

VULNERABLE WITNESSES (SCOTLAND) ACT 2004

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2 – Civil Proceedings

Section 11 – Interpretation of this Part

64. 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 the quality of whose 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.
65. 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. The court may also take into account any other factors not listed in subsection (2) but which appear to be relevant.
66. Subsection (5) defines civil proceedings to include referrals from children’s hearings. This definition excludes proceedings before a tribunal of inquiry, arbitration proceedings, and other proceedings not in any of the ordinary courts of law.

Section 12 – Orders authorising the use of special measures for vulnerable witnesses

67. This section sets out the procedure for child witness notices and vulnerable witness applications in civil proceedings.
68. Subsections (1) to (4) 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 and the court considers that appropriate, or the risk of prejudice to the fairness of the proof significantly outweighs the risk of prejudice to the interests of the child witness.
69. Where a child witness notice requires a live television link within the court or screens (in either case with or without a supporter), then the court must authorise the use of these special measures.
70. Subsections (5) to (7) 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.

71. Subsection (7) 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 11(2).

Section 13 – Review of arrangements for vulnerable witnesses

72. 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 14 – Procedure in connection with orders under sections 12 and 13

73. 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 15 – Vulnerable witnesses: supplementary provision

74. 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.
75. 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 16 – Party to proceedings as a vulnerable witness

76. This section makes it clear that a party to civil proceedings if vulnerable, is able to apply for the use of special measures should they wish to give evidence.

Section 17 – Vulnerable witness: Crown application and saving provision

77. Subsection (1) makes clear that the special measures provisions apply to the Crown as a party to civil proceedings.
78. Subsection (2) ensures that the existing common law powers to make or authorise special arrangements for vulnerable witnesses' evidence are not removed by sections 12 or 13.

Section 18 – The special measures

79. 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 19 – Taking of evidence by a commissioner

80. 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.
81. Parties to the proceedings may only be present with the agreement of the court 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 20 – Live television link

82. 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 21 – Screens

83. 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.
84. 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 22 – Supporters

85. This section allows for a person to be nominated by a vulnerable witness to accompany the witness whilst they give evidence. A witness may act as a supporter provided that they have already given their evidence. The supporter will not be allowed to prompt the witness while the vulnerable witness is giving their evidence in the case.

Section 23 – Establishment of grounds of referral to children's hearings: restrictions on evidence

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

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

87. 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

88. 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).

*These notes relate to the Vulnerable Witnesses (Scotland) Act
2004 (asp 3) which received Royal Assent on 14 April 2004*

89. 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.