

SPICe Briefing

Victims and Witnesses (Scotland) Bill: Stage 3

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Stage 3 proceedings on the Victims and Witnesses (Scotland) Bill are scheduled to take place on 12 December 2013.

This briefing considers a number of the key issues raised during the Justice Committee's stage 1 consideration of the bill and subsequent recommendations made by the Justice Committee in its stage 1 report. It also considers the Scottish Government's response to those recommendations; and some of the key amendments lodged at stage 2. A separate SPICe briefing [Victims and Witnesses \(Scotland\) Bill: Stage 3 – National Confidential Forum](#) provides information on the Health and Sport Committee's consideration of those provisions relating to the National Confidential Forum.



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EXECUTIVE SUMMARY

- The Victims and Witnesses (Scotland) Bill seeks to make provision in two main policy areas – improving and increasing rights and support for victims and witnesses (primarily in relation to criminal cases); and the establishment of a National Confidential Forum to provide a forum for adults who were in institutional care as children, including those who were abused, or who witnessed such abuse, whilst in such care
- Key proposals relating to victim and witnesses include, amongst other things, giving victims and witnesses a right to certain information about their case; creating a duty on organisations and agencies within the criminal justice system to set clear standards of service for victims and witnesses; creating a presumption that certain categories of victim are vulnerable and giving such victims the right to utilise special measures when giving evidence; introducing a victim surcharge which will see offenders contribute to the cost of supporting victims; and introducing restitution orders which will contribute to the cost of specialist, non-NHS support services which assist in the recovery of police officers who have been assaulted in the course of their duty
- The establishment of a National Confidential Forum (NCF) will create an opportunity for adults who were placed in institutional care as children to recount their experiences, including abuse, in a confidential, non-judgemental and supportive setting. It is intended that the NCF will contribute to the improvement of health and wellbeing for people placed in institutional care as children by offering acknowledgement of their experiences, including experiences of abuse and neglect
- At Stage 1 of the bill, the Justice Committee was designated as lead committee and considered the victims and witnesses provisions in the bill. The Health and Sport Committee was appointed as a secondary committee to consider those provisions in the bill relating to the NCF
- Key issues in relation to victims and witnesses which were raised during stage 1 included: whether a definition of ‘victim’ should be placed on the face of the bill; victims’ effective participation in the criminal justice system; the right of victims of certain sexual offences to specify the gender of any person who has reason to interview them; and vulnerable witnesses

INTRODUCTION

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

The Parliament's Justice Committee was designated as lead committee on the bill and considered proposals in the bill relating to victims and witnesses. The Health Committee was designated as a secondary committee and considered the proposals in relation to the National Confidential Forum.

Key proposals in relation to victims and witnesses include:

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

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

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

PARLIAMENTARY CONSIDERATION

The Parliament's Justice Committee published its stage 1 report on those aspects of the bill relating to victims and witnesses on 3 June 2013. The Scottish Government produced a written response to the stage 1 report on 13 June 2013. The bill completed stage 1 (consideration of general principles) with the stage 1 debate on 19 June 2013.

Stage 2 consideration of the bill was carried out by the Justice Committee at its meetings on [12 November 2013](#) and [19 November 2013](#) and was followed by the publication of the bill (as amended at stage 2). Stage 3 proceedings are scheduled to take place on 12 December 2013.

KEY ISSUES AND RECOMMENDATIONS AT STAGE 1

Definition of 'victim'

The bill as introduced did not include a clear definition of 'victim' and does not make any distinction between those individuals who are victims of alleged crimes and those crimes which have been proven by the courts. [EU Directive 2012/29/EU](#) on establishing minimum standards on the rights, support and protection of victims of crime, which is implemented in part by the bill, does 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".

During stage 1, the Committee received evidence from some witnesses that a clear definition of 'victim' should be included on the face of the bill. 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 would or would not have rights under the bill. They put forward a suggestion that the definition of 'victim' used in the Victims of Crime Assistance Act 2009 of Queensland, Australia may be an appropriate definition to use in the bill. That definition 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.

(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)."

Victim Support Scotland supported the Law Society's view that a clear definition of 'victim' including both victims and their family members should be included in the bill. (Scottish Parliament Justice Committee 2013a)

During stage 1 evidence, some witnesses raised concerns regarding the bill's use of the word 'victim' to refer, not only to individuals in cases where the guilt of an offender had been proven, but also to cases before and during court proceedings. For example, in its written evidence, 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 word 'victim' to cases in which guilt had been proved. (Scottish Parliament Justice Committee 2013a)

The Committee expressed sympathy for the Faculty's view and was concerned at the suggestion that the presumption of innocence may be compromised by the bill's use of the word 'victim' when referring to cases where guilt has not yet been proven or admitted. The Committee also recognised that some of the provisions in the bill would be incorporated into the Criminal

Procedure (Scotland) Act 1995 which uses the term ‘complainer’ rather than ‘victim’ and considered that issues of clarity and consistency should be addressed. The Committee acknowledged however, that the word ‘complainer’ may not be appropriate within a bill aimed at improving support for victims.

The Committee recommended that the Scottish Government give consideration to including a definition of ‘victim’ on the face of the bill arguing that this would help provide clarity for individuals on their rights under the bill, and may also serve to alleviate concerns raised that use of the term prior to and during trials may compromise the presumption of innocence afforded to the accused. (Scottish Parliament 2013a)

In response, the Cabinet Secretary for Justice stated that 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 on-going improvements within the system and to ensure that witnesses are able to perform their public duty effectively. He stated that in pursuing these objectives, he was mindful of the need to ensure that the justice process is fair to the accused. He stated that there should be no need for a criminal conviction before a person who has suffered as a result of a crime has access to appropriate support services. He also agreed that it was important to ensure that no negative inference should be drawn in relation to the guilt of the accused. (Scottish Government 2013)

He went on to say that the bill achieves this and does draw a distinction between alleged victims and those where a crime has been proved by the courts by providing clarity in the context of individual sections within the bill. To illustrate this he pointed to section 5 of the bill as introduced which allows victims or alleged victims of certain offences to specify the gender of the investigating officer who is to carry out an interview¹. 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...”

With regard to the use of the word ‘complainer’, the Cabinet Secretary welcomed the Committee’s acknowledgement that this may not be appropriate for the bill. He referred to his previous explanation in oral evidence to the Committee that 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, he did not consider that there is a risk to the presumption of innocence.

With regard to the Committee’s recommendation that consideration be given to including a clear definition of ‘victim’ on the face of the bill, the Cabinet Secretary stated that consideration was given to including an overarching definition 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.”
(Scottish Government 2013)

The Cabinet Secretary went on to say that he noted the concerns raised by both the Committee and the Faculty of Advocates regarding the inclusion of a definition in the bill, and while he was not persuaded of the need for an overarching definition, he was happy to consider, along with other justice partners, whether any further clarity was required.

¹ The types of offences are sexual offences; human trafficking; domestic abuse; and stalking.

Victims' effective participation in the criminal justice system

The Committee had a number of concerns regarding section 1(3)(d) of the bill which would allow victims and witnesses, as far as would be appropriate to do so, to “participate effectively” in investigations and proceedings. During stage 1, the Committee was made aware of a level of confusion amongst organisations within the criminal justice system as to the precise meaning of the relevant provision and considered that a lack of clarity could raise the expectations of victims. For example, they may be led to believe that they would have a more active role to play in criminal proceedings than could be realistically met, or that, in the attempt to comply with the principle of effective participation for victims and witnesses, access to justice for the accused may be compromised. Accordingly, the Committee urged the Scottish Government to consider either clarifying the meaning of section 1(3)(d) in guidance or removing it from the bill.

In response, the Cabinet Secretary for Justice noted the Committee’s concerns and stated that the general principles of the bill 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. He went on to say that the idea of effective participation of victims and witnesses within the criminal justice system underlies much of the bill and the relevant EU Directive (see above). In his response to the Committee’s stage 1 report, he pointed out that 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 contained at section 1(3)(d) of the bill as introduced was simply intended to reflect that position, and to ensure that it is given due consideration by justice agencies when dealing with victims and witnesses. The Cabinet Secretary stated that the duty to set out standards of service under section 2 of the bill would ensure that a more detailed and practical explanation of how victims and witnesses could expect to be involved in the process is provided, along with the service they will be entitled to receive from a particular agency. (Scottish Government 2013)

With regard to the standards of service to be complied with by organisations and individuals, along with details of a reporting mechanism on how the standards are working in practice, the Committee asked the Scottish Government to consider placing these within guidance for approval by the Parliament.

The Cabinet Secretary expressed concern in his response to the Committee on this issue arguing that a single set of standards could not give a detailed and organisation-specific indication of what victims and witnesses could expect.

He stressed that this was important as different organisations will interact with victims and witnesses in different ways and considered that organisation-specific standards would better reflect the role that each plays in relation to victims and witnesses. He acknowledged that while it would be possible to maintain an organisation-specific approach and set out individual standards in statutory guidance subject to Parliamentary approval, this would slow down the process of putting standards in place. He also pointed out that, as all of the named organisations in the bill already have robust complaints procedures in place, any issues in relation to service standards which arise could be dealt with through this route which would ensure that where individuals are not happy with a response, complaints could be escalated to the appropriate bodies as they are at present. Given the duty placed upon organisations to publish standards and to comply with the general principles outlined at section 1 of the bill, the Cabinet Secretary was not persuaded that there was a need to put the standards themselves within statutory guidance.

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

In compliance with EU Directive 2012/29/EU, the bill as introduced provides a right for victims of certain offences to choose the gender of any investigating officer who has reason to interview

them. Those offences are sexual offences, human trafficking, domestic abuse and stalking. The bill also provides that the police must explain to a victim that they have this right prior to any interview being carried out. The bill provides exceptions where to comply with the requirement would be likely to prejudice a criminal investigation or that it would not be reasonably practicable to do so.

The Committee heard concerns from a number of witnesses at stage 1 that there may be practical difficulties in ensuring that the right to specify the gender of an interviewer could be met and asked the Cabinet Secretary to provide assurance that the Government would work with Police Scotland to improve capacity in this area in order to meet the rights specified in the bill. The Committee also suggested that consideration be given to specifying that in circumstances where it is not possible to comply with such a request, that a full explanation is provided to the victim and is included in the report to the relevant Procurator Fiscal. (Scottish Parliament 2013a)

The Cabinet Secretary noted the Committee's concerns and, with regard to the practical difficulties which may be involved in complying with the requirement to allow a victim to specify the gender of an interviewer, pointed out that, while this would be an operational matter for the police, the Government would work with Police Scotland on the practical implementation of the measures in the bill. He also said that the Government would be happy to discuss with Police Scotland the Committee's suggestion that an explanation be provided to victims where the police are unable to fulfil a request.

During stage 1 evidence, the Committee also heard from some witnesses that, given the nature of some of the offences covered, the right to specify the gender of an interviewer in certain cases should be extended so that a victim could also specify the gender of a medical examiner should one be required. The Cabinet Secretary stated that he would be happy to look into this suggestion.

Vulnerable witnesses

The bill contains a number of measures in relation to vulnerable witnesses including:

- amending the definition of a 'child witness' so that all those under the age of 18 will automatically be entitled to use special measures, known as 'standard special measures'² to assist them in giving evidence
- 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 automatically entitled to use standard special measures when giving evidence
- 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.

² Standard special measures consist of the use of a live television link; a screen; and the use of a supporter. The party citing a vulnerable witness who is automatically entitled to use standard special measures may also apply to the court that they give evidence (a) in the form of a prior statement; (b) to a Commissioner; or (c) in a closed court.

- 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
- 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

During stage 1, the provisions allowing objections to be lodged where the use of special measures was automatic, raised a number of concerns including the right to object to special measures being used by child witnesses and other vulnerable witnesses. The Committee was also keen to establish whether the provisions in relation to objections struck the appropriate balance between the rights of the victim and the accused. The Committee also sought clarification as to where responsibility lay in relation to establishing the vulnerability of witnesses.

In response, the Cabinet Secretary explained that currently, there is limited opportunity for parties to raise legitimate concerns in court about the granting of special measures and that the Government believes there should be a mechanism by which to do so. He went on to say that the bill aims to ensure that there is a presumption that special measures will be available but that there are also safeguards which allow the court a degree of flexibility and discretion to consider legitimate concerns raised about the particular circumstances of a case.

He also said that while the bill sought to widen the availability of special measures it was vital that this was achieved without prejudice to the accused, something which is stated explicitly in the EU Directive. The Cabinet Secretary pointed out that such a balance was highlighted in a recent appeal³ which was lodged on the grounds that decisions to grant special measures are made 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 that existing legislation was compatible with Articles 6 and 8 of the European Convention on Human Rights⁴, the proposals in the bill significantly extend the categories of individuals entitled to special measures. So to ensure ECHR compatibility, the Government deemed it necessary to include provisions in the bill for a right to object to special measures. This will enable any legitimate concerns to be raised by any party to the proceedings and allow the court to give due consideration to those concerns.

With regard to the Committee's request for clarification on where responsibility would lie for establishing vulnerability, the Cabinet Secretary confirmed that the party citing the witness (which would be COPFS in most cases) would be obliged to carry out individual assessments of witnesses to be cited to ascertain whether they were vulnerable and if they are, to submit an application to the court specifying which of the special measures would be appropriate. An assessment would take account of personal characteristics, the type or nature of the crime and the circumstances of the crime. It would then be for the court to determine if a witness was vulnerable and if the special measures sought were appropriate.

KEY AMENDMENTS AT STAGE 2

As pointed out above, the Justice Committee considered stage 2 amendments at its meetings on [12 November 2013](#) and [19 November 2013](#). The following paragraphs do not cover all of the amendments lodged at stage 2 but provide (a) information on the debates on those amendments which relate to some of the key issues outlined above; and (b) information on an

³ AMI v PF Glasgow (2012).

⁴ Article 6 – Right to a fair trial; and Article 8 – Right to respect for private and family life.

amendment in relation to restorative justice which was not considered by the Committee at stage 1.

Definition of 'victim'

At stage 2, Margaret Mitchell MSP lodged an amendment which sought to include a definition of 'victim' within the bill. She argued that it appeared somewhat strange that a bill conferring rights on victims would not include a definition of the term itself and that the inclusion of a clear definition would provide clarity for individuals. (Scottish Parliament 2013b)

The amendment was intended to cover both natural persons and legal entities in three sets of circumstances: in cases in which a person has a crime committed directly against them; where a relative or dependant of that person suffers harm as a result of the crime committed against that person; and cases in which a person suffers as a result of intervening to help another person against whom a crime is being committed. Harm would be defined to include physical, mental or emotional harm as well as economic loss. The amendment required the Scottish Ministers to set out in subordinate legislation the family members to which the definition would apply.

In response, the Cabinet Secretary for Justice stated that he did not consider an overarching definition of 'victim' to be necessary but reminded the Committee that he had indicated at stage 1 that he would consider further whether additional clarity was required in relation to the use of the word 'victim' in the bill. (Scottish Parliament 2013b)

He argued that the word 'victim' is currently used and understood both by justice organisations and victim support organisations without the need for an overarching definition and that providing such a definition would significantly complicate matters and risk inadvertently excluding individuals who should benefit from provisions within the bill. Such a definition would also risk including individuals who would not fall within a reasonable interpretation of 'victim'. He pointed out that the definition proposed in Margaret Mitchell's amendment appeared to hinge on an offence having been committed against a person. This could imply that a conviction is necessary to establish that an offence has been committed as there is no reference to an offence that is alleged to have been committed against a person. He went on to say:

"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". (Scottish Parliament 2013b)

He also pointed out that as the amendment only covered offences against the person, offences against property might not be covered with the risk that individuals whose property had been vandalised would not be classed as victims. The Cabinet Secretary also argued that the inclusion of prescribed relatives of all victims i.e. not only those who have died as a result of an offence but victims who have suffered any harm, seemed to be a step too far. While he agreed that victims' relatives should benefit from provisions within the bill in some circumstances, he found it hard to justify that a relative of someone who had had their wallet stolen and as such, suffered economic loss should be treated as a victim. For these reasons, the Cabinet Secretary considered that it would be preferable to qualify and explain the use of the term 'victim' only when necessary and to make it applicable to the circumstances involved which the bill as introduced sought to do.

To that end, the Cabinet Secretary lodged a number of minor amendments at stage 2 to ensure that certain provisions extended to family members as well as victims themselves. These included amendments which would ensure that when a person's death was caused by a

criminal offence, prescribed relatives of that person would be able to request information under section 3 of the bill which deals with disclosure of information in criminal proceedings in the same way that victims or witnesses can. Similar amendments sought to ensure that the victim surcharge fund (provided for at section 22 of the bill) can be used to support those who appear to be victims, in order to provide immediate support before criminal proceedings commence and also to support prescribed relatives of victims as well as victims themselves. The Cabinet Secretary invited the Committee to support his amendments and urged Margaret Mitchell to withdraw her amendment.

In response, Margaret Mitchell welcomed the Cabinet Secretary's amendments but did not think that they necessarily excluded putting a definition of 'victim' on the face of 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”. (Scottish Parliament 2013b)

While believing that there was still good reason to include a definition on the face of the bill, Margaret Mitchell withdrew her amendment with a view to coming back at stage 3 with a revised proposal. The Cabinet Secretary's amendments were agreed to without division.

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

As outlined above, the bill provides a right for victims of certain offences to choose the gender of any person who has reason to interview them. During evidence at stage 1, the Cabinet Secretary gave a commitment that he would consider the recommendation that this right be extended to enable victims of certain offences to choose the gender of a person who was to carry out medical examinations. At the Justice Committee meeting on 12 November 2013, he acknowledged that there are wider justice and health implications involved in delivering a service which is responsive to the needs of victims of sexual offences and that this could not be achieved through legislation alone. He informed the Committee that discussions are already underway between Police Scotland and NHS Scotland to ensure that appropriate guidance and support are available to professionals tasked with carrying out forensic examinations and to victims of sexual offences. (Scottish Parliament 2013b)

The Cabinet Secretary brought forward an amendment at stage 2 which sought to ensure that the police also inform victims and alleged victims of sexual offences that they have a right to request a medical examiner of a specified gender and emphasised that the amendment would underpin the work currently going on between the police and NHS Scotland. He acknowledged that the amendment alone was not a complete solution to the issues surrounding this area and that meeting the needs of victims of sexual offences required more work but believed that it was a vital step to ensure that victims' views are sought and that it would act as a driver for more comprehensive change.

Committee Members stated that the amendment was a positive move forward in this area and it was agreed to without division.

Vulnerable witnesses

As outlined above, the provisions in the bill allowing objections to be lodged where the use of standard special measures was automatic, raised a number of concerns including the right to

object to such measures being used by child witnesses and deemed vulnerable witnesses⁵. At stage 2, Alison McInnes lodged an amendment which sought to 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 currently available in cases involving children and vulnerable witnesses. She pointed out that a number of victim support organisations had expressed “deep concern” about the proposals to allow objections to be lodged in such cases. In proposing her amendment she stated that:

“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”. (Scottish Parliament 2013b)

In response, the Cabinet Secretary stated that he fully supported amendment 63 and considered that it addressed the concerns which had been raised at stage 1 by the Committee and the various 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 certain categories of vulnerable witness. I believe that that approach strikes the appropriate balance between the rights of victims and those of the accused and I am grateful to Alison McInnes”. (Scottish Parliament 2013b)

The Cabinet Secretary lodged a consequential amendment at stage 2 which would ensure that when a vulnerable witness notice contained a request for both standard and non-standard special measures and an objection is lodged in relation to the latter, that the resulting hearing will only deal with the non-standard measures and that standard special measures would automatically be granted as usual.

After receiving representations from members of the Victims Organisations Collaboration Forum Scotland (VOCFS), Elaine Murray MSP also lodged amendments at stage 2 in relation to objections being raised where special measures are concerned. These amendments sought to remove the relevant sections dealing with objections from the bill altogether. Speaking to the amendments Elaine Murray stated:

⁵ The bill provides that the definition of a “child witness” is a child under the age of 18; and that a “deemed vulnerable witness” is a witness who is considered vulnerable as a result of being an alleged victim of a sexual offence, human trafficking, domestic abuse or stalking.

“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”. (Scottish Parliament 2013b)

In response, the Cabinet Secretary pointed out that section 13 of the bill deals with other vulnerable witnesses who are not child or deemed vulnerable witnesses. He also pointed out that representations can already be made to the courts in relation to special measures without any formal procedure being in place and that this would continue even if the relevant sections were removed from the bill. He considered that it was more appropriate to clarify what can already happen by putting this on a statutory footing, while at the same time ensuring that those special measures that are automatically available to certain groups are not subject to challenge as provided for in Alison McInnes’ amendment.

Amendment 63 and the Cabinet Secretary’s consequential amendment were agreed to without division and Elaine Murray’s amendments on this issue were not moved.

Restorative justice

Article 12 of the EU Directive provides 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 practices.

At stage 2, Alison McInnes MSP brought forward an amendment which would require ministers to provide for the referral of a victim and the perpetrator of a crime to restorative justice services. The amendment would require ministers to define when that should occur and to set out procedures for such referrals. The amendment sought to provide that a referral would only occur if the victim had consented and that that consent could be withdrawn at any time. The victim should also be fully informed of how restorative justice services work and protected from any further form of victimisation or retaliation. Moving the amendment, Alison McInnes stated:

“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”. (Scottish Parliament 2013b)

A number of members indicated their support for the amendment.

In response, the Cabinet Secretary stated that while he fully understood the intention behind the amendment and supported the concept of restorative justice, he was not persuaded that this was the right time to introduce what was essentially a statutory right to access such services. He stated that detailed consideration would need to be given to the nature and effectiveness of the services which were to be offered and also to the potential costs, which could not be ignored given present financial circumstances.

He added that given the voluntary and case-specific nature of such services, there were compelling reasons for adopting a more flexible approach than would be possible through a statutory scheme. It would be difficult in particular, to establish definitive circumstances in which referral would be appropriate and which reflected the very personal and case-specific nature of each case. The Cabinet Secretary said that he could not support the amendment and invited Alison McInnes to withdraw it with an assurance that the Government was open to giving the matter further consideration as to whether the benefits of restorative justice should be more widely reviewed.

Alison McInnes pressed the amendment pointing out that it would require the Government to define when access to such services should occur and to set out procedures for referral, allowing the Government to take a stepped approach. The amendment was then agreed to after a division.

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