

YOUTH JUSTICE AND CRIMINAL EVIDENCE ACT 1999

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part II: Giving of evidence or information for purposes of criminal proceedings

Chapter I: Special Measures directions in case of vulnerable or intimidated witnesses

Sections 16 and 17: Eligible witnesses

82. Witnesses other than the defendant (who already has the benefit of a number of procedural safeguards) will be eligible for special measures to help them with giving evidence in criminal proceedings if:
- they are under 17;
 - they suffer from a mental disorder, or have a mental impairment or learning disability (which could include autistic spectrum disorders) that the court considers significant enough to affect the quality of their evidence;
 - they have a physical disorder or disability (which could include deafness) that the court considers likely to affect the quality of their evidence; or
 - the court is satisfied that the witnesses are likely, because of their own circumstances and the circumstances relating to the case (section 17(2)), to suffer fear or distress in giving evidence to an extent that is expected to affect its quality.

It will be possible to make applications, and for courts to grant special measures, on more than one of these grounds.

83. A witness under the age of 17 will always be eligible for help (and section 21 provides for measures to continue when a witness turns 17 before the end of the trial). Otherwise, in deciding eligibility courts must consider witnesses' own views about their status. Complainants of sexual offences will be considered eligible unless they inform the court that they do not want to be eligible. "Complainant" is defined in section 63 of the Act as "a person against or in relation to whom the offence was (or is alleged to have been) committed" – in other words, the alleged victim.
84. It is intended that courts will authorise special measures (see section 19) if they take the view that a measure or combination of measures will be likely to improve the quality of a witness's evidence. Without the measures, the quality is likely to range:
- from being unintelligible (in that the witness would not meet the tests for competence and intelligibility given in section 53: "to understand questions put to him as a witness and give answers to them which can be understood")

- to being intelligible, but of a worse quality than it could be, because of the circumstances that make the witness eligible for help.

‘Quality’ means more than intelligibility (section 16(5)): it encompasses completeness, accuracy and being able to address the questions put and give answers which can be understood (both as separate answers and when taken together as a complete statement of the witness’s evidence).

Section 18: Special measures available to eligible witnesses

85. *Subsection (1)* of this section makes the special measures set out in sections 23 to 30 available to all eligible witnesses. The only exceptions are the examination of a witness through an intermediary (section 29) and the use of a communication device (section 30), which are not available to witnesses who are eligible on the ground of fear or distress only. The Act does not affect courts’ common law discretion to make measures available to disguise witnesses’ identities in the wholly exceptional circumstances (such as where a public interest immunity certificate has been granted) where that identity needs to be kept secret in court.

86 *Subsection (2)* provides that courts will not be able to award any of the special measures until they are notified by the Secretary of State that a particular measure or group of measures is available in their area: this will allow for phased implementation of the measures.

87. The Secretary of State will be able to make new special measures available, and amend or remove others, by orders subject to the *affirmative resolution procedure* (i.e. the orders will have to be discussed and approved by Parliament) (*subsection (5)*).

Section 19: Special measures direction relating to an eligible witness

88. This section describes what courts must consider when they decide, on application from either the prosecution or the defence, or of their own accord, whether special measures might be appropriate for a witness. They must consider:

- whether the witness is eligible for special measures under section 16 or 17; and
- if the witness is eligible, whether any of the special measures available would improve the witness’s evidence (*subsection (2)*) in the circumstances of the case and, if so, which ones. The circumstances of the case include the witness’s own views and the possibility that the measures might tend to inhibit the evidence being tested effectively.

89. Any direction must give detailed instruction about where, when and how the measures specified should be provided (*subsection (4)*).

90 The inherent discretion of the court to offer these or other measures to witnesses who do not qualify as eligible (such as defendants), or who need measures for reasons other than age, incapacity, fear or distress, is not affected (*subsection (6)*).

Section 20: Further provisions about directions: general

91. This section makes special measures directions binding until the end of the trial, although courts can alter or discharge a direction if it seems to be in the interests of justice to do so.

92. Either party can apply for the direction to be altered or discharged, but it must show that there has been a significant change of circumstances since the court made the direction or since an application for it to be altered was last made.

93. This provision is intended to create some certainty for witnesses, by encouraging the party calling the witness (ie, the prosecution or the defence) to make applications for

special measures as early as possible and by preventing re-applications on grounds the court has already found unpersuasive.

94. Special measures directions can be made before the trial begins, at a Plea and Directions Hearing in the Crown Court, or another pre-trial hearing. Special measures directions might also be made if, witnesses were called at a *Newton* hearing (to settle the factual basis upon which sentence will be passed after a guilty plea), and new directions would be needed for a retrial or appeal.
95. *Subsection (5)* is intended to ensure that there is a record of the court's reasons for giving, altering or discharging a direction or refusing an application. This is intended to include, for example, the court's reasons for deciding that a witness is ineligible for help. The reasons should be recorded so that it is clear to everyone involved in the case what decision has been made and why it was made.
96. It is intended to use the rule-making powers in *subsection (6)*:
 - to enable applications that are not contested by the other side to be decided by the court without a hearing;
 - to prevent the renewal of an unsuccessful application under this section except where there has been a material change of circumstances;
 - so that expert witnesses can give evidence about whether a witness will benefit from special measures (courts can hear evidence from non-expert witnesses on such subjects under their existing discretion);
 - to govern the way that confidential and sensitive information connected with applications for special measures is dealt with.

Section 21: Special provisions relating to young witnesses

97. This section imposes special obligations on courts when they deal with witnesses under the age of 17.
98. It creates three groups of child witnesses:
 - children giving evidence in a sexual offence case (as defined in section 35)
 - children giving evidence in a case involving an offence of violence, abduction or neglect, and
 - children giving evidence in all other cases.
99. The first two groups are described as being in need of "special protection", and each group will benefit from strong presumptions about how they will give evidence. Children in sexual offence cases will receive a particularly high level of protection. *Subsections (2) to (8)* set out how each category of witness will give their evidence.
100. Most child witnesses – those giving evidence in cases that do not involve offences of sex, violence, cruelty or abduction – will have a video recording admitted as their evidence-in-chief and will give any further evidence, or cross-examination, through a live link at trial. A presumption to this effect will apply unless giving evidence in this way would not improve the quality of the child's evidence.
101. For witnesses in need of special protection, courts will not have to consider whether special measures will improve the quality of their evidence. That requirement is, in effect, treated as being satisfied.
102. All witnesses in need of special protection will have a video recording of their evidence-in-chief admitted. (The only possible exception would be if the court exercised its power under clause 27(2) to exclude a recording if it would not be in the interests of justice to be admit it.) Witnesses who are giving evidence in sexual offence cases will go on to

be cross-examined at a pre-trial hearing which will be recorded on video, unless they inform the court that they do not want this measure to apply to them. Those giving evidence in violent offence cases will give further evidence through live link at trial.

103. *Subsection (8)* provides that, if a court makes a special measures direction in respect of a child witness who was eligible for special measures on grounds of youth only, and the witness turns 17 before beginning to give evidence, the direction will no longer have effect. But if such a witness turns 17 after beginning to give evidence, the special measures provided for him will continue to apply. The intention is to reduce confusion for the witness and the court.
104. *Subsection (9)* provides that if a witness gave video-recorded evidence in chief or was cross-examined on video before the trial when he was under 17, but since turned 17, the video recording will still be admissible as evidence.

Section 22: Extension of provisions of section 21 to certain witnesses over 17

105. This section extends some of the provisions of section 21 to witnesses who are over 17 at the beginning of the trial, but who made a video recording to take the place of their evidence-in-chief when they were under 17. They will be eligible for special measures in the same way that they would be if they were under 17, and the same presumptions will apply to them as apply to children under 17. That includes being considered “in need of special protection” if they are giving evidence in a case involving sex, violence, neglect or abduction.

Section 23: Screening witness from accused

106. Screens may be authorised under this section to shield the witness from seeing the defendant. *Subsection (2)* is intended to ensure that screens do not prevent the judge, magistrates or jury and at least one legal representative of each party to the case (i.e. the prosecution and each defendant) seeing the witness, and the witness seeing them.

Section 24: Evidence by live link

107. This section allows witnesses to give evidence by live link. This would usually mean a closed circuit television link, but the section is drafted sufficiently widely to apply to any technology with the same effect.
108. *Subsections (2) and (3)* are intended to create a presumption that a witness who gives evidence by live link for a part of the proceedings will continue to give evidence by this means throughout.
109. *Subsections (5) and (6)* describe how temporary facilities may be made available to magistrates’ courts for the purposes of hearing evidence by live link.

Section 25: Evidence given in private

110. This section allows the courtroom to be cleared of people who do not need to be present while a witness gives evidence. The measure will only be available in a case involving a sexual offence or when the court is persuaded that someone has tried to intimidate, or is likely to try to intimidate, the witness. The direction will describe individuals or groups of people, rather than areas of the court, and will mostly affect those in the public gallery and the press gallery. The court will have to allow at least one member of the press to remain if one has been nominated by the press. The freedom of any member of the press who is excluded from the courtroom under this section to report the case will be unaffected, unless a reporting restriction is imposed separately.

Section 26: Removal of wigs and gowns

111. This measure can apply to the judiciary as well as legal representatives.

Section 27: Video recorded evidence in chief

112. This section allows a video-recorded interview to take the place of a witness's evidence in chief, both at trial and for the purposes of committal proceedings (*subsection (10)*).
113. *Subsections (2) and (3)* allow video recordings to be excluded and edited if the interests of justice so require. In deciding whether to allow only an edited recording to be used in evidence, courts will have to consider whether the parts sought to be excluded are so prejudicial as to outweigh the desirability of using the whole recording.
114. *Subsection (4)* provides that, where a direction has been made for a recording to be shown to the court, the court can later exclude the recording if there is not enough information available about how and where the recording was made or if the witness who made the recording is not available for further questioning (whether by video, in court or by live link) and the parties to the case have not agreed that this is unnecessary. However, courts will retain the discretion to admit the recording in these circumstances.
115. The video recording (as edited, in a case where that is required) will form the whole of a witness's evidence in chief unless:
- the witness is asked to give evidence about matters not covered in the recorded interview; or
 - the court gives permission for the witness to be asked further questions about matters not covered adequately in the recorded interview. *Subsections (5)(b) and (7)* allow courts to give such permission on their own initiative or on an application by one of the parties to the case if that party can show that there has been a material change of circumstances since the direction to admit the video recording was made.
116. If the witness is asked to give further evidence, *subsection (9)* allows courts to direct that the evidence should be given by live link and, as in other circumstances where a live link is provided, allows temporary facilities to be authorised for magistrates' courts.
117. Witnesses aged 14 or over who make a video recording that is intended to take the place of their evidence-in-chief will either swear an oath at the beginning of the interview, if someone is available to administer the oath and they are capable of being sworn, or give evidence unsworn.

Section 28: Video recorded cross-examination or re-examination

118. This section provides that, where the court has already allowed a video recording to be admitted as the witness's main evidence, the witness may be cross-examined before trial, and the cross-examination, and any re-examination, recorded on video for use at trial.
119. The cross-examination would not be recorded in the physical presence of the defendant, although he would have to be able to see and hear the cross-examination and be able to communicate with his legal representative. This could be achieved through a live link, for example.
120. The video-recorded cross-examination may, but need not, take place in the physical presence of the judge or magistrates and the defence and prosecution legal representatives. However, a judge or magistrate will have to be able to control the proceedings. It is intended that the judge or magistrate in charge of this procedure would normally be the trial judge. All the people mentioned in this paragraph will have to be able to see and hear the witness being cross-examined and communicate with anyone who is in the room with the witness (such as an intermediary).
121. As with video-recorded evidence in chief, a video recording of cross-examination may afterwards be excluded if any rules of court governing the cross-examination have not been complied with (*subsection (4)*).

122. *Subsections (5) and (6)* provide that witnesses who have been cross-examined on video are not to be cross-examined again unless the court makes a direction permitting another video-recorded cross-examination. It will only do so if the subject of the proposed cross-examination is relevant to the trial and something which the party seeking to cross-examine did not know about at the time of the original cross-examination (and could not have reasonably found out about by then) or if it is otherwise in the interests of justice to do so. Information that has not yet been disclosed to the cross-examining party is intended to count as information that the party could not reasonably have found out about.

Section 29: Examination of witness through intermediary

123. This section allows witnesses to be questioned and to give evidence through an intermediary. An intermediary is someone whom the court approves to communicate to the witness the questions the court, the defence and the prosecution ask, and then communicate the answers the witness gives in reply. The intermediary will be allowed to explain questions and answers if that is necessary to enable the witness and the court to communicate.
124. The intermediary will normally be a specialist - through training or, perhaps, through unique knowledge of the witness - who can help a witness who has difficulty understanding questions or framing evidence coherently to communicate. An intermediary might, alternatively, have skills to overcome specific communication problems, such as those caused by deafness. Deaf witnesses will be able to choose to rely on existing administrative arrangements for the provision in court of interpreters for the deaf, or, if they prefer, to apply for an interpreter or communication aid under the Act's provisions.
125. The judge or magistrates and at least one legal representative for both the prosecution and the defence must be able to see and hear the witness giving evidence and be able to communicate with the intermediary. The jury will also be able to see and hear the witness unless the evidence is being video-recorded (in which case they will see the recording when it is shown to them later).
126. Where intermediaries are used at a very early stage of an investigation or proceedings, and subsequently an application is made for a video recording of an interview in which they were involved to be admitted as evidence, that direction can be given despite the judge, magistrates or legal representatives not having been present. But the intermediary who was involved must still gain the court's approval retrospectively before the recording can be admitted.
127. Intermediaries will have to declare that they will perform their function faithfully. They will have the same obligation as foreign language interpreters (whose services are not a measure for which this section provides) not to wilfully make false or misleading statements to the witness or the court. If they do make such statements they will commit an offence under the Perjury Act 1911.

Section 30: Aids to communication

128. The communication aids that are intended to be authorised under this section are aids to overcoming physical difficulties with understanding or answering questions, such as sign boards and communication aids. The section is not designed to cover devices for disguising speech.

Section 31: Status of evidence given under Chapter 1

129. This section provides that evidence given using any of the special measures in this Act - for example, by video recording, or through an intermediary - shall be treated as if it was given orally in court in the usual way. This means that it will have the same status as it would have if it were actually given orally in court.

130. This section also provides that, if an adult who would normally give sworn evidence gives unsworn evidence by means of a video recording, it will be admissible at trial. However, such witnesses would be able to swear an oath or make a solemn affirmation if someone authorised to administer the oath or affirmation were present at the time of the recording.

Section 32: Warning to jury

131. This section provides for the jury to be warned, if the judge thinks it necessary, that the fact that special measures have been made available to a witness should not prejudice the conclusions they might draw about the defendant. This will be particularly relevant where, for example, intimidated witnesses are screened from the defendant: this should not be taken as justifying a conclusion that the defendant is dangerous.