



# Vulnerable Witnesses (Scotland) Act 2004

## 2004 asp 3

### PART 2

#### CIVIL PROCEEDINGS

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

#### **11 Interpretation of this Part**

- (1) For the purposes of this Part of this Act, a person who is giving or is to give evidence in or for the purposes of any civil proceedings is a vulnerable witness if—
- (a) the person is under the age of 16 on the date of commencement of the proceedings (such a vulnerable witness being referred to in this Part as a “child witness”), or
  - (b) where the person is not a child witness, there is a significant risk that the quality of the evidence to be given by the person will be diminished by reason of—
    - (i) mental disorder (within the meaning of section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13)), or
    - (ii) fear or distress in connection with giving evidence in the proceedings.
- (2) In considering whether a person is a vulnerable witness by virtue of subsection (1)(b) above, the court must take into account—
- (a) the nature and circumstances of the alleged matter to which the proceedings relate,
  - (b) the nature of the evidence which the person is likely to give,
  - (c) the relationship (if any) between the person and any party to the proceedings,
  - (d) the person’s age and maturity,
  - (e) any behaviour towards the person on the part of—
    - (i) any party to the proceedings,
    - (ii) members of the family or associates of any such party,
    - (iii) any other person who is likely to be a party to the proceedings or a witness in the proceedings, and
  - (f) such other matters, including—

- (i) the social and cultural background and ethnic origins of the person,
- (ii) the person's sexual orientation,
- (iii) the domestic and employment circumstances of the person,
- (iv) any religious beliefs or political opinions of the person, and
- (v) any physical disability or other physical impairment which the person has,

as appear to the court to be relevant.

- (3) For the purposes of subsection (1)(a) above, proceedings are taken to have commenced when the petition, summons, initial writ or other document initiating the proceedings is served, and, where the document is served on more than one person, the proceedings shall be taken to have commenced when the document is served on the first person on whom it is served.
- (4) In subsection (1)(b), the reference to the quality of evidence is to its quality in terms of completeness, coherence and accuracy.
- (5) In this Part—
  - “child witness notice” has the meaning given in section 12(2),
  - “civil proceedings” includes, in addition to such proceedings in any of the ordinary courts of law, any proceedings to which section 91 (procedural rules in relation to certain applications etc.) of the Children (Scotland) Act 1995 (c. 36) applies,
  - “court” is to be construed in accordance with the meaning of “civil proceedings”,
  - “special measure” means any of the special measures set out in, or prescribed under, section 18,
  - “vulnerable witness application” has the meaning given in section 12(6)(a).

## **12 Orders authorising the use of special measures for vulnerable witnesses**

- (1) Where a child witness is to give evidence in or for the purposes of any civil proceedings, the court must, before the proof or other hearing at which the child is to give evidence, make an order—
  - (a) authorising the use of such special measure or measures as the court considers to be the most appropriate for the purpose of taking the child witness's evidence, or
  - (b) that the child witness is to give evidence without the benefit of any special measure.
- (2) The party citing or intending to cite a child witness must lodge with the court a notice (referred to in this Part as a “child witness notice”)—
  - (a) specifying the special measure or measures which the party considers to be the most appropriate for the purpose of taking the child witness's evidence, or
  - (b) if the party considers that the child witness should give evidence without the benefit of any special measure, stating that fact,
 and the court must have regard to the child witness notice in making an order under subsection (1) above.
- (3) If a child witness notice specifies any of the following special measures, namely—

- (a) the use of a live television link in accordance with section 20 where the place from which the child witness is to give evidence by means of the link is another part of the court building in which the court-room is located,
  - (b) the use of a screen in accordance with section 21, or
  - (c) the use of a supporter in accordance with section 22 in conjunction with either of the special measures referred to in paragraphs (a) and (b) above,
- that special measure is, for the purposes of subsection (1)(a) above, to be taken to be the most appropriate for the purposes of taking the child witness's evidence.
- (4) The court may make an order under subsection (1)(b) above only if satisfied—
- (a) that the child witness has expressed a wish to give evidence without the benefit of any special measure and that it is appropriate for the child witness so to give evidence, or
  - (b) that—
    - (i) the use of any special measure for the purpose of taking the evidence of the child witness would give rise to a significant risk of prejudice to the fairness of the proceedings or otherwise to the interests of justice, and
    - (ii) that risk significantly outweighs any risk of prejudice to the interests of the child witness if the order is made.
- (5) Subsection (6) below applies in relation to a person other than a child witness who is to give evidence in or for the purpose of any civil proceedings (referred to in this section as “the witness”).
- (6) The court may—
- (a) on an application (referred to in this Part as a “vulnerable witness application”) made to it by the party citing or intending to cite the witness, and
  - (b) if satisfied that the witness is a vulnerable witness,
- make an order authorising the use of such special measure or measures as the court considers most appropriate for the purpose of taking the witness's evidence.
- (7) In deciding whether to make an order under subsection (6) above, the court must—
- (a) have regard to—
    - (i) the possible effect on the witness if required to give evidence without the benefit of any special measure, and
    - (ii) whether it is likely that the witness would be better able to give evidence with the benefit of a special measure, and
  - (b) take into account the matters specified in section 11(2)(a) to (f).

### **13 Review of arrangements for vulnerable witnesses**

- (1) In any civil proceedings in which a person who is giving or is to give evidence (referred to in this section as “the witness”) appears to the court to be a vulnerable witness, the court may at any stage in the proceedings (whether before or after the commencement of the proof or other hearing at which the witness is giving or is to give evidence or before or after the witness has begun to give evidence)—
- (a) on the application of the party citing or intending to cite the witness, or
  - (b) of its own motion,
- review the current arrangements for taking the witness's evidence and make an order under subsection (2) below.

- (2) The order which may be made under this subsection is—
- (a) where the current arrangements for taking the witness’s evidence include the use of a special measure or combination of special measures authorised by an order under section 12 or under this subsection (referred to as the “earlier order”), an order varying or revoking the earlier order, or
  - (b) where the current arrangements for taking the witness’s evidence do not include any special measure, an order authorising the use of such special measure or measures as the court considers most appropriate for the purpose of taking the witness’s evidence.
- (3) An order under subsection (2)(a) above varying an earlier order may—
- (a) add to or substitute for any special measure authorised by the earlier order such other special measure as the court considers most appropriate for the purpose of taking the witness’s evidence, or
  - (b) where the earlier order authorises the use of a combination of special measures for that purpose, delete any of the special measures so authorised.
- (4) The court may make an order under subsection (2)(a) above revoking an earlier order only if satisfied that—
- (a) the witness has expressed a wish to give or, as the case may be, continue to give evidence without the benefit of any special measure and that it is appropriate for the witness so to give evidence, or
  - (b) that—
    - (i) the use, or continued use, of the special measure for the purpose of taking the witness’s evidence would give rise to a significant risk of prejudice to the fairness of the proceedings or otherwise to the interests of justice, and
    - (ii) that risk significantly outweighs any risk of prejudice to the interests of the witness if the order is made.
- (5) Subsection (7) of section 12 applies to the making of an order under subsection (2)(b) of this section as it applies to the making of an order under subsection (6) of that section but as if the references to the witness were to the witness within the meaning of this section.
- (6) In this section, “current arrangements” means the arrangements in place at the time the review under this section is begun.

#### **14 Procedure in connection with orders under sections 12 and 13**

- (1) In section 5 (power to regulate procedure etc. in the Court of Session by act of sederunt) of the Court of Session Act 1988 (c. 36), after paragraph (d) there is inserted—
- “(da) to regulate the procedure to be followed in proceedings in the Court in connection with the making of orders under sections 12(1) and (6) and 13(2) of the Vulnerable Witnesses (Scotland) Act 2004 (asp 3) (“the 2004 Act”);
  - (db) to regulate, so far as not regulated by the 2004 Act, the use in any proceedings in the Court of any special measures authorised by virtue of that Act to be used;”.

- (2) In section 32(1) (power of Court of Session to regulate civil procedure in the sheriff court) of the Sheriff Courts (Scotland) Act 1971 (c. 58), after paragraph (e) there is inserted—
- “(ea) regulating the procedure to be followed in connection with the making of orders under sections 12(1) and (6) and 13(2) of the Vulnerable Witnesses (Scotland) Act 2004 (asp 3) (“the 2004 Act”);
  - (eb) regulating, so far as not regulated by the 2004 Act, the use of special measures authorised by virtue of that Act to be used;”.

## **15 Vulnerable witnesses: supplementary provision**

- (1) Subsection (2) below applies where—
- (a) a party is considering for the purposes of a child witness notice or a vulnerable witness application which of the special measures is or are the most appropriate for the purpose of taking the evidence of the person to whom the notice or application relates, or
  - (b) the court is making an order under section 12(1) or (6) or 13(2).
- (2) The party or, as the case may be, the court must—
- (a) have regard to the best interests of the witness, and
  - (b) take account of any views expressed by—
    - (i) the witness (having regard, where the witness is a child witness, to the witness’s age and maturity), and
    - (ii) where the witness is a child witness, the witness’s parent.
- (3) For the purposes of subsection (2)(b) above, where the witness is a child witness—
- (a) the witness is to be presumed to be of sufficient age and maturity to form a view if aged 12 or older, and
  - (b) in the event that any views expressed by the witness are inconsistent with any views expressed by the witness’s parent, the views of the witness are to be given greater weight.
- (4) In this section—
- “parent”, in relation to a child witness, means any person having parental responsibilities within the meaning of section 1(3) of the Children (Scotland) Act 1995 (c. 36) in relation to the child witness,
  - “the witness” means—
    - (a) in the case referred to in subsection (1)(a) above, the person to whom the child witness notice or vulnerable witness application relates,
    - (b) in the case referred to in subsection (1)(b) above, the person to whom the order would relate.

## **16 Party to proceedings as a vulnerable witness**

Where a child witness or other person who is giving or is to give evidence in or for the purposes of any civil proceedings (referred to in this section as “the witness”) is a party to the proceedings—

- (a) sections 12 and 13 have effect in relation to the witness as if references in those sections to the party citing or intending to cite the witness were references to the witness, and

- (b) section 15 has effect in relation to the witness as if—
  - (i) in subsection (1), paragraph (a) were omitted, and
  - (ii) in subsection (2), the words “The party or, as the case may be,” were omitted.

## **17 Crown application and saving provision**

- (1) Sections 11 to 15 of this Act apply to the Crown.
- (2) Nothing in section 12 or 13 of this Act affects any power or duty which a court has otherwise than by virtue of those sections to make or authorise any special arrangements for taking the evidence of any person in any civil proceedings.

## **18 The special measures**

- (1) The special measures which may be authorised to be used by virtue of section 12 or 13 of this Act for the purpose of taking the evidence of a vulnerable witness are—
  - (a) taking of evidence by a commissioner in accordance with section 19,
  - (b) use of a live television link in accordance with section 20,
  - (c) use of screen in accordance with section 21,
  - (d) use of a supporter in accordance with section 22, and
  - (e) such other measures as the Scottish Ministers may, by order made by statutory instrument, prescribe.
- (2) An order under subsection (1)(e) above is not to be made unless a draft of the statutory instrument containing the order has been laid before and approved by a resolution of the Scottish Parliament.

## **19 Taking of evidence by a commissioner**

- (1) Where the special measure to be used is taking of evidence by a commissioner, the court must appoint a commissioner to take the evidence of the vulnerable witness in respect of whom the special measure is to be used.
- (2) Proceedings before a commissioner appointed under subsection (1) above must be recorded by video recorder.
- (3) A party to the proceedings—
  - (a) must not, except by leave of the court, be present in the room where such proceedings are taking place, but
  - (b) is entitled by such means as seem suitable to the court to watch and hear the proceedings.
- (4) The recording of the proceedings made in pursuance of subsection (2) above is to be received in evidence without being sworn to by witnesses.

## **20 Live television link**

- (1) Where the special measure to be used is a live television link, the court must make such arrangements as seem to it appropriate for the vulnerable witness in respect of whom the special measure is to be used to give evidence by means of such a link.

- (2) Where—
- (a) the live television link is to be used in proceedings in a sheriff court, but
  - (b) that court lacks accommodation or equipment necessary for the purpose of receiving such a link,
- the sheriff may by order transfer the proceedings to any sheriff court in the same sheriffdom which has such accommodation or equipment available.
- (3) An order may be made under subsection (2) above—
- (a) at any stage in the proceedings (whether before or after the commencement of the proof or other hearing at which the vulnerable witness is to give evidence), or
  - (b) in relation to a part of the proceedings.

## **21 Screens**

- (1) Where the special measure to be used is a screen, the screen must be used to conceal the parties to the proceedings from the sight of the vulnerable witness in respect of whom the special measure is to be used.
- (2) However, the court must make arrangements to ensure that the parties are able to watch and hear the vulnerable witness giving evidence.
- (3) Subsections (2) and (3) of section 20 apply for the purposes of use of a screen under this section as they apply for the purposes of use of a live television link under that section but as if—
- (a) references to the live television link were references to the screen, and
  - (b) the reference to receiving such a link were a reference to the use of a screen.

## **22 Supporters**

- (1) Where the special measure to be used is a supporter, another person (“the supporter”) nominated by or on behalf of the vulnerable witness in respect of whom the special measure is to be used may be present alongside the witness for the purpose of providing support whilst the witness is giving evidence.
- (2) Where the person nominated as the supporter is to give evidence in the proceedings, that person may not act as the supporter at any time before giving evidence.
- (3) The supporter must not prompt or otherwise seek to influence the vulnerable witness in the course of giving evidence.

*Establishment of grounds of referral to children’s hearings: restrictions on evidence*

## **23 Establishment of grounds of referral to children’s hearings: restrictions on evidence**

After section 68 (application to sheriff to establish grounds of referral) of the Children (Scotland) Act 1995 (c. 36) there is inserted—

**“68A Restrictions on evidence in certain cases involving sexual abuse**

- (1) This section applies in relation to—
- (a) an application under section 65(7) or (9) of this Act in which the ground of referral to be established is a condition mentioned in—
    - (i) paragraph (b) of subsection (2) of section 52 of this Act where that condition is alleged to be satisfied by reference to sexual behaviour engaged in by any person,
    - (ii) paragraph (d), (e) or (f) of that subsection where that condition is alleged to be satisfied by reference to a relevant offence, or
    - (iii) paragraph (g) of that subsection, or
  - (b) an application under section 85 of this Act for a review of a finding that any such ground of referral is established.
- (2) In hearing the application, the sheriff shall not admit, or allow questioning designed to elicit, evidence which shows or tends to show that the child who is the subject of the application or any other witness giving evidence at the hearing (such child or other witness being referred to in this section and section 68B of this Act as “the witness”)—
- (a) is not of good character (whether in relation to sexual matters or otherwise),
  - (b) has, at any time, engaged in sexual behaviour not forming part of the subject matter of the ground of referral,
  - (c) has, at any time (other than shortly before, at the same time as or shortly after the acts which form part of the subject matter of the ground of referral), engaged in such behaviour, not being sexual behaviour, as might found the inference that the witness is not a credible or reliable witness, or
  - (d) has, at any time, been subject to any such condition or predisposition as might found the inference referred to in paragraph (c) above.
- (3) In subsection (1)(a)(ii) above, “relevant offence” means—
- (a) an offence mentioned in paragraph 1 or 4 of Schedule 1 (offences against children under the age of 17 to which special provisions apply) to the Criminal Procedure (Scotland) Act 1995 (c. 46), or
  - (b) any other offence mentioned in that Schedule where there is a substantial sexual element in the alleged commission of the offence.
- (4) In subsection (2)(b) and (c) above—
- (a) “the subject matter of the ground of referral” means—
    - (i) in the case of an application in which the ground of referral to be established is the condition referred to in paragraph (a) (i) of subsection (1) above, the sexual behaviour referred to in that paragraph,
    - (ii) in the case of any other application, the acts or behaviour constituting the offence by reference to which the ground of referral is alleged to be established, and
  - (b) the reference to engaging in sexual behaviour includes a reference to undergoing or being made subject to any experience of a sexual nature.



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

- (1) The sheriff hearing an application referred to in subsection (1) of section 68A of this Act may, on an application by any party to the proceedings, admit such evidence or allow such questioning as is referred to in subsection (2) of that section if satisfied that—
  - (a) the evidence or questioning will relate only to a specific occurrence or occurrences of sexual or other behaviour or to specific facts demonstrating—
    - (i) the character of the witness, or
    - (ii) any condition or predisposition to which the witness is or has been subject,
  - (b) that occurrence or those occurrences of behaviour or facts are relevant to establishing the ground of referral, and
  - (c) the probative value of the evidence sought to be admitted or elicited is significant and is likely to outweigh any risk of prejudice to the proper administration of justice arising from its being admitted or elicited.
- (2) In subsection (1) above—
  - (a) the reference to an occurrence or occurrences of sexual behaviour includes a reference to undergoing or being made subject to any experience of a sexual nature,
  - (b) “the proper administration of justice” includes—
    - (i) appropriate protection of the witness’s dignity and privacy, and
    - (ii) ensuring the facts and circumstances of which the sheriff is made aware are relevant to an issue to be put before the sheriff and commensurate with the importance of that issue to the sheriff’s decision on the question whether the ground of referral is established.
- (3) In this section, “the witness” means the child who is the subject of the application referred to in section 68A(1) or other witness in respect of whom the evidence is sought to be admitted or elicited.”