

Children's Rights Impact Assessment

<p>1. What is being proposed? <i>(Name/description of the policy, legislation)</i></p> <p>The Victims and Witnesses (Scotland) Bill was introduced in the Scottish Parliament on 6 February 2013 by the Scottish Government. The Bill seeks to make provision for:</p> <ol style="list-style-type: none"> rights and support for victims and witnesses (primarily in relation to criminal cases) and the establishment of a National Confidential Forum for adults placed in institutional forms of care as children. <p><i>Please note that this assessment looks solely at the impact of the provision for victims and witnesses. It makes no assessment of the National Confidential Forum.</i></p>	<p>Policy <input type="checkbox"/></p> <p>Legislation <input checked="" type="checkbox"/></p> <p>Other <input type="checkbox"/></p>	
	<p>Existing <input type="checkbox"/></p> <p>New <input checked="" type="checkbox"/></p>	
<p>2. What is the aim, objective or purpose of the proposal? <i>(How does it relate to other initiatives? Does it seek to fulfil national targets?)</i></p> <p>The overarching objective of the Bill is to improve support available to victims and witnesses throughout the justice system, putting victims interests at the heart of ongoing improvements to that system and ensuring that witnesses are able to fulfil their public duty effectively.</p> <p>Key proposals in relation to victims and witnesses include:</p> <ul style="list-style-type: none"> 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. <p>In 2012 an EU Directive establishing minimum standards on the rights, support and protection of victims of crime (2012/29/EU) was finalised. This Bill includes provision for implementing this Directive. The Directive is a measure on the 'Budapest Roadmap' for improving victims rights. It is part of a package of measures which aim to strengthen the rights and protection of victims of crime, especially in court proceedings and includes a proposal for a regulation on mutual recognition of civil protection measures.</p> <p>Improving the experience of victims and witnesses is a key objective in the Making Justice Work (MJW) programme set up in 2010 by the Scottish Government. The Scottish Government is working together with organisations across the justice system on five major projects which form the MJW. The Victims and Witnesses (Scotland) Bill is one part of ongoing work on project 2 - improving procedures and case management.</p>		

3. Who initiated the proposal? (e.g. Scottish Government, Scottish Parliament)

The Scottish Government. The Bill was introduced by the Cabinet Secretary for Justice.

4. Who is to implement the proposal?

(e.g. Local Authorities, Health Boards)

Section 1 - General principles: the Lord Advocate; the Scottish Ministers; Police Scotland; Scottish Court Service (SCS); Parole Board for Scotland (PBS).

Section 2 - Standards of service: Police Scotland; Crown Office Procurator Fiscal Service (COPFS); SCS; Scottish Prison Service (SPS); PBS.

Section 3 - Disclosure of information: Police Scotland; COPFS; SCS.

Section 4 - Interviews with children: police officers and social workers.

Section 5 - Gender of interviewer: Police Scotland.

Section 8 - Child and deemed vulnerable witnesses: COPFS; SCS; Scottish Children's Reporter Administration (SCRA).

Section 21 - Restitution order: revenue raised to be collected by SCS and passed to the Scottish Government (SG); fund administered by SG or contracted to another individual or body to administer.

Section 22 - Victim surcharge: revenue raised by victim surcharge collected by SCS and passed to SG; administration of funds may be delegated to a third party.

5. Which articles of the UNCRC are relevant?¹

The following two articles are of particular relevance when assessing the impact of the proposed legislation. They have been identified by the Committee on the Rights of the Child as general principles of relevance to the implementation of the whole UNCRC.

- Article 3 (1) "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".
- Article 12 (1) "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child".

Other articles which are relevant and require consideration are:

- Article 2 (1) "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind".
- Article 5 "States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians, or other persons legally responsible for the child, to provide in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention."

- Article 19 (1) “States Parties shall take all appropriate legislative, administrative, social and educational measures be taken to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has care of the child”.
- Article 23 (1) “States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child’s active participation in the community”.
- Article 34 “States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse”.
- Article 35 “States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale or traffic in children for any purpose or in any form”.
- Article 37 “States Parties shall ensure that a) no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment”.

6. Does the proposal contravene the UNCRC or any other laws?

(e.g. European Convention on Human Rights, Children (Scotland) Act 1995)

Section 19 requests that victim statements for any persons under the age of 14 be made by a carer of the child. This does not reflect section 2(2) of the Age of Legal Capacity (Scotland) Act 1991 where it states that “a person of or over the age of 12 years shall have testamentary capacity, including legal capacity to exercise by testamentary writing any power of appointment”. Whilst the Age of Legal Capacity Act sets a lower age limit, in practice children below the age of 12 are able to instruct their own solicitor where they are deemed competent to do so.

In this respect Section 19 also fails to reflect Article 12 of the UNCRC which requires states to assure “that any child capable of forming a view has the right to express views freely in all matters affecting him or her and that the child’s views are given due weight in accordance with age and maturity”. In General Comment No.12 (2009) ‘The right of the child to be heard’ the Committee on the Rights of the Child noted that age alone cannot determine the significance or scope of the child’s comprehension of a particular situation. What is relevant is the capacity of a child to express his or her own views in a reasonable and independent manner. Furthermore in General Comment No.7 (2005) ‘Implementing child rights in early childhood’, the Committee suggested that the concept of ‘evolving capacities’ should be viewed as a positive and enabling process that supports the maturation, autonomy and self-expression of the child.

According to the Manual on Human Rights Reporting “This right should be ensured and respected even in situations where the child would be able to form views and yet be unable to communicate them, or when the child is not yet fully mature or has not yet attained a particular older age”.

7. Which groups of children will be affected by the proposal?

1. Children and young people under the age of 18 who are victims of crime.
2. Children and young people under the age of 18 who witness crime.
3. Children and young people under the age of 18 who are a witness in civil proceedings.
4. Children and young people experiencing domestic abuse.
5. Children under the age of 14 who are not direct victims of crime.
6. Children under the age of 14 who are direct victims of crime.
7. Young people under 18 years who are convicted of a crime.

8. Positive Impact

(Note the groups affected)

1. The general principles set out that child victims and witnesses should be able to obtain information about what is happening in their case; should have their safety ensured; should be able to access appropriate support; and should be able to participate effectively where that is appropriate.
2. The Bill introduces standards of service and procedures for resolving complaints by named persons for child victims and witnesses.
3. The Bill proposes the disclosure of information about criminal proceedings to child victims and witnesses.
4. Where a police officer and social worker are carrying out a joint interview with a child or young person under the age of 18 they must have regard to any guidance issued by Scottish Ministers about the carrying out of such interviews.
5. In sexual offences, human trafficking, domestic abuse and stalking, child victims' will have the right to specify the gender of interviewer.
6. The Bill proposes a change of definition of vulnerable witnesses in criminal proceedings to include persons under the age of 18. This will enable all child witnesses under the age of 18 to access special measures. This will bring Scotland in line with the rest of the UK, the EU Directive and the UNCRC.
7. The automatic right to use standard special measures (SSMs) will be extended to victims of domestic abuse. This will help to limit the distress of children and young people experiencing domestic abuse.
8. The Bill will remove the presumption that child witnesses under the age of 12 will give evidence away from the court building. Child witnesses will be able to express if they wish to be present in the court-room to give evidence. This chimes with the concept of the 'evolving capacities' of the child embodied in articles 5 and 12 of the UNCRC.
9. Extends the restrictions of reporting by newspapers of criminal proceedings involving children (as the person against,

9. Negative Impact

(Note the groups affected, gaps or inconsistencies in the proposal)

1. Two of the general principles, (c) and (d) in section 1, use the term 'appropriate', however it is unclear as to how this will be defined and interpreted by relevant persons. This may mean that a child does not have the necessary support to enable them to participate effectively in an investigation or proceedings. It also has the potential to allow for inaccurate assumptions to be made about the capacity of a child to give evidence.
2. The development of standards of service is left to named persons with no duty to consult with child victims or witnesses of crime or those organisations supporting them.
3. There is no detail as to how the standards of service will be monitored, evaluated and reported on. There is no duty to ascertain the direct experiences of children and young people to assess whether the standards are making a positive difference to them.
4. There is no clear sense as to how the standards of service shall be enforced and what (if any) consequences there will be if a named person fails to meet them. There is no indication as to what (if any) national agency will have oversight over the enforcement of the standards.
5. There is no duty on a named person to promote and raise awareness of the standards of service with child victims and witnesses.
6. The standards of service only govern the quality of service provided to child victims and witnesses in relation to criminal investigations and proceedings, and do not cover civil proceedings.
7. Section 9 will allow any party to criminal proceedings to object to a notice requesting special measures for child and vulnerable witnesses. This may well add to the fears and anxieties that a child witness already has about a case and may well prevent them from giving their best evidence. Section 9 may also

<p>or in respect of whom the proceedings are taken, or as a witness) to persons under the age of 18, rather than under the age of 16 thus preventing their identity from being revealed. This will bring the definition of a child in line with article 1 of the UNCRC.</p> <p>10. The definition of a child witness in civil proceedings will be extended to include anyone under the age of 18. Currently this definition includes only those under the age of 16. This will bring the definition of a child in line with article 1 of the UNCRC.</p> <p>11. The Bill provides that a child under the age of 14 who is not the direct victim of a crime but a close relative of the victim (victim may be a parent or a sibling) can have a victim statement made on their behalf by a carer. Currently children under the age of 14 can only have a victim statement made by a carer if they are the direct victim of the crime.</p> <p>12. The Bill will establish a victim surcharge fund which can then make payments to child victims, or those who provide services to child victims.</p>	<p>dissuade victims and witnesses of domestic abuse from giving evidence in criminal proceedings.</p> <p>8. Children under the age of 14 will be precluded from giving victim statements themselves; these must be made on their behalf by a carer. In any civil matter however a child is presumed old enough to be able to instruct their own solicitor from the age of 12 and even younger if the child is deemed competent.</p> <p>9. There will be an onus on a child witness or victim to request information in relation to any criminal investigation or proceedings.</p> <p>10. In some instances the disclosure of information may be refused, but it is not clear from the Bill if this decision will be communicated to the child witness or victim. Such a situation may well cause serious distress to the witness or victim and serve to undermine one of the general principles of the Bill.</p> <p>11. A young person aged 16 or 17 convicted of an offence may be ordered to pay a victim surcharge or restitution order. Depending on the amount set for either penalty, a vulnerable young person may not be in a financial position to make such payments.</p>
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10. Has there been any consultation in the development of the proposal? *(Note the groups affected)*

There has been an informal consultation with organisations such as Victim Support Scotland, Children 1st and Rape Crisis Scotland during 2010-11. There have been focus groups, meetings and regional consultation events on witness issues along with a Victim Summit in 2011.

A formal public consultation ‘Making Justice Work for Victims and Witnesses’ was held during 2012 which asked for views on most of the proposals to be included in the Bill. The consultation received 76 responses.

There has been consultation with a number of key stakeholder groups, justice organisations and individual victims during the policy development process.

No information is available as to whether or not children and young people were directly consulted in the development of the proposals in the Bill.

11. What conclusions have been reached by the Commissioner?

(Is the proposal the best way of achieving its aims, taking into account children's rights? Please note any gaps in information)

Access to justice is an important children's rights issue, enshrined in both domestic and international law. Young people are significantly more likely to be victims of crime than the general population, and yet they receive limited support in the aftermath of crime with their views seldom sought and their needs met. Overall this Bill seeks to address these failings by enshrining in legislation the rights and support for child victims and witnesses. Of particular significance is the extension of the definition of child to include all persons under the age of 18, in line with Article 1 of the UNCRC.

There are a number of provisions in the Bill that could and should be strengthened to take account of children's rights, and these are outlined in the recommendations below.

It should be noted that the proposed intention of the legislation will be undermined if 'Section 9 Objections to special measures: child and deemed vulnerable witnesses' is allowed to remain as it is. At the very minimum there should be an exemption for all child witnesses (persons under the age of 18) from all objections under this section.

12. What recommendations should be made and who should be informed of them?

(e.g. Should relevant groups be consulted)

The following recommendations are for the attention of the Scottish Parliament Justice Committee, the lead Committee considering the victims and witnesses provisions of the Bill.

Recommendations concerning the provisions of the Bill

1. The best interests principle outlined in Article 1(2) of the EU Directive which states that "where the victim is a child, the child's best interests shall be a primary consideration and shall be assessed on an individual basis" should be included in all published standards of service.
2. The meaning of 'prescribed relative of a victim' should be defined in Schedule 1A part 7. It is necessary to clarify this to ensure that the standards of service are inclusive of a child who is a family member of a victim (e.g. child, sibling, grandchild) and who has suffered harm as a result of the crime.
3. Introduce a requirement for named persons to consult with children and young people and those organisations supporting them when developing the standards of service.
4. Include a duty to promote and raise awareness of the rights set out in the Bill in line with Article 26 (2) of the EU Directive which states that "Member States shall take appropriate action, including through the internet, aimed at raising awareness of the rights set out in this Directive...in particular by targeting groups at risk such as children".
5. An obligation to provide a statement of reasons for non-disclosure of information needs to be added to section 3(4).
6. Consideration should be given to removing section 9 from the Bill and at the very minimum there should be an exemption for all persons under the age of 18 from all objections to special measures.
7. Age of entitlement to have victim statements made on their behalf to be lowered from children under 14 to children of or below the age of 12 to take account of the child's capacity to form and express their own views.
8. Disclosure of information to be changed from 'right to request' to 'right to receive' in line with Article 6 of the EU directive which states that "Member States shall ensure that victims are notified without unnecessary delay of their right to receive the following

information about the criminal proceedings...".

9. Consideration to be given to extending the right to standard special measures for child witnesses to civil proceedings.

Recommendations concerning secondary legislation and/or guidance accompanying the Bill

1. Further guidance should be issued as to how named persons define 'appropriate support' for section 1 (3) (c).
2. Further guidance should be issued as to how named persons will determine when it is appropriate for child victims and witnesses to participate effectively in an investigation and proceedings.
3. In terms of the disclosure of information there needs to be guidance on the type of information provided to a child, methods of communicating that information and the timescales involved. Article 25 of the EU Directive should be reflected in secondary legislation to ensure "that officials likely to come into contact with victims receive both general and specialist training to a level appropriate to their contact with victims..." There is an imperative to ensure that specialist training includes skills and methods for engaging with children and young people; in particular assessing their level of understanding.
4. It is suggested that the use and effectiveness of special measures be monitored and that this evaluation take into account the views of children and young people.
5. Introduce a requirement to proactively explain the full range of standard special measures to child witnesses and victims to maximise their capacity to give evidence.
6. Submission of child witness applications outlining any special measures should be a compulsory part of pre-trial hearings.
7. Further clarification is required as to the likely amounts of the victim surcharge and restitution orders and whether these will vary depending on type of offender or other circumstances.

13. Is a full impact assessment required?

(Please elaborate)

This initial impact assessment along with written and oral evidence submitted to the Justice Committee from key stakeholders, the Policy Memorandum and Explanatory Notes to the Bill should ensure that children's rights are taken into account when reviewing the draft legislation. No full children's rights impact assessment is therefore required at this time. The Bill however should be appraised at stage 2 to assess whether or not our recommendations have been taken account of and to what extent any proposed amendments infringe children's rights.

Yes

No

Preliminary Screening by: Gillian Munro, the office of Scotland's Commissioner for Children and Young People

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¹ Regard should always be had to the four general principles of the UN Convention on the Rights of the Child (UNCRC): articles 2, 3, 6 and 12.