POLICY NOTE

THE JUSTICE OF THE PEACE COURTS (SPECIAL MEASURES) (SCOTLAND) ORDER 2015

SSI 2015/…….

1. The above instrument was made in exercise of the powers conferred by section 288G(1) of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act"). The instrument is subject to the affirmative procedure in terms of section 288G(3) of the 1995 Act.

Policy Objectives

2. The Vulnerable Witnesses (Scotland) Act 2004 ("the 2004 Act") makes provision for various measures to support vulnerable witnesses in criminal (by inserting provisions into the 1995 Act) and civil court proceedings. These are known as "special measures" and include enabling vulnerable witnesses to give evidence from behind a screen to prevent them seeing the accused, and giving evidence remotely by video link. These measures have been subject to recent amendment through the Victims and Witnesses (Scotland) Act 2014 ("the 2014 Act"), primarily to provide certain categories of vulnerable witness with more routine access to those measures.

3. In criminal court proceedings, special measures are currently available in the High and sheriff courts. The policy objective of this instrument is to make special measures available in the Justice of the Peace ("JP") courts, utilising the order-making power in section 288G of the 1995 Act. Section 288G provides that sections 271 to 271M, 288E and 288F of the 1995 Act may be applied to proceedings in the JP courts, with such modification as may be specified.

4. During the passage of the Vulnerable Witnesses (Scotland) Bill in 2003-4, the Scottish Executive set out two reasons why it considered that extending special measures to the then district courts was not considered necessary at that time. This was, firstly, due to the need for extension not having been demonstrated and, secondly, the future of district courts being unclear pending the outcome of the review of summary justice being carried out by Sheriff Principal McInnes ("the McInnes Review") at that time.

5. As a result of the recommendations of the McInnes review, district courts were abolished and JP courts created as part of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007. As part of that process, the JP courts were unified so that responsibility for same came under the auspices of the then Scottish Court Service ("SCS") with the process of unification being completed in February 2010. As a result of unification and the recent court reforms, there are now 34 JP courts in Scotland. Of that number, four are stand-alone facilities in that they occupy their own court building.

6. With the uncertainty of the district courts resolved, the implementation of the 2014 Act progressing, and Scotland's compliance with the European Directive 2012/29/EU of 25 October 2012 on *establishing minimum standards on the rights, support and protection of victims of crime* ("the Directive") at the fore, it is now considered both necessary and desirable to make vulnerable witness provisions available in the JP courts, under the provisions of section 288G of the 1995 Act. In terms of Directive compliance, Article 23 requires that certain protective measures be available to vulnerable witnesses across the court system – and while the current system of special measures in the High and sheriff courts goes beyond these requirements, provision in the JP courts is currently lacking. While the full special measures regime need not be applied to the JP courts to ensure compliance with the Directive, it is considered appropriate that the same special measures are available in the JP courts, for the purposes of consistency and for the effective operation of special measures across the entire justice system. The provision of special measures in the JP courts will ensure that victims and witnesses can expect the same level of support when giving their evidence, regardless of the type of court proceedings.

Special Measures availability – application of sections 271 to 271M, 288E and 288F

7. Article 3(1) makes provision for sections 271 to 271M of the 1995 Act to apply to proceedings in the JP courts, subject to certain modifications for those provisions to operate effectively. The effect of Article 3(1) is to apply the current provisions relating to child witnesses and vulnerable witnesses to the JP courts as they currently apply in the High and sheriff courts. Since 2004, the demand for the use of special measures has increased significantly[1], and for the purposes of consistency with the High and sheriff courts, it was considered that the full range of provisions in relation to vulnerable witnesses should be applied in the JP courts.

8. Article 3, paragraphs (2) to (4) make certain modifications to sections 271(5), 271I(8) and 271J(4) of the 1995 Act so they can be applied to JP courts. These modifications only apply in the application of these sections to proceedings in the JP courts – sections 271 to 271M remain unchanged in their application to proceedings in the High Court or sheriff court. The modifications include adding a reference to the JP courts into the definitions of "court", and "hearings in relevant criminal proceedings". Article 3(2) modifies section 271I(8) so that, in proceedings in the JP court, where evidence is to be taken by a commissioner under section 271I of the 1995 Act, the commissioner shall be a justice of the peace. Article 3(3) modifies section 271J so that proceedings can be transferred to another JP court where there is a lack of accommodation or availability of equipment.

9. Article 4 of the instrument extends section 288E of the 1995 Act, which sets out a prohibition on the accused person conducting his or her own defence in certain cases involving child witnesses under the age of 12, to the JP court. A number of modifications

[1] Scottish Court Service Evidence and Procedure Review Report March 2015: http://www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/reports-data/evidence-and-procedure-full-report---publication-version-pdf.pdf?sfvrsn=2

are made to section 288E of the 1995 Act in order to ensure that those provisions can operate efficiently in the JP courts. It is considered unlikely that such circumstances will arise in the JP court, given the nature of the offences covered by that section (see subsection (3)), together with the restrictions on prosecutions in the JP court in terms of section 7 of the 1995 Act which sets out certain offences which cannot be tried in the JP courts (such as murder, culpable homicide, robbery, theft by housebreaking, theft or reset amongst others). However, as section 288E incorporates reference to child witnesses procedure, it is considered necessary to apply that section, with modifications, to the JP court to cater for the event that the provisions require to be utilised.

10. Similarly, Article 5 of the instrument extends section 288F of the 1995 Act, which sets out a prohibition on the accused person conducting his or her own defence in certain cases involving vulnerable witnesses, to the JP court. Again, a number of modifications are made to section 288F in order to ensure that those provisions can operate efficiently in the JP courts.

11. Section 288C of the 1995 Act prohibits an accused charged with a sexual offence, or in certain circumstances an offence with a substantial sexual element, from conducting his or her own defence in evidential hearings. Section 288D of the 1995 Act sets out the court's function in appointing a solicitor to represent an accused who is prohibited from conducting his or her own defence under section 288C but has not instructed a solicitor. Sections 288E(4) and 288F(5) of the 1995 Act extend section 288D so that it operates to allow the court to appoint a solicitor for an accused who is prohibited from conducting his or her own defence under sections 288E and 288F and has not instructed a solicitor.

12. Article 4(2)(b) of the instrument modifies section 288E(4) so that, in applying section 288D to the proceedings referred to in section 288E, it applies section 288D to relevant proceedings in the JP Courts. This means that, where proceedings are raised in the JP court for an offence specified in section 288E(3) of the 1995 Act (as modified by this instrument), and there is a child witness under the age of 12, if the court is satisfied that the accused does not have a solicitor, the court must appoint a solicitor for the accused.

13. Similarly, Article 5(2)(b) of the instrument modifies section 288F(5) so that in applying section 288D to the proceedings referred to in section 288E, it applies section 288D to relevant proceedings in the JP Courts. This means that, where the JP court has ordered under section 288F(2) of the 1995 Act that the accused cannot conduct his or her own defence in cases where there is a vulnerable witness (other than a child witness under 12), and the court is satisfied that the accused does not have a solicitor, the court must appoint a solicitor for the accused.

Commencement and Transitional provisions

14. Article 1(2) provides that the instrument comes into force only in relation to criminal proceedings commenced on or after the coming into force of this instrument. The

commencement of proceedings is defined at Article 1(3) as the day on which a report of the case has been received by the procurator fiscal.

Approach to commencement

15. The commencement and transitional provisions set out at paragraph 14 of this policy note are to enable commencement of sections 271 to 271M, 288E and 288F of the 1995 Act to take place effectively, as to apply the provisions of these sections to on-going cases would create significant operational difficulties for those organisations responsible for the fair and effective operation of the criminal justice system. Furthermore, the approach to commencement is consistent with the approach taken in relation to the original commencement of sections 271 to 271M (as amended or inserted by the 2004 Act), and the amendment of those provisions by the 2014 Act (which came into force on 1 September 2015) in respect of the High and sheriff courts.

Consultation

16. The Scottish Government has consulted with the Scottish Courts and Tribunals Service, Crown Office and Procurator Fiscal Service and Police Scotland in the development of the instrument.

17. The Scottish Government has also consulted other key stakeholders, including the Lord President's office and the Criminal Courts Rules Council. It will continue to engage with stakeholders to monitor the introduction and the impact and benefit of special measures in the JP courts to inform future policy development in this area.

Impact Assessments

Equality Impact Assessment ("EQIA")

18. The provisions of the 2004 Act have already been subject to assessments on the effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development etc. which were carried out for the purposes of the Vulnerable Witnesses Bill. The results of those impact assessments are more fully set out in the policy memorandum to the Bill and can be found on the Scottish Parliament website at:

    http://www.scottish.parliament.uk/parliamentarybusiness/Bills/25102.aspx.

19. An EQIA was carried out for the purposes of the Victims and Witnesses (Scotland) Bill, and it was determined that the Bill would be unlikely to have any significant differential effect on the protected characteristics, in terms of the Equality Act 2010. The results of the EQIA were published on the Scottish Government website.

20. As this instrument applies provisions which are already operating in the High and sheriff courts to the JP courts, and which provisions have already been subject to significant assessment, the Scottish Government, having carried out an EQIA screening exercise for the purposes of this instrument, does not consider that a further EQIA is required.

Privacy Impact Assessment ("PIA")

21. The provisions of sections 271 to 271M of the 1995 Act relating to special measures for child and vulnerable witnesses are currently in operation in the High and sheriff courts. The instrument extends those provisions to the JP courts which will broadly handle the same personal data as is currently handled in the High and sheriff courts in respect of applications for special measures for child witnesses and vulnerable witnesses. The only factor identified as new was the introduction of Justices of the Peace ("JPs"), and their consideration of child witness notices and vulnerable witness applications for special measures. However, no potential privacy impacts could be identified on the basis that JPs are part of the Judiciary, and are subject to the same training around information handling, and the statutory provisions relating to data handling. The results of the PIA will be published on the Scottish Government's website

Children's Rights and Wellbeing Impact Assessment ("CRWIA")

22. A CRWIA was carried out for the purposes of the instrument, but was limited in scope to children giving evidence in criminal proceedings. The CRWIA identified no negative impacts for the provisions in the instrument, which are considered to deliver better outcomes for all child victims and witnesses under 18 years who are required to give evidence in court. The results of the CRWIA will be published on the Scottish Government's website.

Strategic Environmental Assessment ("SEA")

23. In terms of SEA and the Scottish Government's statutory obligations under the Environmental Assessment (Scotland) Act 2005, it is considered that the Order is likely to have no or minimal effects on the environment and can be exempted under Section 7 of the 2005 Act. A pre-screening notification has therefore been submitted to the Consultation Authorities, which once processed will be added to the SEA Database.

Business Regulatory Impact Assessment ("BRIA")

24. A BRIA was carried out for the purposes of this instrument and a copy of the BRIA results will be published on the Scottish Government website.

Financial effects

25. As part of the consultation process, it was identified at an early stage that a programme of works would be required to prepare a number of the JP courts (in particular the 4 stand-alone JP courts which occupy their own premises) for the extension of the provisions for vulnerable witnesses. In order to reduce immediate costs, not all JP courts will be equipped on the basis that all locations can be covered through scheduling arrangements in co-located JP courts. The Scottish Government is contributing £300,000 towards the costs incurred by the Scottish Courts and Tribunals Service for these works. This contribution was met from within the existing Scottish Government budgets allocated to assist that organisation in preparing for the changes to special measures arising from implementation of the 2014 Act, which cost less than originally anticipated (see paragraph 15 of the Financial Memorandum for the Victims and Witnesses (Scotland) Bill[2]).

26. The Scottish Government is currently considering whether any extension of the existing Witness Service (operated by Victim Support Scotland) is necessary, as a result of the extension of special measures for vulnerable witnesses to the JP courts as set out above. It is expected that any such extension will be met from within existing Scottish Government budgets.

Scottish Government
Justice Directorate
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[2] http://www.scottish.parliament.uk/S4_Bills/Victims%20and%20Witnesses%20(Scotland)%20Bill/b23s4-introd-en.pdf