the time to be heard pilot forum. Provisions in the bill that relate to the NCF are based on that successful pilot.

The NCF will give people who were placed in institutional care as children the opportunity to share their experiences through a confidential, supportive and non-judgmental process. It will help to improve the health and wellbeing of such individuals by offering acknowledgement of their experiences, including experiences of abuse and neglect. Lessons may also be learned from those past experiences to help us to inform current and future childcare policies.

We listened to the views of survivors and stakeholders and welcomed the Health and Sport Committee’s recommendations. At stage 2, the Minister for Public Health proposed amendments that will enhance the scope of the NCF and give more people an opportunity to participate, all of which received cross-party support.

We have extended the eligibility criteria to include 16 and 17-year-olds. We have clarified the definition of institutional care to ensure that a range of care or health services can be included in the eligibility criteria.

We have ensured a balance between the ability of the Mental Welfare Commission and the NCF to produce reports and the retention of confidentiality.

We also recognised the importance of allowing the NCF to operate as soon as possible, and the bill now provides for the appointments process to begin without delay, so that former residents—in particular, ill and older survivors—will be given the opportunity to participate in the NCF from 2014.

Of course, the bill is not, and will not be, the end of the process of reform and improvement. The proposals relevant to the criminal justice system will be implemented in the wider context of the Scottish Government’s making justice work programme, a central objective of which is to improve the experience of victims and witnesses. We will work closely with our partners in the criminal justice system and the third sector to ensure that the provisions are implemented effectively. We will also continue to work to identify non-legislative improvements that can be made.

For too long, victims have been treated and made to feel like bystanders in the criminal justice system. The passage of the bill will mean that more consideration is given to the rights and needs of victims and witnesses of crime and will improve their experience of the system to which they turn to see justice served.

I look forward to hearing members’ views on the bill. I confirm that it is not the end of the journey but the end of a stage on the journey.

I move,

That the Parliament agrees that the Victims and Witnesses (Scotland) Bill be passed.
The Deputy Presiding Officer: Before I call the next speaker, I advise Parliament that we are very tight for time. I apologise to the two members who will not be able to be called in the debate and advise other members that speeches will be of three minutes. I also thank the next two opening speakers for cutting their time.

16:19

Graeme Pearson (South Scotland) (Lab): I thank the clerks of, and the colleagues who remain on, the Justice Committee for the work that they have done and the commitment that they have shown over the past few months in dealing with the bill.

Despite the fact that many of the amendments that we proposed this afternoon were unsuccessful, it is appropriate to thank those who, on behalf of the Parliament, prepared those amendments for the high-quality work that they turned round.

Most of all, I record my thanks to the victims who came forward and shared their experience of the current situation and the system that operates to deliver justice throughout Scotland. There is no doubt that that experience has been a very mixed bag.

As I indicated earlier, the approach that has been taken in the bill was driven largely by a desire to ensure that Scotland fell into step with European directives on victims and witnesses, which is a laudable outcome in itself. However, I think that that approach has meant that there has not been quite enough focus on the needs of victims and witnesses in the light of the reality of their experience in our system. To that extent, I am disappointed at the lack of ambition to deliver on some of the needs that victims and witnesses have been so willing to share with us.

The cabinet secretary has indicated that the ability of services to deliver a uniformity of provision is extremely important for the future, and I agree. However, in evidence to the Justice Committee, it was made very clear by witnesses from the police and other services that, at the moment, they do not have the facilities to deliver the kind of information that is required in a format that witnesses and victims would find acceptable. That is a real worry and concern for the years ahead, as we look to see how we can improve the experience of witnesses. I hope that the cabinet secretary will remember that evidence and take particular account of the need to ensure that systems operate effectively and collaboratively within each service and across services.

We have rehearsed the impact on witnesses and victims of their experience in court. I found it moving to discover that their experience of the court process had an impact that almost matched their experience of the crime and to hear that they did not understand what was happening or the layout of the court, because no one had explained to them the processes that they were to enter into. Despite my experience of nearly four decades, something that had passed me by was the fact that many victims and families find it extremely galling and painful to constantly have to iterate the name of the accused to find out information about the case. There must be a way in which our system can adapt so that it can deal with such details, given the impact that they have on victims, which can remain with them for years.

On victims’ involvement in the victim notification scheme, it became apparent that to receive through the post, out of the blue, an official letter that is written in bureaucratic language and which is necessarily devoid of emotion takes the victim or their family right back to the crime and leaves them at home—often alone—to consider their next steps. In one case, the widow of the deceased in a murder trial was left to make contact with the authorities in the way that was indicated in the letter. She eventually received six letters that identified five named contacts, yet there was still an absence of information. Although we have considered how we can move forward into a brave new world, the cabinet secretary needs to understand that the world in which we exist is far removed from the guidance and the decisions that the Parliament has taken to protect our victims and witnesses.

We have spoken a great deal about the issue and the impact that it has on victims but, from a selfish point of view, the Parliament should be concerned about the range of victims and witnesses who have suffered as a result of the system. The system cannot work if the public do not have the confidence to engage with it. When people who have been victimised are witnesses in court, they are often left denuded of any confidence as citizens. They are left damaged and less able to rejoin the community as fully fledged citizens, and they are certainly less willing to engage with the system or to become involved in it again in the future.

All the amendments were lodged with a view to improving the situation—to balancing the rights of the accused with the needs of the victims and witnesses in our system. I hope that the cabinet secretary has taken account of some of the evidence that we have offered through the afternoon and that he will take steps to improve the bill’s contents.

16:25

Margaret Mitchell (Central Scotland) (Con): I welcome the opportunity to speak in the stage 3
debate on the bill, which the Scottish Government introduced as far back as February. The bill provides for certain rights and support for victims and witnesses. To date, the Scottish Parliament has passed no victim-specific legislation, although a number of legislative and non-legislative changes in relation to victims have been made since 1999.

The bill aims to put victims’ interests at the heart of on-going improvements to the justice system and to ensure that witnesses can fulfil their public duty effectively. The bill is welcome as a major step towards achieving those aims.

During scrutiny of the bill, I lodged amendments that were intended to strengthen and improve it. For example, the bill confers a range of rights on victims, yet it fails to define victims. An amendment to define victims was consequently lodged for clarification, but the cabinet secretary was not minded to accept it, although the Law Society of Scotland’s view was that

“A clear definition will be crucial if the Bill is to deliver on its promise—to place victims’ interests at the heart of on-going improvements to the Scottish justice system.”

All parties accept that more could be done to encourage justice organisations to work collaboratively, but the amendment to create a statutory requirement for the police, the Crown and the Scottish Court Service to work together and, crucially, to offer a single point of contact for victims, which was eminently sensible, was also rejected by the cabinet secretary.

The amendment to introduce independent legal advice for victims of serious sexual assault sought to tackle a long-standing concern about the inappropriate use of complainers’ and victims’ health information and other sensitive information in sexual offence trials. We had the opportunity today to address a terrible injustice that only the cabinet secretary and his Government deny exists—the use of such information for the sole purpose of seeking to discredit the victims of rape, attempted rape and other serious offences.

My amendments could have tackled the inappropriate use of such information and put in place a much-needed pilot, which would have cost a mere £20,000. Having a few less adverts and billboards for the white paper could have paid for that.

The bill will have the Scottish Conservatives’ support this evening, but it has glaring omissions, which we can only hope will be rectified in the future.

The Deputy Presiding Officer: We move to the open debate. Speeches are to be of three minutes, as previously indicated.

16:28

Christine Grahame (Midlothian South, Tweeddale and Lauderdale) (SNP): I am pleased to recognise that section 1 of the bill refers to a victim as someone

“who is or appears to be a victim”.

We must always remember that, until court proceedings are concluded and the case is proven, the prime witness is an alleged victim. They might be a victim to the police and to everybody else but, in court, they are the alleged victim. That is important. We are maintaining the principle of being innocent until proven guilty—the presumption of innocence. The burden of proof is on the Crown and the standard of proof is beyond reasonable doubt.

I welcome the bill, because it goes without saying that victims, alleged victims and witnesses often find what goes on in court mystifying. Although a culture change has occurred and there have been moves to make courts more user friendly, if I can use that expression, that has not been good enough.

I recall, when I was a civil practitioner, being in the criminal court and not knowing what was going on. I saw the procurator fiscal and the defence having a wee chat in the well of the court. The mumbles went on and I presume that plea bargaining was being done in the middle of things. Goodness knows what the public made of that.

It is equally important not only that information is given to someone from the start, when they go to the police station to make a complaint about an alleged offence, right through to the release of the convicted person, but that it is provided in plain English. We in the chamber are also guilty of getting into technospeak, and it is very important that people can understand the information and feel that they can ask for an explanation of what is going on.

I do not think that the notion of having a single point of contact—worthy though it seems to be—is practical. What happens if that single point of contact is ill or on holiday and not available? The idea of developing a hub is good, but the personal touch is always important.

The Deputy Presiding Officer: The member is in her final minute.

Christine Grahame: I accept that there is as much variation among witnesses as there is in the features on our faces, so I find the part of the bill that deals with vulnerable witnesses interesting. Some witnesses can be tough cookies—they will know the inside of court like the back of their hand, possibly better than the judge or the sheriff—so we must not think that all alleged victims or witnesses are sweet little people. However, it is
important that we protect those who are by far the majority: the people who never thought that they would be in court but find themselves there giving evidence and find out that it is not like it is on the telly.

I am finished, Presiding Officer—I have done it with time to spare. Thank you.

The Deputy Presiding Officer: Many thanks for that.

16:31

John Pentland (Motherwell and Wishaw) (Lab): People can find court proceedings stressful at the best of times without having to recount in intensive detail not only the crimes that they may have been the victim of or a witness to but other information about their lives past and present, which is sometimes of questionable relevance as evidence.

Of course, the courts need to establish the truth, and not all witnesses and victims tell the whole truth and nothing but the truth. However, for the many who do, questioning can seem like an unwarranted intrusion on their private lives and an unjustified attack on their character. Yet, while defendants have lawyers to advise them and give them significant support and the prosecution has extensive resources at its disposal, victims and witnesses are too often left out in the cold. Limited advice and support is available to them, but they lack someone to speak up specifically and solely for their interests in the court proceedings.

As amendments 1 and 2, in the name of Elaine Murray, highlighted, we ought to ensure that our legislation is sensitive to the needs, rights and wishes of child victims and witnesses. The welfare of the child should be paramount in setting standards of service for child victims and witnesses.

There should be guidance on the circumstances in which sensitive personal information of victims of sexual offences can be disclosed in court, and legal advice should be made available to victims in such circumstances. Victims and witnesses should be consulted before regulations that may affect them are changed. Victims should be able to choose how they are told about the prisoner’s eligibility for release and the outcome, and they should get support to help them to cope with the news rather than having to experience the shock that can result from a letter landing on the doormat. We should give victims and witnesses the chance, if they wish, to speak directly to the offender via videolink ahead of release, at least in cases of life imprisonment.

We on the Labour side of the chamber welcome the bill, but we regret that it has become a missed opportunity. Even though the cabinet secretary has accepted one of Labour’s amendments today, the bill could have been so much better if he, and his colleagues on the committee at stage 2, had been more willing to accept suggestions from other parties, which were often based on the wishes and suggested improvements that were expressed by victims and organisations representing children and young people.

That said, after six and a half years we finally have legislation on the issue from the Government that, while not as ambitious as it could have been, is still an improvement. On that basis, despite my reservations, I will support the bill.

16:34

Roderick Campbell (North East Fife) (SNP): I refer members to my declaration in the register of members’ interests that I am a member of the Faculty of Advocates.

It seems a long while ago since we embarked on scrutiny of the bill, which responds to a very real need to improve the lot of victims and witnesses in the criminal justice system. We need to recognise that the impact of crime is deeply stressful in itself without the justice system compounding that experience. The bill serves a useful purpose, as it not only takes account of the EU directive but goes beyond it.

In the short time available, I will make a few points. More information for victims is a must. They cannot understand the process if they do not have information. The bill is certainly a step forward in that respect, although with the caveat that any online hub should not replace the human touch and that vital face-to-face support that victims need at what is a stressful time.

On decisions not to prosecute, since stage 1 we have had a Crown Office review, which was perhaps encouraged by the European directive and which has given rise to the amendment that was made at stage 2 to enable victims to request a review, with an obligation on the Lord Advocate to set and publish procedural rules for conducting such reviews. That is a step forward, but it would be helpful if the Government could advise on the timetable for the publication of those rules.

On automatic special measures, at stage 1 there were concerns that extending the right to special measures was in conflict with allowing a right to object to their use. At stage 2, we sought to differentiate between standard and non-standard special measures, preserving a right to object to the latter, which strikes me as the right balance.

The cabinet secretary has outlined an approach to the victim surcharge that might be described as
Victims organisations argued that the proposal for evidence without appearing in the courtroom would undermine all the other provisions and rights in the bill, which was a pretty damning verdict. I was therefore pleased to secure an amendment at stage 2 that means that those individuals’ rights will not be eroded, and I am grateful to the cabinet secretary for his support on that.

Given that the bill seeks to ensure that the system works better for victims and that Scotland complies with the relevant EU directive, I considered the initial omission of restorative justice to be significant. Again, I lodged an amendment at stage 2 to that effect, and I am grateful to the cabinet secretary for his support on that and for his amendment on the issue at stage 3. Over the years, Parliament has increasingly recognised that restorative justice services can in the right circumstances assist victims to overcome their experience, achieve a greater understanding of why they were a victim and have an opportunity to receive a genuine apology. In turn, it can inspire those who have caused harm to reflect on their actions and take personal responsibility. Some excellent restorative justice services already operate, but I believe that they have too often developed in a piecemeal fashion. I hope that the inclusion of the section on restorative justice will highlight their value and instil greater consistency in the system.

On restitution orders, I believe that, had the Government set its mind to the issue, it could have extended the system to include fire and ambulance service personnel, and I am disappointed that it did not endeavour to do so. It is a greater disappointment to me and to many other members that the Government did not take the opportunity to give added protection to victims of sexual offences by supporting Graeme Pearson’s or Margaret Mitchell’s amendments on that. That remains unfinished business.

No one chooses to be a victim or a witness of crime, and it is therefore incumbent upon us to ensure that victims and witnesses are heard and to seek to make the whole process, from the moment a crime is first reported to the point where an offender completes their sentence, less intimidating and less distressing. The bill represents a welcome step in the right direction and the Liberal Democrats will support it.

16:40

Duncan McNeil (Greenock and Inverclyde) (Lab): “Trust us.” That is the plea to adult survivors of sexual and physical abuse. “Trust us.” That is what we ask of them, in asking them to participate in the national confidential forum. However, trust is the most fragile of emotions; it is hard earned, easily lost and difficult to win back. Survivors have heard it all before, of course. Trust
was taken from them as children in the most traumatic of circumstances, and they have heard the same thing since, with promises of psychological support and judicial action—promises that are not always kept.

That is not a political point—far from it—as we learn if we listen to petitioner Helen Holland and Chris Daly. Helen Holland spoke of fellow survivors who had passed away in recent years, saying:

“The people who died were denied the right to have their voices heard. Please do not deny people that right any longer.”

Chris Daly talked about retraumatisation, saying:

“Survivors have been making this point for years ... We have been telling the Parliament and the Government that survivors need psychological help now.”

The Health and Sport Committee welcomes the aims of the national confidential forum. It was that aspect of the bill that we were asked to consider and we supported the Scottish Government’s stage 2 amendments, including lowering the age criteria, but some points from our stage 1 report are still to be addressed. We would welcome an update on the progress of the national confidential forum guidance for care providers, we would appreciate a sense of when the findings of the foster care research will be implemented, and we seek protection of training needs for those who will support participation at the forum.

As one witness said, survivors will judge the success of the forum on the basis of its outcomes for them. They will also want their testimony to help children who are in care today, and we should remember the 300 children who are reported to the children’s panel every year who are directly or indirectly affected by sexual abuse.

We need to remember that, nine years ago this month, Jack McConnell said sorry to adult survivors on behalf of the people of Scotland. He delivered that apology, in this chamber, “to those who were subject to such abuse and neglect and who did not receive the level of love, care and support that they deserved, and who have coped with that burden all their lives.”

It is a moral imperative. We must lighten that burden and allow those troubles to be heard. We must regain that trust via justice measures as well as through healing, and we must support all survivors, whether they choose the forum or other remedies. In the words of the former First Minister, we must

“do more to support them in the future than we have ever done in the past.”

The Deputy Presiding Officer: I thank members for curtailing their speeches, and I apologise to Sandra White and John Finnie for being unable to call them. We come to closing speeches.

16:43

Margaret Mitchell: As I said in my opening speech, the bill contains some important measures that will help people who are affected by crime. Consequently, the Scottish Conservatives will vote in favour of the bill this evening.

However, it is important to point out that the bill has not met with complete support from victims’ organisations. The Scottish Government should therefore reflect on the words of Peter Morris, a campaigner for victims’ rights, who stated in his written evidence to the Justice Committee:

“To say that this legislation is radical is not true and to say that this now puts victims at the heart of the justice system is also not true.”

In other words, more can be done, so I hope that the bill is not the end of the process.

There are areas of the bill that could and should have gone further. The real travesty is the lack of political will from the Scottish Government to stop medical records and sensitive information being used to discredit witnesses and to play to the prejudices and myths that are known to persist in sexual offence trials. My amendments could have tackled the inappropriate and deeply damaging use of that information. We now have a situation where Scottish Women’s Aid, Engender, Action Scotland Against Stalking, Children 1st and other organisations support the proposal on the pilot and have offered help to try to make it work. Only the cabinet secretary and the Scottish Government have set their faces against it.

Despite the Scottish Government’s efforts to improve the lot of victims through the bill, there is an elephant in the room. Even if a victim is much better and more swiftly informed about the process, gives evidence in a safer and more protected environment, and a conviction is secured and they are able to make a statement before sentencing, all that will be cold comfort to the victim if the prison sentence that is imposed is nothing like the prison sentence that is served. Automatic early release for prisoners does a disservice to victims. It discredits the system and destroys public confidence, and the Scottish Government’s plans to tackle that disgrace will, in effect, continue to allow 98 per cent of offenders to be released early with no questions asked.

The bill is welcome, but my closing remarks put the limits of its effectiveness well and truly in context.
Elaine Murray (Dumfriesshire) (Lab): Scottish Labour will support the bill at decision time. We believe that the bill will make a positive difference to the experience of victims and witnesses during criminal investigations and proceedings. However, as others do, we believe that the bill could have gone further.

I am pleased that my amendment 19, which will enable victims to object to the awarding of compensation orders, was accepted. The justice secretary said that it was not absolutely necessary, but others including Scottish Women’s Aid and Rape Crisis Scotland felt that the bill, as it stood, could make matters worse for victims. I am therefore pleased that Parliament unanimously accepted their view and agreed to the amendment.

I also welcome the cabinet secretary’s reassurances to my colleague, Graeme Pearson, on amendment 17 on the rights of victims to make statements in forms other than the written form. I am sure that attention will be paid to how that reassurance is reflected in practice and the experience of victims in that regard. The reassurance is now on the record and is therefore available to victims and their representatives, which is always helpful.

However, I am disappointed that other amendments that received support from and, indeed, were proposed by organisations that represent victims and witnesses were not accepted by the cabinet secretary or by Parliament. The bill as it will be passed does not recognise the rights, needs, and wishes of child victims and witnesses, in particular. As I said earlier, the justice system has been constructed by adults for adults. Investigations and court processes can be confusing and frightening for adults, so how much more frightening are they for children? Assurances have again been put on the record that might assist people who work with children in those circumstances, but can they guarantee that some of the practices that children have endured will no longer persist?

For example, Children 1st has advised us of failures to keep children informed about progress and of failures to ensure that they understand the process and procedures that they are going to go through. They need to be communicated with in forms and using methods that they understand. We have heard an example in which police called at a school to talk to a young man about the court process that he was going to have to go through, so what had happened to him was made public to his schoolmates. The police visit did not take place at a time or place that he wanted, and he did not necessarily want everyone else to know about the ordeal that he was going through. Children’s rights and wishes need to be respected, but that does not happen often enough. We do not come up to scratch on that.

We are also disappointed that amendments that would have improved provision of information and support for victims and witnesses were not accepted, as Graeme Pearson and Margaret Mitchell have said. Graeme Pearson described a number of personal issues and real experiences of victims who have been let down by the system, and who have had to continue to repeat their experiences to a variety of people when there have been failures to pass information back to them about what is happening in court. We have all heard about such things. I am sure that no MSP who has served for any length of time has not heard first hand about such victim experiences.

Amendments to protect the victims of sexual crimes from having their medical and sexual histories revealed to the public in court were also, unfortunately, rejected. I am sorry that that happened. In particular, even if there was a problem with detailing a pilot in the bill, surely the justice secretary could have offered to run a pilot without its being in regulations. Surely that could have been the Government’s response to the suggestions, but it was not. As Margaret Mitchell pointed out, a pilot would have cost very little in comparison with the amounts of public money that are currently being used to argue one side of the independence referendum debate.

The stage 2 amendments on access to restorative justice seem to me to have been watered down. However, I understand that concerns on the issue were expressed by organisations that represent victims of domestic and sexual abuse. I hope that the watering down in amendment 8 today does not signal a retraction from the purpose of the amendment, which I strongly supported at stage 2.

I am sorry that the amendments that sought to enable children below the age of 12 to be allowed to make a victim statement were rejected, even though a long list of well-respected individuals and organisations have supported that. As my colleague John Pentland said, the Government seems to be reluctant to accept amendments that are offered by members of Opposition parties, even when they have attracted widespread support from representative organisations. It feels a little bit like either our faces or our politics do not fit when it comes to some amendments.

Duncan McNeil made an important point about the experiences of adult survivors of sexual abuse and the disappointments that they have encountered over the years. That really must not continue, so I echo his request for updates on progress.
The justice secretary said in his opening remarks that this was
“the end of a stage on the journey”
and not the end of the journey. I agree with that, because in our opinion the bill is unfinished business. Labour members hope—indeed, they intend—to return to the issues that were rejected today. We also intend to monitor how the bill’s provisions work in practice. We hope in the future to have the opportunity to make subsequent improvements.

The Presiding Officer (Tricia Marwick): I now call on Kenny MacAskill to wind up the debate. Cabinet secretary—you have until five o’clock.

16:51

Kenny MacAskill: First, I thank Duncan McNeil for his contribution. Understandably, the amendments and, indeed, the debate throughout have concentrated on the victims and witnesses part of the bill, but I think that we would do the nation a disservice if we did not record the important part that the national confidential forum plays in the bill. In putting it in a historical context, it was important to go back to the apology that many of us who were around at that time will know was made by the then First Minister, Jack McConnell. There was a historic wrong and the forum will be unable to resolve what happened to the individuals concerned, but it is the start of a process that we hope will help them.

My colleague the Minister for Public Health has been dealing with that matter. I am extremely grateful for the work that was done on it by Duncan McNeil and his colleagues. As I have said, putting on the record the background to the forum does all of us a great service.

I can clarify two points that Duncan McNeil raised. First, on good practice, the guidance is in preparation and it will be available by summer 2014. Secondly, on foster care, the results of the survey of those who were in foster care and their interest in the national confidential forum were communicated only yesterday, so perhaps that is in the post for Duncan McNeil. As I said, I am grateful for what Duncan McNeil has done in putting on the record the progress on on-going work with regard to the national confidential forum. In addition, on comments that Elaine Murray made just a few minutes ago, it is fair to say that it is unfinished business, too, with regard to those who have been victims of institutional abuse. There is welcome progress in that regard, and I am grateful to all those involved in it.

I am also grateful for the involvement in the bill of all those outside the chamber, although colleagues in other parties have expressed some disappointment in that regard. I will comment on that, but I think that in the main it has been recognised and welcomed that we are making progress. However, I accept that, as Elaine Murray said earlier, it is work in progress. We should remember that this is the first-ever victims and witnesses bill in the Scottish Parliament; it is the first time that dealing with victims and witnesses in Scotland has been enshrined in legislation. That should be put on the record and we should recognise the progress that has been made.

There are particular aspects that we still have to consider, but we will address them. I have made it clear that I do not think that putting a pilot on the face of primary legislation is the correct way to go. In that regard, I met Rape Crisis Scotland and encouraged it to meet the Scottish Legal Aid Board, and it has done so. There are options to consider, such as having a women’s law centre or a change in how we address certain matters, and I am open to doing that. I have seen the Legal Services Agency letter that was referred to. I know that agency well and was a director of it for several years. I am happy to consider its proposals. I think that we must look at matters in the cold light of day in order to work out what is best, but I am happy to give that commitment.

Margaret Mitchell: Is a pilot outside the provisions of the bill?

Kenny MacAskill: We have to look at what will provide best for victims and witnesses, especially those whom Rape Crisis Scotland is dealing with. That may be a pilot, a scheme that is discussed between Rape Crisis Scotland and the Scottish Legal Aid board, or something that none of us has yet thought of. I am committed to recognising that more has to be done. More will be done and how it will be done should be worked out with those organisations; I am happy to give that commitment.

Graeme Pearson correctly raised oral statements. Let us see how they operate down south. They have not commenced down there yet. I am happy to indicate that we will keep under review how they are progressing and whether they are working well.

The same applies to ages of children. We have gone for the age of 12 because that is when there is testamentary capacity and other aspects that relate to how children are viewed. If that should change, we can address it in years to come.

As I said to Elaine Murray, we should recognise that this is work in progress. We have reached the end of a stage of a journey, but it is a significant stage. For the first time ever, we are enshrining in law the rights of victims, ensuring that we also cover those who are witnesses, which can be deeply distressing for many individuals, ensuring
that offenders should contribute and pay to alleviate suffering and distress, and ensuring that we address the issue of those who have suffered institutional abuse.

I would like to record my thanks to someone who is not in the chamber: the former Lord Advocate, Dame Elish Angiolini, to whom a great deal, if not all, of the credit for the bill’s genesis goes. Her jurisdiction predated the Administration in which I have served— it was a previous Labour and Liberal Democrat Administration. She correctly recognised that insufficient progress had been made and that a wrong had to be addressed. I pay tribute and great credit to her.

Equally, I give credit to the currently serving Lord Advocate, Frank Mulholland, who recognised that the issue was about not just victims but witnesses. I said that in many instances it can be deeply traumatic to be a witness. There can be instances, sadly, in which people can be subject to abuse, harassment or even threats, and we have to recognise that.

We have come a long way and I can assure Opposition members that we will keep particular aspects under review. When I first entered into law, more than 30-odd years ago, there was a hierarchy. The judiciary were looked after first of all. They dictated how matters would be dealt with in the court. Thereafter in the pecking order was the prosecution, then the defence, then expert witnesses. Nobody considered victims. At best, there might have been consideration of provision of a Women’s Royal Voluntary Service canteen, so that witnesses could get a cup of coffee. Sometimes that was provided; in many courts it was not. As for those who were witnesses, they were expected to just like it or lump it. They were expected to turn up whether they were civilians or police, and whether they were threatened or intimidated. To be fair, good work was done by the police, the prosecution and, indeed, sheriff clerks to alleviate such matters, but there was no consideration, planning or foresight to address them.

There have been some begrudging comments from some on the Opposition benches, but I put on record that now we have that historic first. We have enshrined in statute the rights of victims and witnesses. That is long overdue and we should pay tribute to those responsible for the bill’s genesis, in particular, the current and past Lord Advocates.

There is work to be done and I am happy to work to address matters with Opposition parties and the organisations and agencies that they mentioned. However, I would say to Margaret Mitchell that if she wants to address some of the difficulties of those who have suffered rape and sexual abuse, maybe she should reconsider where she is heading on the removal of the requirement for corroboration. Post-Cadder, the difficulty is significant, which is why she should read what Scottish Women’s Aid, Rape Crisis Scotland and Victim Support Scotland are saying. They are all united in the desire that action should be taken.

We have reached a historic juncture: we have enshrined in statute the rights of victims. We know the standards that they are entitled to expect and the standards that agencies are expected to achieve, and we know that the offender will pay. I am delighted to have moved the motion to pass the Victims and Witnesses (Scotland) Bill. It is work in progress, but work that we can be proud of.
Decision Time

17:00

The Presiding Officer (Tricia Marwick): There is one question to be put as a result of today’s business. The question is, that motion S4M-08562, in the name of Kenny MacAskill, on the Victims and Witnesses (Scotland) Bill, be agreed to.

Motion agreed to,
That the Parliament agrees that the Victims and Witnesses (Scotland) Bill be passed.

The Presiding Officer: That concludes decision time.

Meeting closed at 17:00.
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Victims and Witnesses (Scotland) Bill

[AS PASSED]

An Act of the Scottish Parliament to make provision for certain rights and support for victims and witnesses, including provision for implementing Directive 2012/29/EU of the European Parliament and the Council; and to make provision for the establishment of a committee of the Mental Welfare Commission with functions relating to persons who were placed in institutional care as children.

General principles

1 General principles

(1) Each person mentioned in subsection (2) must have regard to the principles mentioned in subsection (3) in carrying out functions conferred on the person by or under any enactment in so far as those functions relate to a person who is or appears to be a victim or witness in relation to a criminal investigation or criminal proceedings.

(2) The persons are—

(a) the Lord Advocate,
(b) the Scottish Ministers,
(c) the chief constable of the Police Service of Scotland,
(d) the Scottish Court Service,
(e) the Parole Board for Scotland.

(3) The principles are—

(a) that a victim or witness should be able to obtain information about what is happening in the investigation or proceedings,
(b) that the safety of a victim or witness should be ensured during and after the investigation and proceedings,
(c) that a victim or witness should have access to appropriate support during and after the investigation and proceedings,
(d) 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.

(4) The Scottish Ministers may by order modify subsection (2).

(5) An order under subsection (4) is subject to the affirmative procedure.
Standards of service

2 Standards of service

(1) Each person mentioned in subsection (2) must set and publish standards in relation to—

(a) the carrying out of the functions of the person mentioned in subsection (3) in relation to a person who is or appears to be a victim or witness in relation to a criminal investigation or criminal proceedings,

(b) the person’s procedure for making and resolving complaints about the way in which the person carries out those functions.

(2) The persons are—

(a) the Lord Advocate,

(b) the Scottish Ministers,

(c) the chief constable of the Police Service of Scotland,

(d) the Scottish Court Service,

(e) the Parole Board for Scotland.

(3) The functions are—

(a) in the case of the Lord Advocate, functions relating to the investigation and prosecution of crime,

(b) in the case of the Scottish Ministers, functions relating to prisons and young offenders institutions and persons detained in them,

(c) in the case of any other person mentioned in subsection (2), any functions.

(3A) Before a person mentioned in subsection (2) (“the publisher”) publishes standards under subsection (1), the publisher must consult—

(a) every other person mentioned in subsection (2), and

(b) such other persons as appear to the publisher to have a significant interest in the standards.

(4) The Scottish Ministers may by order—

(a) modify subsection (2),

(b) so far as is necessary or expedient in consequence of any modification made under paragraph (a), modify subsection (1), (3) or (5).

(5) In this section—

“prison” and “young offenders institution” have the meanings given by section 307(1) of the 1995 Act,

“victim” includes a prescribed relative of a victim.

(6) In subsection (5), “prescribed” means prescribed by the Scottish Ministers by order.

(7) An order under subsection (4) is subject to the affirmative procedure.

(8) An order under subsection (5) is subject to the negative procedure.

2A Reports

(1) This section applies where a person publishes standards under section 2(1).
(2) The person must prepare and publish a report in relation to the matters mentioned in subsection (3)—
   (a) before the end of the period of 12 months beginning with the day on which standards are first published under section 2(1), and
   (b) as soon as practicable following—
      (i) the expiry of the period of 12 months beginning with the day on which a report is published under paragraph (a), and
      (ii) each subsequent period of a year.

(3) The matters are—
   (a) an assessment of how, and the extent to which, the standards have been met during the period of the report,
   (b) an explanation of how the person intends to meet the standards during the year after the period of the report,
   (c) a description of any modification of the standards made during the period of the report, and
   (d) a description of any modification of the standards that the person proposes to make during the year after the period of the report.

(4) The Scottish Ministers may by regulations prescribe information (in addition to that required under subsection (3)) that reports prepared under subsection (2) must contain.

(5) Regulations under subsection (4) are subject to the negative procedure.

### Rules: review of decision not to prosecute

#### 2B Rules: review of decision not to prosecute

(1) The Lord Advocate must make and publish rules about the process for reviewing, on the request of a person who is or appears to be a victim in relation to an offence, a decision of the prosecutor not to prosecute a person for the offence.

(2) Rules under subsection (1) may in particular make provision for or in connection with—
   (a) the circumstances in which reviews may be carried out,
   (b) the manner in which a request for review must be made,
   (c) the information that must be included in a request for review,
   (d) the matters to be taken into account by the Lord Advocate when carrying out reviews,
   (e) the process to be followed by the Lord Advocate when carrying out reviews.

(3) In this section, “prosecutor” means Lord Advocate, Crown Counsel or procurator fiscal.

### Restorative justice

#### 2C Restorative justice

(1) The Scottish Ministers may issue guidance about—
   (a) the referral of a person who is, or appears to be, a victim in relation to an offence and a person who has, or is alleged to have, committed the offence to restorative justice services, and
(b) the provision of restorative justice services to those persons.

(2) Any person, or description of person, prescribed by the Scottish Ministers by order must have regard to any guidance issued by the Scottish Ministers under subsection (1).

(3) In this section, “restorative justice services” means any process in which the persons such as are mentioned in subsection (1)(a) participate with a view to resolving any matter arising from the offence or alleged offence with the assistance of a person who is unconnected with either person or the offence or alleged offence.

(4) An order under subsection (2) is subject to the negative procedure.

Disclosure of information

3 Disclosure of information about criminal proceedings

(1) A person mentioned in subsection (2) (a “requester”) may at any time request a qualifying person to disclose to the requester qualifying information in relation to an offence or alleged offence and any criminal investigation or criminal proceedings relating to it.

(2) The persons are—

(a) a person who appears to be a victim of the offence or alleged offence,

(aa) in the case where the death of a person mentioned in paragraph (a) was (or appears to have been) caused by the offence or alleged offence, a prescribed relative of the person,

(b) a person who is to give, or is likely to give, evidence in criminal proceedings which have been, or are likely to be, instituted against a person in respect of the offence or alleged offence,

(c) a person who has given a statement in relation to the offence or alleged offence to a constable or the prosecutor.

(3) Where a request is made under subsection (1), the qualifying person must disclose to the requester any qualifying information which the person holds.

(3A) In the case where the qualifying information falls within paragraph (a), (b) or (c) of subsection (6), a qualifying person must not comply with a request under subsection (1) in so far as disclosure of the qualifying information would require disclosure of information supplied by a Minister of the Crown or a department of the Government of the United Kingdom that is held in confidence by the person.

(4) A qualifying person need not comply with a request under subsection (1) in so far as the qualifying person considers that it would be inappropriate to disclose any qualifying information.

(5) In this section—

“prescribed” means prescribed by the Scottish Ministers by order,

“qualifying information” means information that—

(a) falls within subsection (6),

(b) relates to the offence or alleged offence, and

(c) is specified in the request under subsection (1),

“qualifying person” means—
(a) the chief constable of the Police Service of Scotland,
(b) a prosecutor (as defined in section 307(1) of the 1995 Act),
(c) the Scottish Court Service.

(6) Information falls within this subsection if it is—
(a) a decision not to proceed with a criminal investigation and any reasons for it,
(b) a decision to end a criminal investigation and any reasons for it,
(c) a decision not to institute criminal proceedings against a person and any reasons for it,
(d) the place in which a trial is to be held,
(e) the date on which and time at which a trial is to be held,
(f) the nature of charges libelled against a person,
(fa) the place in which the hearing of an appeal arising from a trial is to be held,
(fb) the date on which and time at which the hearing of an appeal arising from a trial is to be held,
(g) the stage that criminal proceedings have reached,
(h) the final decision of a court in a trial or any appeal arising from a trial, and any reasons for it.

(7) The Scottish Ministers may by order modify—
(a) the definition of “qualifying person” in subsection (5),
(b) subsection (6).

(8) An order under—
(a) subsection (2)(aa) is subject to the negative procedure,
(b) subsection (7) is subject to the affirmative procedure.

Interviews

4 Interviews with children: guidance

(1) Subsection (2) applies where the persons mentioned in subsection (3) are jointly carrying out an interview with a child in relation to—
(a) criminal proceedings which have been instituted against some other person, or
(b) a matter which might result in criminal proceedings being instituted against some other person.

(2) The persons must have due regard to any guidance issued by the Scottish Ministers about the carrying out of interviews with a child in relation to those matters.

(3) The persons are—
(a) a constable,
(b) a social worker (as defined in section 77 of the Regulation of Care (Scotland) Act 2001).

(4) The Scottish Ministers may by order modify subsection (3).
(5) An order under subsection (4) is subject to the negative procedure.

(6) In this section, “child” means a person under 18 years of age.

5 Certain offences: victim’s right to specify gender of interviewer

(1) This section applies where an investigating officer intends to carry out a relevant interview with a person who is or appears to be the victim of an offence of a type mentioned in subsection (5).

(2) Before the relevant interview takes place, the investigating officer must give the person who is to be interviewed the opportunity to specify the gender of the investigating officer who is to carry out the interview.

(3) If the person who is to be interviewed specifies a gender under subsection (2), the relevant interview may be carried out only by an investigating officer of that gender.

(4) The investigating officer need not comply with subsection (2) if—

(a) complying with it would be likely to prejudice a criminal investigation, or

(b) it would not be reasonably practicable to do so.

(5) The types of offence are—

(a) an offence listed in any of paragraphs 36 to 59ZL of Schedule 3 to the Sexual Offences Act 2003,

(b) an offence under section 22 of the 2003 Act (traffic in prostitution etc.),

(c) an offence under section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (trafficking people for exploitation),

(d) an offence the commission of which involves domestic abuse,

(e) stalking.

(6) Failure to comply with subsection (2) in relation to a particular relevant interview has no effect on any criminal proceedings to which the interview relates.

(7) The Scottish Ministers may by order modify subsection (5).

(8) In this section—

“investigating officer” means—

(a) a constable, or

(b) a person of such other description as the Scottish Ministers may by order prescribe,

“relevant interview” means—

(a) questioning of a person in the course of criminal proceedings which have been instituted in relation to another person, or

(b) questioning of a person with a view to instituting criminal proceedings against another person.

(9) Any reference in this section (other than subsection (10)) to an investigating officer includes a reference to two or more investigating officers acting jointly.

(10) An order under subsection (7) or paragraph (b) of the definition of “investigating officer” in subsection (8) is subject to the negative procedure.
Medical examinations

5A Certain medical examinations: gender of medical examiner

(1) This section applies where a person makes a complaint to a constable alleging that the person is the victim of an offence listed in any of paragraphs 36 to 59ZL of Schedule 3 to the Sexual Offences Act 2003.

(2) Before a medical examination of the person in relation to the complaint is carried out by a registered medical practitioner in pursuance of section 31 of the Police and Fire Reform (Scotland) Act 2012, the constable must give the person an opportunity to request that any such medical examination be carried out by a registered medical practitioner of a gender specified by the person.

(3) If the person makes such a request, the constable must ensure that the registered medical practitioner who is to (or, but for the request, would) carry out the examination is informed of the nature of the request.

(4) In this section, references to a registered medical practitioner include references to a person of such other description as the Scottish Ministers may by order prescribe.

(5) An order under subsection (4) is subject to the negative procedure.

Vulnerable witnesses

6 Vulnerable witnesses: main definitions

In section 271 of the 1995 Act (vulnerable witnesses: main definitions)—

(a) for subsection (1), substitute—

“(1) For the purposes of this Act, a person who is giving or is to give evidence at, or for the purposes of, a hearing in relevant criminal proceedings is a vulnerable witness if—

(a) the person is under the age of 18 on the date of commencement of the proceedings in which the hearing is being or is to be held,

(b) there is a significant risk that the quality of the evidence to be given by the person will be diminished by reason of—

(i) mental disorder (within the meaning of section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003), or

(ii) fear or distress in connection with giving evidence at the hearing,

(c) the offence is alleged to have been committed against the person in proceedings for—

(i) an offence listed in any of paragraphs 36 to 59ZL of Schedule 3 to the Sexual Offences Act 2003,

(ii) an offence under section 22 of the Criminal Justice (Scotland) Act 2003 (traffic in prostitution etc.),

(iii) an offence under section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (trafficking people for exploitation),

(iv) an offence the commission of which involves domestic abuse, or

(v) an offence of stalking, or
(d) there is considered to be a significant risk of harm to the person by reason only of the fact that the person is giving or is to give evidence in the proceedings.”.

(b) after subsection (1), insert—

“(1AA) The Scottish Ministers may by order subject to the affirmative procedure modify subsection (1)(c).”.

(c) subsection (1A) is repealed,

(d) in subsection (2), after “(1)(b)" insert “or (d)”, and

(e) after subsection (4), insert—

“(4A) In determining whether a person is a vulnerable witness under subsection (1)(b) or (d), the court must—

(a) have regard to the best interests of the witness, and

(b) take account of any views expressed by the witness.”.

7 Child and deemed vulnerable witnesses

(1) In section 71(2XA) of the 1995 Act (first diet), for “child” substitute “vulnerable”.

(2) In section 72(6)(b)(ii) of the 1995 Act (preliminary hearing procedure), for “child” substitute “vulnerable”.

(3) In section 271(5) of the 1995 Act (definitions for sections 271A to 271M of the 1995 Act)—

(a) before the definition of “court”, insert—

“‘child witness” means a vulnerable witness referred to in subsection (1)(a),”, and

(b) after that definition, insert—

“‘deemed vulnerable witness” means a vulnerable witness referred to in subsection (1)(c).”.

(4) In section 271A of the 1995 Act (child witnesses)—

(a) in subsection (1)—

(i) after “child witness”, where it first occurs, insert “or a deemed vulnerable witness”, and

(ii) the word “child”, where it second occurs, is repealed,

(b) in subsection (2)—

(i) after “child witness”, where it first occurs, insert “or a deemed vulnerable witness”,

(ii) for “child”, where it second occurs, substitute “vulnerable”, and

(iii) in each of paragraphs (a) and (b), the word “child” is repealed,

(c) in each of subsections (3) and (4), for “child” substitute “vulnerable”,

(ca) after subsection (3), insert—

“(3A) In the case where a vulnerable witness notice under subsection (2)(a) specifies only a standard special measure, subsection (3)(a) does not apply.”.
(d) in subsection (5)—
   (i) for “child”, where it first occurs, substitute “vulnerable”, and
   (ii) in paragraphs (a), (b) and (c), the word “child”, in each place where it
        occurs, is repealed,

(e) in subsection (5A)—
   (i) in paragraph (a), for “child” substitute “vulnerable”, and
   (ii) in paragraph (b), for “child” substitute “vulnerable”,

(f) in subsection (6)—
   (i) in paragraph (a), after “child witness” insert “or a deemed vulnerable
        witness”,
   (ii) in paragraph (b), for “child”, where it first occurs, substitute “vulnerable”,
   (iii) in paragraph (b), the word “child”, where it second occurs, is repealed,
   (iv) in paragraph (c), for “child”, where it first occurs, substitute “vulnerable”,

(g) in subsection (7)(a)—
   (i) for “child”, where it first occurs, substitute “vulnerable”, and
   (ii) the word “child”, where it second occurs, is repealed,

(h) in subsection (8A)(a)—
   (i) in sub-paragraph (i), for “child” substitute “vulnerable”, and
   (ii) in paragraph (ii), the word “above”, where it second occurs, is repealed,

(i) in subsection (9), the word “child”, in each place where it occurs, is repealed,

(j) in subsection (10), the word “child”, in each place where it occurs, is repealed,

(k) in subsection (11)(a), the word “child” is repealed, and

(l) in subsection (13), for “child” substitute “vulnerable”.

       witnesses”.

(6) The title of section 271C of the 1995 Act becomes “Vulnerable witness application”.

(7) In section 271E(1)(a) of the 1995 Act (party considering vulnerable witness notice or
       application), for “child” substitute “vulnerable”.

(8) In section 271F(2)(a) of the 1995 Act (modifications of section 271 in relation to
       accused giving evidence as a child witness)—
   (a) in paragraph (a)(i), for “child witness (except in the phrase “child witness
       notice’”) substitute “witness”, and
   (b) in paragraph (a)(ii), the word “child” is repealed.

(9) In section 288E of the 1995 Act (prohibition of personal conduct of defence in certain
     cases involving child witnesses under the age of 12), in each of subsections (5) and (7)
     for “child” substitute “vulnerable”.
8 Child and deemed vulnerable witnesses: standard special measures

In section 271A of the 1995 Act (the standard special measures)—

(a) in subsection (14)—

(i) in paragraph (a), the words from “where” to the end are repealed, and

(ii) in paragraph (c), the words from “in”, where it second occurs, to the end are repealed, and

(b) after that subsection, insert—

“(15) The Scottish Ministers may, by order subject to the affirmative procedure—

(a) modify subsection (14),

(b) in consequence of any modification made under paragraph (a)—

(i) prescribe the procedure to be followed when standard special measures are used, and

(ii) so far as is necessary, modify sections 271A to 271M of this Act.”.

9 Objections to special measures: child and deemed vulnerable witnesses

In section 271A of the 1995 Act (child witnesses)—

(a) after subsection (4), insert—

“(4A) Any party to the proceedings may, not later than 7 days after a vulnerable witness notice has been lodged, lodge with the court a notice (referred to in this section as an “objection notice”) stating—

(a) an objection to any special measure (other than a standard special measure) specified in the vulnerable witness notice that the party considers to be inappropriate, and

(b) the reasons for that objection.

(4B) The court may, on cause shown, allow an objection notice to be lodged after the period referred to in subsection (4A).

(4C) If an objection notice is lodged in accordance with subsection (4A) or (4B)—

(a) subsection (5)(a)(ii) does not apply to the vulnerable witness notice, and

(b) the court must make an order under subsection (5A).”,

(b) in subsection (5), for “later than 7” substitute “earlier than 7 days and not later than 14”, and

(c) in subsection (13), after “notice” insert “or an objection notice”.

10 Child witnesses

(1) In section 271B of the 1995 Act (further special provision for child witnesses under the age of 12), for subsection (3), substitute—

“(3) Subsection (4) applies if the child witness expresses a wish to be present in the court-room for the purpose of giving evidence.
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(4) The court must make an order under section 271A or, as the case may be, 271D which has the effect of requiring the child witness to be present in the court-room for the purpose of giving evidence unless the court considers that it would not be appropriate for the child witness to be present there for that purpose.

(5) Subsection (6) applies if the child witness—
   (a) does not express a wish to be present in the court-room for the purpose of giving evidence, or
   (b) expresses a wish to give evidence in some other way.

(6) The court may not make an order under section 271A or 271D having the effect mentioned in subsection (4) unless the court considers that—
   (a) the giving of evidence by the child witness in some way other than by being present in the court-room for that purpose would give rise to a significant risk of prejudice to the fairness of the trial or otherwise to the interests of justice, and
   (b) that risk significantly outweighs any risk of prejudice to the interests of the child witness if the order were to be made.”.

(2) In section 271A(5) of the 1995 Act (orders authorising special measures), for “271B(3)” substitute “271B”.

(3) In section 271D of the 1995 Act (review of arrangements for child witnesses and certain other witnesses), after subsection (6), add—
   “(7) This section is subject to section 271B.”.

11 Reporting of proceedings involving children

In section 47 of the 1995 Act (restriction on report of proceedings involving children), in each of subsections (1), (2) and (3)(a), for “16”, wherever it occurs, substitute “18”.

12 Other vulnerable witnesses: assessment and application

(1) After section 271B of the 1995 Act, insert—

“271BA Assessment of witnesses

(1) This section applies where a party intends to cite a witness other than a child witness or a deemed vulnerable witness to give evidence at, or for the purposes of, a hearing in relevant criminal proceedings.

(2) The party intending to cite the witness must take reasonable steps to carry out an assessment under subsection (3).

(3) An assessment must determine whether the person—
   (a) is likely to be a vulnerable witness, and
   (b) if so, what special measure or combination of special measures ought to be used for the purpose of taking the person's evidence.

(4) In determining under subsection (3)(a) whether a person is likely to be a vulnerable witness the party must—
   (a) take into account the matters mentioned in section 271(2),
(b) have regard to the best interests of the person, and
(c) take account of any views expressed by the person.”.

(2) In section 271C(1) of the 1995 Act (citation of vulnerable witnesses)—
(a) after “witness”, where it first occurs, insert “or a deemed vulnerable witness”, and
(b) before “considers” insert “and, having carried out an assessment under section 271BA, “.

13 Objections to special measures: other vulnerable witnesses
In section 271C of the 1995 Act (other vulnerable witnesses)—
(a) after subsection (4), insert—
“(4A) Any party to the proceedings may, not later than 7 days after a vulnerable witness application has been lodged, lodge with the court a notice (referred to in this section as “an objection notice”) stating—
(a) an objection to any special measure specified in the vulnerable witness application that the party considers to be inappropriate, and
(b) the reasons for that objection.

(4B) The court may, on cause shown, allow an objection notice to be lodged after the period referred to in subsection (4A).

(4C) If an objection notice is lodged in accordance with subsection (4A) or (4B)—
(a) subsection (5) does not apply to the vulnerable witness application, and
(b) the court must make an order under subsection (5A).”,
(b) in subsection (5), for “later than 7” substitute “earlier than 7 days and not later than 14”; and
(c) in subsection (11)—
(i) after “application”, where it first occurs, insert “or an objection notice”,
(ii) after “application”, where it second occurs, insert “or, as the case may be, the notice”.

14 Review of arrangements for vulnerable witnesses
In section 271D(1)(a) of the 1995 Act (application for review of arrangements for vulnerable witnesses), for “the party citing or intending to cite the witness” substitute “any party to the proceedings”.

15 Temporary additional special measures
After section 271H of the 1995 Act, insert—
“271HA Temporary additional special measures
(1) The Scottish Ministers may, by order subject to the affirmative procedure, specify additional measures which for the time being are to be treated as special measures listed in section 271H(1).
(2) An order under subsection (1) may make different provision for different courts or descriptions of court or different proceedings or types of proceedings.

(3) An order under subsection (1) must specify—

(a) the area in which the additional measures may be used,

(b) the period during which the additional measures may be used, and

(c) the procedure to be followed when the additional measures are used.”.

16 Special measures: closed courts

(1) In section 271H(1) of the 1995 Act (the special measures), after paragraph (e) insert—

“(ea) excluding the public during the taking of the evidence in accordance with section 271HB of this Act,”.

(2) After section 271HA of the 1995 Act (inserted by section 15 of this Act), insert—

“271HB Excluding the public while taking evidence

(1) This section applies where the special measure to be used in respect of a vulnerable witness is excluding the public during the taking of the evidence of the vulnerable witness.

(2) The court may direct that all or any persons other than those mentioned in subsection (3) are excluded from the court during the taking of the evidence.

(3) The persons are—

(a) members or officers of the court,

(b) parties to the case before the court, their counsel or solicitors or persons otherwise directly concerned in the case,

(c) bona fide representatives of news gathering or reporting organisations present for the purpose of the preparation of contemporaneous reports of the proceedings,

(d) such other persons as the court may specially authorise to be present.”.

(3) In section 271F(8)(a) of the 1995 Act (special measures not applying in relation to a vulnerable witness who is the accused), after “271H(1)(c)” insert “and (ea)”.

17 Power to prescribe further special measures

In section 271H of the 1995 Act (the special measures)—

(a) in subsection (1), paragraph (f) is repealed,

(b) after subsection (1), insert—

“(1A) The Scottish Ministers may, by order subject to the affirmative procedure—

(a) modify subsection (1),

(b) in consequence of any modification made under paragraph (a)—

(i) prescribe the procedure to be followed when special measures are used, and
(ii) so far as is necessary, modify sections 271A to 271M of this Act.”,
and
(c) subsection (2) is repealed.

18 Vulnerable witnesses: civil proceedings

In section 11(1) of the Vulnerable Witnesses (Scotland) Act 2004 (vulnerable witnesses: civil proceedings)—

(a) in paragraph (a), for “16” substitute “18”,
(b) the word “or” immediately after that paragraph is repealed, and
(c) after paragraph (b), insert “, or

(c) the person is of such description or is a witness in such proceedings as the Scottish Ministers may by order subject to the affirmative procedure prescribe.”.

Victim statements

19 Victim statements

(1) Section 14 of the 2003 Act (victim statements) is amended in accordance with subsections (2) to (7).

(2) In subsection (5)—

(a) in paragraph (a)—

(i) after “when”, insert “or after”, and
(ii) after “offence”, insert “but before sentence is imposed”,

(b) in paragraph (b)—

(i) after “when”, insert “or after”, and
(ii) after “offence”, insert “but before sentence is imposed”.

(3) In subsection (6)(b)—

(a) in sub-paragraph (i), after “subsection (10)” insert “(taking no account of qualifying persons who have not attained the age of 12 years)”,
(b) the word “or” immediately after sub-paragraph (i) is repealed,
(c) sub-paragraph (ii) is repealed, and
(d) after that sub-paragraph, the words “or as the case may be to the child” are repealed.

(4) In subsection (8)—

(a) for “neither” substitute “not”, and
(b) the words “nor a child such as is mentioned in sub-paragraph (ii) of that paragraph” are repealed.

(5) After subsection (11), insert—

“(11A)Where a child who has not attained the age of 12 years has (but for this subsection) the opportunity to make a statement by virtue of subsection (2), (3) or (6)(a)(i)—
(a) any statement made by virtue of the subsection must instead be made by a carer of the child, but
(b) those subsections otherwise apply as if references in them to a person and to the maker of a statement are to the child.

(11B) For the purposes of subsection (11A), “carer of the child” means—

(a) a person who cared for the child when the offence (or apparent offence) was perpetrated,
(b) a person who cares for the child when the statement is made,
(c) a person who has cared for the child at any other time.

(11C) If more than one person comes within the meaning of “carer of the child” the persons may agree which carer is to make the statement after, so far as practicable and having regard to the age and maturity of the child—

(a) giving the child an opportunity to express any views on which carer is to make the statement, and
(b) taking account of any views expressed by the child.

(11D) If no agreement is reached in accordance with subsection (11C)—

(a) the statement may be made by each person coming within the description in subsection (11B)(a), and
(b) if there is no such person, the statement may be made by each person coming within the description in subsection (11B)(b).

(11E) In subsection (11B), the expressions “cared for” and “cares for” are to be construed in accordance with the definition of “someone who cares for” in paragraph 20 of schedule 12 to the Public Services Reform (Scotland) Act 2010.”.

(6) In subsection (12)(a)—

(a) for “subsection (6)(b)(ii)” substitute “this section”, and
(b) for “there” substitute “in any part of this section”.

(7) After subsection (12), insert—

“(13) A victim statement, or a statement made by virtue of subsection (3) in relation to a victim statement, may be made in such form and manner as may be prescribed.

(14) An order under subsection (13) may—

(a) include such incidental, supplementary or consequential provision as the Scottish Ministers consider appropriate,
(b) modify any enactment (including this Act).

(15) An order under subsection (13) may be made so as to have effect for a period specified in the order.

(16) An order under subsection (13) containing provision of the type mentioned in subsection (15) may provide that its provisions are to apply only in relation to one or more areas specified in the order.”.

(7A) Section 16 of the 2003 Act (victim’s right to receive information concerning release etc. of offender) is amended in accordance with subsections (7B) to (7F).
(7B) In subsection (5)—

(a) in paragraph (a)—

(i) after “person”, insert “to be given the information”, and

(ii) after “Act”, insert “(except that, in the case where a qualifying person is a child who has not attained the age of 12 years, paragraph (a)(i) of the said section 14(6) is to be construed as if the reference to the qualifying person were to a person who cares for the child),”,

(b) in paragraph (b)(ii)—

(i) after “child”, insert “who has not attained the age of 12 years”,

(ii) the words from “such” to “paragraph (b)” are repealed,

(iii) after “person” insert “to be given the information”, and

(iv) for the words from “mentioned”, where it second occurs, to “cares”, substitute “references to the person who cares for the child”,

(c) in paragraph (b)(i), after “sub-paragraph”, where it second occurs, insert “(taking him to be the person “afforded an opportunity”)”, and

(d) in paragraph (b) the words “(taking him to be the person “afforded an opportunity”)” are repealed.

(7C) In subsection (6)—

(a) for “and (8) to (12)” substitute “to (11)”, and

(b) after “relation to”, where it first occurs, insert “paragraphs (a) and (b)(i) of”.

(7D) Subsection (7) is repealed.

(7E) In subsection (8), for “(7)” substitute “(5)(a) and (b)(ii)”.

(7F) After subsection (8), add—

“(9) The Scottish Ministers may by order amend this section by substituting for—

(a) the person for the time being specified in any part of this section to whom information may be made available such other person as they think fit,

(b) the age for the time being specified in any part of this section such other age as they think fit.”.

(8) In section 88(2) of the 2003 Act (orders), at the beginning of paragraph (b) insert “14(13) or”.

### Sentencing

20 **Duty to consider making compensation order**

In section 249 of the 1995 Act (compensation order against convicted person), after subsection (4) insert—

“(4A) In any case where it would be competent for the court to make a compensation order, the court must consider whether to make a compensation order.

(4B) Before making a compensation order, the court must take steps to ascertain the views and wishes of the victim.
(4C) No compensation order may be made where the victim notifies the court that
the victim does not wish to receive compensation from the person convicted of
the offence.

(4D) For the purposes of subsections (4B) and (4C), “victim” has the meanings
given by subsections (1A) and (1C).”.

21 Restitution order

After section 253 of the 1995 Act, insert—

“Restitution order

253A Restitution order where conviction of police assault etc.

(1) This section applies where a person (“P”) is convicted of an offence under
section 90(1) of the Police and Fire Reform (Scotland) Act 2012 (police assault
etc.).

(2) The court, instead of or in addition to dealing with P in any other way, may
make an order to be known as a restitution order requiring P to pay an amount
not exceeding the prescribed sum (as defined in section 225(8)).

(3) The Scottish Ministers may by regulations amend subsection (2) so as to
substitute for the amount for the time being specified such other amount as
may be prescribed by, or determined in accordance with, the regulations.

(4) Any amount paid in respect of a restitution order is to be paid to the clerk of
any court or any other person (or class of person) authorised by the Scottish
Ministers for the purpose.

(5) Regulations under subsection (3) are subject to the negative procedure.

253B The Restitution Fund

(1) A person to whom any amount is paid under section 253A in respect of a
restitution order must pay the amount to the Scottish Ministers.

(2) The Scottish Ministers must pay any amount received by virtue of subsection
(1) into a fund to be known as the Restitution Fund.

(3) The Scottish Ministers must establish, maintain and administer the Restitution
Fund for the purpose of securing the provision of support services for persons
who have been assaulted as mentioned in section 90(1) of the Police and Fire
Reform (Scotland) Act 2012 (“victims”).

(4) Any payment out of the fund may be made only to—

(a) a person who provides or secures the provision of support services for
victims, or

(b) the Scottish Ministers or, with the consent of the Scottish Ministers, a
person specified by order by virtue of subsection (5) in respect of outlays
incurred in administering the fund.

(5) The Scottish Ministers may delegate to such person as they may specify by
order the duties imposed on them by subsection (3) of establishing,
maintaining and administering the Restitution Fund.
(6) The Scottish Ministers may by order make further provision about the administration of the Restitution Fund including provision for or in connection with—
   (c) specifying persons or classes of person to or in respect of whom payments may be made out of the fund (but subject to subsection (4)),
   (d) the making of payments out of the fund,
   (e) requiring financial or other records to be kept,
   (f) the making of reports to the Scottish Government containing such information and in respect of such periods as may be specified.

(7) An order under subsection (5) or (6) is subject to the affirmative procedure.

(8) In this section, “support services”, in relation to a victim, means any type of service or treatment which is intended to benefit the physical or mental health or well-being of the victim.

253C Restitution order, fine and compensation order: order of preference

(1) Subsection (2) applies where a court considers in relation to an offence that it would be appropriate—
   (a) to make a restitution order,
   (b) to impose a fine, and
   (c) to make a compensation order.

(2) If the person convicted of the offence (“P”) has insufficient means to pay an appropriate amount under a restitution order, to pay an appropriate fine and to pay an appropriate amount in compensation, the court should prefer a compensation order and then a restitution order over a fine.

(3) Subsection (4) applies where a court considers in relation to an offence that it would be appropriate—
   (a) to make a restitution order, and
   (b) to impose a fine or make a compensation order.

(4) If P has insufficient means to pay an appropriate amount under a restitution order and to pay an appropriate fine or, as the case may be, an appropriate amount in compensation, the court should prefer a compensation order and then a restitution order over a fine.

253D Application of receipts

(1) This section applies where the court makes a restitution order in relation to a person (“P”) convicted of an offence and also in respect of the same offence or different offences in the same proceedings—
   (a) imposes a fine and makes a compensation order, or
   (b) imposes a fine or makes a compensation order.

(2) A payment by P must be applied in the following order—
   (a) the payment must first be applied in satisfaction of the compensation order,
(b) the payment must next be applied in satisfaction of the restitution order,
(c) the payment must then be applied in satisfaction of the fine.

253E  Enforcement: application of certain provisions relating to fines

(1) The provisions of this Act specified in subsection (2) apply in relation to restitution orders as they apply in relation to fines but subject to the modifications mentioned in subsection (2) and to any other necessary modifications.

(2) The provisions are—
(a) section 211(3) and (7),
(b) section 212,
(c) section 213 (with the modification that subsection (2) is to be read as if the words “or (4)” were omitted),
(d) section 214(1) to (4) and (6) to (9) (with the modification that subsection (4) is to be read as if the words from “unless” to “decision” were omitted),
(e) sections 215 to 217,
(f) subject to subsection (3) below, section 219(1)(b), (2), (3), (5), (6) and (8),
(g) sections 220 to 224,
(h) section 248B.

(3) In the application of the provisions of section 219 mentioned in subsection (2)(f) for the purposes of subsection (1)—
(a) a court may impose imprisonment in respect of a fine and decline to impose imprisonment in respect of a restitution order but not vice-versa,
(b) where a court imposes imprisonment both in respect of a fine and a restitution order, the amounts in respect of which imprisonment is imposed are to be aggregated for the purposes of section 219(2).”.

22  Victim surcharge

After section 253E of the 1995 Act (inserted by section 21), insert—

“Victim surcharge

253F  Victim surcharge

(1) This section applies where—
(a) a person (“P”) is convicted of an offence other than an offence, or offence of a class, that is prescribed by regulations by the Scottish Ministers,
(b) the court does not make a restitution order, and
(c) the court imposes a sentence, or sentence of a class, that is so prescribed.
(2) Except in such circumstances as may be prescribed by regulations by the Scottish Ministers, the court, in addition to dealing with P in any other way, must order P to pay a victim surcharge of such amount as may be so prescribed.

(3) Despite subsection (2), if P is convicted of two or more offences in the same proceedings, the court must order P to pay only one victim surcharge in respect of both or, as the case may be, all the offences.

(4) Any sum paid in respect of a victim surcharge is to be paid to the clerk of any court or any other person (or class of person) authorised by the Scottish Ministers for the purpose.

(5) Regulations under this section may make different provision for different cases and in particular may include provision—
   
   (a) prescribing different amounts for different descriptions of offender,
   
   (b) prescribing different amounts for different circumstances.

(6) Where provision is made by virtue of subsection (5), the Scottish Ministers may by regulations make provision for determining which victim surcharge is payable in the circumstances mentioned in subsection (3).

(7) Regulations under this section are subject to the affirmative procedure.

253G The Victim Surcharge Fund

(1) A person to whom any sum is paid under section 253F(4) in respect of a victim surcharge must pay the sum to the Scottish Ministers.

(2) The Scottish Ministers must pay any sum received by virtue of subsection (1) into a fund to be known as the Victim Surcharge Fund.

(3) The Scottish Ministers must establish, maintain and administer the Victim Surcharge Fund for the purpose of securing the provision of support services for persons who are, or appear to be, the victims of crime and prescribed relatives of such persons.

(4) Any payment out of the fund may be made only to—
   
   (a) a person who is or appears to be the victim of crime,
   
   (aa) a prescribed relative of a person who is or appears to be the victim of crime,
   
   (b) a person who provides or secures the provision of support services for persons who are, or appear to be, victims of crime, or
   
   (c) the Scottish Ministers or, with the consent of the Scottish Ministers, a person specified by order by virtue of subsection (5) in respect of outlays incurred in administering the fund.

(5) The Scottish Ministers may delegate to such person as they may specify by order the duties imposed on them by subsection (3) of establishing, maintaining and administering the Victim Surcharge Fund.

(6) The Scottish Ministers may by regulations make further provision about the administration of the Victim Surcharge Fund including provision for or in connection with—
   
   (d) the making of payments out of the fund,
(e) the keeping of financial and other records,
(f) the making of reports to the Scottish Government containing such
information and in respect of such periods as may be specified.

(7) An order under subsection (5) and regulations under subsection (6) are subject
to the affirmative procedure.

(8) In this section—
“prescribed” means prescribed by the Scottish Ministers by regulations,
“support services”, in relation to a person who is or appears to be the victim
of crime, means any type of service or treatment which is intended to
benefit the physical or mental health or well-being of the person or a
prescribed relative of the person.

(9) Regulations under subsections (3), (4) and (8) are subject to the negative
procedure.

253H Application of receipts

(1) This section applies where the court orders the payment of a victim surcharge
in relation to a person (“P”) convicted of an offence and also in respect of the
same offence or different offences in the same proceedings—
(a) imposes a fine and makes a compensation order, or
(b) imposes a fine or makes a compensation order.

(2) A payment by P must be applied in the following order—
(a) the payment must first be applied in satisfaction of the compensation
order,
(b) the payment must next be applied in satisfaction of the victim surcharge,
(c) the payment must then be applied in satisfaction of the fine.

253J Enforcement: application of certain provisions relating to fines

(1) The provisions of this Act specified in subsection (2) apply in relation to victim
surcharges as they apply in relation to fines but subject to the modifications
mentioned in subsection (2) and to any other necessary modifications.

(2) The provisions are—
(a) section 211(3) and (4),
(b) section 212,
(c) section 213 (with the modification that subsection (2) is to be read as if
the words “or (4)” were omitted),
(d) section 214(1) to (4) and (6) to (9) (with the modification that subsection
(4) is to be read as if the words from “unless” to “decision” were
omitted),
(e) sections 215 to 218,
(f) subject to subsection (3) below, section 219(1)(b), (2), (3), (5), (6) and
(8),
(g) sections 220 to 224,

(h) section 248B.

(3) In the application of the provisions of section 219 mentioned in subsection (2)(f) for the purposes of subsection (1)—

(a) a court may impose imprisonment in respect of a fine and decline to impose imprisonment in respect of a victim surcharge but not vice-versa,

(b) where a court imposes imprisonment both in respect of a fine and a victim surcharge, the amounts in respect of which imprisonment is imposed are to be aggregated for the purposes of section 219(2).”.

Release of offender: victim’s rights

23 Victim’s right to receive information about release of offender etc.

In section 16 of the 2003 Act (victim’s right to receive information about release of offender etc.)—

(a) in subsection (1), for the words from “a”, where it first occurs, to “offence)” substitute “an offence”, and

(b) in subsection (3), for paragraph (d) substitute—

“(d) that the convicted person is for the first time entitled to be considered for temporary release by virtue of rules under section 39(6) of the 1989 Act,”.

24 Life prisoners: victim’s right to make oral representations before release on licence

In section 17 of the 2003 Act (release on licence: right of victim to receive information and make representations)—

(a) in subsection (1)—

(i) the words from “be”, where it first occurs, to the end become paragraph (a) of the subsection, and

(ii) after that paragraph, add—

“(b) if the convicted person is serving a sentence of life imprisonment, be afforded an opportunity to make oral representations to a member of the Parole Board for Scotland who is not dealing with the convicted person’s case as respects such release and as to conditions which might be specified in the licence in question.”,

(b) in subsection (4)—

(i) after “how” insert “written”, and

(ii) at the end add “and how oral representations under that subsection should be made”,

(c) after subsection (10), insert—

“(10A)In complying with the duty imposed on them by subsection (5), the Scottish Ministers may fix different times in relation to written and oral representations respectively.”, and

(d) after subsection (12), add—
“(13) The Scottish Ministers may by order modify the description or descriptions of convicted person for the time being specified in subsection (1)(b).”.

25 Temporary release: victim’s right to make representations

After section 17 of the 2003 Act, insert—

5 “17A Temporary release: victim’s right to make representations about conditions

(1) This section applies where by virtue of subsection (1) or (5) of section 16 a person (the “victim”) is given the information mentioned in subsection (3)(d) of that section as respects a convicted person.

(2) On the first occasion on which the convicted person is entitled to be considered for temporary release by virtue of rules under section 39(6) of the 1989 Act, the Scottish Ministers must give the victim an opportunity to make written representations to them about any conditions that the victim considers should be imposed in relation to the temporary release.

(3) Subsection (2) applies only if the victim has notified the Scottish Ministers that the victim wishes to be given the opportunity to make representations under that subsection.

(4) The Scottish Ministers must—

(a) fix a time within which any written representations under subsection (2) require to be made to them if they are to be considered by them, and

(b) notify the victim of the time fixed.”.

26 National Confidential Forum

After section 4 of the Mental Health Act, insert—

25 “4ZA National Confidential Forum

(1) The Commission must establish and maintain a committee to be known as the National Confidential Forum (“NCF”) for the purpose of carrying out the following functions (referred to in this Act as “NCF functions”)—

(a) the general functions mentioned in section 4ZB,

(b) the functions conferred on NCF in schedule 1A.

(2) Schedule 1A makes further provision about NCF.

4ZB General functions of NCF

The general functions of NCF are—

(a) to provide means for persons who were placed in institutional care as children to describe in confidence (such descriptions being referred to in this Act as “testimony”)—

(i) experiences of that care,

(ii) any abuse experienced during the period spent in that care,
(b) to acknowledge testimony by enabling it to be given at hearings established by NCF or by written or other means,

(c) based on testimony received—

(i) 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), and

(ii) to make recommendations about policy and practice which NCF considers will improve institutional care (including by protecting children from, and preventing or reducing the incidence of, abuse),

(d) 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 them,

(e) to provide information about advice and assistance available to persons giving, or proposing to give, testimony.

4ZC Carrying out NCF functions

(1) The Commission must delegate the NCF functions to NCF.

(2) The person appointed to chair NCF (the “NCF Head”) must account to the Commission for the carrying out of the NCF functions.

(3) Subsections (1) and (2) do not affect the responsibility of the Commission for the carrying out of the NCF functions.

4ZD Modifications in relation to NCF

(1) The following modifications of this Part apply in relation to the NCF functions—

(a) sections 5, 6, 9, 9A, 10, 16 and 19 do not apply,

(b) in section 17(1), references to the Commission (except in the phrase “Commission Visitor”) are to be read as if they were references to NCF,

(ca) sub-paragraph (2) of paragraph 11 of schedule 1A applies in relation to the Commission’s annual report mentioned in section 18(1) as it applies in relation to a report prepared under that paragraph,

(d) section 20 is to be read as if after subsection (1) there were inserted—

“(1A) For the purposes of the law of defamation—

(a) any statement made in good faith by NCF, its members or NCF staff in carrying out any of the NCF functions is privileged,

(b) any statement made by an eligible person in accordance with arrangements made by NCF under paragraph 8(2) of schedule 1A is privileged.

(1B) A word or expression used in subsection (1A) has the same meaning as it has in schedule 1A.”.

(2) Section 1 of the Public Records (Scotland) Act 2011 is to be read as if after subsection (8) there were inserted—
“(8A) The Mental Welfare Commission for Scotland must have a separate records management plan in relation to the public records created in carrying out the NCF functions (within the meaning of section 4ZA(1) of the Mental Health (Care and Treatment) (Scotland) Act 2003).”.

27 NCF: constitution and operation

(1) In schedule 1 to the Mental Health Act—
   (a) in paragraph 2A(1)(b), for “6 nor more than 8” substitute “7 nor more than 9”,
   (b) omit the word “and” immediately preceding paragraph 2B(2)(b), and
   (c) at the end of that paragraph, insert “and

   (c) one person who has such skills, knowledge and experience as the Scottish Ministers consider to be relevant in relation to the carrying out of the NCF functions.”.

(2) After schedule 1 to the Mental Health Act, insert—

“SCHEDULE 1A
(introduced by section 4ZA(2))
NATIONAL CONFIDENTIAL FORUM
PART 1
MEMBERS OF NCF ETC.

Membership

1 (1) NCF is to consist of—

   (a) the NCF Head, appointed by the Scottish Ministers, and
   (b) at least 2 other members, appointed by the Scottish Ministers.

(2) The Scottish Ministers must, when appointing a person under sub-paragraph (1)(a) or (b), have regard to the recommendation of the selection panel mentioned in paragraph 2(1).

(3) Each member—

   (a) is to be appointed for such period as the Scottish Ministers think fit, and
   (b) holds and vacates office in accordance with the terms of appointment.

(4) A member may by written notice to the Scottish Ministers resign office as a member.

(5) The Scottish Ministers must, as soon as practicable after receiving a resignation notice, inform the Commission of the notice.

Membership selection panel

2 (1) The selection panel is to consist of—

   (a) a representative of the Scottish Ministers,
   (b) the person appointed in accordance with paragraph 2A(1)(a) of schedule 1 to chair the Commission, and
(c) other persons of such number and description as may be determined by the Scottish Ministers.

(2) The selection panel may recommend for appointment only persons who the panel consider to have such skills, knowledge and experience as the panel consider to be relevant to the carrying out of the NCF functions.

(3) The selection panel may not recommend for appointment persons who are members of the Commission.

(4) The selection panel is to determine the selection process to be applied in determining persons to be recommended for appointment.

NCF staff

3 (1) This paragraph applies where—

(a) the Commission proposes, in accordance with paragraph 7(1)(b) of schedule 1, to appoint a member of staff, and

(b) the employment of that person is to relate to the carrying out of NCF functions.

(2) The person may be appointed only if—

(a) the person has been recommended for appointment by the NCF Head,

(b) the terms of the person’s appointment would prevent the person from carrying out any other function conferred on the Commission during the period when the Commission is required to establish and maintain NCF.

NCF powers and procedure

4 (1) NCF may do anything which appears to it to be necessary or expedient for the purposes of, or in connection with, the carrying out of the NCF functions.

(2) It is for the NCF Head to determine NCF’s procedure, having regard to the views of the other NCF members.

(3) In carrying out its functions and in determining its procedure, NCF must have regard to the need to avoid any unnecessary costs to public funds, eligible persons and others.

(4) The validity of any proceedings of NCF is not affected by—

(a) any vacancy in its membership,

(b) any defect in the appointment of a member.

(5) Members of the Scottish Government and persons authorised by the Scottish Government may not attend or take part in meetings of NCF.

Application of schedule 1 to NCF

5 (1) The provisions of schedule 1 mentioned in sub-paragraph (2) do not apply in relation to NCF.

(2) The provisions are—

(a) paragraph 7D,
(b) paragraph 7E,
(c) paragraph 7G.

**PART 2**

DELEGATION OF FUNCTIONS

5

Delegation by NCF

6 (1) NCF must delegate the NCF functions to the persons mentioned in subparagraph (3), to the extent determined by the NCF Head.

(2) NCF may otherwise delegate the NCF functions to those persons, to the extent determined by NCF.

10 (3) Those persons are—

(a) the NCF Head,
(b) any other member of NCF,
(b) any member of NCF staff.

(4) This paragraph does not affect—

(a) NCF’s responsibility for the delegated functions, or

(b) the NCF Head’s accountability for the carrying out of the NCF functions under section 4ZC(2).

**PART 3**

ELIGIBILITY TO PARTICIPATE IN FORUM

20

Eligibility

7 (1) NCF may receive testimony from any eligible person whose application to provide testimony has been accepted by NCF.

(2) An “eligible person” is a person who—

(a) is 16 years of age or over,

(b) was placed in an establishment providing institutional care during the person’s childhood, and

(c) is no longer in that care.

(3) In this schedule “institutional care” means a care or health service which meets the conditions in sub-paragraph (4) and is of a description or type prescribed by order made by the Scottish Ministers.

(4) The conditions are that the care or health service—

(a) was provided to children in Scotland at some time (whether or not the service is still provided),

(b) included residential accommodation for the children, and

(c) was provided by a body corporate or unincorporated.

(5) An order under sub-paragraph (3) may not prescribe a service provided at premises used wholly or mainly as a private dwelling.
(6) An order under sub-paragraph (3) is subject to the affirmative procedure.

**PART 4**

**CONDUCT OF HEARINGS ETC**

**Testimony given to NCF**

8 (1) NCF must make provision for receiving testimony under paragraph 7(1).

(2) NCF must make arrangements for testimony to be given—
   (a) at a hearing established by NCF (a “forum hearing”), or
   (b) by other means of communication (whether oral or written).

(3) Where NCF receives testimony at a forum hearing it must ensure that—
   (a) at least 2 members of NCF are present while the forum hearing is receiving the testimony, and
   (b) the forum hearing is held in private.

(4) For the purposes of sub-paragraph (3), a forum hearing is held in private if the only persons present are—
   (a) the person giving the testimony,
   (b) any person accompanying that person whose attendance has been approved by NCF,
   (c) members of NCF,
   (d) NCF staff.

(5) It is otherwise for NCF to determine procedures for receiving testimony, taking account of—
   (a) any procedures determined under paragraph 4(2), and
   (b) the duty in paragraph 4(3).

**Recording of testimony**

9 (1) NCF may record testimony and any other information received from eligible persons in such manner as it thinks fit.

(2) NCF must as soon as reasonably practicable after receiving any information from an eligible person take such steps as it thinks fit to organise the information in such a way as to preserve the anonymity of—
   (a) the person providing the information,
   (b) any individual mentioned in the testimony, and
   (c) any establishment providing institutional care mentioned in the testimony.

**Payment of expenses**

10 NCF may require the Commission to pay such expenses as NCF considers reasonable—
   (a) to eligible persons, and
(b) to persons accompanying eligible persons to forum hearings.

PART 5
Reporting

Reports by NCF

11 (1) NCF may prepare—

(a) reports based on testimony received,
(b) reports setting out, in relation to the testimony, matters it identifies and recommendations made by virtue of section 4ZB(c).

(2) A report prepared under this paragraph must not identify or include information which creates a real risk of identifying—

(a) a person who has been in institutional care during childhood,
(b) a person alleged to have experienced or committed abuse,
(c) an establishment providing institutional care.

(2A) Sub-paragraph (2) does not prevent a report from including information which is otherwise in the public domain.

(3) It is otherwise for NCF to determine the form and content of a report prepared under this paragraph.

Annual NCF reports

12 (1) As soon as practicable after 31 March in each year, NCF must submit to the Scottish Ministers a report on the discharge of the NCF functions during the period of 12 months ending on 31 March.

(2) NCF must consult the Commission before preparing a report under this paragraph.

(3A) Sub-paragraph (2) of paragraph 11 applies in relation to a report prepared under this paragraph as it applies in relation to a report prepared under that paragraph.

(4) NCF must send a copy of each report prepared under this paragraph to the Commission.

(5) The Scottish Ministers must lay before the Scottish Parliament a copy of each report submitted to them under sub-paragraph (1).

PART 6
Confidentiality

Disclosure of information

13(1) This paragraph applies to—

(a) the Commission,
(b) a person who is or has been a member of the Commission,
(c) NCF,
(d) a person who is or has been a member of NCF,
(e) a person who is or has been an employee of the Commission,
(f) a person who has been given information by a person carrying out NCF functions for the purpose of storing or preserving that information.

(2) A person must not disclose any information which—
(a) has been provided to the person in connection with the carrying out of the NCF functions, and
(b) is not otherwise in the public domain.

(3) Sub-paragraph (2) does not prevent disclosure of any information by the person in so far as—
(a) the disclosure is to another person mentioned in sub-paragraph (1) and is necessary for the purpose of enabling or assisting the carrying out by NCF or the Commission of any of its functions under this Act,
(b) the disclosure is necessary for the purpose of enabling—
(i) NCF to prepare a report in accordance with paragraph 11 or 12, or
(ii) the Commission to prepare its annual report mentioned in section 18(1),
(c) the disclosure is in accordance with sub-paragraph (4), (5) or (6).

(4) A member of NCF must disclose to a constable information received by that member to the extent that it is, in the opinion of the member acting in good faith, reasonably necessary to prevent the commission of an offence involving the abuse of a child.

(5) A member of NCF may disclose to a constable information received by that member to the extent that—
(a) it relates to an allegation made by a person who has given testimony that an offence involving the abuse of a child has been committed, and
(b) it is, in the opinion of the member acting in good faith, in the public interest to do so.

(6) A court may order disclosure of information in, or for the purposes of, civil or criminal proceedings (including the purposes of the investigation of any offence or suspected offence) if it is satisfied that—
(a) the disclosure is necessary in the interests of justice, and
(b) the extent of the disclosure is necessary in the interests of justice.

**PART 7**

**GENERAL**

14 In this schedule—
“child” means a person who is under 18 years of age,
“childhood” means the period when a person is under 18 years of age,
“eligible person” has the meaning given by paragraph 7(2),
“forum hearing” has the meaning given by paragraph 8(2),
“institutional care” has the meaning given by paragraph 7(3),
“NCF staff” means persons appointed in accordance with paragraph 3.”.

(3) In schedule 2 to the Public Appointments and Public Bodies etc. (Scotland) Act 2003 (specified authorities), before the entry for “Accounts Commission for Scotland” (and the italic cross-heading immediately preceding it), insert—
“NCF Head and any other member of the National Confidential Forum established under section 4ZA(1) of the Mental Health (Care and Treatment) (Scotland) Act 2003”.

General

28 Interpretation

In this Act—
“the 1995 Act” means the Criminal Procedure (Scotland) Act 1995,
“the 2003 Act” means the Criminal Justice (Scotland) Act 2003, and
“the Mental Health Act” means the Mental Health (Care and Treatment) (Scotland) Act 2003.

29 Ancillary provision

(1) The Scottish Ministers may by order make such supplementary, incidental, consequential, transitional, transitory or saving provision as they consider appropriate for the purposes of, in consequence of, or for giving full effect to, any provision of this Act.
(2) An order under this section may modify any enactment (including this Act).
(3) An order under subsection (1) containing provisions which add to, replace or omit any part of the text of an Act is subject to the affirmative procedure.
(4) Otherwise, an order under subsection (1) is subject to the negative procedure.

30 Commencement

(1) This section and sections 26 so far as it inserts the new section 4ZA, 27(1), 27(2) so far as it inserts paragraphs 1, 2 and 5 of the new schedule 1A, 27(3), 28, 29 and 31 come into force on the day after Royal Assent.
(2) The other provisions of this Act come into force on such day as the Scottish Ministers may by order appoint.
(3) An order under subsection (2) may contain transitory or transitional provision or savings.

31 Short title

The short title of this Act is the Victims and Witnesses (Scotland) Act 2013.
Victims and Witnesses (Scotland) Bill

[AS PASSED]

An Act of the Scottish Parliament to make provision for certain rights and support for victims and witnesses, including provision for implementing Directive 2012/29/EU of the European Parliament and the Council; and to make provision for the establishment of a committee of the Mental Welfare Commission with functions relating to persons who were placed in institutional care as children.

Introduced by: Kenny MacAskill
On: 6 February 2013
Bill type: Government Bill