

VICTIMS AND WITNESSES (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

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

OVERVIEW OF THE BILL

2. There are two main policy areas in the Bill: reforms to the justice system relating to victims and witnesses, and the establishment of a National Confidential Forum (NCF, the Forum) for adults placed in institutional forms of care as children.

3. The proposed reforms relating to victims and witnesses aim to put victims' interests at the heart of ongoing improvements to the justice system and to ensure that witnesses are able to fulfil their public duty effectively. Key proposals include:

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

4. The establishment of the NCF creates a unique opportunity for adults who were placed in institutional care as children to recount their experiences, including abuse, in a confidential, non-judgemental and supportive setting. The NCF will help improve the health and wellbeing of people placed in care as children, by offering acknowledgement of their experiences, including experiences of abuse and neglect.

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

POLICY OBJECTIVES – VICTIMS AND WITNESSES REFORMS

Overview

6. Overall crime levels in Scotland have fallen over recent years and, in 2011/12, recorded crimes were at their lowest level for 37 years¹. However, as well as tackling crime, the Scottish Government recognises that the justice system needs to do more to support victims and witnesses of crime.

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

Background

Victims Policy

8. The Scottish Strategy for Victims² was published in 2001. It set out an action plan which was based on three core principles - that victims should be provided with generic and case specific information; that they should receive appropriate support; and that they should have their voice heard. In 2005, the National Standards for Victims of Crime³ set out the level of service that victims and witnesses should expect in their dealings with the criminal justice and children's hearing systems.

¹ <http://www.scotland.gov.uk/Publications/2012/06/1698/0>

² <http://www.scotland.gov.uk/Resource/Doc/158900/0043165.pdf>

³ <http://www.scotland.gov.uk/Resource/Doc/36496/0024967.pdf>

9. Since 2005, a number of improvements have been made in relation to the support of victims of crime. These include:

- extending the coverage of the Victim Notification Scheme⁴ (VNS) to custodial sentences of 18 months or more (from four years or more);
- introducing a national victim statement scheme⁵ in solemn cases from 2009;
- organisational developments, including the launch by the Crown Office and Procurator Fiscal Service (COPFS) of a document setting out how victims and witnesses will be treated ('Our Commitments to Victims and Witnesses'⁶) and amendment of the police Standard Prosecution Report to improve identification of witness vulnerability; and
- the joint protocol⁷ between the Association of Chief Police Officers in Scotland (ACPOS) and COPFS to challenge domestic abuse.

10. In late 2012, an EU Directive establishing minimum standards on the rights, support and protection of victims of crime (2012/29/EU)⁸ (the Directive) was finalised. The Directive is a measure on the 'Budapest Roadmap' for improving victim rights. It is part of a package of measures which aim to strengthen the rights and protection of victims of crime, especially in court proceedings and includes a proposal for a regulation on mutual recognition of civil protection measures. The objectives of the Directive are to ensure that all victims of crime receive appropriate protection and support, are able to participate in criminal proceedings and are recognised and treated respectfully, sensitively and professionally without discrimination in all contacts with any public authority.

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

- victims are treated with respect and police, prosecutors and judges are trained to properly deal with them;
- victims get information on their rights and their case in a way they understand;
- victim support exists;
- victims can participate in proceedings if they want and are helped to attend the trial;
- vulnerable victims are identified – such as children, victims of rape, or those with disabilities – and are properly protected; and
- victims are protected during the police investigation and court proceedings.

12. While Scotland already complies with much of the Directive, some changes (both legislative and non-legislative) to the justice system will be required. This has been the subject of

⁴ In certain criminal cases, victims have a right (under the Criminal Justice (Scotland) Act 2003) to receive information about the release of an offender and some other relevant details. Further information is available at: <http://www.victimsofcrimeinscotland.org.uk/the-justice-process/after-the-verdict/victim-notification-scheme>.

⁵ This scheme allows victims or relatives of serious crimes to make a written statement that tells the court how the crime affected them. Further information is available at: <http://www.victimsofcrimeinscotland.org.uk/the-justice-process/court-process/victim-statement-scheme>.

⁶ <http://www.copfs.gov.uk/sites/default/files/Booklet%20Final%20December%202010.pdf>

⁷ http://www.acpos.police.uk/Documents/Policies/CRIME_ACPOS-COPFSDomesticAbuseJointProtocolV3_Dec%2008.pdf

⁸ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:315:0057:01:EN:HTML>

consideration and discussion between the Scottish Government and justice partner organisations (particularly bodies such as the Scottish Court Service (SCS) and COPFS).

Witnesses Policy

13. Much of the work on witnesses in recent years has focused on implementing the Vulnerable Witnesses (Scotland) Act 2004⁹ (the 2004 Act) which was phased in between 2005 and 2008. The 2004 Act makes provision for the use of special measures – such as a screen to prevent the witness seeing the accused or CCTV links to give evidence remotely – for the purpose of taking evidence from children or other vulnerable witnesses. It has provided a much greater focus on the needs of witnesses (including victims) when giving evidence, helping to identify and explore vulnerability, considering the impact this may have on their ability to give their best evidence and what special measures and/or additional support will make a difference.

14. Other developments include:

- The Criminal Justice and Licensing (Scotland) Act 2010¹⁰ - provisions to allow witnesses to see their statements again before giving evidence; introducing a statutory scheme of witness anonymity orders; and raising the age of automatic entitlement to standard special measures to up to age 18 in human trafficking cases;
- The Children's Hearings (Scotland) Act 2011¹¹ - provisions to widen application of restrictions on evidence or questioning about character and sexual behaviour in hearings in front of a sheriff, and allow use of prior statements;
- Work to update guidance on the joint investigative interviewing of child witnesses (published in December 2011) and the roll out of visual recording equipment;
- The Getting People to Court project (which is part of the wider Making Justice Work programme) which focuses on the factors that affect witness attendance at court.

Other reforms

15. These improvements have been complemented by other reforms which have made the justice system more responsive to the needs of victims and witnesses. Examples include:

- High Court Reform – ensured that more cases are settled at an earlier stage and that those cases which do go to trial are better prepared, so reducing anxiety for, and inconvenience to, victims and witnesses
- Summary Justice Reform - introduced a range of measures designed to make procedures quicker, simpler, fair and effective. A series of evaluations - including one on victims', witnesses' and public perception of the differences made by Summary Justice Reform - was published between November 2011 and March 2012.

Making Justice Work

16. The Making Justice Work¹² (MJW) programme was set up in 2010 by the Scottish Government, with the vision that:

⁹ <http://www.legislation.gov.uk/asp/2004/3/contents>

¹⁰ <http://www.legislation.gov.uk/asp/2010/13/contents>

¹¹ <http://www.legislation.gov.uk/asp/2011/1>

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

17. MJW is one of five justice change programmes which have been designed to improve how the justice system deals with the challenge of improving outcomes laid down in the National Performance Framework¹³ and expanded upon in the Strategy for Justice¹⁴. The creation of the MJW programme was also influenced by a number of significant changes to the justice system which are likely to be made over the next few years. In particular, the Scottish Government has broadly accepted the findings of a number of recent reports reviewing various aspects of the justice system, which will change how business is done in the courts. The most significant of these are Lord Gill’s review of the civil courts¹⁵; Lord Carloway’s report into criminal law and practice¹⁶; and Sheriff Principal Bowen’s review of sheriff and jury procedure¹⁷.

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

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

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

- **Project 1 – Delivering efficient and effective court structures**

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

- **Project 2 – Improving procedures and case management**

This projects aims to improve the procedures of the justice system and to introduce active and effective management of cases, in order to minimise delays and adjournments to ensure the most cost-effective use of court time. This includes projects such as the

¹² <http://www.scotland.gov.uk/Topics/Justice/legal/mjw>

¹³ <http://www.scotland.gov.uk/About/Performance/scotPerforms>

¹⁴ <http://www.scotland.gov.uk/Publications/2012/09/5924>

¹⁵ <http://www.scotcourts.gov.uk/about-the-scottish-court-service/the-scottish-civil-courts-review>

¹⁶ <http://www.scotland.gov.uk/About/Review/CarlowayReview>

¹⁷ <http://www.scotland.gov.uk/Publications/2010/06/10093251/0>

Summary Justice System Model, Getting People to Court, and Video Conferencing, as well as the Victims and Witnesses (Scotland) Bill.

- **Project 3 – Enabling access to justice**

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

- **Project 4 – Co-ordinating IT and management information**

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

- **Project 5 – Establishing a Scottish Tribunals Service**

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

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

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

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

23. In order to deliver the MJW vision and track progress on the justice outcomes, MJW has defined eight ‘justice system benefits’. These have been developed in partnership with justice organisations and external stakeholders. Four of these eight benefits are focussed on the end users

of the justice system, including victims and witnesses¹⁸. The effectiveness of the proposals in the Bill will be measured as part of that work.

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

Evidence base and key principles identified

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

- Reports of the HM Inspectorate of Constabulary for Scotland / Inspectorate of Prosecution in Scotland (HMICS/IPS) joint thematic inspection into services for victims (Phase 1¹⁹ published in October 2010 and Phase 2²⁰ in November 2011)
- The annual Scottish Crime and Justice Survey
- The Audit Scotland report into Scotland's justice system²¹ (published in September 2011)
- Sheriff Principal Bowen's independent review of Sheriff and Jury procedure (published June 2010)
- The evaluation report into Victims, Witnesses and Public Perceptions of Summary Justice Reform²²
- Holding focus groups, meeting and consultation on witness issues in 2010-11, and a Victim's Summit in January 2011.

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

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

¹⁸ These 4 benefits are: affordable access; improved user experience; fair and equitable justice; and increased public confidence in the justice system.

¹⁹ <http://www.hmics.org/publications/victims-criminal-justice-system-i>

²⁰ <http://www.hmics.org/publications/victims-criminal-justice-system-ii>

²¹ http://www.audit-scotland.gov.uk/docs/central/2011/nr_110906_justice_overview.pdf

²² <http://www.scotland.gov.uk/Publications/2012/02/4610>

- victims and witnesses should be able to contribute effectively to cases which affect them; and
- offenders should pay for the injury, loss or distress they have caused.

Need for further reform

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

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

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

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

Proposals

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

Statement of general principles

Policy objectives

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

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

Proposed approach

34. A number of general principles, broadly reflecting those above, will be set out in the Bill. These principles will be:

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

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

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

Alternative approaches considered

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

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

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

Access to case specific information

Policy objectives

40. The policy objective is to ensure that victims and witnesses can access practical and up to date information about the progress and outcome of their case. Information from surveys and stakeholder engagement has shown that a lack of such information can cause significant uncertainty and distress. In addition, Article 6 of the Directive requires that certain information be made

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

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

Proposed approach

41. A duty will be placed on COPFS, SCS and the police to provide certain information to victims and witnesses about their case, on request. COPFS, SCS and the police have been selected as they hold most of the practical information about cases which victims and witnesses are likely to find useful.

42. The information to be provided will initially be that described in the Directive, with the exception of the notifications relating to persons in custody, as this will be covered by an extension to the existing VNS (see paragraph 49). The Bill will retain sufficient flexibility to allow the information in question to be modified if this appears necessary and appropriate in the future, and to extend the list of organisations affected.

43. In the longer term, the Scottish Government intends to look at building on this right to information. In particular, it intends to carry out a feasibility study during 2013, in collaboration with justice partner organisations, on creating an online information hub which could gather information from various organisations within the criminal justice system and allow direct access to the data at appropriate times by individual victims and witnesses. The hub could provide the information described above from a single point, in addition to more generic information about the justice system. One example of how this type of system can work is the ‘Track My Crime’ system set up by Avon and Somerset Constabulary.²³

Alternative approaches considered

44. An alternative approach considered was to introduce more extensive provisions to make justice organisations share their information proactively with other justice organisations in the interests of easy accessibility for victims and witnesses by creating the right for a victim or witness to be able to obtain all the information they required from the first organisation they contacted. However, this raised a number of practical issues, particularly around the sharing of potentially sensitive data and ensuring appropriate access. It was concluded that a feasibility study into pooling information to create a single point of contact for victims and witnesses should be carried out in the first instance, to identify any such issues and consider how these could be overcome.

²³ <https://asp.trackmycrime.police.uk/Account/Index?ReturnUrl=%2f>

Ability to make representations when offenders are first eligible for temporary release

Policy objectives

45. The VNS²⁴ gives victims who are registered, the right to be informed, if they so wish, when a prisoner is eligible to be considered for temporary release. Temporary release is part of the process of managing a prisoner's progress through the prison estate and preparing them for release and reintegration into the community. The SPS writes to the victim and the letter invites the recipient to contact SPS if they wish to discuss the case. While the victim is free to contact SPS with any concerns, they are not expressly invited to make representations in the same way that victims are in relation to the release of prisoners on licence.

46. The Scottish Government considers that the ability of victims to make representations about the release of prisoners should not be limited in this way. The policy objective is therefore to extend the current ability to make formal written representations to include eligibility for temporary release as well as release on licence.

Proposed approach

47. Victims will be given the right to make written representations when prisoners are first eligible for temporary release, and will be able to raise any concerns they have about the conditions that are placed on them.

Alternative approaches considered

48. No alternative approaches were considered in relation to this proposal.

Extension of Victim Notification Scheme

Policy objectives

49. In certain criminal cases, victims have a right (under the Criminal Justice (Scotland) Act 2003) to receive information about the release of an offender and some other relevant details, through the VNS. However, the VNS is not currently open to all victims of crime; only those where the offender has committed an offence set out in the Victim Notification (Prescribed Offences)(Scotland) Order 2004, and where their sentence is 18 months or longer.

50. As mentioned at paragraph 40, the Directive requires that victims be able to access information about the release or escape of prisoners. While that is the purpose of the VNS, the Scottish Government considers that it should be extended slightly to better reflect the Directive. In particular, the Directive does not specify any threshold on the length of sentence before victims should have the right to be informed (though it does suggest that cases involving minor offences should be excluded), and it states that this right should apply to all crimes.

Proposed approach

51. The Bill will remove the list of prescribed offences in relation to the VNS, so that victims of all offences will potentially be eligible.

²⁴ <http://www.sps.gov.uk/VictimNotificationScheme/victim-notification-scheme.aspx>

52. The Scottish Government also intends to lower the sentence threshold, so that victims of offenders sentenced to 12 months or more (rather than 18 months or more) are eligible. It is considered that sentences of less than 12 months indicate a fairly minor offence, and that the VNS should not be extended to cover these. This latter change will be made through existing order-making powers, rather than in the Bill.

Alternative approaches considered

53. No alternative approaches were considered, as removing the list of prescribed offences was considered the only way to achieve the policy objective.

54. In relation to the proposed lowering of the sentence threshold (which is an integral part of this proposal, despite not requiring provision in the Bill), consideration was given to how workable it would be to completely remove the lower sentence length restrictions, so allowing victims of even minor offences to make use of the VNS. However, doing so would create significant practical difficulties. In particular, it would be impossible to notify victims that they could register on VNS and tell them about an offender's release in many cases. This was particularly evident in cases where there was a very short custodial sentence or the offender was released early due to time spent on remand prior to sentencing.

Duty on justice organisations to set out standards of service

Policy objectives

55. National Standards for Victims of Crime were published in 2005. These set out the level of service that victims (and victims when giving evidence as witnesses) should expect in their dealings with the criminal justice and children's hearing systems. The standards did not include commitments and expectations to be delivered by each of the criminal justice and children's hearings agencies. There are currently no specific service standards for witnesses.

56. A recurring theme in consultations undertaken during the 2010-11 victim and witness policy reviews was that there is a need for clear standards of service to be set out for both victims and witnesses. In addition, the Directive has at its heart an underlying minimum set of standards that victims should expect to receive. For these reasons, the objective is to create a duty on criminal justice agencies to set clear standards of service for victims and witnesses and to also set out, or make specific reference to, their complaints procedure.

Proposed approach

57. The Bill will require organisations involved in supporting victims and witnesses in the justice system to develop and set out clear standards of service for victims and witnesses, while having regard to the overarching principles set out in the Bill (see paragraph 34), and set out an effective route for complaints so that victims and witnesses are able to air any concerns about the services being provided. The organisations on which this duty will be placed are as follows:

- The Police Service of Scotland
- COPFS
- SCS

- SPS
- The Parole Board for Scotland (PBS)

58. As COPFS is a Ministerial Department the actual duty will be placed on the Lord Advocate in relation to functions relating to the investigation and prosecution of crime. Similarly, as SPS is an Executive Agency, the actual duty will be placed on the Scottish Ministers in relation to functions relating to prisons and young offenders institutions and the persons detained in them. However, both COPFS and SPS will be expected to set out distinct standards of service and a complaints procedure.

Alternative approaches considered

59. The alternative approach considered was to set out a list of generic standards in the Bill. The Scottish Government concluded that one uniform set of generic standards would be unlikely to achieve the policy objective. Such a list would not be significantly different to what is already in place for victims on a non-statutory basis, and would not give a detailed and organisation-specific indication of what victims and witnesses can expect (which is important as different organisations inevitably provide very different services).

Improving support for vulnerable witnesses

Policy objectives

60. In relation to witnesses, the focus in recent years has been on implementing the 2004 Act which has provided a much greater focus on the needs of witnesses (including those who are victims) when giving evidence. This includes helping to identify and explore vulnerability, considering the impact this may have on their ability to give their best evidence and what special measures and/or additional support will make a difference.

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

Proposed approach

62. The Bill contains a number of reforms to improve the identification and the support available to enable vulnerable witnesses to give their best evidence. These are as follows:

Definition of child witness

63. At present, the definition of ‘child witness’ in relation to special measures only includes those up to age 16 (unless they are witnesses in a human trafficking case, in which case it includes 16 and 17 year olds). The Bill will bring the definition of child witness into line with the rest of the UK, with the effect that all those under the age of 18 will be automatically entitled to special measures to assist them in giving evidence. In addition, it will enable the Scottish Government to

comply with the Directive which defines ‘child witness’ for the purpose of criminal proceedings as any person below 18 years of age.

64. To maintain equality across the justice system, the Bill will also make this change to the definition of ‘child witness’ in relation to civil proceedings.

Definition of vulnerable witness

65. Currently only ‘child witnesses’ are automatically classed as vulnerable (and so entitled to use certain special measures when giving evidence). There are two additional categories of witnesses who fall within the definition of ‘vulnerable person’: those where there is a significant risk that the quality of their evidence will be diminished by reason of either mental disorder (within the meaning of s328 of the Mental Health (Care & Treatment) (Scotland) Act 2003), or fear or distress in connection with giving evidence at the trial.

66. These two categories allow any witness to be regarded as vulnerable under certain conditions. No further detail was set out at the time in order to avoid creating a hierarchy of vulnerability - i.e. suggesting that some types of witness are inherently more vulnerable than others.

67. However, since these changes were made, there have been several developments to improve support for victims of sexual offences and domestic abuse including the setting up of the National Sexual Crimes Unit and the creation of Domestic Abuse courts in Glasgow and Edinburgh. There was also support amongst statutory and voluntary organisations during the consultation around witness support and policy in Scotland in 2010-11 to create a presumption that certain types of victim, including victims of sexual offences and domestic abuse, are likely to be vulnerable. Similar suggestions have been made in relation to victims of human trafficking and victims of stalking.

68. The Scottish Government accepts that vulnerability cannot be identified solely by virtue of what offences witnesses may have been the victim of, and that not all victims of the offences mentioned above will be vulnerable. However, the nature of these crimes is such that the Scottish Government considers it is appropriate to create a presumption in criminal proceedings that the relevant victims are vulnerable and should be entitled to the use of certain special measures when giving evidence, so long as the views of such individuals are taken into account before a final decision is made in each case.

69. Provisions in the Bill will therefore amend the definition of vulnerable witness in criminal proceedings to include victims of sexual offences, domestic abuse, human trafficking, and stalking, during the case to which that particular offence relates. As with child witnesses currently, there will be a presumption that such individuals are vulnerable, and they will be entitled to use certain special measures when giving evidence. The Bill will be sufficiently flexible to allow this list of victims who are presumed to be vulnerable to be updated in future if appropriate.

70. The Bill will also allow any witness to be considered vulnerable following an individual assessment which takes account of their personal characteristics, type or nature of the crime and the circumstances of the crime. The party citing the witness (which will be COPFS in most cases) will be obliged to carry out individual assessments of each of their intended witnesses to ascertain

whether that witness is vulnerable and, if they are, to submit an application specifying which special measure would be appropriate to assist them. The court will then determine if they are indeed vulnerable and if the special measures sought are the most appropriate.

71. Vulnerable witnesses for the prosecution will be identified at an early stage in proceedings by a member of COPFS staff on the basis of the information provided by the police and also on their own observations. All of these witnesses will be sent information on the support available to them and they will also be referred to Victim Information and Advice (VIA). Witnesses can discuss with VIA staff how they have been personally affected by the crime and whether they would benefit from the use of special measures. In some cases it may be appropriate to personally meet with the witness to ensure that they are fully assessed and offered the necessary support for giving evidence.

72. A different approach is being taken in relation to civil proceedings. As indicated in paragraph 64, children under the age of 18 will, in future, be treated as vulnerable witnesses. The court must then make an order under section 12 of the 2004 Act authorising the use of special measures or laying down that the child must give evidence without the benefit of special measures. The Scottish Government considers that this provides an appropriate balance in civil cases between the protection of witnesses and the interests of justice.

73. The Bill will also make provision so that other categories of witnesses in civil cases prescribed by order made by the Scottish Ministers should be regarded as vulnerable witnesses. The Scottish Ministers could prescribe categories of witness in civil cases by reference to classes of people (e.g. victims of domestic abuse) or by reference to witnesses involved in certain types of actions (e.g. applications for forced marriage protection orders or applications for civil protection orders against domestic abuse).

74. The provisions of the 2004 Act will remain in place in relation to a person other than a child witness who is to give evidence in or for the purpose of civil proceedings. Under section 12(6) of the 2004 Act, the court may, on receiving an application by the party citing or intending to cite the witness and, if satisfied that the witness is a vulnerable witness, make an order authorising the use of special measures. Again, the Scottish Government considers that these provisions strike an appropriate balance in civil cases between the protection of vulnerable witnesses and the interests of justice.

Special measures

75. There are a number of standard special measures (SSMs) and special measures (SMs) defined in the 2004 Act in relation to criminal proceedings. The Bill will amend some of these and add a closed court as a SM. Table 1 sets out the current position and what the position will be with the Bill provisions in force.

Table 1

Current position	Position after Bill provisions in force
<p>Automatic Entitlement to SSMs</p> <p>Children under age 16 (under 18 in human trafficking cases) have an automatic entitlement to use SSMs, which are as follows:</p> <ul style="list-style-type: none"> • a live TV link where the witness is in another part of the court building • a screen • a supporter in conjunction with either of the above <p>In addition, the party citing such a witness can apply to the court to use the following SMs:</p> <ul style="list-style-type: none"> • a live TV link outwith the court building • a supporter as a stand alone measure • giving evidence in chief in the form of a prior statement • taking evidence by commissioner 	<p>Automatic Entitlement to SSMs</p> <p>Children under age 18, victims of sexual offences, domestic abuse, human trafficking and stalking will have an automatic entitlement to use SSMs, which will be as follows:</p> <ul style="list-style-type: none"> • a live TV link • a screen • a supporter <p>In addition, the party citing such a witness will be able to apply to the court to use the following SMs:</p> <ul style="list-style-type: none"> • giving evidence in chief in the form of a prior statement • taking evidence by commissioner • a closed court
<p>Applications for SMs</p> <p>Witnesses who do not fall within the description above are considered to be vulnerable witnesses:</p> <ul style="list-style-type: none"> • where there is a significant risk that the quality of their evidence will be diminished by reason of mental disorder (within the meaning of s328 of the Mental Health (Care & Treatment) (Scotland) Act 2003, or fear or distress in connection with giving evidence at the trial. <p>The party citing a vulnerable witness can apply to use the following SMs:</p> <ul style="list-style-type: none"> • a live television link • a screen • a supporter • giving evidence in chief in the form of a prior statement • taking evidence by commissioner <p>Use of all SMs is at the discretion of the court.</p>	<p>Applications for SMs</p> <p>Witnesses who do not fall within the description above will be considered to be a vulnerable witness:</p> <ul style="list-style-type: none"> • where there is a significant risk that the quality of their evidence will be diminished by reason of: mental disorder (within the meaning of s328 of the Mental Health (Care & Treatment) (Scotland) Act 2003, or fear or distress in connection with giving evidence at the trial. • where there is considered to be a significant risk of harm to the person as a result of giving evidence (this will be assessed in the first instance by the party citing the witness, who will conduct an individual assessment taking account of their personal characteristics, the type or nature of the crime and the circumstances of the crime). <p>The party citing a vulnerable witness will be able to apply to use the following SMs:</p> <ul style="list-style-type: none"> • a live television link • a screen • a supporter • giving evidence in chief in the form of a prior statement • taking evidence by commissioner • a closed court <p>Use of all SMs will be at the discretion of the court.</p>

76. It should be noted that the accused, if classed as vulnerable, will also be entitled to apply to use SMs (but not a screen or a closed court) to assist them to give their evidence.

Notification and application process

77. The Bill makes a number of minor amendments to the notification and application processes for special measures, primarily to take account of the additional groups of witnesses who will be entitled to use SSMs. The existing process for notifying the court that a witness is a child witness, and so will be entitled to the use of SSMs, will be adapted for use in cases involving child witnesses and the other categories automatically deemed vulnerable (victims of sexual offences, domestic abuse, stalking and human trafficking).

78. For witnesses automatically classed as vulnerable, the party citing the witness will submit a Vulnerable Witness Notice (VWN) to the court, setting out that the witness falls within the relevant categories and requesting a particular SSM. If the VWN also requests a SM, it will be for the court to decide, taking account of the views of the witness, whether to authorise the SM.

79. For witnesses who are not automatically classed as vulnerable, the party citing the witness will be able to make a Vulnerable Witness Application (VWA) seeking permission from the court for the use of a SM. It will be for the court to decide whether the witness falls within the definition of ‘vulnerable witness’ and, if so, whether to authorise the giving of evidence by means of the SM requested. The court must take the views of the witness into account when considering whether SMs should be used.

Objections to special measures and review arrangements

80. The Scottish Government considers that both parties to a case should be informed at an early stage of any request for the use of special measures, and should be able to object if they consider that such a request is inappropriate in the circumstances (which there is limited opportunity to do currently). The Bill will ensure that parties are so notified, and introduce a right to object within a set time period, which will involve setting out what special measures are felt to be inappropriate and the rationale for this position. If an objection is made, the court will hear representations from both parties before deciding whether the measures specified in the VWN or VWA are appropriate.

81. At present, the arrangements for taking the evidence of a vulnerable witness can be reviewed during the case on the application of the party citing the witness, or by the court itself. While both parties can then be heard on the matter, the non-citing party cannot apply for a review. Given that the ability to object to a request for special measures prior to the commencement of proceedings is being extended equally to all parties, the Scottish Government considers that all parties should also be able to request such a review. The Bill will therefore allow a review to be carried out by the court on the application of any party to the proceedings, not just on the application of the party citing the witness.

82. The Scottish Government is only making these changes in relation to criminal proceedings. In relation to civil proceedings, it considers that existing provision in Part 2 of the 2004 Act (which covers the circumstances in which the court can refuse special measures in civil proceedings) remains appropriate.

Closed court as a special measure

83. As a general rule, all trials in Scotland are held in public. However, there are some situations in which the public can be excluded, and the court’s common law power to regulate its

own proceedings includes the ability to exclude the public from proceedings where this is necessary for the administration of justice. There is also specific guidance relating to the exclusion of the public in child witness cases (Lord Justice General's Memorandum on Child Witnesses). In addition, section 50(3) and section 92(3) of the Criminal Procedure (Scotland) Act 1995 (the 1995 Act) allow the court to direct that the courtroom is cleared of all persons not directly involved in the proceedings in cases involving certain types of offences.

84. The Directive requires that a closed court, in addition to various other measures, be available as a possible option for supporting vulnerable witnesses in giving evidence, where appropriate. The Scottish Government considers that the availability of closed courts will require to be widened slightly in order to reflect the Directive.

85. In addition, the Scottish Government considers that the decision on whether or not a closed court is to be used should be made as early as is practicable, in order to avoid causing the witness undue stress.

86. To address both of these points, the Bill will designate closed courts as an additional special measure which can be applied for by parties citing a vulnerable witness. This will reflect the requirements of the Directive by ensuring that a closed court is an available option, where appropriate, for all vulnerable witnesses, and will ensure that witnesses are informed in good time of any such application.

87. The Scottish Government recognises the balance that must be struck between ensuring that trials are generally held in public, and protecting the interests of vulnerable witnesses. In practice, the Scottish Government expects that a closed court will only be appropriate in exceptional circumstances, given the range of other special measures which are available, but this will be a matter for the court to determine.

Prospective measures to meet communication support needs

88. There are no SMs at present which offer support specifically to those with communication needs. The Scottish Government considers that such measures could be of use to some vulnerable witnesses. For example, intermediaries may be useful in ensuring that witnesses with communication support needs can understand questions put to them and can communicate their answers effectively, and witness profiling would allow an assessment of the individual's potential to be a credible and competent witness to be presented to the court before any trial. However, the Scottish Government considers that further examination of these and other possible measures is required before determining whether they should be introduced, and that the ability to pilot potential measures on a limited basis would be a crucial part of such an assessment.

89. The Bill will therefore enable the Scottish Ministers to specify additional temporary special measures and to restrict these to certain locations and time periods. This will allow pilots of potential new special measures to be carried out and their effectiveness assessed before making a decision on whether they should be extended more widely (which can be achieved under order making powers in the 1995 Act).

Alternative approaches considered

90. No alternative approaches were considered in relation to the definition of child witness, the inclusion of the additional discretionary category of vulnerable witness or including a closed court as a SM as these changes are required in order to comply with the Directive. There was no alternative approach considered on the provision of SMs to assist witnesses with communication support needs as pilot schemes were considered necessary in order to make sure any new SMs were appropriate and viable before extending across Scotland.

91. An alternative approach considered in relation to adding categories of adult witness who will be classed as automatically vulnerable was to do nothing, as the Directive does not require any category of adult witness to be considered automatically vulnerable. However, as set out above, the Scottish Government considered that, given the particular nature of the crimes in question, introducing a presumption of vulnerability for victims of sexual abuse, domestic abuse, human trafficking and stalking is the correct approach (and is one which was widely supported during the public consultation exercise on the proposals in the Bill).

92. Another approach considered was to include a wider list of victims for which there should be a strong presumption that specific protection measures should be made available. However, it was concluded that this approach was not necessary given that the Bill will enable any witness who is considered vulnerable following an individual assessment of need, to apply for special measures.

93. An alternative approach to amending the notification process was to remove it for those presumed vulnerable and therefore automatically entitled to use SSMs. However, SCS need to be aware of which SSMs or SMs have been requested in order to provide them and the court and other parties to the proceedings also need to be notified of any request to use them. This was therefore not considered to be a practicable option.

94. As there is no express provision in the Directive requiring the accused to be given a right to challenge the use of SMs in court an alternative approach of doing nothing in relation to a right to object was considered. However, the requirement in the Directive to make SMs available to victims is stated to be without prejudice to the rights of the accused. The Scottish Government believes that the best way of ensuring the spirit of this requirement is met is for there to be a right for all parties to object to the use of SSMs or SMs requested and for any objection to be considered by the court.

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

Policy objectives

95. Part 1 of the 2004 Act amended section 271(b) of the 1995 Act to include a presumption that child witnesses under the age of 12 should give evidence away from the court building in trials concerning specific offences. These include murder, culpable homicide, and abduction. Section 271(b) gives effect to this presumption by preventing the court making an order which would require the child witness to be present in the court or any part of the court building for the purposes of giving evidence unless satisfied that:

- the child has expressed a wish to be so present for the purposes of giving evidence and that it is appropriate for a child witness to be present; or

- in any other case that the taking of the evidence of a child without the child being present would give rise to a significant risk of prejudice to the fairness of the trial or otherwise to the interests of justice and that risk significantly outweighs any risk of prejudice to the interests of the child.

96. Feedback from some justice partners suggests that the current presumption is applied too rigidly by the courts and little regard may be given to the needs and wishes of the child. For example, decisions of the courts in line with section 271(b) can result in decisions where a child is required to give evidence from a remote site, separately from their mother or father who may be giving evidence in the court. This can cause additional stress for witnesses and their family.

Proposed approach

97. The Bill proposes a minor amendment to section 271(b) to place greater weight on the wishes of the witnesses in consideration of whether an order should be made requiring a child witness to be present in the court room. This is achieved by creating a presumption that a child witness will give evidence in the court-room where they have expressed a wish to do so.

Alternative approaches considered

98. No other approaches were considered to meet the policy objective.

Duty to have regard to guidance on Joint Investigative Interviews

Policy objectives

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

100. Revised Guidance on Joint Investigative Interviewing of Child Witnesses in Scotland²⁵ was published on 19 December 2011, but currently has no statutory basis. It promotes best practice for police and social workers undertaking JIIs with children and makes clear that such interviews should only be undertaken by practitioners who are both trained and competent. The guidance emphasises that every decision made about interviewing a child must be made on the basis that the paramount consideration is the best interests of the child. It also makes clear that these interviews should be visually recorded unless there is a good reason why this is not appropriate (e.g. recording was a feature of the alleged crime).

101. While the existing guidance is being used, the Scottish Government considers that to ensure its effectiveness and to reflect requirements in the Directive, it should be placed on a statutory footing, with a requirement on the police and social workers to have regard to it when conducting a JII with a child witness.

²⁵ <http://www.scotland.gov.uk/Publications/2011/12/16102728/0>

Proposed approach

102. A requirement will be placed on the police and social workers to have regard to guidance issued by the Scottish Ministers when conducting JIIs with child witnesses (under the age of 18). The existing guidance will then be re-issued in due course.

Alternative approaches considered

103. The alternative approach considered was doing nothing. While police and social workers conducting JIIs with child witnesses have received training in relation to the revised guidance and currently follow that guidance, the Scottish Government concluded that this was not an acceptable approach if the Directive is to be complied with.

Sexual offences - right for victim to choose gender of interviewer

Policy objectives

104. When victims have been identified as being vulnerable to further victimisation or intimidation, appropriate measures should be taken to prevent such harm. Vulnerable victims can find the interview process highly distressing, particularly where the crime is of a very personal nature. To help minimise distress, the Directive requires that all interviews with victims of sexual violence, gender-based violence or violence in close relationships, unless conducted by a public prosecutor or judge, are conducted by a person of the same sex, if the victim so wishes and if the court proceedings will not be prejudiced.

Proposed approach

105. The Bill introduces a right for victims to choose the gender of any person who has reason to interview them. Although it is perhaps more likely that a victim would choose to be interviewed by a person of the same sex, the Bill proposed a wider approach that allows the victim to choose without any limitation.

106. The right would apply in relation to any interview by the police or in any other part of subsequent criminal proceedings. To reflect the requirements of the Directive, the right would not apply where the victims has reasons to be interviewed by a sheriff or judge or by the Procurator Fiscal.

107. In line with the proposals for changes to special measures (set out in paragraphs 65-69) the right would apply to victims of sexual offences; domestic abuse; human trafficking; and stalking. An order making power would allow the list of offences or circumstances in which the right should apply to be modified.

108. The Bill also proposes that the police, or any other persons intending to interview a victim, should be required to explain to the victim, before any interview takes place, that they have a right to choose the gender of the person(s) who will interview them. Any failure to provide such an explanation in advance of an interview being conducted would not affect the validity of the interview and would not affect any subsequent proceedings.

109. In order to avoid potentially putting criminal investigations at risk, the Bill will contain an exception for cases in which complying with a request for a particular gender of interviewer would be likely to prejudice an investigation.

Alternative approaches considered

110. These provisions are required to ensure compliance with Article 23 of the Directive. No alternative approaches were considered.

Ability to make oral representations to the parole board

Policy objectives

111. The VNS allows those registered on it to receive specific information and make written representations to PBS when the prisoner who committed an offence against them is being considered for release and/or when licence conditions are being set.²⁶ PBS considers those representations along with other information when reaching a decision on release or licence conditions. If a licence condition is made relating to the victim's representations, they are informed of the decision.

112. The PBS is primarily concerned with the assessment of risk to the public if a prisoner is released. The policy intention is that victims should feel more involved in the criminal justice process and that they should have the option of making representations in person rather than in writing if they feel that this would better allow them to convey their views.

Proposed approach

113. The Bill will allow certain victims who are registered on the VNS to make oral representation to a PBS member if they wish. The PBS member who meets with the victim will not be a member of the tribunal considering the case but will convey any concerns to the tribunal members. This will only apply to life sentence prisoners in the first instance with an option to extend it to other categories of prisoner in future. Victims will still have the option of making written representations, as at present.

Alternative approaches considered

114. Consideration was given to doing nothing and continuing with written representations being the only option. However, this does not achieve the policy intention of giving victims more flexibility in making representations or of involving them further in the criminal justice process.

Victim statements – increased flexibility in timing of submission

Policy objectives

115. Victim statements allow victims and close relatives to tell the court about the physical, emotional and financial impact of a crime on them. A victim statement is written and is given to the court if the accused pleads guilty or is found guilty. The judge or sheriff should consider the statement and what weight should be attached to it. Section 14 of the 2003 Act sets out the

²⁶ http://www.scottishparoleboard.gov.uk/page/victims_and_families

arrangements for the submission of victim statement. A prosecutor must lay any victim statement before the court:

- in solemn proceedings, when moving for sentence as respect an offence; and
- in summary proceedings, when a plea of guilty is tendered in respect of, or the accused is convicted of, an offence.

116. On occasion the victim impact statement may not be available for the court at the relevant time. This can be for various reasons, including the timing of the plea, especially if it is a very early plea of guilty.

Proposed approach

117. The Bill would allow a victim impact statement to be submitted to the court at any time after the prosecutor moves for sentence (or the accused pleads guilty or is found guilty), but before sentence is passed. This is to ensure that, if the statement is not available at the time of the guilty plea, this does not prejudicially affect the victim in the case.

Alternative approaches considered

118. There are no alternative approaches that would achieve the policy objective.

Victim statements – extend eligibility to carers of those under 14, and change to definition of carer

Policy objectives

119. Under current legislation children under 14 years are entitled to have a victim statement made on their behalf by their carer if they are the *direct* victim of the crime. However, in cases where the victim has died, children under 14 (for example, the son, daughter or sibling of the victim) are not eligible to make a statement or have one made on their behalf by a carer. Relatives aged 14 years and over can make a statement in these cases. A similar anomaly arose in the VNS and this was rectified by section 36 of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007.

Proposed approach

120. The Bill seeks to introduce consistency between the VNS and the victim statement arrangements so that a child under 14 years, who is not the direct victim of the crime, can have a victim statement made on their behalf by a carer. The Scottish Government also proposes to amend the definition of carer in relation to the victim statement scheme so that the carer who makes the statement on behalf of a child under 14 years does not have to have been the carer at the time of the offence or alleged offence.

Alternative approaches considered

121. No alternative approaches were considered to meet the policy objectives.

Require court to consider compensation

Policy objectives

122. Compensation orders (i.e. a payment from the offender to the victim) may be imposed by the court in respect of personal injury, loss or damage caused directly or indirectly to the victim or any alarm or distress caused directly to the victim.

123. The Directive requires that victims of crime should be entitled to a decision on compensation from the offender within a reasonable time. It seeks to encourage member states to promote measures to ensure offenders provide compensation. Currently the court has the option to grant a compensation order but is under no obligation to consider doing so. The Scottish Government is committed to strengthening the link between offenders and compensation for their victims and the policy objective is to ensure that courts consider direct compensation orders in appropriate cases.

Proposed approach

124. The Bill makes a minor amendment to existing legislation which will place a duty on the courts to consider a compensation order in relevant cases. This means that consideration will have to be given to making a compensation order in every situation where there is a victim who is eligible to receive a compensation payment under a such an order, for example a person who has been caused personal injury, loss, damage, alarm or distress as a result of an offender's criminal acts.

Alternative approaches considered

125. No alternative approaches were considered. Doing nothing would be contrary to the Scottish Government's commitment to ensuring that appropriate consideration is given to providing compensation for victims of crime and the Directive requirement to promote the use of direct compensation. The proposed approach still allows the court the latitude not to impose a compensation order if it is not considered appropriate.

Introduction of victim surcharge

Policy objectives

126. While the court can already make direct compensation orders to victims, this is not always appropriate; for example in cases where there is no identifiable victim. The Scottish Government considers that, regardless of whether or not the court imposes a direct compensation order, offenders should be made more accountable for the harm or damage caused by their actions and should contribute to supporting the needs of victims of crime generally.

127. The policy objective is therefore to create a fund to help meet the immediate needs of victims of crime and to maintain this through contributions from offenders.

Proposed approach

128. The Bill will require the court to impose a victim surcharge on offenders in certain circumstances, to be set out in secondary legislation. In the first instance, the Scottish Government intends to impose the surcharge in cases resulting in a court fine.

129. The money raised will be put into a central victims' fund, to be administered by a third party, to be used in providing immediate and practical support to victims of crime. The Scottish Government will have the ability to set out how the victims' fund is to be operated and to extend the surcharge to apply to other types of sentence, for example if application to fines proves to be successful.

130. Disbursements from the fund will be made to provide assistance and support to victims with immediate unmet needs, for example:

- basic life essentials;
- removal costs (for personal safety);
- funeral costs;
- cleaning (for example, following a violent incident in a victim's home).

131. While no decisions have been taken yet about how the amount of the surcharge will be calculated, the Scottish Government has developed a model which may be used. Under this model, the amount of the surcharge would be linked to the amount of the court fine, by way of a scale set out in secondary legislation. The levels on this scale would be set by reference to the standard scale of fines, as shown in table 2.

Table 2 - possible surcharge model

Court fine between (£)	Surcharge (£)
0.01 - 200	20
200.01 - 500	30
500.01 - 1000	40
1000.01 - 2500	50
2500.01 - 5000	100
5000.01 - 10,000	200
Over 10,000	10% of fine

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

Table 3 - potential income from victim surcharge

Fines between (£):	Average number of fines imposed p.a.	Level of victim surcharge (£)	Income - 100% collection rate (£)*	Income – 80% collection rate (£)	Income - 60% collection rate (£)
0 – 200	38,149	20	763,000	610,400	457,800
200.01 – 500	23,438	30	703,100	562,500	421,900
500.01 – 1,000	3,885	40	155,400	124,300	93,200
1000.01 – 2,500	535	50	26,800	21,400	16,000
2,500.01 – 5,000	107	100	10,700	8,600	6,400
5,000.01 – 10,000	54	200	10,900	8,700	6,500
Over 10,000	89 (total value £4,854,610)	10% of fine	485,500	388,400	291,300
Total per annum (£)	-	-	2,155,400	1,724,300	1,293,100

* All income estimates rounded to nearest £100

133. It is acknowledged that once a fine or, in future, a surcharge is imposed by the court, there will in some cases be a time delay before full payment is received, either because of agreed phased payment arrangements or following enforcement action against defaulters. Information from SCS suggests that a reasonable estimated collection rate, based on previous years, is likely to be around 66% after one year, and around 90% after 3 years.

134. Some other jurisdictions have some form of victim surcharge in place including Northern Ireland and England and Wales. In Northern Ireland the offender levy was introduced in the Justice Act (NI) 2011. In England and Wales the victim surcharge was introduced by the Domestic Violence, Crime and Victims Act 2004.

Alternative approaches considered

135. In Northern Ireland, the offender levy applies to fines and to custodial sentences and offenders have to pay between £5 and £50. This is pooled in the Victims of Crime Fund which is used to support projects for victims and witnesses in the justice process, as well as for local initiatives taken forward by groups working with victims in the community.

136. In England and Wales, following the consultation *Getting it right for victims and witnesses*, the Ministry of Justice has decided to increase the amounts of surcharge payable, to include juveniles and to extend the categories of sentences that the surcharge will apply to.²⁷ The surcharge

²⁷ <https://consult.justice.gov.uk/digital-communications/victims-witnesses>

rate varies from £10 to £120 depending on the charge. The fund will be used to provide services for victims of crime.

137. The Scottish Government considered adopting a similar approach for the use of the funds. However, after speaking to those who provide support and assistance to victims of crime, it considers that responding to the immediate needs in the aftermath of a crime would best serve victims.

Introduction of restitution orders

Policy objectives

138. In comparison with other forms of employment, police officers and police staff are at disproportionate risk of being assaulted while carrying out their job. This is reflected in the arrangements that exist to support police officers and staff who are assaulted and who require particular care and support services in the wake of these incidents. These support services – offered through the Police Benevolent Fund and the Police Treatment Centres, for example - are largely paid for by police officers themselves. The Scottish Government wishes to ensure that, even where there is not a direct compensation order, persons who assault police officers and police staff are punished in such a way that they contribute to the care and support their actions make necessary.

Proposed approach

139. A restitution order is a new financial penalty whereby those who are convicted of the statutory offence of assaulting a police officer or member of police staff (section 90(1) of the Police & Fire Reform (Scotland) Act 2012) may be required to contribute to the cost of providing services which care for, treat or rehabilitate police officers. A financial penalty would be imposed on individuals convicted of such an offence. It would be collected, just as fines are, by SCS, and the receipts credited to a fund. The fund would be administered by the Scottish Government, and would pay out such monies as it receives to purposes approved by the Scottish Parliament. These purposes would support or promote the physical and/or mental health and well-being of police officers and staff.

140. Restitution orders would not replace compensation orders for criminal injuries to individual police officers or staff; nor would they preclude such officers or staff from seeking compensation through the civil courts. They would replace a victim surcharge in the circumstances of a conviction under section 90(1) of the 2012 Act.

Alternative approaches considered

141. An alternative approach would be not to introduce restitution orders, but instead to provide that monies from the victim surcharge could be used to fund services supporting or promoting the physical and/or mental health and well-being of police officers and staff. However, this would not meet the policy objective to make a clear link between the criminal offence and a suitable punishment which would be used to ameliorate or mitigate the effects of that crime. The opportunity to make this link is provided by the fact that there are existing services providing targeted support for precisely the group protected by the criminal offence.

142. Moreover, the victim surcharge would likely not raise as much support for these care services as the restitution order is likely to do, as the upper limit is as high as any potential fine, rather than a relatively small portion of it. In any event the victim surcharge is intended to focus on meeting the very immediate needs of victims of crime, rather than assist with the long-term provision of services to a group of people who are especially likely to fall victim to a particular crime and who are paying for those services from their own pockets.

143. Another potential approach would be to hypothecate fines for section 90(1) of the 2012 Act to the purposes to which restitution orders will be applied. This is not possible, however, as Regulation 2(2)(b) of the Scotland Act (Designation of Receipts) Order 2009 classes fines among the designated receipts which, under section 64(6) of the Scotland Act, must be paid to HM Treasury. Restitution orders are therefore a new penalty which will co-exist with fines, and which may be imposed instead of, or alongside, a fine. However, since restitution orders have the function of supporting victims, as indicated above, a victim surcharge would not apply in respect of a fine where a restitution order was a possible penalty.

CONSULTATION

144. Informal consultation with stakeholder organisations (such as Victim Support Scotland, Children 1st and Rape Crisis Scotland) took place in relation to victims and witness policy during 2010-11. This included looking at whether the 2004 Act had achieved what was intended or whether other improvements were needed, and revisiting the Scottish Strategy for Victims which was published in 2001. Focus groups, meetings and regional consultation events on witness issues along with the Victims' Summit held in January 2011 and a stakeholder meeting group held in October 2011, helped identify the key areas which needed to be addressed.

145. This information formed the basis of many of the measures included in the public consultation 'Making Justice Work for Victims and Witnesses', which closed in July 2012. This asked for views on most of the proposals to be included in the Bill, in addition to some which do not require primary legislation, and 76 responses were received.

146. An analysis of the consultation responses is available online (at <http://www.scotland.gov.uk/Publications/2013/01/8185>) and the proposals in the paper were supported by the majority of respondents. Negative views were, as expected, mostly focussed on the need to take into account data protection and privacy issues with any information-sharing proposals, and the need to consider logistical, administrative and resource issues in relation to all of the planned reforms.

147. Consultation has also taken place with key stakeholder groups, justice partners and individual victims during the policy development process, including the following organisations:

- SCS
- COPFS
- SPS
- PBS
- ACPOS

This document relates to the Victims and Witnesses (Scotland) Bill (SP Bill 23) as introduced in the Scottish Parliament on 6 February 2013

- VSS
- Scotland against Stalking
- Children 1st
- Scottish Woman's Aid
- ASSIST
- Rape Crisis Scotland
- Law Society of Scotland

148. Again, there is general support for the proposals. The Scottish Government will continue to work with victim support organisations in particular throughout the Bill process.

POLICY OBJECTIVES – NATIONAL CONFIDENTIAL FORUM

Overview

149. The principal policy objective of this part of the Bill is to offer adults placed in institutional care as children acknowledgement of their experiences, including abuse and neglect, through the creation of the National Confidential Forum (NCF). The value of such recognition, in terms of improved health and wellbeing, was evident in the experience of the Pilot Forum, ‘Time to be Heard’ on which the NCF is firmly based.

Background

The SurvivorScotland Strategy

150. SurvivorScotland, the National Strategy for Adult Survivors of Childhood Abuse,²⁸ was launched in September 2005. The Strategy encompasses all adult survivors of childhood abuse, including people abused in care as children. The implementation of the Strategy has different elements, including the provision of funding for services for adult survivors of childhood abuse; training for professionals; and measures to increase public awareness of childhood abuse.

151. In 2004, the then First Minister offered an apology on behalf of the people of Scotland to those who were subject to abuse and neglect as children in residential care²⁹. Following this, in 2005, a review of the systems of laws, rules and regulations that governed residential schools and children’s homes between 1950 and 1995 was commissioned by the Scottish Government³⁰. The conclusions and recommendations contained in that Review note the need for former residents to ‘have their experiences as a child in a residential establishment heard and recorded-as a means of acknowledging and believing what they need to tell’³¹. Most of the recommendations of the Review have been implemented, with the remainder to be completed in 2013.

152. There have been a number of inquiries into the abuse of children in specific institutions over the last 20 years, including an independent inquiry for Edinburgh City Council into the sexual abuse of children in two children’s homes³² and an independent inquiry for Fife Council concerning physical and sexual abuse committed in children’s homes³³. More recently, there was an independent inquiry into abuse at Kerelaw residential school in Ayrshire³⁴.

153. In 2010, the Scottish Government provided funding for a new service, In Care Survivors Service Scotland (ICSSS) recognising the very specific needs of people abused in care settings. The Scottish Government committed £750,000 to ICSSS (until October 2011) and has recently committed a further £637,500 until 2015. This voluntary sector service enables dedicated support

²⁸ www.survivorscotland.org.uk

²⁹ Scottish Parliament, 1 December 2004, Col 12391.

³⁰ *Historical Abuse Systemic Review: Residential Schools and Children’s Homes in Scotland 1950 to 1995* Tom Shaw, (2007) Scottish Government. <http://www.scotland.gov.uk/Publications/2007/11/20104729/0>

³¹ Historical Abuse Systemic Review, page 155.

³² *Edinburgh’s Children: The report of the Edinburgh Inquiry into Abuse and Protection of Children in Care* Marshall, Jamieson and Finlayson, (1999) Edinburgh City Council.

³³ *Fife Council Independent Enquiry Established By the Chief Executive Following the Conviction of David Logan Murphy For The Sexual Abuse of Children* Anne Black, and Ceri Williams, (2002) Fife Council.

³⁴ <http://www.scotland.gov.uk/Publications/2009/05/08090356/0>

to be provided to adults who were abused in care as children. Support is offered, principally, through a national confidential telephone support line and the provision of information, advocacy and confidential counselling to survivors and their families. As such, it provides an important service which complements the role of the NCF and will support the participation of people in hearings of the NCF, at all stages of that process.

154. During the lifespan of the Time to be Heard Pilot Forum in 2010, the Scottish Government recognised the need for support to be available to participants before, during and after they shared their experiences. The services of ICSSS were highlighted to every person who applied to participate in the Pilot Forum. ICSSS offered a specific service to people considering participation and the ICSSS helpline was open until 11 pm on the days on which hearings were held.

Experiences in other jurisdictions

155. In developing the policy underpinning the establishment of the NCF, the experiences of other jurisdictions in responding to adults placed in care as children were considered. This spanned developments in Canada, Australia, New Zealand, Wales and Ireland.

156. From 2001 to 2010, a Confidential Committee operated as part of the Commission to Inquire into Child Abuse in Ireland³⁵. The approach of the Committee was sympathetic and informal, designed to support survivors be able to describe their experiences. This model, in particular, helped inform the development of what became the Time to be Heard Pilot Forum.

157. The UK Government has no dedicated policy in respect of adult survivors of abuse. Following recent allegations of historic abuse, the Prime Minister has announced two inquiries. The first inquiry will look into the conduct and remit of the Waterhouse inquiry which was held between 1996 and 2000, to investigate alleged abuse in North Wales in the 1970s and 1980s. The second inquiry will look into the police handling of the original complaints and any new allegations.

158. Legislation in the Northern Ireland Assembly to establish an inquiry into historical institutional childhood abuse was passed on 11 December 2012.³⁶ The Northern Ireland Inquiry will include an Acknowledgement Forum in which survivors of abuse will be supported to recount their childhood experiences of institutional care. Tom Shaw, the chair of Time to be Heard, is a member of the panel of the Acknowledgement Forum.

The ‘Time to be Heard’ Pilot Forum

159. In 2009, the Scottish Ministers announced that a Pilot Forum, known as Time to be Heard, (‘TTBH’) would be established. The purpose of TTBH was to test the appropriateness and effectiveness of a confidential forum in giving former residents of residential schools and children’s homes the opportunity to recount their experiences in care, in particular abusive experiences, to an independent and non-judgemental panel.

³⁵ <http://www.childabusecommission.ie/>

³⁶ <http://www.niassembly.gov.uk/Assembly-Business/Legislation/Primary-Legislation-Current-Bills/Inquiry-into-Historical-Institutional-Abuse-Bill/Inquiry-into-Historical-Institutional-Abuse-Bill-as-Introduced-Explanatory-and-Financial-Memorandum/>

160. The scope of TTBH was limited to one institution. Quarriers was selected because it was one of the largest institutions in Scotland providing residential care for young people and accommodated children from all parts of the country, with up to 1500 children living in the Village at any one time. In total over 30,000 children had been cared for by Quarriers since its inception in the late 19th century to the closure of mainstream residential child care provision in the 1980s. Focussing on one institution which operated with large numbers over a long period has yielded rich information to inform the scope of the NCF.

161. People seeking to participate in TTBH were not asked to identify themselves as survivors nor to indicate that they had experienced abuse in care, to ensure the broadest possible representation of former residents³⁷.

162. The experience of TTBH was evaluated using a number of different methods including: questionnaires returned by participants; in-depth interviews of participants; and daily debrief sheets compiled by the Chair and Commissioners. Feedback was also obtained from ICSSS, including anonymised information about the use of its helpline. The experiences of other support agencies were noted in interviews with Kingdom Abuse Survivors Project, Breaking the Silence, Open Secret, Health in Mind and the Moira Anderson Foundation.

163. Feedback from participants, through the questionnaire, was very positive. While a quarter of respondents said that they had found it very difficult or quite difficult to decide to take part in TTBH, none indicated that they regretted doing so. Over 85 per cent considered that they were able to say all or most of what they wanted to say and all said that they felt listened to with respect and sensitivity. Over 87 per cent considered that the overall experience had been almost all or mainly positive. The findings of the in-depth interviews (conducted independently of the Scottish Government) confirmed that the outcomes for participants in TTBH were very positive³⁸. Feedback from participants directly to the Chair and Commissioners was again very positive, both about the experience of TTBH and the effect of participation on their self-respect, self-confidence and progress towards closure. Many said that they felt acknowledged, affirmed and could begin to move on from painful past experiences.

164. An independent report of the experience of TTBH was published in 2011³⁹ and states that:

‘The experience of TTBH has shown clearly the benefits of a confidential forum. The large majority of participants have confirmed, in terms of release or partial release from the burden of the past, its encouragement of self-worth and self confidence, and its contribution to moving on and getting closure. TTBH also afforded them a means of contributing to making provision of care better for children today.’⁴⁰

165. The TTBH Report contains 15 recommendations, 6 of which are concerned with the establishment and operation of a NCF. The Scottish Government has accepted all six recommendations in taking forward the policy to establish a national forum, including, that

³⁷ See paragraphs 3.4.2 and 4.1.1 of the TTBH Report

<http://www.scotland.gov.uk/Publications/2011/03/07122331/14>

³⁸ <http://www.survivorscotland.org.uk/confidential-forum/time-to-be-heard/process-review/> ; see also para, 3.5 <http://www.scotland.gov.uk/Publications/2011/03/07122331/0>

³⁹ <http://www.scotland.gov.uk/Publications/2011/03/07122331/0>

⁴⁰ At page 104.

legislation should be introduced to underpin a national forum, thereby enabling it to function with a status and protections not able to be afforded to TTBH.

The Human Rights Framework and InterAction

166. In 2009, the Scottish Government commissioned the Scottish Human Rights Commission (SHRC) to produce a human rights framework for the design and implementation of a Forum for survivors of historic child abuse in Scotland (the SHRC Framework)⁴¹. The SHRC Framework was published in February 2010⁴² to which the Scottish Government provided an interim response (in June 2010) on the specific recommendations for the TTBH Pilot Forum and a further response (in February 2011) following the completion of the TTBH hearings and just before the launch of the TTBH Report, on all of the recommendations⁴³.

167. The SHRC Framework outlines what the SHRC regards as a ‘comprehensive approach to ensuring effective access to justice, remedies and reparation for childhood abuse’. The confidential committee model adopted for TTBH focused on acknowledgement rather than accountability. As such, the SHRC Framework addresses wider issues than those addressed by the TTBH Pilot Forum. These matters are now being taken forward in the ‘InterAction’, a process which is being led by the Centre for Excellence for Looked After Children in Scotland (CELCIS) and in respect of which the Scottish Government is participating. CELCIS has stated that the aim of the InterAction is to ‘give those affected by historic child abuse while in care in Scotland, as well as government, institutions, civil society and others with an interest, a voice on how the Human Rights Framework should be implemented’.

Other developments

Restorative justice

168. A restorative justice pilot project ran alongside TTBH, highlighting that this approach can offer a form of accountability and may be helpful to some survivors⁴⁴. SACRO, which managed the pilot, intends to build on learning from the initial project to look at ways in which restorative justice opportunities may be offered to a wider group of survivors.

Limitation on civil actions

169. The Scottish Government has acknowledged the concern expressed by some stakeholders regarding the practical application of a ‘time-bar’ in respect of civil proceedings brought by survivors of historic abuse. The three year limitation period, beyond which civil actions for personal injury are not generally permitted, is not absolute. The law already permits the courts to exercise discretion and allow claims to proceed where they deem it equitable to do so. However, the Scottish Government has recognised that even with this flexibility, there is a perception that the current limitation regime is unduly restrictive in respect of survivors of historic abuse.

⁴¹ A human rights framework for the design and implementation of the proposed ‘Acknowledgement and Accountability Forum’ and other remedies for historic child abuse in Scotland, SHRC, February 2010.

⁴² <http://www.scottishhumanrights.com/news/latestnews/article/framework>

⁴³ <http://www.survivorscotland.org.uk/time-to-be-heard/scottish-human-rights-commission/>

⁴⁴ See <http://www.survivorscotland.org.uk/confidential-forum/time-to-be-heard/restorative-justice-toolkit/> for further information.

170. The Scottish Government has considered the Scottish Law Commission's reports on Damages for Psychiatric Injury (2004) and Personal Injury Actions: Limitations and Prescribed Claims (2007). A consultation was launched on 19 December 2012, with a closing date of 15 March 2013⁴⁵.

PROPOSALS - NATIONAL CONFIDENTIAL FORUM

171. In 2011, the Scottish Government announced its intention to establish a national acknowledgement forum, building on the positive experience of TTBH.

172. On 23 July 2012, the Scottish Government launched a consultation on the proposal to establish a 'forum giving adult survivors abused in residential care as children the opportunity to describe their experiences to people who understand about such abuse in residential care.' The consultation document set out ten questions, including questions as to the scope of the forum and protections and support for participants. Consultation events were held across the country and one to one sessions with individual survivors of abuse arranged to ensure a depth and range of participation.

173. The Scottish Government has considered fully the views expressed by stakeholders in written consultation responses and at consultation events and one to one sessions⁴⁶. In particular, the views of survivors of abuse in care have been given careful consideration in shaping the functions and scope of the NCF as set out in the Bill.

174. The main findings of the consultation are set out as follows, with the full Consultation Report being available on the Scottish Government website⁴⁷:

- Almost all respondents agreed with the purpose proposed for it as an acknowledgement forum⁴⁸. No respondent disagreed with this purpose. This general view was reinforced at each of the consultation events, with widespread agreement of the focus on, and need for, acknowledgment.
- Respondents saw benefits for former, current and future residents of institutional care as a direct result of the establishment of the NCF, specifically in contributing to the improved health and wellbeing of participants and informing improvements to policy and practice.
- Four fifths of respondents agreed that the NCF should operate independently of Government.⁴⁹ The option preferred by respondents is for the NCF to be established as a separate unit within an existing public body.
- A very high proportion of respondents agreed that all people who were placed in residential care by the state should be eligible to take part in the NCF⁵⁰. The Scottish

⁴⁵ <http://www.scotland.gov.uk/Publications/2012/12/5980>

⁴⁶ <http://www.scotland.gov.uk/Publications/2012/12/8644/downloads>

⁴⁷ <http://www.scotland.gov.uk/Publications/2013/01/8196/downloads>

⁴⁸ 92% of respondents agreed (47 out of 51, with 2 respondents not providing a response and 2 not expressing a preference).

⁴⁹ 80% of respondents agreed (41 out of 51, with 3 respondents not agreeing, 3 not expressing a preference and 4 not providing a response).

Government considers it important that the opportunity of acknowledgement be extended to all people placed in residential care, irrespective of whether they were placed there by the state or their family. It is intended, therefore, that the NCF will be open to all of those people.

- A very high proportion of respondents agreed that the types of residential care listed in the consultation document should be included within the scope of the NCF⁵¹. Just less than a fifth of respondents proposed that the scope of the Forum encompass all categories of care. A further fifth of respondents made a specific reference to foster care being included within the scope of the Forum, with half of those proposing that foster care be considered.
- The Scottish Government has considered in depth the matter of the scope of eligibility to participate in the NCF and proposes that the principal criterion for participating in the Forum will be the experience of having been placed in institutional care as a child, which may include abuse and neglect. It will be that experience which will be the starting point for determining eligibility to participate in the Forum. It is intended that the scope of the NCF will encompass all forms of institutional care into which children can be placed, including long stay hospitals and secure units. As such, the scope of the NCF will be considerably wider than that of the Time to be Heard Pilot Forum.
- Almost three quarters of respondents agreed that the process to be followed in hearings of the NCF should be the same for all participants, regardless of whether they identify themselves as survivors of abuse or intend to disclose abuse⁵².
- Over half of respondents agreed that people engaged with the NCF should be protected from any form of legal action as a result of either participating in hearings or working for the Forum⁵³.
- The general view expressed in consultation responses was that support was required for participants and their carers and family members before, during and after participation in the NCF. A high proportion of respondents made suggestions as to the range and types of support they considered would be helpful to participants in the Forum. The Scottish Government will be working closely with stakeholders to ensure that the support requirements of participants in the Forum are known and that steps are taken to meet those requirements and that any barriers to participation in the Forum are identified and tackled.

175. Following the Scottish Government's consultation on the NCF, and drawing on the experience of TTBH, the Bill contains a number of provisions, as set out below. In general terms, the Bill provides a framework within which the NCF will operate, thereby explicitly addressing the recommendation in the TTBH Report that 'appropriate legislation should be introduced to give the necessary protection for the effective operation of a national confidential forum'.

⁵⁰ 88% of respondents agreed (45 out of 51, with 1 respondent disagreeing and 5 not providing a response).

⁵¹ 84% of respondents agreed (43 out of 51, with 1 disagreeing and 7 not providing a response).

⁵² 71% of respondents agreed (36 out of 51, with 5 disagreeing; 3 having no preference; and 7 not providing a response.)

⁵³ 57% of respondents agreed (29 out of 51, with 6 disagreeing; 7 having no preference; and 9 not providing a response).

Functions

176. The functions of the NCF are set out clearly on the face of the Bill. These functions are new and distinct and are as follows:

- to receive and listen, in private and in confidence, to the experiences of adults who were placed in institutional care as children, including experiences of abuse, and to offer acknowledgement of those experiences;
- to contribute to the prevention of the abuse of children placed in institutional care in the future by making proposals to inform policy and practice, based on experiences recounted in hearings of the NCF;
- to make a contribution to the permanent record of life in care, enhancing public knowledge and understanding of an important part of Scotland's history;
- to signpost services to participants and their families which can offer support, advocacy, advice and information.

Eligibility to participate

177. The Bill sets out the principal criterion for participating in the NCF; namely the experience of having been placed in institutional care as a child.

178. The scope of 'institutional' care is significantly wider than the scope of TTBH (which was open to residents of only one institution) and the traditional scope of 'residential child care', to encompass all forms of institutional care into which children can be placed, including long stay hospitals and secure units. The extension of the scope of the NCF, as compared with that of TTBH, is based on evidence which demonstrates that the confidential forum model works for people placed in institutional forms of care as children, including, but not confined to, people who have experienced abuse.

179. The Scottish Government recognises the importance of responding, in an appropriate and informed way, to the distinct experiences of people placed in institutional forms of care as children. There are specific facets of institutional care, particularly care provided on an historical basis, which distinguish it from other forms of care and which can have particular implications for residents throughout their lives. In particular, the recounting of childhood experiences of institutional care where there has been abuse can be traumatic with implications not only for the person recounting their own experience but for other former residents, former and current employees of the institution in question and the institution itself. This may deter people from disclosing abuse experienced in the context of institutional care.

180. The Bill provides that the NCF will be open to all persons placed in institutional care as children, whether they were placed there directly by the state or under a private arrangement. The Scottish Government considers it important that the experiences of all persons placed in institutional forms of care are heard, spanning many decades during which the law, policy and practice relating to the placement of children in care, and the state's responsibility to those children, have changed significantly.

181. The experiences which the NCF will hear will be all experiences of being in institutional care as a child, including abuse. The scope of the NCF is purposely not restricted solely to hearing about experiences of abuse because this would not give a balanced view of life in care. A fifth of participants in TTBH identified their experience of Quarriers as positive. In any event, not all people who have experienced abuse in care necessarily identify themselves as having done so. They do not necessarily consider themselves to be either ‘victims’ or ‘survivors’ and, therefore, may be deterred from considering participation in the NCF. As the Scottish Government’s response⁵⁴ to the SHRC Framework clearly states:

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

182. The Bill provides that the NCF will be open to any person over 18 years of age who has had an experience of being in institutional care as a child. There is no time restriction either in relation to the length of time spent in care or the start and end date of that period of time in care (with the exception that it is not current).

Confidentiality

183. The Bill makes provision to safeguard the confidentiality of information held by the NCF, including testimony given by participants in hearings of the Forum and information held by the Forum in discharging its functions.

184. The Bill sets out a general prohibition on the disclosure of information provided to the NCF in the fulfilment of its functions, principally concerning information provided by people in confidential hearings of the Forum. Such information will be exempt from the Freedom of Information regime. The Bill also includes provision for the protection of participants, members and staff of the NCF from action for defamation, including an absolute level of privilege for participants in the Forum. These provisions enable people to be given assurances, as far as possible and in advance of participation, that what they say in hearings of the Forum will be treated in confidence and will be protected from founding an action for defamation. This was not possible during TTBH. These provisions strike an appropriate and reasonable balance between the need to offer protection to participants in the NCF and the right of any person who may be accused of abuse to take action. The rights of both participants in the NCF and persons against whom allegations of abuse are made have been weighed to strike a fair and proportionate balance.

185. The Bill makes provision for confidentiality to be breached in specific circumstances, including where a participant makes an allegation that a crime has been perpetrated or is likely to be perpetrated. Efforts will be made by the NCF to support participants to report such allegations directly to the police themselves.

⁵⁴ <http://www.survivorscotland.org.uk/time-to-be-heard/scottish-human-rights-commission/>

Conduct of hearings

186. The Bill makes provision to ensure that hearings of the NCF will involve at least two members; that they will be held in private; and that participants will be entitled to be accompanied by a companion of their choice.

Hosting by the Mental Welfare Commission

187. The Bill makes provision for the hosting of the NCF by the Mental Welfare Commission (MWC). The MWC is a relevant and appropriate body to host the NCF as there are strategic links between the role and functions of the respective bodies in promoting the health and wellbeing of people. The MWC also has expertise and capacity to support the development of the NCF, while at the same time affording it operational autonomy.

188. The NCF will be set up as a mandatory committee of the MWC. The members of this committee will be responsible for the effective operational discharge of the functions of the NCF.

Reports

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

Alternative approaches considered

190. In developing the policy underpinning the development of the NCF, different approaches have been considered informed by the specific context of Scotland and learning from other jurisdictions. Approaches considered have included: not establishing a NCF at all; establishing a non-statutory forum; and establishing a forum with wider functions than that proposed for the NCF.

Not establishing a National Confidential Forum

191. The Scottish Government has made a commitment to establish a confidential acknowledgement forum on a national footing, based on the positive impact of TTBH. The vast majority of responses to the recent consultation on the NCF were in agreement that a Forum with the role and function proposed be established to provide acknowledgement to people placed in institutional care as children. The experience of TTBH demonstrates the significant benefits of acknowledgement provided in a supportive, confidential and non-judgemental setting, both to individual participants and their families in terms of improved health and wellbeing and in contributing to the prevention of abuse in the future.

192. The option of not establishing the NCF would likely only be acceptable to stakeholders if the benefits and outcomes of a confidential, acknowledgement forum could be achieved in other ways.

193. Existing opportunities for people placed in care as children to give testimony are limited to court action, which is adversarial and presents a risk of retraumatisation without the guarantee of acknowledgement. People may also access support services and share their experiences in that way. However, this option does not offer the opportunity of non-judgemental acknowledgement by an informed and well-respected panel, who will use the experiences shared with it to contribute to the prevention of future harm to children and to inform the public record of life in care for children in Scotland.

194. It is considered that the NCF adds much to existing remedies, services and responses to persons placed in care as children, including those who have experienced abuse. It does not duplicate any current provision and is, in fact, unique in providing the opportunity of non-judgmental acknowledgement and belief.

A non-statutory forum

195. It is possible that the NCF could be established on a non-statutory footing, in the same way as TTBH.

196. The absence of legislative provision to underpin the work of TTBH was highlighted for particular attention in the TTBH Report. The Report sets out the implications of the Pilot Forum not having had a legislative underpinning⁵⁵ and that this ‘necessitated changes in the conduct of the Forum’s business and especially in the way in which it recorded what participants said’. In particular, the Report states that as ‘TTBH did not have statutory protection for confidentiality, the Chair and Commissioners developed practices to mitigate any risks that information provided in confidence might require to be disclosed’. Another consequence of the non-statutory basis of TTBH identified in the Report was the ‘implications for the possible personal liability of the Chair and Commissioners, employment and contractual issues and the ownership of the records held by TTBH...as a result of the Forum not having a separate legal personality’. The TTBH Report concludes that ‘despite these difficulties, the Pilot Forum proceeded effectively. Nevertheless, it is essential that any future forum be established on a statutory basis, thus providing necessary protections for both the participants and staff of the forum.’

197. The NCF needs to be able to offer assurances of confidentiality to individual participants in discharging its role and functions. It is essential that prospective participants are not deterred from taking part in hearings by the fear that their testimony might be made public or that they might be sued because of the content of that testimony. It is imperative that participants feel secure that the NCF offers a confidential and non-judgemental process for them to describe their experiences, without adverse consequence. The Head and members of the NCF, and its staff, also require a safe environment within which to work, where they are not at risk of being sued for pursuing legitimate activities. While the likelihood of legal action against participants, members and staff of the NCF may be considered low, the very prospect of it will have a deterrent effect on participation and a consequent effect on the overall effectiveness of the Forum. The advantage of primary legislation to underpin the establishment and operation of the NCF is that safeguards and protections can be put in place to ensure that, as far as possible, information held by the Forum is confidential.

⁵⁵ At paragraph 3.7.2 <http://www.scotland.gov.uk/Publications/2011/03/07122331/0>.

198. It is, therefore, considered fundamental that there be a legal framework within which the NCF will be established and operate, thereby explicitly addressing the recommendation in the TTBH Report that ‘appropriate legislation should be introduced to give the necessary protection for the effective operation of a national confidential forum’⁵⁶.

A Forum with wider powers

199. There are some stakeholders who consider that the NCF should be empowered to discharge functions in addition to those provided for in the Bill. In particular, some stakeholders consider that the NCF should be able to conduct investigations and inquiries into abuse and to provide financial compensation. A small minority of respondents to the consultation on the NCF indicated this position.

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

‘Comment[ing] on a combination of acknowledgement and accountability in one, I would say that that is impossible if we want to have the beneficial outcomes of the confidential hearing committee. If we introduce an investigative or accountability dimension, we instantly introduce an adversarial element into the forum, which would prevent a number of the people from whom we heard from coming forward to be heard. Those people do not want to be challenged and disbelieved again; it is sufficiently traumatic for them to come back, remember the experience and recount it to people such as us. It would change the whole dimension, operation and experience of that. That is not to say that there should not be such an opportunity; however, in my opinion, there is a need for a confidential forum that does not involve that. We provided people, if they wished, with guidance on what other action they could take. That was one way of helping them. However, we do not see accountability forming a practical combination with acknowledgement.’⁵⁷

201. The Scottish Government’s response to the SHRC Framework echoes this position, recognising the importance that participants in TTBH attached to the confidential nature of the process and the supportive approach taken in what were non-legal, informal proceedings. In this response, the Scottish Government highlighted that:

‘introducing an investigatory requirement would undoubtedly change the nature of the process in significant ways. First, the institutions would need to be given the opportunity to present their account and to be parties to the process. Second, the survivors’ accounts would have to be open to challenge, either by the institutions (drawing on an adversarial model) or by the Chair and Commissioners. Third, the proceedings themselves would need to be reframed to reflect elements of a legal, or certainly a formal, process, including legal representation and some form of adjudication.’

202. The Scottish Government recognises that the NCF is part of a suite of responses to people placed in care as children, including survivors of abuse. That is why the Scottish Government has agreed to take part in the ‘InterAction’ process, managed by the SHRC and the Centre for

⁵⁶ Recommendation 2-see page 110 <http://www.scotland.gov.uk/Publications/2011/03/07122331/0>

⁵⁷ 1 March 2011, Proceedings of the Public Petitions Committee, paragraphs 3457-8.

Excellence for Looked After Children in Scotland, to develop an Action Plan for taking forward the recommendations in the SHRC Framework.

CONSULTATION

203. In 2008, the Scottish Government launched a discussion paper entitled ‘Developing an Acknowledgement and Accountability Forum for Adult Survivors of Childhood Abuse’⁵⁸. The aim of the Forum was proposed as:-

‘to acknowledge the pain experienced by survivors and to give some of them the opportunity to recount those experiences in order to secure public recognition and to assist, where possible, with their own individual recovery [and to ensure] that survivors receive practical help to assist them to recover as far as they are able.’⁵⁹

204. All respondents to the consultation, almost half of whom were survivors, agreed that a forum for adult survivors who were abused in care as children should be established. There was, however a clear difference of view among respondents as to whether such a forum should include acceptance of accountability as one of its aims; whether it was the appropriate vehicle for obtaining an apology; and whether financial compensation should be part of the forum’s responsibilities.

205. Many of the respondents felt that it would be a good idea to test out such a forum so that public awareness could be raised, teething problems could be ironed out and improvements and adjustments made before rolling it out on a national basis⁶⁰.

206. A consultation on the NCF was launched on 23 July and closed on 12 October 2012. The NCF Reference Group and Survivor Stakeholder Group contributed to both the design of the consultation and to the responses. The consultation was circulated to approximately 517 contacts and was posted on the Scottish Government Consultation website. An advert was taken out in ‘Third Force News’ to proactively highlight the consultation process to the voluntary and community sectors.

207. Four consultation events were held in different parts of Scotland during August and September 2012 to give people the opportunity engage in a less formal and more direct way. A total of 54 attendees provided comments which were then summarised by those who facilitated the events.

208. The opportunity of individual and smaller group sessions were also offered to survivors of abuse experienced in care and to support organisations. This approach was designed to offer survivors the chance to take part in the consultation in a safe, supportive and private atmosphere. In total, seven survivors asked to meet on a one to one basis. Of the five survivors who felt able to participate (two decided to withdraw), four were female and one male. All had been placed in various residential care settings where abuse took place. Sessions with individual survivors were held in Dundee, Glasgow, Oban, Dunoon and Greenock.

⁵⁸ <http://www.scotland.gov.uk/Publications/2008/10/10114037/0>

⁵⁹ Consultation on Acknowledgement and Accountability, page 2.

⁶⁰ <http://www.scotland.gov.uk/Publications/2009/06/02154100/0>

209. Responses to the consultation demonstrate the general support which exists for the creation of the NCF and the positive value placed on acknowledgement in contributing to the health and wellbeing of people placed in institutional care as children⁶¹.

210. A high proportion (almost 90%) of respondents to the consultation agreed with the proposed scope of the NCF, namely that it be open to persons placed in residential care by the state as children. This included almost all individual survivors who responded to the consultation. A number of respondents questioned whether the focus of the NCF should be limited to persons placed in care by the state, as many persons have been, particularly historically, placed in institutional care under private arrangements. This has been taken into account and is reflected in the provisions in the Bill on the scope of eligibility to participate in the NCF.

211. A minority of respondents (nine) to the consultation proposed that the scope of the NCF be extended beyond that proposed to encompass all categories of care. Two of these responses came from individual survivors. A further minority of respondents (ten) made a specific reference to foster care being included within the scope of the Forum. None of these responses came from individual survivors. Half of the respondents who mentioned foster care specifically simply indicated that it be considered in defining the scope of the Forum, with one respondent suggesting that foster care 'may have to be considered' and another suggesting that there may be a 'second phase' which encompasses foster care. Where a rationale was given for proposing that foster care be considered for inclusion within the scope of the NCF, this was based on the view that there is abuse within foster care and, as such, people placed in foster care and who have experienced abuse should be able to participate in the Forum.

212. Many respondents to the consultation highlighted the need for support for participants before, during and after their participation in the NCF, including counselling and advocacy services. This correlates to responses to the consultation which identified the particular barriers which may prevent people participating in the Forum and measures which could be put in place to dismantle, or minimise, such barriers. It is intended that operational arrangements will be put in place, similar to those set up under TTBH, to ensure that there is appropriate support for participants at all stages of their engagement with the NCF.

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

Equal Opportunities

213. An Equality Impact Assessment (EQIA) has been carried out and the results will be published on the Scottish Government website at <http://www.scotland.gov.uk/Publications/Recent>.

214. In relation to the victims and witnesses reforms, the Scottish Government considers that the Bill does not discriminate on the basis of age, maternity and pregnancy, marriage and civil

⁶¹ <http://www.scotland.gov.uk/Publications/2012/12/8644/downloads>
<http://www.scotland.gov.uk/Publications/2013/01/8196/downloads>

partnership, gender reassignment, race, disability, religion and belief, sex or sexual orientation. Indeed, the reforms are intended to ensure that the particular needs of individuals are met (e.g. the introduction of an individual assessment of vulnerability for witnesses, which takes account of their personal characteristics, type or nature of the crime and the circumstances of the crime), including those originating from protected characteristics.

215. In relation to the establishment of the NCF, it is also considered that the Bill's provisions are not discriminatory on the basis of the protected characteristics listed above. The EQIA does not identify any group that will be adversely affected by the establishment of the Forum. In fact, based on TTBH, it is very likely that the NCF will have a significant and positive impact on the lives and outcomes of a group of people who can be, as a result of their experiences of care, disadvantaged in terms of mental and physical wellbeing, educational attainment, income levels, employment opportunities and family life. In addition, it is considered that the NCF will have a particular benefit for older people some of whom may never have shared their experiences of care.

Human Rights

216. It is not considered that the victims and witnesses reforms in the Bill raise any issues relating to the European Convention on Human Rights (ECHR). There is no effect on the rights of the accused or the presumption of innocence and it is considered that the Bill does not interfere with the Article 6 rights (right to a fair trial) of persons accused of criminal conduct.

217. The provisions in the Bill concerning the NCF do not give rise to any issues of concern in relation to the ECHR. It is not considered that the Forum engages Article 6 of the ECHR (right to a fair trial). The Forum will have a positive effect on participants' realisation of their Article 8 right (to protection of private and family life) in giving them the opportunity to describe their experiences in a confidential, non-judgmental setting with acknowledgement and support. The Bill provisions which prohibit the disclosure of information received by the NCF in the discharge of its functions and which restrict the right to raise an action of defamation, are proportionate measures which appropriately balance competing rights in pursuit of a legitimate aim.

Island communities

218. The Bill has no differential impact upon island or rural communities

Local government

219. The Bill has no direct impact on local authorities in discharging their duties under health and social care legislation.

220. An outcome of participation in the National Confidential Forum may be an increase in the number of persons seeking help from services, but this may well be offset by a more appropriate use of health and social care services, leading to improved outcomes and the prevention of crisis.

Sustainable Development and Environmental Issues

221. The Bill has no negative impact on sustainable development and will have a strong positive effect on the health and wellbeing of the people of Scotland, assisting not only adults who were in institutional care as children, but also bringing benefits to their families and wider communities.

222. The potential environmental impact of the Bill has been considered. A pre-screening report confirmed that the Bill has minimal or no impact on the environment and consequently that a full Strategic Environmental Assessment does not need to be undertaken. It is therefore exempt for the purposes of section 7 of the Environmental Assessment (Scotland) Act 2005.

This document relates to the Victims and Witnesses (Scotland) Bill (SP Bill 23) as introduced in the Scottish Parliament on 6 February 2013

VICTIMS AND WITNESSES (SCOTLAND) BILL

POLICY MEMORANDUM

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