

# **VULNERABLE WITNESSES (SCOTLAND) BILL**

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## **EXPLANATORY NOTES**

### **(AND OTHER ACCOMPANYING DOCUMENTS)**

#### **CONTENTS**

1. As required under Rule 9.3 of the Parliament's Standing Orders, the following documents are published to accompany the Vulnerable Witnesses (Scotland) Bill introduced in the Scottish Parliament on 23 June 2003:

- Explanatory Notes;
- a Financial Memorandum;
- an Executive Statement on legislative competence; and
- the Presiding Officer's Statement on legislative competence.

A Policy Memorandum is printed separately as SP Bill 5-PM.

## **EXPLANATORY NOTES**

### **INTRODUCTION**

2. These Explanatory Notes have been prepared by the Scottish Executive in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

### **THE BILL**

4. The Bill is in 3 parts.

5. Part 1 (Criminal Proceedings) deals with evidential and procedural matters for vulnerable witnesses giving evidence in criminal proceedings. The Criminal Procedure (Scotland) Act 1995 will be amended to define the categories of vulnerable witness and the special measures available. This part also provides for evidence of previous identifications and expert evidence regarding the subsequent behaviour of complainers to be admitted by the court in certain cases. A discretionary power is also introduced to prohibit the accused from personally conducting his own defence in cases involving vulnerable witnesses.

6. Part 2 (Civil Proceedings) deals with evidential and procedural matters for vulnerable witnesses in civil proceedings. The Bill also restricts the extent to which evidence can be led regarding the character and sexual history of a witness in referrals from the children's hearing system.

7. Part 3 (Miscellaneous and General) abolishes the competence test for all witnesses.

### **COMMENTARY ON SECTIONS**

#### **PART 1 – CRIMINAL PROCEEDINGS**

##### **Section 1 – Evidence of children and other vulnerable witnesses: special measures**

8. This section replaces section 271 of the Criminal Procedure (Scotland) Act 1995 with new sections 271 to 271N. These sections define “vulnerable witness” and set out the special measures available to these witnesses and the procedure to be followed in criminal proceedings to enable such measures to be used.

##### *Section 271 – Vulnerable witnesses: main definitions*

9. Subsection (1) defines a “vulnerable witness” as being:

*These documents relate to the Vulnerable Witnesses (Scotland) Bill (SP Bill 5) as introduced in the Scottish Parliament on 23 June 2003*

- a child (i.e. a person under 16 at the time the complaint or indictment is served on the accused); or
- an adult witness whose "quality of evidence" (as defined in subsection (4)) may be diminished either as a result of a mental disorder (as defined by section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003), or due to fear or distress of the witness associated with giving their evidence.

10. Subsection (2) sets out a range of factors, which must be taken into account by the court when it determines whether an adult witness is vulnerable.

11. Subsection (5) makes it clear that the provisions on vulnerable witnesses apply only to proceedings in the High Court and sheriff court, although the Bill confers a power on the Scottish Ministers by order to apply the provisions to proceedings in the district court (see section 271N).

*Section 271A – Child witnesses*

12. Subsection (1) entitles all child witnesses to give their evidence with the help of at least one special measure. Under subsections (2) and (13) the party calling the witness must submit a notice to the court and at the same time intimate it to the other parties at least 14 clear days before the trial, setting out which special measures the party considers to be the most appropriate. Where a child has expressed a view then details of the child's view must be included in the notice.

13. The court must consider the child witness notice within 7 days of the notice having been lodged. In the event that the court is satisfied with the special measure sought the court can make an order granting the use of that measure for the child witness giving evidence. This order can be made in the absence of the parties. Subsections (5) and (10) enable a hearing to be held in cases where the court is not satisfied and the parties are to be given an opportunity to address the court at this hearing. These hearings can be conjoined with an existing diet already set down for the case.

14. In the event that a child witness notice is not lodged in time the court also has power under subsections (7) and (8) to either order such a notice to be lodged or to arrange a diet to be held before the trial.

15. Subsections (5)(a)(ii) and (10)(b) enable the court to order that the child witness is to give evidence without the benefit of any special measure. Subsections (2)(b), (6)(b) and (11) however have the effect that such an order can be made in only two circumstances: if the child has expressed a wish to give evidence without any special measure and the court considers that appropriate, or if the use of a special measure would give rise to a significant risk of prejudice to the trial and that risk significantly outweighs any risk of prejudice to the interests of the child.

*Section 271B – Further special provision for child witnesses under the age of 12*

16. This section provides a general rule that children under 12 are to give evidence away from the court building in certain cases. These cases (listed in subsection (2)) involve offences

of a sexual or violent nature. This means that the special measures that would be appropriate in these cases would either be evidence on commission or a live television link to a remote location.

17. Subsection (3) creates the general rule and sets out two exceptions to it. The first exception is for cases where a child witness chooses to give evidence in court and it is considered appropriate by the court for the child to do so. The second exception would be where taking the child's evidence outwith the court would give rise to a significant risk of prejudice to the trial and that risk significantly outweighs any risk of prejudice to the interests of the child.

#### *Section 271C – Vulnerable witnesses other than child witnesses*

18. This section sets out the requirements associated with an application for special measures to help an adult vulnerable witness give their evidence.

19. Under subsections (2) and (9) the party calling the witness must submit an application to the court and at the same time intimate it to the other parties at least 14 clear days before the trial, setting out which special measures are most appropriate. Where the witness has expressed a view then details of the witness's view must be included in the application.

20. The court must consider the vulnerable witness application within 7 days of the application having been lodged. In the event that the court is satisfied that the witness is vulnerable and it is appropriate for them to use the special measure sought then the court can make an order granting the use of that measure for the vulnerable witness giving evidence. This order can be made in the absence of the parties. Subsections (5) and (6) enable a hearing to be held in cases where the court is not satisfied and the parties are to be given an opportunity to address the court at this hearing. These hearings can be conjoined with an existing diet already set down for the case.

21. The court in deciding whether to make an order granting the use of a special measure for the witness must also give consideration to a number of factors set out in subsection (7). These factors are:

- the possible effect on the witness if they are not allowed to use special measures;
- whether there is a chance that they will be more able to give their evidence with special measures than without; and
- the list of factors set out in the new section 271 (2).

22. Subsection (4) allows the court to accept an application which has been made late.

#### *Section 271D – Review of arrangements for vulnerable witnesses*

23. This section enables the court at any time, up to and including when a vulnerable witness is giving evidence in a trial, to review the arrangements for the taking of their evidence. The court may make an order regarding the arrangements at the request of the party who is calling the witness or of its own accord. Such an order may add a special measure, or substitute a special measure in the previous order for another special measure which is considered more appropriate. Where a previous order contains a combination of special measures, the number of measures to

be used can be reduced. An order that special measures may no longer be used can only be made in two types of instance. One is where the court is satisfied that it is appropriate to revoke the use of special measures where the witness does not wish to use them. Another is if the court is satisfied that there is a significant risk of prejudice to the fairness of the trial significantly outweighing the risk of prejudice to the witness.

24. Subsection (2)(b) allows the court to make an order for a special measure to be used by a vulnerable witness in circumstances where an order has not previously been made. In making such an order, the court must take into account the factors listed in section 271C(7).

*Section 271E – Vulnerable witnesses: supplementary provision*

25. Subsections (1) to (3) require the party calling the witness and the court in determining a special measures order to consider the best interests and views of the witness when deciding the special measure most appropriate for the purpose of taking the evidence. With regard to child witnesses the views of the child's parent are also to be considered unless that person is the accused.

26. This section ensures that children over 12 are presumed to be able to give a view and in the case of children under 12, the age and maturity of the child is to be considered in determining whether they can express a view on the special measures to be used. In the event that the views of the child and the parent differ, then the views of the child are to be given greater weight.

*Section 271F – The accused*

27. This section sets out the provisions for allowing an accused, if considered to be vulnerable, to give his or her evidence with the use of a special measure. The provisions of sections 271 to 271M will apply to the accused as a vulnerable witness, but with certain modifications.

28. Section 271 is modified for the accused by amending the factors to be taken into account under section 271(2) in determining vulnerability, including the fact that the accused is entitled to or will have legal representation. The accused is also not entitled to use screens as a special measure for the giving of his or her evidence.

29. In most cases it will not be known whether the accused is to give evidence until the last minute. The modifications made by this section ensure that special measures are considered for the accused in advance of the trial but on a contingent basis.

*Section 271G – Saving provision*

30. This section ensures that the existing common law powers to make or authorise special arrangements for vulnerable witnesses' evidence are not removed by the new sections 271A to 271F.

*Section 271H – The special measures*

31. Subsection (1)(a) to (e) lists the special measures that will be available to vulnerable witnesses to help them give their evidence. Subsection 1(f) confers on the Scottish Ministers a power to make provision for other special measures by way of statutory instrument.

*Section 271I – Taking of evidence by a commissioner*

32. This section enables evidence on commission to be used as a special measure for vulnerable witnesses. The court is empowered to appoint a commissioner to take the evidence of a vulnerable witness in advance of the trial.

33. The accused may only be present with the agreement of the commissioner but at least must be able to watch and listen by some means while the witness's evidence is taken e.g. by a live TV link.

*Section 271J – Live television link*

34. This section allows witnesses to give evidence by live TV link. Subsection (1) imposes a duty on the court to make suitable arrangements for the evidence of a vulnerable witness to be given from outside the court-room by a live television link. Subsection (2) allows for this to happen from either another part of the court building or any suitable place that can be identified away from the court building. Subsection (3) confirms that when a live link is used in these proceedings it will be treated as taking place in the presence of the accused.

35. Subsection (4) allows for the sheriff to transfer a case or part of a case in which it is intended that a live television link be used from a sheriff court that does not have either the suitable accommodation or equipment to another sheriff court within the same sheriffdom that does.

*Section 271K – Screens*

36. Subsection (1) provides for the use of screens when a vulnerable witness is giving evidence in a criminal trial. The purpose of the screen will be to conceal the accused from the sight of the vulnerable person whilst that witness is giving evidence.

37. Subsection (2) imposes a duty on the court to ensure that the accused is able to see and hear the witness giving evidence e.g. by way of a TV monitor that relays the image of the witness to the accused.

*Section 271L – Supporters*

38. This section allows for a person to be nominated by a vulnerable witness to accompany the witness into the court-room or the room where the witness is to give evidence by live TV link. The supporter can not be a witness in the trial. The supporter will not be allowed to prompt the witness while the vulnerable witness is giving their evidence in the case.

*Section 271M – Giving evidence in chief in the form of a prior statement*

39. Subsections (1) and (2) allow for a previous statement made by a vulnerable witness and which has been reliably recorded on video or in some other way to be used as their main evidence without the need for the witness having to adopt the statement.

40. Section 260 of the Criminal Procedure (Scotland) Act 1995 Act already allows prior statements to be admitted as evidence in criminal proceedings, but subsection (2) of section 260 requires that during the course of the proceedings the witness must confirm in court that the statement was made by him or herself and is adopted as evidence.

41. Subsection (3) of section 271M enables the provisions already contained in section 260 of the 1995 Act to also apply to statements lodged in evidence under this section, by making some minor modifications to section 260, principally to ensure that the witness does not have to adopt the statement.

*Section 271N – Application of sections 271 to 271M to proceedings in the district court*

42. This section confers on the Scottish Ministers a power to apply sections 271 to 271M with modifications to proceedings in the district court by way of statutory instrument.

**Section 2 – Consideration before the trial of matters relating to vulnerable witnesses**

43. This section imposes a duty on the court to consider at a hearing whether there are any vulnerable witnesses in the case. The court must fulfil this duty at an intermediate diet in sheriff summary proceedings, a first diet in sheriff solemn proceedings and at either a preliminary diet or the start of the trial diet in High Court proceedings.

**Section 3 – Evidence of vulnerable witnesses at proofs in relation to victim statements**

44. This section inserts a new section 15A into the Criminal Justice (Scotland) Act 2003 which applies the special measures provisions in sections 271 to 271M of the Criminal Procedure (Scotland) Act 1995 (as inserted by the Bill) to proofs ordered in relation to victim statements. Subsection (3) of the new section ensures that any witness who gives evidence using a special measure during the trial will also be able to use that special measure if they are giving evidence at any subsequent proof ordered in relation to a victim statement. A notice can be lodged or application made seeking the use at the proof of special measures for a vulnerable witness who has not previously used a special measure in the case.

**Section 4 – Evidence of identification prior to trial**

45. This section inserts a new section 281A into the Criminal Procedure (Scotland) Act 1995. Subsection (1) of the new section provides that if the witness has previously identified the accused in an identification procedure before the start of the trial, then there is no need for the witness to make a dock identification at the trial. A report is lodged instead naming the person the witness has identified in the procedure as the accused.

46. Subsection (2) of the new section states that a prosecutor has to serve a copy of the report and a notice on the accused, at least 14 clear days before the start of the trial, showing he or she intends to rely on this evidence in court. The accused has no more than 7 days after receiving the notice to say if he or she intends to challenge the report. In special circumstances the court may allow extra time for the accused to challenge the report.

### **Section 5 – Expert evidence as to subsequent behaviour of complainer**

47. This section inserts a new section 275C into the Criminal Procedure (Scotland) Act 1995 which enables certain expert evidence to be admitted in cases involving sexual offences as defined by section 288C of the 1995 Act (as inserted by the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002). This evidence may only be admitted for the purpose of explaining the behaviour of the victim of the offence to rebut any inference adverse to the credibility or reliability of the complainer which might otherwise be drawn from the behaviour.

48. Subsection (4) ensures that this provision does not restrict the use of expert evidence that can currently be admitted by the court.

### **Section 6 – Power to prohibit personal conduct of defence in cases involving vulnerable witnesses**

49. Section 6 inserts a new section 288E into the Criminal Procedure (Scotland) Act 1995. This section provides that a person may be prohibited from conducting their own defence in any case other than a sexual offence case (where there is already an automatic prohibition) if a vulnerable witness is giving evidence in the trial.

50. Subsection (2) enables the court to make an order prohibiting the accused from conducting their own defence where it is satisfied that this is in the interests of the vulnerable witness.

51. Subsection (3) prevents the court from making such an order where there is a significant risk of prejudice to the fairness of the trial, which outweighs any prejudice to the interests of the vulnerable witness which may arise from allowing the accused to conduct their own defence.

52. Subsection (5) provides that once the court has decided that a person will be prohibited from conducting their own defence the same procedure as set down in section 288D of the 1995 Act applies. That section provides for the appointment of a solicitor by the court for the accused.

## **PART 2 – CIVIL PROCEEDINGS**

### **Section 7 – Interpretation of this Part**

53. This section defines a vulnerable witness in any civil proceedings as being:

- a child (i.e. a person under the age of 16 at the commencement of proceedings); or
- an adult witness whose “quality of evidence” (as defined in subsection (4)) may be diminished either as a result of a mental disorder (as defined by section 328 of the

Mental Health (Care and Treatment) (Scotland) Act 2003), or due to fear or distress of the witness associated with giving their evidence.

54. Subsection (2) sets out a range of factors, which must be taken into account by the court when it determines whether an adult witness is vulnerable.

55. Subsection (5) defines civil proceedings to include referrals from children's hearings.

### **Section 8 – Orders authorising the use of special measures for vulnerable witnesses**

56. This section sets out the procedure for child witness notice and vulnerable witness applications in civil proceedings.

57. Subsections (1) to (3) specify the procedure for child witness notices. The party calling the child witness must lodge a notice outlining the special measures sought. The court is required to make an order authorising the use of the most appropriate special measure to enable the child witness to give their evidence or to make an order stating that the child witness will be giving their evidence without the benefit of a special measure. The latter order can only be made if either the child witness has expressed the wish not to use a special measure or the risk of prejudice to the fairness of the trial significantly outweighs the risk of prejudice to the interests of the child witness.

58. Subsections (4) to (6) give the court a power, on application by the party intending to call the witness, to authorise the use of a special measure for an adult vulnerable witness. Before making such an order for the most appropriate special measure the court must be satisfied that the witness is vulnerable. In reaching this decision the court must take into account a range of factors.

59. Subsection (6) sets out the range of factors which must be taken into account by the court when determining whether to make an order:

- the possible effect on the witness if they are not allowed to use special measures;
- whether there is a chance that they will be more able to give their evidence with special measures than without; and
- the list of factors set out in the section 7(2).

### **Section 9 – Review of arrangements for vulnerable witnesses**

60. This section enables the court at any time, up to and including when a vulnerable witness is giving evidence in a proof, to review the arrangements for the taking of their evidence. The court may make an order regarding the arrangements at the request of the party who is calling the witness or of its own accord. Such an order may add a special measure, or substitute a special measure in the previous order for another special measure which is considered more appropriate. Where a previous order contains a combination of special measures, the number of measures to be used can be reduced. An order that special measures may no longer be used can only be made in two types of instance. One is where the court is satisfied that it is appropriate to revoke the

use of special measures where the witness does not wish to use them. Another is if the court is satisfied that the risk of prejudice to the fairness of the proceedings significantly outweighs the risk of prejudice to the witness.

### **Section 10 – Procedure in connection with orders under sections 8 and 9**

61. This section provides for Rules of Court to be put in place for the procedure in connection with the making of orders for vulnerable witnesses.

### **Section 11 – Vulnerable witnesses: supplementary provision**

62. This section requires the party calling the witness and the court in determining an order to consider the best interests and views of the witness when deciding the special measure most appropriate for the purpose of taking the evidence. With regard to child witnesses the views of the child's parent are also to be considered.

63. Subsection (3) ensures that children over 12 are presumed to be able to give a view and in the case of children under 12, the age and maturity of the child is to be considered in determining whether they can express a view on the special measures to be used. In the event that the views of the child and the parent differ, then the views of the child are to be given greater weight.

### **Section 12 – Vulnerable witness: Crown application and saving provision**

64. Subsection (1) makes clear that the special measures provisions apply to the Crown as a party to civil proceedings.

65. Subsection (2) ensures that the existing common law powers to make or authorise special arrangements for vulnerable witnesses' evidence are not removed by sections 7 to 11.

### **Section 13 – The special measures**

66. Subsections (1)(a) to (d) list the special measures that will be available to vulnerable witnesses to help them give their evidence. Subsection 1(e) confers on the Scottish Ministers a power to make provision for other special measures by way of statutory instrument.

### **Section 14 – Taking of evidence by a commissioner**

67. This section enables evidence on commission to be used as a special measure for vulnerable witnesses. The court is empowered to appoint a commissioner to take the evidence of a vulnerable witness in advance of the proof or other hearing.

68. Parties to the proceedings may only be present with the agreement of the commissioner but at least must be able to watch and listen by some means while the witness's evidence is taken e.g. by a live TV link.

### **Section 15 – Live television link**

69. This section allows witnesses to give evidence by live TV link. Subsection (1) imposes a duty on the court to make suitable arrangements for the evidence of a vulnerable witness to be given from outside the courtroom by a live television link. Subsection (2) allows the sheriff to transfer a case in which it is intended that a live television link be used from a sheriff court that does not have either the suitable accommodation or equipment to another court in the same sheriffdom that does.

### **Section 16 – Screens**

70. Subsection (1) provides for the use of screens when a vulnerable witness is giving evidence in a civil proof. The purpose of the screen will be to conceal all parties from the sight of the vulnerable person whilst that witness is giving evidence.

71. Subsection (2) imposes a duty on the court to ensure that the parties who are screened from the witness are able to see and hear the witness giving evidence e.g. by way of a TV monitor that relays the image of the witness to the accused.

### **Section 17 – Supporters**

72. This section allows for a person to be nominated by a vulnerable witness to accompany the witness into the courtroom or the room where the witness is to give evidence by live TV link. The supporter can not be a witness in the trial. The supporter will not be allowed to prompt the witness while the vulnerable witness is giving their evidence in the case.

### **Section 18 – Establishment of grounds of referral to children’s hearings: restrictions on evidence**

73. This section inserts 2 new sections into the Children (Scotland) Act 1995.

#### *Section 68A – Restrictions on evidence in certain cases involving sexual abuse*

74. This new section creates a general rule that evidence or questioning with reference to character and sexual behaviour is not admissible in children’s referrals. The prohibition applies to the child who is the subject of the referral or any other witness in respect of whom the evidence is to be admitted.

#### *Section 68B – Exceptions to restrictions under section 68A*

75. Subsection (1) allows a hearing to be held where an application has been made to admit evidence which would fall within the general restriction. The court can admit this evidence if satisfied that it comes within the factors set out in paragraphs (a) to (c).

76. Subsection (2) of the new section requires the court to take account of the need to protect the privacy and dignity of the witness in determining whether to admit this type of evidence.

## **PART 3 – MISCELLANEOUS AND GENERAL**

### **Section 19 – Abolition of the competence test for witnesses in criminal and civil proceedings**

77. This section prohibits the use of the “competence test” in criminal and civil proceedings. The court is no longer entitled to ask preliminary questions of the witness regarding whether the witness understands the difference between truth and lies and the duty to give truthful evidence.

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## **FINANCIAL MEMORANDUM**

### **INTRODUCTION**

78. The provisions in the Bill will increase the range of statutory special measures, and allow more people to use them when giving their evidence. The costs will come from additional work associated with applying for and making arrangements for special measures, and using special measures, including providing appropriate facilities such as live television links, and facilities for recording on video the statements of vulnerable witnesses.

79. Of particular financial relevance is the fact that more witnesses will give their evidence from outwith the court building, by way of a live television link, or by video recorded evidence on commission. There will be a presumption that a child witness under 12 who has to give evidence in a sexual or violent case will give his or her evidence by one of these methods.

80. The costs on the Scottish Administration associated with these provisions will fall mainly on the Crown Office and Procurator Fiscal Service, the Scottish Court Service, legal aid, judicial salaries and the Scottish Children’s Reporter’s Administration. There will also be some additional costs for the police and local authorities, and individuals in civil cases.

### **CALCULATING THE NUMBER OF VULNERABLE WITNESSES**

81. In order to estimate the costs it is necessary to estimate the number of vulnerable witnesses who are cited to give evidence, and those who then go on to actually give their evidence. There are no figures currently available which detail exactly the number of child or other vulnerable witnesses.

#### **Child witnesses**

82. To try to estimate the number of child witnesses, the Executive has drawn on a detailed research study on numbers of child witnesses in the High Court, Crown Office figures on the numbers of cases each year, and figures from the Witness Service database, which records the age of the witness to whom a service is being provided.

83. The Witness Service figures by their very nature under-estimate the numbers of child witnesses, since not all witnesses use the service. For the purposes of calculating child witness

figures for this memorandum, the database has only been used where it gives a higher number of child witnesses than calculated elsewhere.

84. In criminal proceedings the Executive has estimated that there are around 6700 child witnesses cited to give evidence each year, of whom around 2000 will go on to give their evidence.

85. Child witnesses under 12 in sexual and violent cases will automatically give their evidence away from the court building, either by evidence on commission or a remote live television link. These measures will be more expensive, so the likely uptake of these measures and the likely costs have been estimated separately. Using the child witness research, and Executive statistics on numbers of sexual or violent cases, the Executive estimates that there may be 250 uses each year of evidence on commission, and 400 uses of remote live television link.

### **Adult vulnerable witnesses**

86. The Bill widens the definition of vulnerable witness and there is therefore likely to be more widespread use of special measures than at present, but it is very difficult to predict with accuracy what the level of increase in demand will be.

87. The Executive has drawn on two sources of information to estimate the number. The Home Office has supplied some figures for England and Wales, and in particular for Merseyside, where they are piloting similar provisions to those contained in the Bill. Information has also been obtained from the Witness Service database, which records information such as disability, ethnicity, age, the nature of the case, and any referring agency (social work departments, the police, voluntary sector organisations such as Women's Aid etc.).

88. Home Office calculations for England and Wales estimate that overall there could be vulnerable witnesses in around 5% of cases. The Witness Service database supports this 5% headline figure, and breaks it down to 12% of High Court cases, 7% of sheriff solemn cases and 4% of sheriff summary cases.

89. Using these figures results in an estimate of 150 adult vulnerable witnesses each year in the High Court, of whom 50 will go on to give their evidence, 370 vulnerable witnesses each year in sheriff solemn proceedings of whom 175 will go on to give their evidence, and 1500 vulnerable witnesses each year in sheriff summary proceedings of whom 400 will go on to give their evidence.

### **Civil proceedings**

90. There will be relatively few vulnerable witnesses in civil proceedings, largely due to the nature of many civil proceedings (such as small claims disputes) and the fact that very few cases go to proof. The Executive still estimates that there will be vulnerable witnesses in civil proceedings, for example witnesses with a mental disorder, or intimidated witnesses in family proceedings. The Executive estimates that there could be around 230 actions each year involving vulnerable witnesses which proceed to proof.

## **COSTS ON THE CROWN OFFICE AND PROCURATOR FISCAL SERVICE**

91. The main costs on the Crown Office and Procurator Fiscal Service (COPFS) are expected to be additional staff costs arising from preparing applications and notices for special measures, and attending hearings required to deal with these, as it is expected that the vast majority of vulnerable witnesses will be called by the Crown. There will also be staff costs and outlays associated with the use of certain special measures.

### **Applications and notices for special measures**

#### *Preparing applications and notices*

92. COPFS estimate that the preparation of a notice or application for special measures in the High Court will cost around £146 per witness. In addition reports (such as psychiatric reports) to support vulnerable witness applications or notices may have to be commissioned at an estimated cost of £300 each. If there are 300 child witnesses and 150 adult vulnerable witnesses in the High Court each year the total would be around £200,000 each year.

93. In sheriff and jury cases the preparation of a notice or application for special measures is estimated to cost around £89 per witness, and again expert reports may be needed for all child witnesses and half of all adult vulnerable witnesses at a cost of £300 each. If there are 450 child witnesses and 370 adult vulnerable witnesses this would give a total cost of around £263,500 each year.

94. In sheriff summary cases the preparation of a notice or application for special measures is estimated to cost around £79 per witness, and expert reports may be needed for around a quarter of all vulnerable witnesses at a cost of £300 each. If there are 6000 child witnesses and 1500 adult vulnerable witnesses this would give a total cost of around £1,155,000 each year.

95. COPFS estimate their total additional staff costs and outlays associated with applying for special measures as about **£1.62 million** per year.

96. COPFS have also estimated that there will be a one off cost of **£50,000** to build a vulnerable witness tracking system into their existing IT facilities.

#### *Hearing applications*

97. A hearing will not be necessary for the court to deal with an application or notice, but for the purpose of costing the Bill it has been assumed that the court may wish to hear evidence in around 2000 applications or notices each year, perhaps in 150 High Court cases, 350 Sheriff solemn cases and 1500 summary cases. In practice such a hearing may be a separate hearing, or (as is more likely to be the case) part of an initial hearing such as an intermediate diet. Either way there will be additional work to do for those involved.

98. Assuming the average hearing lasts half an hour and allowing time for preparation and follow up work, COPFS estimate that this will cost £180 in a High Court case, and £53 in a sheriff court case. This results in a total cost of attending hearings of around **£130,000** per year.

## **Using special measures**

99. There will also be additional costs to COPFS associated with the use of certain special measures, such as evidence on commission, live television links to remote locations and the use of prior video-recorded statements. These measures will be used mainly for children under 12 in sexual or violent cases, but will also be appropriate for some older child witnesses and adult witnesses, especially victims of sexual abuse or intimidation.

### *Evidence on commission*

100. The Executive estimates that there may be 250 uses of evidence on commission each year and 400 uses of live television link to a remote location.

101. It is assumed that the costs will be met by the COPFS, as the party most likely to be calling the vulnerable witness. If 200 of the commissions each year are in High Court cases COPFS estimate the cost at £200,000 for their own staff costs, and £164,000 for the commissioners. If there are 50 Sheriff court cases a year, COPFS staff costs will be around £12,500, and £31,000 for the commissioners.

102. In addition there will be costs associated with having an operator set up and use the recording equipment for the commission. This will cost £75 per commission, giving a total cost of £18,750 a year.

103. This combines to give a total of around **£426,000** each year.

### *Remote television link*

104. The estimated cost to COPFS associated with the use of live television link to a remote location is **£10,000** a year for the connection time.

### *Prior video-recorded statements*

105. It is difficult to know exactly how many prior statements will be recorded and used. COPFS have suggested that it might be the norm for all young witnesses (those under 12), other child witnesses who are victims of sexual or violent abuse, and adults in serious sexual abuse cases. As mentioned above (see paragraph 99) there may be others such as domestic abuse victims for whom such measures are appropriate.

106. The Executive estimates that there could be 1550 under 12s across the different proceedings, and around 750 other vulnerable witnesses of the kind mentioned above. This combines to give an estimated total of up to 2300 prior recorded statements a year.

107. If each interview lasts for around 2 hours (COPFS estimate) and the cost of transcribing them is around £100 per hour this gives a total cost of around **£500,000** each year.

## **Total costs for COPFS**

108. Overall, COPFS estimate that the total additional costs to them arising from full implementation of the Bill's provisions would be around **£2.686 million** per year.

## **COSTS ON THE SCOTTISH COURT SERVICE AND JUDICIAL SALARIES**

109. The Bill's provisions will result in both capital costs to the Scottish Court Service and recurring costs to the Scottish Court Service and Judicial Salaries.

### **Capital equipment costs**

110. There will be capital costs for the equipment of buildings with the necessary facilities in terms of technology and refurbished rooms. Currently, nine of the 52 courts are equipped with CCTV. There may need to be a further modest provision for improved CCTV evidence in a number of key court locations, to which cases involving child witnesses could be directed. Ten courthouses could be equipped at a cost of £55,000 each. The total capital cost to the Scottish Court Service resulting from the provisions of the Bill is therefore estimated at **£550,000**.

### **Considering notices and applications for special measures**

111. Notices and applications are to be considered in chambers by the judge and in the absence of parties. There could be nearly 9000 notices and applications each year (6,700 notices, 2020 applications). Scottish Court Service estimate that each notice or application could take on average 15 minutes to consider in chambers. 9,000 would equate to approximately 2.5 full-time equivalents. This would add **£246,000** per annum to judicial salaries.

### **Hearing applications for special measures**

112. The main recurring costs will arise if there is an increased number of hearings required to deal with applications for special measures. Estimates have been based on the assumption that in the majority of cases involving vulnerable witnesses, applications will be made at an early stage in the proceedings, so a separate hearing for consideration of special measures may be required.

113. As mentioned in paragraph 97 there may be around 2000 such hearings needed each year.

114. The Scottish Court Service has estimated that on average the cost of such a hearing (assuming the average hearing lasts half an hour) would be £200, which includes the cost of the judge, clerks and any administrative support required. 77% (£154) of this cost is judicial salaries and the rest (£46) is court costs. If there are 2000 hearings each year in criminal cases this will cost **£308,000** a year to judicial salaries, and **£92,000** a year to the Scottish Court Service. There could also be hearings in 230 civil cases, costing **£35,000** a year to judicial salaries, and **£11,000** a year to the Scottish Court Service. There could also be hearings in 200 children's referrals hearings, costing **£31,000** a year to judicial salaries, and **£9,000** a year to the Scottish Court Service.

## **Using special measures**

115. There will also be costs associated with the use of special measures. Whilst special measures used in the court itself such as screens, live television link to another room, or a supporter will not represent any additional cost to the Scottish Court Service, measures such as evidence on commission and live television links to remote locations will. In such cases the party calling the witness will pay for the special measure in question, but the court may require an official to be at the remote location. The estimated additional cost to the Scottish Court Service is around **£14,000** each year for evidence on commission, and **£28,000** a year for live television links.

## **Total costs on the Scottish Court Service and judicial salaries**

116. These figures combine to give total additional recurring costs of £774,000, of which **£620,000** will be Judicial Salaries, and **£154,000** will fall to the Scottish Court Service.

## **COSTS OF LEGAL AID**

### **Hearings regarding special measures**

117. The main cost to legal aid arises from the increased number of hearings relating to applications for special measures. Estimates have been based on the assumption that in the majority of cases applications will be made at an early stage in the proceedings, so a separate hearing for consideration of special measures may be required.

118. Hearings in summary cases will be covered by the fixed payments system. It is anticipated that a relatively small percentage of summary cases will involve vulnerable witnesses and thus the extra costs will be minimal.

119. In High Court cases defence counsel will be present at any hearing, resulting in costs of £500 per hearing, assuming that all accused are eligible for legal aid. There will also be preparatory work done by the defence solicitor, estimated at £50. If there are 150 hearings each year in the High Court, this would result in additional costs to legal aid of around £82,500 each year.

120. For solemn cases in the Sheriff Court, it is assumed that counsel would not normally need to appear and the solicitor will appear at any hearing. If there are 350 such cases, it is estimated that the cost would be about £50 per hearing, with a total cost of £17,500 per annum.

121. This gives a total cost associated with hearings regarding special measures to legal aid of **£100,000** per annum.

### **Special measures**

122. It is assumed that in the vast majority of criminal cases, vulnerable witness will be called by the Crown, and they will therefore meet associated costs. However, for evidence on

commission, defence counsel will be present. The estimated cost for such attendance is £500 per commission. If the uptake is 250 per year this will cost legal aid around **£125,000** a year.

### **Civil cases**

123. Parties will have to pay for special measures in civil cases, although where legal aid is involved, in effect the legal aid fund would bear the costs. The Scottish Legal Aid Board's good track record in supporting successful cases means that in practice much of the cost may be recovered from judicial expenses. It is therefore estimated that the additional the legal aid costs in civil cases will be marginal.

### **Total costs of legal aid**

124. Overall, the additional burden on the Legal Aid fund resulting from implementation of the Bill's provisions is estimated to be **£225,000** each year.

### **COSTS ON THE SCOTTISH CHILDREN'S REPORTER ADMINISTRATION**

125. Last year around 2000 cases were referred from the children's hearing system to the Sheriff Court, and evidence was heard in 600 of these.

126. Potentially special measures could be considered in each of the 2000 cases. However, given the more informal nature of the proceedings, it is estimated that there may only need to be an additional 200 hearings to deal with special measures.

127. The SCRA has estimated that implementation of the Bill's provisions would result in additional staff costs in respect of making applications and arrangements for special measures totalling around **£200,000** per year.

### **COSTS ON THE POLICE**

128. Costs on the police are dealt with in the section below on local authorities. Police and social workers frequently conduct interviews with vulnerable witnesses jointly, and so costs such as training, and providing appropriate facilities will be met jointly with key partners.

### **COSTS ON LOCAL AUTHORITIES**

129. Police officers and social workers will be required to conduct and record video interviews, which may then be used as a vulnerable witness's main evidence.

130. Suitable locations will have to be identified and rooms equipped with the necessary technology. In practice, the locations of such rooms may vary across Scotland. In England a variety of Court Service buildings, police stations, hospitals and other health centres, and local authority social work premises are used. Multi-agency teams will need to identify the most suitable locations in their areas. The Executive estimates that 30 such rooms across Scotland may need to be equipped. Suitable video equipment would cost £7000 per room, giving a total capital cost of £210,000.

131. There will also need to be extra rooms which can be joined via a live television link to court buildings. Fitting such rooms will cost around £20,000 per room. If 10 are equipped around Scotland then this will cost £200,000.

132. There will be a maintenance cost associated with the new equipment. Typically a maintenance contract can cost 15% of the capital outlay per year. This would be around **£30,000** a year for the live television link equipment, and **£30,000** a year for recording equipment, a total of £60,000 per year once all the equipment has been purchased.

133. There is also scope to join up with work led by other Executive departments and agencies elsewhere requiring similar facilities. Whilst the funding set out above will meet the requirements in terms of hours of need, by sharing resources as appropriate it will be possible to maximise the geographic spread of facilities.

134. There will also be training costs. The Executive estimates this at £200,000 to develop and provide initial training programmes to existing staff. Future costs could be absorbed into regular training programmes.

135. This gives a total of **£610,000** as an initial non-recurring cost to local authorities of implementing the provisions of the Bill, and a recurring cost of **£60,000** per annum.

## **COSTS TO OTHER BODIES, INDIVIDUALS AND BUSINESSES**

136. There will be some cost to individuals calling vulnerable witnesses in civil cases. As discussed above, many of these costs will in practice be met by the legal aid fund. The expected small numbers of civil cases means that this will impact on very few individuals, although theoretically up to around 200 people a year who are not eligible for legal aid will have to pay for special measures. These will be people who have not been granted legal aid. The cost will be related to the measure applied for. It is not anticipated that there will be a charge for measures which involve the use of existing court facilities such as screens, or live television link.

## **MARGINS OF UNCERTAINTY IN ESTIMATES**

### **Witness numbers**

137. The methods of calculation of numbers of witnesses who will be able to benefit from the provisions in the Bill are explained in paragraphs 81 to 90 above and those uncertainties should be borne in mind when considering the resulting cost calculations.

### **Costs and level of uptake of new provisions**

138. In calculating the likely financial impact of the Bill, the Executive has proceeded on the basis of anticipating a high level of uptake. However, the figure on the numbers of eligible witnesses is an estimate, as is the predicted uptake of the more expensive special measures, especially for the early years of implementation when the routine use of special measures for vulnerable witnesses will still represent a change from normal practice. Some applications for

special measures may be rejected, or indeed some potentially vulnerable witnesses may choose to give their evidence in the normal way in open court.

139. Applications are already made for special measures, mainly for child witnesses, in some cases each year. Because no accurate figures are currently kept of the numbers of such applications, this memorandum has costed the total work associated with special measures, rather than assessing the level of additional work implementation of the Bill's provisions would involve. If predictions about numbers of eligible witnesses and uptake of special measures are borne out it is likely that overall additional costs may be less than are estimated here.

140. The Executive also hopes that in practice, a hearing to decide the matter of special measures will not be necessary in as many cases as has been estimated, and that in many cases the court will be able to reach a conclusion that the special measures applied for are appropriate as a paper exercise on the basis of the written notice or application lodged. In addition, it may not be necessary in practice for specialist reports to be supplied with every notice or application, especially for children, who will have an automatic entitlement to special measures. These may be required more frequently initially, but the Executive hopes that over time the use of special measures for child witnesses will become more routine and decisions to award certain special measures will be made without the need for as many hearings or specialist reports. The numbers of hearings assumed to be required and the costs associated with them may accordingly be over-estimated. The Executive has erred on the side of caution since it is not possible to know how many (if any) applications will be granted without hearings or to what extent specialist reports will in practice be required by the court. Much will depend on the approach taken in practice by the court and by the parties to cases.

## **OVERLAP WITH OTHER DEVELOPMENTS**

141. The Bill has been costed on a stand-alone basis. In reality some of the costs attributed to it may be offset against spending which may result from other ongoing and prospective changes to court practices and procedures. Some of the changes which the Bill's provisions will bring about will have benefits in other areas, and developments in other areas may result in savings in costs which have been attributed to this Bill. For example, the increasing use in the courts generally of modern technology will assist in the presentation of all kinds of evidence, not just that of children and other vulnerable witnesses. The changes in High Court procedures recommended by Lord Bonyon, on which legislation is also proposed in 2003-04, will, if implemented, ensure that the great majority of preliminary procedural matters would be dealt with at a hearing on a set date before the trial. This would obviate the need for a special hearing to be set to deal with arrangements for vulnerable witnesses and mean that the costs attributable directly to this Bill would be reduced.

142. For child witnesses, a specialised child witness service, again currently the subject of consultation, might support the process of assessment and application for special measures and result in some decrease of the costs falling on COPFS.

## **TIMESCALES OVER WHICH COSTS ARE EXPECTED TO ARISE**

143. Assuming that the Bill receives Royal Assent during the first Parliamentary year of the current Parliamentary session, it is anticipated that implementation could start early in 2005,

taking account of the time needed for the courts to make the necessary changes to procedure rules by way of Acts of Adjournal (criminal) and Sederunt (civil). While the Executive wishes to see provisions benefiting vulnerable witnesses brought into effect as soon as practicable, it may be appropriate to dovetail such changes with others (such as the proposed reform of High Court procedures), to ensure maximum effectiveness.

144. Plans for implementation will be developed by the Executive in partnership with all stakeholders. Implementation will involve developing radically new ways of working for many people and the Executive envisages that implementation will best be phased, to allow for piloting of new methods and rolling-out of training within the agencies involved.

145. All the costs given in this memorandum assume full implementation. The Executive considers that phasing of implementation will allow it to meet such costs of the Bill as arise up to April 2006 from within existing resources. The main capital costs arising during the implementation phase (i.e. principally those falling on the Scottish Court Service and on local authorities) could be spread over a number of years, by making use initially of existing resources, with additional facilities being developed as capital budgets of the implementation partners allow.

146. As regards recurring costs, it will take time for new procedures to bed in and for staff to be trained. Implementation could be phased in a variety of ways and it is unlikely that the full revenue costs for each agency would need to be incurred in the first year of the provisions having effect. It is therefore expected that such costs as arise up to April 2006 will be able to be absorbed within current spending plans.

147. Costs arising from April 2006, both capital and recurring will be taken account of in budget allocations following the next spending review.

*These documents relate to the Vulnerable Witnesses (Scotland) Bill (SP Bill 5) as introduced in the Scottish Parliament on 23 June 2003*

**SUMMARY OF ANNUAL RUNNING COSTS (ASSUMING FULL IMPLEMENTATION)\***

<b>Special measure</b>	<b>Scottish Court Service</b>	<b>Judicial salaries</b>	<b>COPFS</b>	<b>Legal aid</b>	<b>SCRA</b>	<b>Local authority costs**</b>	<b>Total</b>
Applications/ notices (pre- hearing) (criminal)	-	£246,000	£1.62 million	-	-	-	£1.866 million
Applications/ notices (hearing) (criminal)	£92,000	£308,000	£130,000	£100,000	-	-	£630,000
Applications (civil)	£11,000	£35,000	-	-	-	-	£46,000
Applications (children's referrals)	£9,000	£31,000	-	-	£200,000	-	£240,000
Prior video evidence	-	-	£500,000	-	-	£30,000**	£0.53 million
Evidence on commission	£14,000	-	£426,000	£125,000	-	-	£565,000
CCTV	£28,000	-	£10,000	-	-	£30,000**	£68,000
<b>Total</b>	<b>£154,000</b>	<b>£620,000</b>	<b>£2.686 million</b>	<b>£225,000</b>	<b>£200,000</b>	<b>£60,000**</b>	<b>£3.95 million</b>

\*Figures used in these summary tables refer to figures highlighted in **bold** throughout the financial memorandum.

\*\*These are costs associated with the maintenance of new equipment such as video recording facilities and live television links. In practice these facilities could be housed in a range of different premises, not all of which will be local authority owned.

**SUMMARY OF ONE-OFF COSTS**

Scottish Court Service	£550,000
COPFS	£50,000
Police and local authorities	£610,000
<b>Total</b>	<b>£1.2 million</b>

## **EXECUTIVE STATEMENT ON LEGISLATIVE COMPETENCE**

148. On 19 June 2003, the Minister for Justice (Cathy Jamieson) made the following statement:

“In my view, the provisions of the Vulnerable Witnesses (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

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## **PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE**

149. On 20 June 2003, the Presiding Officer (Mr George Reid) made the following statement:

“In my view, the provisions of the Vulnerable Witnesses (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

*These documents relate to the Vulnerable Witnesses (Scotland) Bill (SP Bill 5) as introduced in the Scottish Parliament on 23 June 2003*

# **VULNERABLE WITNESSES (SCOTLAND) BILL**

## **EXPLANATORY NOTES (AND OTHER ACCOMPANYING DOCUMENTS)**

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