

# VICTIMS AND WITNESSES (SCOTLAND) ACT 2014

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### *National Confidential Forum*

##### *Section 30*

#### **National Confidential Forum**

82. **Section 30** establishes the National Confidential Forum (“the Forum”; “NCF”) as part of the Mental Welfare Commission for Scotland (“the Commission”).
83. The legislation under which the Commission currently operates (Part 2 of, and schedule 1 to, the Mental Health (Care and Treatment) (Scotland) Act 2003 (“the Mental Health Act”) as amended by the Public Services Reform (Scotland) Act 2010) is amended accordingly. Sections 4ZA, 4ZB, 4ZC, 4ZD and schedule 1A (comprising Parts 1-7) are inserted into the Mental Health Act.
84. **Section 30** inserts section 4ZA into the Mental Health Act to require the Commission to establish and maintain a committee of the Commission to be known as the National Confidential Forum.

#### **General functions of NCF**

85. **Section 30** sets out the general functions of the Forum in a new section 4ZB of the Mental Health Act (referred to as the “NCF functions”). The principal function of the Forum is to give people who were placed in institutional care as children the opportunity to describe, in confidence, their experiences of that care, including any abuse experienced during the time spent in care. The descriptions of being in care which people will recount to the members of the Forum are referred to as “testimony”.
86. The Forum is to acknowledge the experiences of people placed in institutional care as children by enabling them to give testimony at hearings of the Forum or in other ways, for example, in writing or by video or phone link.
87. A further function of the Forum is to identify patterns and trends in relation to institutional child care provision, including issues concerning abuse, based on the information provided to it by participants and, subsequently, to make recommendations for the improvement of institutional child care provision in the future.
88. The Forum is also empowered to produce reports on its work and any recommendations arising from the information it receives from people placed in institutional care as children. These reports will be available to the public but the identity of participants in the Forum, other persons and institutions will not be disclosed.

89. The final function of the Forum is to provide people who are considering taking part in hearings of the Forum (and those who do take part in such hearings) with information about sources of assistance and advice.

### **Carrying out NCF functions**

90. **Section 30** inserts section 4ZC into the Mental Health Act to require, in section 4ZC(1), the Commission to delegate the functions, set out above, to the Forum. This requires the NCF functions to be delegated to a distinct entity within the Commission, enabling a significant degree of operational independence for the Forum within the accountability structure of the Commission.
91. Section 4ZC(2) provides that the person appointed to chair the Forum (the “NCF Head”) is to account to the Commission for the work of the Forum in discharging its functions effectively.
92. Section 4ZC(3) makes explicit that, despite the delegation of functions and the accountability of the Head of NCF, the Commission will retain responsibility for ensuring that the Forum carries out its functions.

### **Further modifications in relation to NCF**

93. **Section 30** inserts section 4ZD into the Mental Health Act.
94. Section 4ZD(1)(a) sets out which functions and duties currently undertaken by the Commission will not apply to the Forum. In particular, the duty to monitor Part 1 of the Mental Health Act, to bring to the attention of the Scottish Ministers matters concerning the operation of that legislation and to advise on such matters do not apply to the Forum. The functions of the Commission relating to the publishing of information (including statistical information), particularly about investigations and inquiries, are also expressly disapplied by section 4ZD(1)(a).
95. Section 4ZD(1)(c) prevents the Commission from publishing anything in its annual reports which creates a real risk of identifying: a person in institutional care as a child, a person who experienced or committed abuse or an establishment providing institutional care. This does not apply where the information is already in the public domain.
96. Section 4ZD(1)(d) inserts section 20(1A) into the Mental Health Act to offer protection to the Forum, its members and staff, and participants from an action for defamation.
97. The effect of this protection is that the Forum, and its members and staff, will not be able to be sued for defamation as a result of statements they make, in good faith, while carrying out the work of the Forum. This is akin to the protection provided to members and staff of the Commission.
98. The protection offered to participants in the Forum from an action for defamation is in relation to any statement they make to the Forum and is, therefore, a higher level of protection than that offered to the Forum, its members and staff. This level of protection is to ensure that people who come forward to participate in the Forum can be assured in advance that what they say in information provided to the Forum cannot be used by anyone to found an action of defamation.
99. Section 4ZD(2) amends the Public Records (Scotland) Act 2011 to insert a new subsection (8A) into section 1 of that Act to require the Commission to prepare a records management plan in relation to the NCF functions. This is to be separate from the Commission’s records management plan to further safeguard the confidentiality of testimony and other information given to the Forum by people placed in institutional care as children.

### **Section 31 – NCF: constitution and operation**

100. Section 31(1) extends the maximum membership of the Commission from 8 to 9 members to enable the appointment of an additional member, selected specifically for their skills, experience and knowledge as considered by the Scottish Ministers to be relevant to the work and functions of the Forum.

### **Section 31 – Schedule 1A**

101. Schedule 1A is introduced by section 4ZA(2) and is inserted into the Mental Health Act by section 31(2).

### **Schedule 1A – Part 1 – Members of the National Confidential Forum**

102. Part 1 sets out the membership of the Forum, the appointment of its members and staff and the powers and procedure of the Forum.

#### **Membership**

103. Paragraph 1(1) provides that the Forum is to consist of the NCF Head and no fewer than two other members, all of whom will be appointed by the Scottish Ministers.
104. Paragraph 1(2) provides that the Scottish Ministers must make these appointments having regard to the recommendation of the selection panel (mentioned in paragraph 2(1)). Each member of the Forum is to be appointed for such period as the Scottish Ministers think fit (paragraph 1(3)).
105. Paragraph 1(4) provides that members of the Forum may resign by providing written notice to the Scottish Ministers, and that the Scottish Ministers must then inform the Commission of any such resignation (paragraph 1(5)).

#### **Membership selection panel**

106. Paragraph 2(1) provides that members of the Forum are to be selected by a membership selection panel, the composition of which is set out in that paragraph. The Scottish Ministers are able to determine, in addition to the members of the selection panel set out in paragraph 2(1), that others be included in that selection panel.
107. Paragraphs 2(2), (3) and (4) provide that a membership selection panel is to determine the selection process and can recommend for appointment those who, in the panel's view, have the skills, knowledge and experience to carry out the work of the Forum (excluding members of the Commission).

#### **National Confidential Forum staff**

108. Paragraph 3 provides that the appointment of staff to the Forum requires the recommendation of the Forum Head and that such staff are only to carry out the functions of the Forum.

#### **Powers and procedure of the National Confidential Forum**

109. Paragraph 4(1) empowers the Forum to do anything which is necessary or expedient in order for it to carry out its functions.
110. Paragraph 4(2) specifically empowers the Head of the Forum to determine the procedure of the Forum, having regard to the views of the other members of the Forum. This reflects the leadership role held by the NCF Head.
111. Paragraph 4(3) sets out the requirement that the Forum should have regard to the need to avoid any unnecessary cost to public funds, to participants and others in undertaking its work and carrying out its functions.

112. Paragraph 4(4) provides that proceedings of the Forum will not be invalidated because of a vacancy in the membership or a defect in the appointment of a member.
113. Paragraph 4(5) specifically excludes members of the Scottish Government or other persons authorised by the Scottish Government from taking part in the meetings of the Forum.

### **Application of [schedule 1](#) to the National Confidential Forum**

114. Paragraph 5 disapplies certain powers of the Commission in relation to the Forum.

### **Schedule 1A – Part 2 – Delegation of functions**

115. Part 2 sets out arrangements for the delegation of the NCF functions.

### **Delegation by the National Confidential Forum**

116. Paragraph 6 requires the Forum to delegate its functions to the NCF Head, other members of the Forum or staff, the extent of which is to be determined by the NCF Head.
117. Paragraph 6 also enables the delegation of functions by the Forum to the NCF Head, other members of the Forum or staff, the extent of which is to be determined by the Forum.
118. Paragraph 6 makes explicit that such delegation does not affect the Forum's responsibility, or the accountability of the NCF Head, for the functions of the Forum.

### **Schedule 1A – Part 3 – Eligibility to participate in the National Confidential Forum**

119. Part 3 sets out who will be eligible to participate in the Forum.
120. Paragraph 7(1) provides that the Forum may hear testimony from people who have made an application to participate in a hearing of the Forum and whose application has been accepted.
121. Paragraph 7(2) provides that any person aged 16 or over, who was placed in an establishment providing institutional care as a child for any length of time and who is no longer in that care, may apply to participate in the Forum.
122. Paragraph 7(3) provides that the term “institutional care”, for the purposes of the Forum, means a care or health service which meets the conditions set out paragraph in 7(4) and is of a description or type prescribed by order made by the Scottish Ministers.
123. Paragraph 7(5) provides that services provided at premises used mainly or wholly as a private dwelling (which would include the supervision of children at home, foster care and kinship care) cannot be prescribed in an order under paragraph 7(3).

### **Schedule 1A – Part 4 – Conduct of Hearings**

124. Part 4 sets out how the hearings of the Forum will be conducted.
125. Paragraph 8(2) requires the Forum to make arrangements for participants to give testimony, either at a hearing of the Forum or by other means whether in writing or orally.
126. Paragraph 8(3) requires that at least two members of the Forum be present at a hearing and that hearings be held in private.
127. Paragraph 8(4) explains that a Forum hearing is defined as being “private” provided no one other than the person giving testimony, anyone accompanying that person and members of the Forum and Forum staff are present.

128. Paragraph 8(5) enables the Forum to determine its own procedures for hearing testimony, otherwise than is provided for in paragraph 8. This is subject to the duty to avoid any unnecessary cost to public funds, participants or others in undertaking its work and carrying out its functions.

### **Recording of testimony**

129. Paragraph 9 provides that the Forum may decide how it will record testimony and any other information it receives from persons who take part in hearings. In practice, this may include audio recording or recording in writing and could be undertaken with the participant face-to-face or remotely.
130. Paragraph 9(2) sets out a requirement that the Forum take steps, as soon as reasonably practicable, to organise the information it receives so as to preserve confidentiality, in particular the anonymity of the person giving the testimony and any other individuals or institutions mentioned in testimony.

### **Payment of expenses**

131. Paragraph 10 authorises the Forum to require the Commission to pay reasonable expenses to participants and those who accompany participants to Forum hearings. This will comprise travel and subsistence associated with participation in the Forum.

### **Schedule 1A – Part 5 – Reporting**

132. Part 5 sets out arrangements by which the Forum may prepare reports and is required to produce an Annual Report.
133. Paragraph 11 empowers the Forum to prepare reports based on the information provided to it at hearings.
134. Paragraph 11(2) requires that a report produced by the Forum must not identify or include information which creates a real risk of identifying persons who were placed in institutional care as children, persons alleged to have experienced or committed abuse or institutions.
135. Paragraph 11(3) provides that paragraph 11(2) does not prevent the Forum from preparing a report which includes information which is already in the public domain.
136. Paragraph 12 requires the Forum to prepare a report each year on progress made in discharging the functions of the NCF (covering the 12 month period up to the end of March) and to submit that report to the Scottish Ministers. Annual Reports of the Forum are subject to the same requirements of confidentiality which apply to the other reports produced by the Forum.
137. Paragraph 12(2) provides that the Forum must consult the Commission before preparing its Annual Report and paragraph 12(4) requires the Forum to send a copy of its Annual Report to the Commission.
138. Paragraph 12(5) provides that the Scottish Ministers must lay before the Scottish Parliament a copy of each Annual Report of the Forum.

### **Schedule 1A – Part 6 - Confidentiality**

139. Part 6 sets out arrangements to ensure the confidentiality, as far as possible, of information obtained by the Forum in the course of carrying out its functions.
140. Paragraphs 13(1) and (2) make express provision that certain persons listed are not to disclose information provided to them in connection with the work of the Forum and which is not otherwise in the public domain.

141. Paragraph 13(2) does not prevent the disclosure of information between the persons listed in paragraph 13(1) where this is necessary to carry out the work of the Forum, including the preparation of annual reports by the Forum (in accordance with paragraph 12) and any other reports from the Forum (in accordance with paragraph 11). Under this exception to the duty of confidentiality information from the Forum can also be disclosed to enable preparation of the annual reports of the Mental Welfare Commission.
142. Paragraph 13(4) sets out the circumstances in which a member of the Forum must disclose information to the police. Information must be disclosed to the police where, in the opinion of the member acting in good faith, such disclosure is reasonably necessary to prevent the commission of an offence involving the abuse of a child.
143. Paragraph 13(5) enables a member of the Forum to disclose information to the police where an allegation is made by a person who has given testimony that an offence involving the abuse of a child has been committed. Disclosure is made to the police in these circumstances where it is, in the opinion of the member of the Forum acting in good faith, in the public interest to do so.
144. Paragraph 13(6) provides that a court may order the disclosure of information held by the Forum for the purposes of legal proceedings, whether civil or criminal (including for the purposes of the investigation of any offence or suspected offence), if it is satisfied that such disclosure is necessary in the interests of justice.

#### **Schedule 1A – Part 7**

145. Paragraph 14 sets out definitions of terms used in schedule 1A.