

# **VICTIMS AND WITNESSES (SCOTLAND) BILL**

## **[AS AMENDED AT STAGE 2]**

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### **REVISED EXPLANATORY NOTES**

#### **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

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)).

*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 make incidental, supplementary or consequential provision and to modify any enactment (including the 2003 Act). New subsection (15) sets out that an order made 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

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.

*This document relates to the Victims and Witnesses (Scotland) Bill (SP Bill 23) as amended at Stage 2 (SP Bill 23A)*

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.

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*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

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.

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# **VICTIMS AND WITNESSES (SCOTLAND) BILL**

## **REVISED EXPLANATORY NOTES**

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Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by APS Group Scotland.

ISBN 978-1-78392-319-9