

VITAL VOICES
Helping Vulnerable Witnesses Give Evidence
Policy Statement

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Foreword by the Minister for Justice

Everyone in Scotland has an interest in an effective, efficient and fair justice system. Our distinctive legal system has gained praise throughout the world but it can still be enhanced by further reform. We should expect high standards from the justice system in the administration of law and the treatment of people who become involved in the system. In particular, witnesses play a vital part and the administration of justice would not be possible without the willingness of members of the public to undertake this role.

Many witnesses are vulnerable and without assistance may be unable to participate fully in the justice system. This not only means that the witness may be unnecessarily distressed as a result of the experience but also that the court does not have all the relevant information before it when making a decision.



On 1 May 2002, we issued the consultation paper "Vital Voices: Helping Vulnerable Witnesses Give Evidence". This paper considered possible changes to the law of evidence and related aspects of court procedure, directed at providing specific help to vulnerable witnesses. It examined how the existing supports available to vulnerable witnesses could be improved and combined into a stronger package. Seventy-six responses were received and a report analysing the responses to the consultation exercise was published at the end of 2002. The majority of consultees were in favour of changes to the current law on the categories of persons who should be able to use special measures when giving evidence, the types of special measures used and the availability of these measures in other types of proceedings.

We have analysed the responses to the consultation paper and reviewed how the law works in practice in this area. We agree that changes are necessary. Vulnerable witnesses should receive the support they need to be able to give their best evidence. The proposals contained in this paper are an important step forward to ensuring this happens.

A handwritten signature in black ink that reads "Jim Wallace". The signature is written in a cursive style and is underlined with a single horizontal line.

JIM WALLACE MSP
Deputy First Minister and Minister for Justice

Chapter 1: Introduction

- 1.1** We are committed to improving the way in which all witnesses are treated by the justice system. The proposals contained in this policy statement are intended to enable better assistance and protection to be given to vulnerable witnesses, especially children. Changing the law can help to empower vulnerable witnesses to give their best evidence, but legislative change on its own is not enough. Significant progress in the treatment of witnesses will only be achieved if changes to the law are accompanied by changes to existing procedures, practices and attitudes.
- 1.2** We are already working on a number of initiatives to bring about improvements in the way witnesses, including victims, are treated by the justice system. These include:
- The Witness Service has been made available in all 49 Sheriff Courts and will be further extended to the High Court this year. This service provides information to witnesses about the court process and can arrange pre-court visits, helping witnesses to know what to expect when they give evidence.
 - Victim Information and Advice was established by the Crown Office and Procurator Fiscal Service. This office provides support and information for prosecution witnesses.
 - We are widely consulting on Lord Bonomy's review of the High Court. In his report he recommended that a room be identified at each High Court location where accused persons should wait. The accused would then be required to arrive at court 45 minutes before their case is due to start and to remain for an additional 45 minutes at the close of each day's proceedings, greatly reducing the chances that they might encounter witnesses.
 - Almost three-quarters of courts now have separate rooms for prosecution and defence witnesses and the Scottish Courts Service will continue to refurbish Sheriff Courts so that even more court buildings have this facility.
 - The Law Society of Scotland has issued a code of conduct setting out the responsibilities of solicitors in relation to precognition¹ of witnesses, in particular, vulnerable witnesses.
 - The Child Witness Support Consultation document, which reviewed procedure and practice for child witnesses, concluded its consultation in January 2003. We are now analysing the responses to this consultation.

Framework

- 1.3** All parts of the justice system must take responsibility for vulnerable witnesses. Consideration of the interests of witnesses does not compromise the rights of the accused and the fair treatment of vulnerable witnesses should be seen as an essential part of achieving a fair trial. Our aim is to encourage a climate within our justice system where children and other vulnerable witnesses can fully participate.
- 1.4** Our vision for an effective and efficient justice system, which meets the needs of vulnerable witnesses, includes:
- ◆ Early identification of vulnerable witnesses by the police, legal profession and other agencies.

- ◆ Training for police officers and others conducting investigating interviews so that greater use can be made of recordings of vulnerable witnesses' statements in court, for example, a video recording of the first interview with an alleged victim of a racial or sexual assault.
- ◆ Consistency in the way that special measures for vulnerable witnesses are used.
- ◆ More extensive use of existing special measures, for example, evidence on commission. This may be a particularly suitable way of taking the evidence of young children but has not been used to date.
- ◆ An increase in resources such as live television links to meet the greater demand for special measures.
- ◆ Greater awareness on the part of judges, lawyers and other officials about the appropriate treatment of vulnerable witnesses. The evidence in a criminal case must be properly tested but questioning can be searching without being aggressive. For example, the Child Witness Support Consultation document outlined guidance for the questioning of children in court.
- ◆ Monitoring and evaluation of the effectiveness of changes in legislation and practice.

1.5 The above are simply examples of the practical work that will need to be undertaken for our proposals to be fully implemented. It will be necessary for all those involved in the justice system to work together to achieve the changes required.

1.6 Many aspects of our vision and proposals are complementary to the aims of the Lord Advocate's Working Group on Child Witness Support, which made a number of recommendations, some of which are addressed by the Child Witness Support Consultation document. All the proposals outlined in this statement will therefore be developed in conjunction with proposals arising from the analysis of responses to the Child Witness Support Consultation document and further work to implement the full set of recommendations arising from the Lord Advocate's Working Group on Child Witness Support.

1.7 This statement sets out the Executive's policy for changes to the law and although it is not being issued specifically for consultation, we welcome views from interested parties. These can be sent to:

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Chapter 2: Criminal Proceedings

Who is Vulnerable?

2.1 At the moment, the current statutory definition excludes many witnesses from having access to special measures. Such measures can greatly assist vulnerable witnesses to give their best evidence and there was majority support from consultees for widening the categories of witnesses eligible to use special measures.

We intend to allow more witnesses to be eligible for special measures. We will:

- **give children an automatic entitlement to special measures;**
- **ensure that anyone with a mental illness or learning disability is potentially eligible for special measures; and**
- **introduce a new, third category of vulnerable witness. This category will be flexible, and will look at the wider circumstances of the witness.**

2.2 These three categories are set out in more detail below:

Automatic Entitlement

Child Witnesses

2.3 Most people agree that children are particularly vulnerable, and many children, especially young children, will find the whole court process intimidating, confusing and distressing. We believe child witnesses (aged under 16) should have a right to use a special measure when they give evidence. Making sure child witnesses have automatic entitlement should mean that it is clear at an early stage how their evidence will be given to the court, so that the process is less unsettling for them.

2.4 We are proposing extra protection for particularly vulnerable young children. In criminal cases about sexual or violent matters, our policy is that other than in the most exceptional cases, no child witness under 12 should have to attend court to give their evidence. This will mean that they will give evidence from another building by a live television link, or by evidence on commission, and that there should be greater use of pre-recorded statements.

2.5 In all child witness cases both the person calling the witness, and the court, will have to consider the opinion of the child. If the child is unable to give an opinion the court must consider the opinion of the child's parent or guardian (unless they are the accused). So, if a child witness does not want to have special measures, but would prefer to give evidence in the normal way, then this will be taken into consideration.

2.6 At the moment, if a child witness turns 16 before the trial starts, then they are considered to be an adult, and will lose any entitlement to special measures even where an application for special measures has already been granted. We will change this so that if the witness is under

16 at the start of the criminal proceedings, they will keep their automatic entitlement even if they are 16 by the time the trial starts.

- **Child witnesses should have an automatic entitlement to special measures.**
- **In criminal cases about sexual or violent matters, no child witness under 12 should have to attend court to give their evidence.**
- **If a witness is under 16 at the start of the criminal proceedings, they will keep their automatic entitlement even if they are 16 by the time the trial starts.**

Discretionary Entitlement

Mental Disorder

- 2.7** Any person who has a mental disorder which affects their ability to give evidence will qualify for consideration for special measures.
- 2.8** By “mental disorder”, we mean any mental disorder as defined by the Mental Health (Scotland) Bill,² which is currently before the Scottish Parliament.
- 2.9** Our proposal is that an application for special measures could be made for any person with a mental disorder. The application would have to show that as a result of a mental disorder, the witness would not give their best evidence if they had to testify in the normal way. The application would include a report from a medical professional, such as a psychiatrist, who had assessed the witness.
- 2.10** The court would then consider this application and would either grant or refuse it, or choose an alternative special measure.
- 2.11** The current law helps two categories of adult witnesses: people with a mental illness who are subject to one of a number of mental health related court orders, and people who suffer from “significant impairment of intelligence and social functioning” (people with learning disabilities). Our new definition will cover both of these groups, and will go further to allow anyone with a mental disorder to be considered for special measures.

Any person who has a mental disorder which affects their ability to give evidence will qualify for consideration for special measures.

Taking Wider Circumstances into Account

- 2.12** One of the main concerns voiced by consultees was that the current categories are too narrow. At the moment the focus is on witnesses of a certain age, or witnesses with a mental disorder and as a result, witnesses who are vulnerable because of wider circumstances are simply not eligible under the current legislation. There was general support from consultees for the court to be able to take a witness’s external circumstances into account.

- 2.13** We are proposing that there should be a new category of vulnerable witness. It would cover any witness where fear, distress or intimidation is likely to impair significantly their ability to give their evidence in the normal way, i.e. in open court.
- 2.14** In deciding if a special measure will help a witness to give their best evidence, the court will have to take into account a range of relevant factors. These will include things like the nature of the offence or the evidence, as well as the views of the witness. The court will also take into account wider background circumstances such as the age of the witness, their social or cultural background, and information about any disability, discrimination or harassment.
- 2.15** We want this to be flexible enough to mean that anyone who is vulnerable could be eligible for special measures. We expect this will help many different people, such as victims of sexual or violent abuse, or witnesses of racist or homophobic crimes.

There should be a new category of vulnerable witness, flexible enough to cover any witness where fear, distress or intimidation is likely to prevent them from giving their best evidence in the normal way.

The Accused

- 2.16** Although an accused person does not have to give evidence, some accused people do. The accused is in a different position to other witnesses as they can choose whether or not to give evidence, and they usually have a lawyer acting on their behalf. Even so, there may be times when for example, the accused may be under 16, or may have a mental disorder, and where special measures would be needed to enable them to testify.

We propose that an accused person would be eligible for special measures in the same way as anyone else in relation to their position when giving evidence at trial.

Who Makes the Application?

- 2.17** In child witness cases the child will be automatically entitled to special measures. This will mean that there will be a streamlined notification procedure. Whoever is calling the witness (i.e. the prosecution or defence) will decide which special measure(s) are best for the child, and will notify the court and the other side. In most cases, if there is no objection from the other side, arrangements for those measures will simply go ahead. If the court does not approve the particular special measure requested, they must replace it with another special measure which is in the best interests of the child.
- 2.18** For any other vulnerable witness, whoever calls the witness will make an application for special measures. The court will then consider this application, and decide whether the measure(s) should be used.
- 2.19** Our policy is that the court should have a duty to find out if there are any vulnerable witnesses in a case and to make sure that appropriate arrangements are made for them to give evidence. So, if no application for special measures is made, but the court decides that a witness should

have special measures, then it will be able to order special measures to be used. In child witness cases, the court must ensure that the most appropriate special measures for the child are used. It would only be in an exceptional case that the court should decide that no special measure is appropriate.

2.20 Our aim is that in the vast majority of cases the decision about special measures will be made well before the trial. This should help to eliminate some of the stress that the process can cause, especially to child witnesses.

- **There will be a streamlined notification procedure for child witnesses.**
- **The court will have a duty to find out if there are vulnerable witnesses in a case, and to make sure that child witnesses have the benefit of special measures.**
- **In the vast majority of cases, the decision about special measures should be made well before the trial, helping to eliminate some of the stress that the process can cause.**

Common Law Powers

2.21 Under common law, the court has certain powers to allow special measures. For instance, a court allowed a complainant in a rape case to give her evidence from behind a screen.³ We do not want to change the common law powers of the court. Our proposals will be in addition to the court's common law powers.

Special Measures

2.22 Our proposals will mean that more people will be eligible to use special measures when giving evidence. The special measures that can be used at present are:

- *Video Evidence on Commission* – This allows for the taking and recording of evidence of a vulnerable witness usually before the trial and away from the court building. Although it has not been used to date, many people who responded to the consultation thought it could be of great benefit to vulnerable witnesses, especially children.
- *Screens* – The screen is used to conceal the accused from the witness while the witness is giving evidence in the courtroom.
- *Live television link (sometimes known as CCTV)* – This method is most often used when children give evidence, particularly in sensitive cases of physical or sexual abuse. The live television link avoids the witness having to enter the courtroom.
- *A supporter* – A person who is allowed to sit near to a vulnerable witness in the court (or the room where the witness gives evidence by a live television link) while they give their evidence. Although they are not allowed to communicate with or comfort the witness, their physical presence can relieve the witness of some of their anxiety.

2.23 The first three special measures are provided for under s.271 of the Criminal Procedure (Scotland) Act 1995. There is currently no statutory provision for the use of a supporter in criminal proceedings, although there is some guidance⁴ available that allows a supporter to be used in cases which involve child witnesses. We propose that the use of a supporter should also become a statutory special measure, so that if necessary court rules can be made to regulate how they are chosen and what they are allowed to do. Thirty-two consultees agreed that written guidance to clarify the role of the supporter would be beneficial. Under the proposals set out in paras 2.4 – 2.5 above, children under 12 who give evidence in cases involving sex offences or violence will not, other than in exceptional circumstances, have to come to court to do so. This will mean that greater use will have to be made of the current range of special measures, such as evidence on commission and live television link.

- **Greater use will be made of existing special measures, and more witnesses will be eligible to use them.**
- **A supporter will be made a statutory special measure.**

Admission of Prior Statements

2.24 Many consultees were of the view that better use could be made of prior statements. A prior statement is a previous statement made by a witness, which has been reliably recorded on video or some other way. The law already allows prior statements to be used as evidence in court, but it requires the witness to attend the court to either have the statement read over or a recording of it played back to them. The witness then has to confirm whether the statement is accurate. In effect, they have to be taken through their evidence again by the party who has called them to court, and this can be very distressing for vulnerable witnesses.

2.25 We propose to make it possible for a prior statement of a vulnerable witness to be used as the whole or part of his or her main evidence (“examination in chief”). This would mean that in appropriate cases, witnesses would no longer need to go through the process of having the statement read over or played to them in court and would only have to be cross-examined on it. This could help reduce the time the vulnerable witness needs to spend giving evidence in the courtroom.

2.26 We think this change could particularly help child witnesses under the age of 12 in combination with other special measures. The main evidence of a young child could be a prior statement, with the child only having to be cross-examined on it, either by means of a live television link or video evidence on commission. We are looking carefully at how high quality statements can be recorded and used in practice.

We propose greater use of prior statements as a vulnerable witness’s main evidence.

Restriction on Personal Conduct of Defence by the Accused

- 2.27** The Sexual Offences (Procedure and Evidence)(Scotland) Act 2002 changed the law so that the accused in a rape or sexual offence case is no longer able to question the alleged victim personally. The Act requires an accused to be legally represented throughout the whole trial.
- 2.28** An accused in any other type of case is still entitled to conduct his or her own defence. Although we are not aware of any specific cases in which it has happened, many consultees took the view that there could be circumstances in which an accused conducting his or her own defence would be particularly distressing for a vulnerable witness.
- 2.29** We think the court should have a discretionary power to prevent an accused conducting his or her defence personally and to require the accused to be legally represented, where the interests of justice require it. The discretionary power would be flexible and could be applied where the circumstances of the case justify its use.

The court should have a discretionary power in non-sexual offence cases to prevent an accused conducting his or her defence personally.

Scottish Law Commission's Recommendation on Dock Identification

- 2.30** The Lord Advocate's Working Group report on child witness support recommended⁵ full implementation of the Scottish Law Commission's recommendation on identification procedure in court. Twenty-five consultees were in favour of this recommendation, with only two consultees opposed to it. We agree that this recommendation (see Annex) should be fulfilled. This would mean that any witness who has previously identified the accused at an identification parade, or some other recognised identification procedure, would not have to identify the accused in court. The prosecutor would, instead, submit evidence to the court of the previous identification. This would make it unnecessary for the witness to have to make a "dock identification" which can be distressing, particularly for vulnerable witnesses such as children.

Witnesses who have previously identified an accused will no longer have to identify the accused in court.

Expert Evidence

- 2.31** We consider that expert evidence can be of benefit in criminal trials of sexual assault or child abuse. Such evidence may explain why a witness behaved in a particular way, for example disclosing details of an alleged offence in stages over a period of time. Most people do not have any knowledge of how the behaviour of such victims can be affected, and expert evidence can provide juries with additional information to help them reach their decision. Thirty-four consultees were in favour of greater use being made of expert evidence in cases involving vulnerable witnesses, with only eleven consultees against this proposal. We want to make it competent to lead this kind of evidence where it would assist the fact-finding process and are looking at how this could be done without overburdening the court.

We will further consider how expert evidence can be used in certain types of case, to provide information about the behaviour of a witness.

Chapter 3: Civil Proceedings

- 3.1** We propose that vulnerable witnesses in civil proceedings should also be able to use special measures. There are currently only very limited statutory provisions⁶ to allow witnesses to use special measures. Civil proceedings can, however, sometimes be a worrying and intimidating experience for witnesses. In family proceedings, for instance, a child witness may be asked to give evidence about alleged abuse, or a complainant in a rape case may undertake a civil action against the alleged offender.
- 3.2** The majority of consultees considered that special measures should be available in civil proceedings. There are many different reasons why there may be vulnerable witnesses in civil proceedings. Some children and mentally-ill people could be vulnerable in *any* court case. Other people may be vulnerable due to the nature of the evidence they have to give, or because they have experienced distress due to harassment or discrimination. Whatever the reason for the vulnerability, we want to make sure that vulnerable witnesses are helped to give their best evidence.

Who is Vulnerable?

- 3.3** We propose three categories of vulnerable witness. These categories are similar to the ones used for criminal proceedings, and are wide ranging enough to help any potentially vulnerable witnesses.

Children

- 3.4** Children under the age of 16 will be automatically entitled to special measures. As with criminal courts, there will be a streamlined notice procedure, and the court will have a duty to ensure that children will have the benefit of special measures.
- 3.5** Unlike in criminal proceedings, there will not be any automatic entitlement for children under 12 to give their evidence outside of the court in civil proceedings. This is because this entitlement is linked to certain types of *criminal* case.

Mental Disorder

- 3.6** Anyone who has a mental disorder will be potentially eligible for special measures. Mental disorder will have the same wide definition as for criminal proceedings. As with criminal proceedings, the court will have a discretionary power to grant special measures, if the party calling the witness has shown that the witness might give their best evidence using a special measure.

Wider Circumstances

- 3.7** There will also be a third category, designed to take into account wider circumstances and background information. It will help people who are victims of abuse, racial harassment, intimidation, etc. Again, the court will have a power to grant special measures at its discretion.

Range of Proceedings

- 3.8** There are many different types of civil proceedings, from family proceedings to commercial contract disputes. Potentially, however, any kind of civil case could involve a child witness, or a witness with a learning disability or mental illness. For this reason, special measures will apply across the whole range of civil proceedings, which would include sheriff court proceedings connected with children's hearings.

Special Measures

- 3.9** The rules of evidence in civil courts are generally much more flexible than in criminal cases and the court may have the common law power to allow special measures to be used, although the extent of the power is not clear. Many vulnerable witnesses will also have an extra level of protection in civil cases as compared to criminal cases. Often the person most vulnerable will be a party to the case and may have a legal representative to protect their own interests, for instance by objecting to unfair or aggressive questioning. This means that the need for special measures in civil cases may be less, but nevertheless we want to make sure they are available when they are needed.
- 3.10** We think it would be helpful to clarify that all the special measures (live TV link, screens, the use of a supporter and evidence on commission) used in criminal proceedings should also be available for vulnerable witnesses in civil proceedings. Evidence on commission is already available in civil proceedings, but it is not currently used to help vulnerable witnesses. We propose to extend the use of evidence on commission to explicitly allow for its use for vulnerable witnesses. We do not need to change the law relating to prior statements or expert evidence in civil proceedings, since these can already be used.

Who Pays?

- 3.11** Certain special measures do not cost much money. For instance, courts are equipped with screens already, and so it will not cost anything to use them. For special measures which do incur a cost, it will be the responsibility of the party calling the witness to pay for the special measure. This is normal for civil courts. For instance, if a party calls a witness who speaks no English, then they will have to pay for an interpreter to allow the witness to be able to give their evidence.
- 3.12** In civil proceedings, the onus is on the parties to present a case and pay for the process as necessary. We do not think this should change although some parties will be receiving legal aid.

For civil proceedings, we propose three categories of vulnerable witness similar to the ones used for criminal proceedings.

The special measures used in criminal proceedings should also be available for vulnerable witnesses in civil proceedings.

Specific Provision for Court Proceedings Arising from Children's Hearings

Restrictions on Use of Character and Sexual History Evidence

- 3.13** When the Reporter to the Children's Panel receives information that a child may be in need of compulsory measures of care, he or she will arrange a children's hearing to deal with the case. The grounds for referral to the hearing may not be accepted, or only accepted in part, by the child and/or the relevant person, such as the parent. In such cases the Reporter, if directed to do so by the children's hearing, must apply to the sheriff to find that the grounds for referral are established.
- 3.14** Many of the cases being referred to the sheriff now involve grounds alleging sexual abuse by either the parents or carers of a child, and this may result in evidence of a sensitive nature being led at the proof.
- 3.15** In some cases it may be necessary to lead the evidence of the child or of another witness, such as a sibling, about any alleged sexual abuse which they have suffered. This can result in the alleged abuser seeking to lead evidence about that witness's character or sexual behaviour. In a criminal trial there are restrictions on the use of such evidence, but these do not apply in proceedings connected with children's hearings, even if essentially the same course of conduct is being examined. We think this is an anomaly in the law and can lead to unfair questioning of some vulnerable witnesses. We propose to introduce provisions similar to those that are available in criminal proceedings under the Sexual Offences (Procedure and Evidence)(Scotland) Act 2002 which restricts the use of evidence relating to a complainer's character and sexual behaviour.
- 3.16** Our policy is that a party in the proceedings should only be allowed to lead character or sexual history evidence about any witness if the court is satisfied that it is relevant to establishing the grounds of referral. Many consultees were supportive of a restriction on this type of evidence. The procedure to be used will be simpler than in a criminal case, to reflect the distinct nature of the proceedings.

There should be restrictions on the use of evidence relating to a witness's character and sexual behaviour. It should only be allowed where it is relevant to establishing the grounds of referral.

Chapter 4: Criminal and Civil Proceedings

Abolition of the Competence Test

- 4.1** We think that the competence test should be abolished. The majority of consultees who considered the question of the competence test agreed. Some witnesses, such as young children, may not understand the difference between abstract terms such as “truth” and “lies” but may be perfectly capable of giving a coherent account of real events. We think that there should be no preliminary test of competence which a witness must pass before they start to give evidence, and it should be left to the judge or jury to decide if the witness’s testimony is reliable and credible in light of all the evidence led in the case.
- 4.2** The court should still be able to exercise discretion regarding whether to put a witness on oath. The court may decide that it is not appropriate for a witness to take the oath but instead to give a promise to tell the truth. Witnesses who are not put on oath would be able to give unsworn evidence. Whether or not the witness had taken the oath would be a factor to be taken into account in assessing the credibility and/or reliability of the witness.

The competence test should be abolished. The judge or jury should decide if the testimony is reliable and credible in light of all the evidence led in the case.

Annex

Summary of Relevant Current Law

Criminal Proceedings

Definition of “vulnerable person”

The law currently allows a “vulnerable person” to be eligible to use special measures in criminal trials in certain circumstances.⁷ It defines a “vulnerable person” as a person who comes within one of three categories:

- a person under the age of 16;
- a person aged 16 or over who is the subject of one of a number of mental health-related court orders; and
- a person aged 16 or over who suffers from significant impairment of intelligence and social functioning.

Entitlement to special measures and procedure

There is currently no automatic entitlement to special measures, even for child witnesses. The party calling the witness (i.e. the Crown or the defence) must make a specific application for a particular special measure.

The court must first be satisfied that the witness falls within one of the three categories. It then has discretion whether to grant the application, having regard to the possible effect on the witness if required to give evidence in the standard way, whether the witness would be likely to be better able to testify using a special measure, and the witness’s own views about the manner of giving evidence. The court may also consider where appropriate, the nature of the crime, the nature of the evidence the witness is likely to have to give, the nature of any relationship between the witness and the accused, and where the witness is a child, his or her age and maturity.

Range of measures available

The current special measures which are specifically provided for by section 271 of the Criminal Procedure (Scotland) Act 1995 are:

Screens

Screens are placed so that a witness cannot see the accused while the witness gives evidence. The accused still must be able to see and hear the person give evidence and normally a TV monitor relays the image of the witness to the accused.

Live Television Link

A witness giving evidence in this way usually does so from another room within the court complex. The witness is shown on a TV monitor in the courtroom, and watches a TV monitor in the room where they are giving evidence. The judge controls the images that the witness sees. This method is most often used when children give evidence in cases of a traumatic nature such as sexual abuse.

Evidence on Commission

This involves the taking and recording of evidence of a witness separate from and usually prior to, the trial, outwith the court building. The court appoints a solicitor or advocate as a “commissioner”, which essentially means that person assuming the role of the judge and presiding over the questioning of the witness by the lawyers acting for the Crown and the defence. The commissioner may also ask questions. The accused would not normally be present in the room where the evidence of the witness is being taken, but must be allowed to watch and listen to it by some other means such as a live TV link. The proceedings are recorded on videotape in order that it can be played at the trial. Currently this method is rarely used for vulnerable witnesses.

Some other special measures can be made available at common law:

Supporter

The court may permit a vulnerable person to have a supporter who accompanies the witness into court (or the room where the witness gives evidence by live television link). Practice on this varies widely but can include:

- Removal of wigs and gowns
- Seating a child witness at the table in the court rather than in the witness box
- Clearing the court

The Lord Justice General issued a Memorandum of Guidance in 1990 advising on the use of these measures in cases involving child witnesses. The Scottish Executive has recently consulted on its “Child Witness Support Consultation document” which dealt with such issues as interviewing child witnesses and questioning of children in court.

Use of Prior Statements

In criminal proceedings, any prior statement made by the witness is admissible as long as it is reliably recorded. The prior statement has to be contained in a document (which can be a video recording), the witness must appear in court to “adopt” it, and must have been a competent witness at the time the statement was made.⁸

Although in theory this provision could be used for vulnerable witnesses, in practice this is very rarely done. Instead, it tends to be used to allow witnesses to confirm details of events they gave statements about previously, the details of which they have now forgotten. The fact that the witness needs to “adopt” the statement, which would involve reading it over, or having a recording of it played in court, also rather undermines its usefulness for vulnerable witnesses.

Use of Expert Evidence

There is no statutory provision in Scotland in relation to the admissibility of expert psychological evidence in criminal proceedings. Prosecutors have been attempting to make greater use of expert evidence where they consider it could explain the behaviour of complainers in certain cases, such as where a child may have been the victim of sexual abuse. In a recent case⁹ the Crown sought to lead the evidence of a child psychologist with extensive experience of cases of sexual abuse, to explain why child victims of sexual abuse tended to give an account of what had happened to them in stages over a period of time. The court refused to allow the prosecutor to lead this evidence.

Identification Evidence

Currently a vulnerable witness who gives evidence by means of one of the special measures can confirm that he remembers having identified, before the trial, a person alleged to have committed the offence.¹⁰ The evidence of a third party about the identification made by the witness is then admissible evidence of the identification.

In 1990 the Scottish Law Commission recommended that there should be a procedure whereby it should be possible, in any criminal proceedings, to lodge a report of such an identification parade with the court prior to the trial. The accused would be able to challenge the identification report, but if he did not do so within a specific period, it would be presumed that the person named in the report and the accused were one and the same person. This recommendation, which would cut down the number of "dock identifications", and be of benefit to some witnesses who may not otherwise qualify for special measures, has not been implemented.

Civil Proceedings

Availability of Special Measures for Vulnerable Witnesses

There is currently no provision in primary legislation for special measures to assist vulnerable witnesses to give evidence in civil proceedings.

Use of Prior Statements

Hearsay evidence, which would include prior statements recorded in any form, is currently generally admissible in civil proceedings.¹¹

Civil Proceedings in the Sheriff Court Following Referrals from the Children's Hearing

Use of Special Measures

When the grounds for referral to a children's hearing are not accepted, or are only accepted in part, the Reporter if directed to do so by the children's hearing will apply to the sheriff to find that the grounds for referral are established. Although the primary legislation, the Children (Scotland) Act 1995, stipulates that these proceedings should be heard by the sheriff in chambers,¹² it does not make specific provision for the use of special measures. Rules applicable to these proceedings¹³ make provision for the giving of evidence by a child by means of a live television link, and allow the sheriff to exclude any person, including the relevant person, from the referral while hearing the evidence of any child in the proceedings, if satisfied it is in the interests of the child to do so.

Use of Sexual History and Character Evidence

Civil proceedings to establish disputed grounds of referral in children's hearing cases may involve the leading of evidence that a child has been the victim of a sexual offence, similar to the type of evidence which would be lead to establish the guilt of the alleged perpetrator of the offence.¹⁴ In some instances there may be concurrent civil and criminal proceedings. While in a criminal trial for a sexual offence, there would be restrictions on the use of evidence about the victim's (i.e. the complainer's) character or past behaviour in relation to sexual matters, no such restrictions apply in civil proceedings to establish the grounds of referral to a children's hearing.

Criminal and civil proceedings

The Competence Test

In Scotland there is no minimum age at which a child is considered competent to give evidence. A child must, however, be able to tell the difference between telling the truth and lying, and appreciate the need to be truthful when giving evidence, and the judge must question the child to ascertain this prior to the child giving evidence. This assessment process is known as the "competence test", and applies in both criminal and civil proceedings. Any child who does not pass the competence test will not be allowed to give evidence.

As regards adults it will, in the first instance, be assumed that an adult is competent to give evidence, but if doubts arise a similar competence test will be used.

The test can result in young children, and some adults (for example, someone with a learning disability), who may not understand the abstract concepts of "truth" and "lies", not being permitted to give evidence at all, even if they would be able to give a coherent account of relevant events. Anecdotal evidence also suggests that, since there are no clear criteria for applying the test, it is applied inconsistently. The Scottish Executive report on "Vulnerable and Intimidated Witnesses: Review of provisions in other jurisdictions" noted that there had been major changes in this area particularly for children, and that a number of countries have relaxed competence laws generally.

References

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 In Other Jurisdictions
- Witness service <http://www.vssdirectory.org.uk/wshelp.php>
- Victim information <http://www.crownoffice.gov.uk>
 and advice (click the “are you a victim of crime?” link)
- Scottish Courts Service <http://www.scotcourts.gov.uk>
- Law society of Scotland http://www.lawscot.org.uk/solicitors_services/code_crim.html#13
 Code of Conduct for
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 (Precognition of Witnesses)
- Child Witness Support <http://www.scotland.gov.uk/consultations/justice/childwitness-00.asp>
 Consultation Document
- The Lord Advocate’s <http://www.scotland.gov.uk/cru/kd01/purple/witness-13.htm>
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 (Scotland) Act 1995
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- Criminal Procedure http://www.hms0.gov.uk/acts/acts1995/Ukpga_19950046_en_13.htm#mdiv260
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- Court Opinion on the Stewart Hampson, Ian McMillan, Jason Fox v HMA case http://www.scotcourts.gov.uk/opinionsv/159_02.html
- Court Opinion on the HMA v Grimmond case (relating to the use of expert evidence) <http://www.scotcourts.gov.uk/opinionsv/osb1807.html>
- Civil Evidence (Scotland) Act 1988 Section 2 http://www.hms0.gov.uk/acts/acts1988/Ukpga_19880032_en_2.htm#mdiv2
- Children (Scotland) Act 1995 Section 93 http://www.hms0.gov.uk/acts/acts1995/Ukpga_19950036_en_6.htm#mdiv93
- Mental Health (Scotland) Bill http://www.scottish.parliament.uk/parl_bus/legis.html#64
- Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 <http://www.hms0.gov.uk/legislation/scotland/acts2002/20020009.htm>
- Memorandum by the Lord Justice General on the Treatment of Child Witnesses by the Courts (includes guidance on use of a supporter) <http://www.scotland.gov.uk/consultations/justice/childwitness-38.asp>
- Child Care and Maintenance Rules 1997 <http://www.hms0.gov.uk/si/si1997/19970291.htm>

End notes

¹A precognition is an unsigned statement taken from a potential witness before formal evidence at trial is given.

²S.227, which as at Stage 2 states:

(1) Subject to subsection (2) below, in this Act “mental disorder” means any:

- (a) mental illness;
 - (b) personality disorder; or
 - (c) learning disability,
- however caused or manifested; and cognate expressions shall be construed accordingly.

(2) A person is not mentally disordered by reason only of any of the following:

- (a) sexual orientation;
- (b) sexual deviancy;
- (c) transsexualism;
- (d) transvestism;
- (e) dependence on, or use of, alcohol or drugs;
- (f) behaviour that causes, or is likely to cause, harassment, alarm or distress to any other person;
- (g) acting as no prudent person would act.

³Stewart Hampson, Ian McMillan, Jason Fox v HMA (Appeal No: 159//02 – 28/11/02)

⁴see the Memorandum by the Lord Justice General on the Treatment of Child Witnesses by the Courts

⁵Recommendation 8.1. (This report is contained in the Child Witness Support Consultation document which was published by the Scottish Executive in October 2002.)

⁶for example in Children’s Hearing Referrals, see Child Care and Maintenance Rules 1997 [SI 1997 No. 291]

⁷Section 271 of the Criminal Procedure (Scotland) Act 1995

⁸Section 260 of the Criminal Procedure (Scotland) Act 1995

⁹HMA v Grimmond SSCR 2001

¹⁰Section 271(11) of the Criminal Procedure (Scotland) Act 1995

¹¹Section 2 of the Civil Evidence (Scotland) Act 1988

¹²Section 93(5) of the Children (Scotland) Act 1995

¹³Child Care and Maintenance Rules 1997 [SI 1997 No. 291]

¹⁴For example, where the grounds of referral to a children’s hearing are one of those specified in section 52(2)(d) to (g) of the Children (Scotland) Act 1995

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