

VICTIMS AND WITNESSES (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Victims and Witnesses (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.
2. The contents of this Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

Outline of Bill provisions

3. There are two main policy areas in the Bill: reforms to the justice system relating to victims and witnesses, and the establishment of a National Confidential Forum (NCF) for adults placed in institutional forms of care as children.
4. The proposed reforms relating to victims and witnesses will improve the support available for such individuals. Key proposals include:
 - giving victims and witnesses a right to certain information about their case;
 - creating a duty on organisations within the justice system to set clear standards of service for victims and witnesses;
 - creating a presumption that certain categories of victim are vulnerable, and giving such victims the right to utilise certain special measures when giving evidence;
 - requiring the court to consider compensation to victims in relevant cases;
 - introducing a victim surcharge so that offenders contribute to the cost of supporting victims; and
 - introducing restitution orders, allowing the court to require that offenders who assault police officers pay to support the specialist non-NHS services which assist in the recovery of such individuals.

5. The establishment of the National Confidential Forum (NCF) will provide an opportunity for adults who were placed in institutional care as children to recount their experiences of being in care in a confidential, non-judgemental and supportive setting.
6. The key proposals in the Bill which relate to the NCF are as follows:
- The functions of the NCF are set out in a clear and distinct way, the main function being to offer adults placed in institutional care as children the opportunity of acknowledgement of their experiences, in particular those of abuse.
 - The scope of the NCF is defined to enable all adults placed in institutional care as children the opportunity to participate in hearings.
 - The testimony of persons who participate in the NCF is protected from disclosure and those persons will be protected from the threat of defamation as a result of testimony they give. Members of the NCF who will conduct hearings, receive testimony and offer acknowledgement, and its staff, will also be protected from the threat of action for defamation where they have acted in good faith in discharging the functions of the Forum.
 - The arrangements by which the NCF is to be hosted by an existing public body, specifically the Mental Welfare Commission, are set out, including the mechanisms to safeguard the respective operational autonomy of the Forum and Commission.

Rationale for subordinate legislation

7. In deciding whether provision should be set out in subordinate legislation rather than on the face of the Bill, the Scottish Government has considered:

- the need to strike the right balance between the importance of the issue and providing sufficient flexibility to respond to changing circumstances without the need for primary legislation;
- the need to anticipate the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by the Parliament;
- the need to make proper use of valuable Parliamentary time; and
- the need to allow detailed administrative arrangements to be kept up to date within the basic structures set out in the Bill.

8. The relevant provisions are described in detail below. For each provision, the memorandum sets out:

- the person upon whom the power to make subordinate legislation is conferred and the form in which the power is to be exercised;
- why it is considered appropriate to delegate the power to subordinate legislation and the purpose of each such provision; and

- the parliamentary procedure to which the exercise of the power to make subordinate legislation is to be subject, if any.

Delegated powers

Section 1(4) – General principles

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Order made by Scottish statutory instrument**
Parliamentary procedure: **Affirmative procedure**

9. Section 1 provides that certain persons (the Lord Advocate, the Scottish Ministers, the chief constable of the Police Service of Scotland, the Scottish Court Service and the Parole Board for Scotland) must have regard to four general principles when carrying out any statutory functions they have in relation to victims and witnesses.

10. Section 1(4) gives the Scottish Ministers the power to modify the list of persons on which this duty is placed (set out at section 1(2)).

Reason for taking power

11. There is no immediate intention to modify the list of persons covered by the obligation to take account of the four general principles. However, it is possible that this list will require to be amended in the future, for example to extend the duty to another organisation dealing with victims and witnesses if appropriate, or to modify the list to reflect any changes to the organisations currently listed. It is considered appropriate to provide for the flexibility to make such relatively limited changes by subordinate legislation, rather than requiring further primary legislation.

Reason for choice of procedure

12. As this power can be used to alter primary legislation, and to add or remove the duty to have regard to the principles set out in section 1, it is considered appropriate that it be subject to the affirmative procedure.

Section 2(4) – Standards of Service

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Order made by Scottish statutory instrument**
Parliamentary procedure: **Affirmative procedure**

13. Section 2 creates a duty on certain persons to set and publish standards of service relating to the carrying out of functions in relation to victims and witnesses. It also requires those persons to set out the procedure for making and resolving complaints.

14. Section 2(4) gives the Scottish Ministers an Order making power to modify the list of persons to whom the duty applies (as set out in section 2(2)).

Reason for taking power

15. There is no immediate intention to use the power to modify the list of persons covered by the obligation to set out standards of service. However, as with the duty to have regard to the general principles, it may be necessary or desirable to amend this list in the future - for example, to include a body which has been given new functions in relation to victims and witnesses. It is considered appropriate to provide for the flexibility to make such relatively limited changes by subordinate legislation, rather than requiring further primary legislation.

Reason for choice of procedure

16. The Scottish Government considers the affirmative procedure is appropriate to allow the Scottish Parliament to give a high level of scrutiny to the detail of any changes to primary legislation.

Section 2(6) - Standards of service

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Negative procedure

17. Section 2(5) specifies that “victim”, for the purposes of that section, includes a prescribed relative of a victim. Section 2(6) allows the Scottish Ministers to prescribe by order those to be regarded as a relative of the victim under that subsection.

Reason for taking power

18. Rather than set out a definitive list of those to be regarded as relatives on the face of the Bill, it is considered appropriate to provide such detail in subordinate legislation. This will allow the Scottish Ministers the flexibility to modify the definition of “relative”, which has a fairly narrow application in relation to section 2, without amending primary legislation.

Reason for choice of procedure

19. This power has a narrow focus on the definition of “relative” in section 2, with a fairly limited effect. It is therefore considered that the negative procedure is appropriate.

Section 3(7) – Disclosure of information about criminal proceedings

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Affirmative procedure

20. Section 3 provides that certain persons (the chief constable of the Police Service of Scotland, a prosecutor, and the Scottish Court Service) must provide certain information to victims and witnesses. Subsection (7) gives the Scottish Ministers an order making power to modify who this duty applies to and to modify the information which must be disclosed.

Reason for taking power

21. The information to be provided to victims and witnesses, as set out in subsection (6), covers a variety of facts about the criminal investigation or proceedings (and this list reflects the requirement of the recent EU Directive 2012/29/EU). However, while this list is currently considered appropriate, it is possible that it may be desirable to modify it in the future - for example, to expand the list to encompass other information which victims and witnesses may find useful. It is considered appropriate to allow the flexibility to make any such changes by subordinate legislation, rather than requiring further primary legislation.

22. Similarly, the persons to whom the duty applies may require to be modified in the future. This could be a result of a change in who holds some of the information currently specified or, more probably, to include persons who hold any new information which is specified by order.

Reason for choice of procedure

23. As orders made under this section could have a fairly significant impact on any persons specified (for example, by applying the duty to supply information to an additional person, or by changing the information which is to be provided), it is considered appropriate that any such orders are subject to the affirmative procedure, to ensure that full consideration can be given to the potential impact.

Section 4(4) –Interviews with children: guidance

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Negative procedure

24. Section 4 provides that police officers and social workers must have regard to any guidance issued by the Scottish Ministers under subsection (2) when carrying out a joint investigative interview with a child witness in the course of criminal proceedings or a matter which may lead to criminal proceedings. Section 4(4) gives the Scottish Ministers an order making power which enables them to modify the list of persons to whom this duty applies, as set out in section 4(3).

Reason for taking power

25. The power to issue guidance (under subsection (2)) and modify the list of those who must have regard to it (under subsection (4)) will provide flexibility to allow the guidance to be updated as necessary (e.g. to reflect developments in interviewing techniques, updated research etc.) and the list of interviewers to be updated as required (e.g. to reflect any future change to current job titles or to the category of persons who undertake joint investigative interviews with child witnesses) without requiring primary legislation.

Reason for choice of procedure

26. The power to issue guidance is very narrow, applying only to joint interviews carried out with children. Furthermore, the guidance to be issued under this section already exists in non-statutory form, and will be modified only in consultation with the public bodies who were involved in drafting the original guidance (issued December 2011). It is therefore considered that there is no need for the guidance to be laid in Parliament.

27. The duty to have regard to the guidance is limited – there are no sanctions for a breach of the duty and no obligation to inform the Scottish Ministers in the event that the guidance has not been followed. Accordingly, the order making power to modify the list of persons who must have regard to the guidance is subject to negative procedure as the high level of parliamentary scrutiny offered by the affirmative procedure is not considered necessary when imposing such a modest obligation.

Section 5(7) – Certain sexual offences: victim’s right to specify gender of interviewer

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Negative procedure

28. Article 23 of EU Directive 2012/29/EU¹ requires that all interviews with victims of sexual violence, gender-based violence or violence in close relationships should be conducted by a person of the same sex as the victim, if the victim so wishes, provided that the criminal proceedings will not be prejudiced. Section 5 provides for such a right for victims, and broadens this slightly to allow the victim to specify the gender of the person conducting an interview, which may be the same gender as the victim.

29. Section 5(7) gives the Scottish Ministers an order making power to modify the list of types of offences that this section should apply to. Section 5(8) allows the Scottish Ministers to modify the description of persons carrying out an interview (which currently only includes police officers).

Reason for taking power

30. The power under section 5(7) will allow a wider range of victims to have this entitlement if this is considered appropriate in the future, without requiring further primary legislation. Section 5(8) also allows the Scottish Ministers to modify the description of persons carrying out

¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:315:0057:01:EN:HTML>

an interview. While interviews will ordinarily be carried out by police officers, other interview formats may be developed involving officers of other agencies.

Reason for choice of procedure

31. The Scottish Government considers that any changes under this section are likely to be intended to assist the operational delivery of the requirements of the Directive, and the powers in subsections (7) and (8) are fairly narrow in scope. It is therefore considered appropriate that the negative procedure is used.

Section 6(b) – Vulnerable witnesses: main definitions

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Affirmative procedure

32. Section 6(a) replaces the main definitions of vulnerable witnesses contained in section 271(1) of the Criminal Procedure (Scotland) Act 1995 (the 1995 Act). Section 6(a) inserts subsection (1)(c) which provides that victims of alleged sexual offences, human trafficking, domestic abuse, or stalking, who are giving evidence in proceedings which relate to that particular offence, are to be regarded as vulnerable. Section 6(b) inserts subsection (1AA) which gives the Scottish Ministers an order making power to modify the inserted subsection (1)(c).

Reason for taking power

33. There is no immediate intention to use the power to prescribe additional categories of witnesses who fall under the inserted subsection (1)(c). However, this power will provide the flexibility to allow the Scottish Ministers to do so, if it is found to be necessary in the future, without enacting primary legislation.

Reason for choice of procedure

34. The power is subject to the affirmative procedure. The Scottish Government considers this is appropriate to allow the Scottish Parliament to give a high level of scrutiny to the detail of any changes to primary legislation.

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

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Affirmative procedure

35. Section 271H(1) of the 1995 Act specifies a range of special measures that may be used to assist vulnerable witnesses to give their evidence to the court. Section 8(a) amends the definition of standard special measures so that a supporter can be used as a stand-alone standard special measure and removes the restriction that a live television link can only be used in another part of the court building. Section 8(b) inserts new section 271A(15) into the 1995 Act, giving the Scottish Ministers an order making power so that they can add new standard special

measures, amend or delete existing standard special measures and also modify the detail of how these standard special measures are to operate.

Reason for taking power

36. There is no immediate intention to use the power described above, which is designed to allow the range of standard special measures to be kept up to date with developments such as new or improved technology or the identification of other appropriate support measures for vulnerable witnesses. However, this power will provide the flexibility to allow the Scottish Ministers to do so, if it is found to be necessary in the future, without enacting primary legislation.

Reason for choice of procedure

37. The power is subject to the affirmative procedure. The Scottish Government considers this is appropriate to allow the Scottish Parliament to give a high level of scrutiny to the detail of any changes to primary legislation.

Section 15 – Temporary additional special measures

Power conferred on: The Scottish Ministers
Power exercisable by: order made by Scottish statutory instrument
Parliamentary procedure: Affirmative procedure

38. Section 271H(1) of the 1995 Act specifies a range of special measures that may be used to assist vulnerable witnesses to give their evidence to the court. Section 15 inserts new section 271HA into the 1995 Act to allow the Scottish Ministers to create additional special measures by order for a temporary period. The order must specify where the temporary special measure should take place, the procedures to be used and for how long it should operate.

Reason for taking power

39. The current list of special measures for vulnerable witnesses may be modified in the future, for example to offer better support to those with communication support needs. However, before introducing any new categories of special measures across Scotland, the Scottish Government considers it important to assess whether a particular special measure works and if there is a real benefit to vulnerable witnesses in using it. The ability to pilot potential measures on a limited basis, as this order making power allows, is considered a crucial part of that assessment. This power is likely to be used in conducting such pilots, particularly in relation to the testing of potential new measures relating to communication support needs.

Reason for choice of procedure

40. The power is subject to the affirmative procedure. The Scottish Government considers this is appropriate to allow the Scottish Parliament to give a high level of scrutiny to any proposals to pilot new special measures, which could have a relatively significant impact on the courts.

Section 17(b) – Power to prescribe further special measures

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Affirmative procedure

41. Section 271H(1) of the 1995 Act specifies a range of special measures that may be used to assist vulnerable witnesses to give their evidence to the court. Section 17(b) inserts section 271H(1A) into the 1995 Act. This section gives the Scottish Ministers an order making power so that they can add new special measures, amend or delete existing special measures and also modify the detail of how these special measures are to operate.

Reason for taking power

42. There is no immediate intention to use the powers described above, which are designed to allow the range of special measures to be kept up to date with developments such as new or improved technology or the identification of other appropriate support measures for vulnerable witnesses. However, it is anticipated that, should the testing of additional special measures through a pilot scheme initiated by the Scottish Ministers (see detail of order making power under section 15) prove successful, then the Scottish Ministers may wish to roll it out across Scotland by exercising their power to add another category of special measure and detail how it should operate.

Reason for choice of procedure

43. The power is subject to the affirmative procedure. The Scottish Government considers this is appropriate to allow the Scottish Parliament to give a high level of scrutiny to the detail which may result in changes to primary legislation.

Section 18 – Vulnerable witnesses: civil proceedings

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Affirmative procedure

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

Reason for taking power

45. This power has been taken so that the definition of vulnerable witness, and consequently the potential use of special measures, can be extended to certain types of actions and certain types of witnesses. The areas where this power might be used are to specify classes of people (e.g. victims of domestic abuse) or certain types of action (e.g. applications for forced marriage protection orders or applications for civil protection orders to protect against domestic abuse) where those involved are to be regarded as vulnerable.

Reason for choice of procedure

46. Using this power would extend the definition of vulnerable witness in civil proceedings. This is a significant matter, and the Scottish Government therefore considers that the use of the power should be subject to the affirmative procedure.

Section 21 (new section 253A of the 1995 Act) – Restitution order where conviction of police assault etc.

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Negative procedure

47. Section 21 establishes that, in addition to existing disposals, it shall also be competent to sentence a person convicted of an offence under section 90(1) of the Police and Fire Reform (Scotland) Act 2012 (the “2012 Act”) (which concerns assault on police officers and staff) to pay a sum called a “restitution order”. This shall be credited to a Fund for disbursement for the purpose of securing the provision of support services for such persons as have been assaulted in circumstances to which section 90(1) of the 2012 Act applies.

48. It does so by inserting new sections into the Criminal Procedure (Scotland) Act 1995 (the “1995 Act”).

49. The new section 253A to be inserted into the 1995 Act establishes that persons convicted of an offence under section 90(1) of the 2012 Act shall be liable to a restitution order.

50. This section aligns the maximum amount of such restitution orders to the prescribed sum (as defined in section 225(8) of the 1995 Act) and confers on the Scottish Ministers the power to change the maximum amount by regulations.

Reason for taking power

51. As with any monetary penalty, or any upper limit set upon such a monetary penalty, the severity of any restitution order, and thus its appropriateness and effectiveness as a penalty, will be affected by the changing value of money.

52. For this reason, section 225(4) of the 1995 Act gives the Scottish Ministers a power to vary, by order, the values of the levels of the standard scale for fines and of the prescribed sum.

53. Sentencers’ views of the appropriateness of a restitution order are also likely to be affected by changes in the conditions under which other sanctions, such as fines, may be applied – for example a change made by an order under section 225(4) of the 1995 Act, described above.

54. Giving the Scottish Ministers the power to set the upper limit applicable to the amount of restitution orders, in a similar way to that in which they set the upper limit for fines, is considered to be the best way to build in flexibility to deal with changes in the value of money, and of comparable financial penalties.

Reason for choice of procedure

55. The rate of change in the value of money has historically varied considerably and cannot be forecast for the lifetime of the proposed legislation. There may arise periods in which the value of financial penalties has to be amended frequently. In these circumstances the negative procedure provides the greatest speed and flexibility; and mirrors (for the same reasons) the procedure to be used in changing the limits for fines.

Section 21 (new section 253B of the 1995 Act) - The Restitution Fund

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Affirmative procedure

56. The new section 253B to be inserted into the 1995 Act provides that the Scottish Ministers shall establish a Restitution Fund which shall receive monies realised in respect of restitution orders, and disburse them to appropriate beneficiaries.

57. Subsection (5) allows the Scottish Ministers to delegate, by order, their functions of establishing and maintaining the Restitution Fund.

58. Subsection (6) grants the Scottish Ministers powers to manage the Restitution Fund, by making orders connected with its operation, administration, records and reports, and as to how payments are to be made.

59. The new section sets out in primary legislation the purpose of payments out of the Restitution Fund. This purpose is to secure the provision of support services for persons who have been assaulted as mentioned in section 90(1) of the 2012 Act. The new section also grants the Scottish Ministers powers to specify in subordinate legislation the persons or classes of person who shall receive support from the Restitution Fund as a means of achieving that purpose.

Reasons for taking power

60. The purposes of the Restitution Fund are to be clearly set out in primary legislation. However, the range of circumstances in which the Fund will operate cannot be foreseen. Some may be beyond the Scottish Ministers' control, while others may be driven by wider operational concerns of the Scottish Ministers for, for example, efficient and cost-effective administration, whose requirements may change over time. Applicable regulatory regimes may also change over time.

61. It is appropriate that the operation and administration of the Restitution Fund should be able to respond to changes in these circumstances as efficiently as possible. This argues against setting out detailed arrangements in primary legislation.

62. Similarly, such changes in circumstances may make it appropriate or efficient to delegate the Scottish Ministers' functions of establishing and maintaining the Restitution Fund to a third party (though this is not the Scottish Government's intention at present).

63. The organisations which provide support services for persons assaulted in terms of section 90(1) of the 2012 Act are also likely to change over time. Organisations will cease to operate, and new organisations will arise. Even where the organisation remains essentially the same, the legal person in which they are embodied may change.

64. Finally, the need to be able to continue to meet the purpose of the Restitution Fund, whatever organisations or persons may exist providing services which meet that purpose, makes setting out recipients of monies from the Restitution Fund in primary legislation impractical.

Choice of procedure

65. Both changes in the circumstances in which the Restitution Fund operates, and in the persons or classes of person who offer the support services which are the purposes of the provision, may occur quickly and without prior warning to the Scottish Ministers.

66. In these circumstances the Scottish Ministers must be able to react quickly to ensure that the purpose of the Restitution Fund is still met. At the same time, these powers are fairly extensive. The joint requirements of speed and flexibility on the one hand, and of proper scrutiny on the other, are best met by the affirmative procedure.

Section 22 (new section 253F of the 1995 Act) – Victim Surcharge

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Regulations made by Scottish statutory instrument**
Parliamentary procedure: **Affirmative procedure**

67. Section 22 inserts sections 253F to 253J into the 1995 Act which establish the victim surcharge and the Victim Surcharge Fund. Under new section 253F(1)(a), the Scottish Ministers will have a regulation making power to set out offences, or classes of offences, to which the victim surcharge is not to apply. Under new section 253F(1)(c), the Scottish Ministers will have a regulation making power to set out sentences in relation to which the court must impose a victim surcharge. Under new section 253F(2), the Scottish Ministers will have the power to prescribe circumstances where the victim surcharge does not apply and to set the amount of the victim surcharge the court will be obliged to impose. This includes the ability to set different amounts for different descriptions of offender and for different circumstances. This power can also be used to make provision for determining the amount of the surcharge to be paid when the offender in question is convicted of two or more offences in the same proceedings. Reason for taking power

68. Although the broad purpose and operation of the victim surcharge will be set out on the face of the Bill, it is considered appropriate to set out exactly which offenders this will apply to (by reference to particular offences or sentences, as appropriate), and the amount of the

surcharge, in subordinate legislation. This will allow increased flexibility to respond to changing circumstances, and allow the exact model used to be varied in light of experience.

69. For example, the Scottish Government intends to impose the surcharge on those sentenced to a court fine in the first instance and to set out a tiered scale of surcharge amounts, linked to the amount of the fine. However, this model is likely to require some refinement in the future, and it may be desirable to widen the applicability of the surcharge to other types of offender or, if appropriate, to set out offences to which it does not apply. The powers in new section 253F will enable such changes to be made without requiring primary legislation.

Reason for choice of procedure

70. The power is subject to affirmative procedure. The Scottish Government consider that it is appropriate for the Scottish Parliament to give a high level of scrutiny when considering changes to the amount of victim surcharge that may be imposed and to the classes of offenders who will be affected.

Section 22 (new section 253G of the 1995 Act) – The Victim Surcharge Fund

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Affirmative procedure

71. Section 22 inserts section 253G into the 1995 Act, which deals with the establishment and purpose of the Victim Surcharge Fund. Subsection (5) allows the Scottish Ministers to delegate their functions of establishing and maintaining the Victim Surcharge Fund to a third party. Subsection (6) gives the Scottish Ministers power to set out various administrative and operational details relating to the operation of the Fund, and to prescribe the persons or classes of person who will be able to receive support from the fund.

Reason for taking power

72. As with similar provision in relation to restitution orders, it is considered appropriate that various operational and administrative details be set out in subordinate legislation. This will allow the operation of the Fund to be varied as necessary, in response to changing circumstances. For example, once the Fund is operational, it may be desirable to refine certain aspects of its operation, or to specify more exactly the persons to whom payments can be made. The order making powers in this section will give the Scottish Ministers the flexibility to make such changes as required, without further primary legislation.

Reason for choice of procedure

73. Given the amount of detail which can be set out using the powers in this section, and their impact on the operation of the Victim Surcharge Fund, the affirmative procedure is considered appropriate.

Section 24 – Oral representations to the Parole Board for Scotland

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Negative procedure

74. Section 24 amends section 17 of the Criminal Justice (Scotland) Act 2003 to give victims the right to make oral representations to the Parole Board for Scotland in relation to the release of prisoners serving a life sentence. New subsection (13) gives the Scottish Ministers the power to modify the type of convicted person to which this right relates.

Reason for taking power

75. While there is no immediate intention to extend the right to make oral representations in relation to other categories of prisoner, this may be considered in due course. As any such extension of this right to other categories may be carried out in an incremental manner, in order to assess the impact and benefits, it is considered appropriate that such provision be made in subordinate legislation.

Reason for choice of procedure

76. The power will only be used to extend the existing right to make representations to the Parole Board by varying the class of prisoners it will apply to. Given the narrow scope of the power, the negative resolution procedure is considered appropriate.

Section 27, paragraph 7 of new schedule 1A – Eligibility to participate in the National Confidential Forum

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Affirmative procedure

77. Section 27(2) inserts schedule 1A into the Mental Health (Care and Treatment) (Scotland) Act 2003 (“the 2003 Act”). Schedule 1A makes further provision in relation to the NCF and is inserted into the 2003 Act because the Forum is to operate as part of the Mental Welfare Commission, provision in respect of which is set out in the 2003 Act.

78. Paragraph 7 of schedule 1A makes provision for eligibility to participate in the NCF. Any person aged 18 years or over and who was placed in institutional care as a child for any length of time, and who is no longer in care, may apply to participate in the Forum. The term “institutional care”, for the purposes of participating in the Forum, means a care or health service which provided residential accommodation to children in Scotland.

79. Paragraph 7(3) of Schedule 1A gives the Scottish Ministers power to prescribe the particular types of care or health service which are to be included within the scope of “institutional care”. The types of services prescribed must be services which were provided to children in Scotland; provided by a body corporate or unincorporated; included a residential

accommodation component; and which were not provided at premises used wholly or mainly as a private dwelling.

Reason for taking power

80. The landscape of residential care and health services provided to children in Scotland is dynamic and complex, both services provided historically and those provided currently. Persons applying to participate in the NCF will seek to share experiences of services provided over a significant period of time, spanning up to nine decades. The scope of “institutional care” needs to be sufficiently broad and flexible to encompass the range of institutions into which children were placed over this significant period.

81. It is appropriate for the Scottish Ministers to prescribe the services which will fall within the scope of “institutional care” in a order to enable flexibility in specifying the particular types of services to be including within the scope of the NCF, including any additions or changes to the types of services prescribed to be made efficiently. There is not in existence a comprehensive list of every type of care and health service into which children were placed in Scotland and which were in operation during the time period participants in the Forum will seek to share experiences. Prescription of those services by the Scottish Ministers through the exercise of an order making power will enable a comprehensive and relevant list of services to be specified in a transparent and clear way and will allow sufficient flexibility for changes to that list to be made in recognition of the scale and dynamic nature of service provision over the period in question.

Reason for choice of procedure

82. This power gives the Scottish Ministers the ability to prescribe the particular types of care and health services which will be included within the scope of the National Confidential Forum. The Scottish Government considers that this is a matter in respect of which it is appropriate for the Scottish Parliament to have a high level of scrutiny to enable it to consider whether the types of services so prescribed are relevant and appropriate.

Section 29(1) – Ancillary provision

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Affirmative or Negative procedure, depending on the circumstances

83. Section 29(1) provides the Scottish Ministers with the power to make, by order, such supplementary, incidental, consequential, transitional, transitory or saving provision as they consider appropriate in connection with the Bill.

Reason for taking power

84. As with any new body of law, this Bill may give rise to a need for a range of ancillary provisions. This power is considered necessary in order to ensure that any unexpected issues can be dealt with effectively, and that the purpose of the Bill is not inadvertently obstructed.

85. The power to make supplemental or incidental provision is considered necessary in order to ensure that the policy intentions of the Bill are achieved. For example, it is possible that when

the policy is implemented that there are unforeseen issues, and this power would allow such changes to be made without the need for further primary legislation.

86. Consequential provision may be required in order to make necessary changes to related legislation - a number of consequential amendments are identified in the Bill as introduced (see, for example, section 7), but this power will allow the Scottish Ministers to make further changes should there be an unforeseen interaction with existing legislation.

87. The ability to make transitional or transitory provision may be required during implementation of the Bill to ensure that any changes to existing procedure do not present any issues. Finally, savings provisions will allow the operation of provisions in repealed or amended legislation to be preserved in certain circumstances, if necessary.

88. Without such a power it may be necessary to return to the Parliament, through subsequent primary legislation, to deal with a matter that is clearly within the scope and policy intentions of the original Bill. That would not be an effective use of either Parliament or Government resources.

Reason for choice of procedure

89. Where an order under this section is clearly limited in scope and effect, such as transitional or transitory provisions intended to address temporary issues, the negative procedure is considered appropriate. Such provisions would not have a lasting effect, and would be intended to resolve operational difficulties. However, where an order under this section adds to, replaces, or omits any part of the text of any Act (including this Act), the affirmative procedure will be used. As such amendment to primary legislation has the potential to have a significant impact on the effect of the Bill, this level of parliamentary scrutiny is considered appropriate.

Section 30(2) – Commencement

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: None

90. Section 30(2) gives the Scottish Ministers power to bring into force provisions in the Bill by order. No commencement date is specified in the Bill.

Reason for taking power

91. Exact commencement dates for the substantive provisions of the Bill have not yet been determined. This power allows the Scottish Ministers flexibility to control the commencement of the various provisions as they consider appropriate.

Reason for choice of procedure

92. As is common with commencement orders the power is subject to the default laying requirement under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.

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

DELEGATED POWERS MEMORANDUM