

# **LORD ADVOCATE'S GUIDELINES TO THE POLICE PROVIDING INFORMATION ON VULNERABLE ADULT WITNESSES**

## **INTRODUCTION**

This Guidance follows on from, and should be read in conjunction with the Scottish Executive Guidance on [Information about Child, Young and Vulnerable Adult Witnesses to Inform Decision-making in the Legal Process](#); and guidance on [Identifying Adult Vulnerable Witnesses](#).

## **PURPOSE**

- To ensure consistent recording and reporting to the procurator fiscal of all relevant information about potential vulnerabilities of Crown witnesses;
- To inform decisions about non-statutory arrangements to assist vulnerable witnesses at all stages of the criminal process;
- To inform decisions about statutory special measures which may require to be put in place to enable the witness to give best evidence, under the Vulnerable Witnesses (Scotland) Act 2004;
- To ensure a better, more coherent service is provided to vulnerable witnesses in their contact with the criminal justice system

## **VULNERABLE WITNESSES**

For many witnesses, contact with the criminal justice system is not a matter of choice, comes at a time of great stress in their lives, and is a process that is alien to them. Giving a statement, and perhaps eventually giving evidence at court, can be difficult and stressful. Individual witnesses have different needs. It is the responsibility of those in the criminal justice system to recognise and seek to meet those needs, and to assist the witness to give their best evidence.

## **THE VULNERABLE WITNESSES (SCOTLAND) ACT 2004**

### **Timetable for Implementation**

The Vulnerable Witnesses (Scotland) Act 2004 is being commenced in stages.

- The provisions relating to child witnesses in solemn cases commenced in April 2005 (for police reports received after 1 April 2005).<sup>1</sup>
- The provisions for solemn cases affecting vulnerable adults will commence on 1 April 2006.
- The provisions for summary cases affecting children are expected to be commenced in April 2007, and in respect of adult witnesses towards the end of 2007.

The Act aims to improve conditions for vulnerable witnesses by increasing the number of support measures available to help them participate more fully in criminal and civil

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<sup>1</sup> Separate arrangements have been made for taking evidence by a commissioner.

proceedings. It also extends the definition of ‘vulnerable witness’ to include adult witnesses where there is a significant risk that the quality of their evidence will be diminished through fear or distress.

**All those in the criminal justice system in contact with witnesses must ensure that information about potential vulnerability is recorded and shared. If this does not happen we will fail to meet our responsibilities to vulnerable witnesses under the legislation and deny vulnerable witnesses the opportunity to seek to use the special measures to which they may be entitled.**

### **Child Witnesses**

The legislation states that children are, by reason of age, vulnerable and entitled to the use of a special measure or special measures. The party citing the witness must submit a child witness notice for each witness requesting the special measure – or combination of measures – that it deems appropriate.

### **Vulnerable Adult Witnesses**

An adult witness can be held to be a vulnerable witness, and entitled to special measures when giving evidence, if the legislative test is met. Under the Vulnerable Witnesses (S) Act 2004 a special measure for an adult witness can only be considered:-

“where 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” [that is where the witness is suffering from a mental illness, personality disorder or learning disability]

(ii) fear or distress in connection with giving evidence at the trial or proceedings”.

The reference to the quality of evidence is to its quality in terms of **completeness, coherence and accuracy**.

The Act does not define the word “significant” but it could be interpreted as “extensive or important enough to merit attention”.

### **Identification Evidence and the Relationship with Special Measures**

The Act also extends the routine evidence provisions to allow identification evidence to be accepted in evidence on service of a report providing for identification, if no objection is taken by the defence. Some special measures, such as screens or live link, preclude dock identification in the course of a trial. For the full range of special measures to be available for consideration by the prosecutor, it may be necessary to ensure that corroborated evidence of identification can be found without the need for vulnerable witnesses to identify the accused at court. It may be that the essential link can be achieved by the evidence of a third party who can confirm the accused’s identity, and the vulnerable witness’s identification of the accused. Alternatively, it may be that the necessary evidence of identification can only be secured by the holding of an identity parade or the like.

Officers are referred to the [Lord Advocate's Guidance on the Conduct of Visual Identification Procedures](#). The important relationship between the holding of a parade and the availability of special measures will be apparent. Children are of course entitled to automatic use of "standard" special measures, which includes screens and live link.

### **The Test of Vulnerability: Fear or Distress in Connection with Giving Evidence**

Before allowing special measures to be used, the court must be satisfied that the adult witness is a vulnerable witness. In determining this, the court must take into account a number of factors about the circumstances of the case, and the personal and social circumstances of the witness. These factors are set out in the legislation and include:

- the nature and circumstances of the alleged offence;
- the nature of the evidence which the person is likely to give;
- the relationship between the person and the accused;
- the witness's age and maturity;
- any behaviour towards the witness on the part of the accused; members of the family or associates of the accused, or from any other person who is likely to be an accused or a witness in the proceedings;
- the social and cultural background and ethnic origin of the person;
- the person's sexual orientation;
- the domestic and employment circumstances of the person;
- any religious beliefs or political opinions of the person;
- any physical disability or impairment of the witness which and the person has and;
- any other matter as appears to the court to be relevant.

### **THE ROLE OF THE POLICE**

Children and vulnerable adult witnesses must be identified as early as possible in the process. Police officers have a crucial role to play in this. They are generally the first point of contact a witness has with the criminal justice process, and have the benefit of face-to-face contact with witnesses. Good information captured and conveyed at an early stage also reduces the likelihood of repeated interviews and inquiries by those with different interests. For example, witnesses report defence precognition as often being a source of significant stress.

Information about the vulnerabilities observed in or reported by a witness can be invaluable in assisting the Crown to identify the need for special measures, or to enable the prosecution, together with other criminal justice partners, to put in place other, non-statutory support arrangements which would benefit witnesses.

It is imperative that all relevant information be provided about factors which may make it difficult for the witness to give evidence and to provide information so that the particular needs of individual witnesses can be addressed e.g. information about interpreting needs and other communication difficulties, hearing aids, mobility problems, mental health difficulties, physical disabilities or impairments. It is also vital to provide any information which explains why a witness may be fearful or distressed at the prospect of giving evidence.

### **RECORDING INFORMATION ABOUT VULNERABILITY**

Police officers must record in their report to the procurator fiscal their observations about:

- ❖ a witness's reactions to the crime and to the accused,
- ❖ any expressed fears related to the crime or to involvement in the criminal justice process, and
- ❖ any personal characteristics exhibited by the witness which might suggest vulnerability.

The three areas noted here must be considered and reported upon in respect of each witness. If there are **no** factors present tending to suggest vulnerability of an individual witness, the reporting officer **must** state this in the report, stating "no witness presented as vulnerable / none of the remaining witnesses presented as vulnerable".

However, it is not the responsibility of the police to question a witness about every aspect of the criteria in the legislation; officers are not expected to conduct a needs assessment of the witness and the support and special measures which may assist that individual. Rather, they are required to **record observations and key facts** so as to enable the prosecutor to identify those who may require a more in depth assessment of their needs.

Even where the prosecutor considers that an adult witness is vulnerable and elects to make an application on their behalf, the decision as to whether they are vulnerable is one for the court. Likewise, whether a special measure will be granted, and whether this accords with the wishes of the witness, is a matter for the court. Child witnesses are, of course, automatically deemed vulnerable, but again the use of special measures, and in particular *which* special measure, may be a decision for the court.

## **PROCEDURE**

Until the revised Standard Prosecution Report is available, officers must submit relevant information using the "Remarks" section of the SPR and must provide a child witness's date of birth in the witness list. Any further information that becomes available to the police after the SPR is received by the procurator fiscal should be communicated immediately by confidential subject report or memorandum.

The aim is to capture information which is available or becomes available as part of the investigative process.

Relevant information may be available from:

- social work services or voluntary services, where there is an involvement with the witness
- family members, friends or carers
- an appropriate adult, if employed in the case
- teachers
- health care professionals
- colleagues with previous knowledge of the witness

## **APPROPRIATE ADULTS**

The rights and obligations conferred by statute and common law apply equally to any individual who comes into contact with the police but special care and understanding is required when dealing with mentally disordered people. The role of the appropriate adult is to ensure that a mentally disordered person is not disadvantaged during a police interview, as a result of the disorder from which he or she suffers. (Police circular 7/1998; SWSG Mel. 43/1998). Consequently no person who is identified as a vulnerable witness, by virtue of the substituted Section 271(1)(b)(i) of the Criminal Procedure (Scotland) Act 1995, will be interviewed by a Police Officer unless an appropriate adult is present.

The details of the Appropriate Adult must be provided in the report to the Procurator Fiscal, together with the details of any carer or advocacy worker for the mentally disordered person.

## **WITNESS PROTECTION/INTIMIDATION**

Where the criteria are fulfilled and it is deemed necessary, the protection of all witnesses is achieved through the extant Witness Protection Programme, managed by the Scottish Drugs Enforcement Agency. Details of this Programme are not in the public domain. If any witness is entered in the programme in the course of an investigation, the procurator fiscal must be advised of that fact.

Officers should be aware that a witness who was not initially considered vulnerable at the time of reporting may become so through subsequent intimidation. If such information becomes available, it must be reported immediately to the relevant procurator fiscal by way of subject sheet.

## **PRIVACY**

Information about any of the vulnerability factors outlined in the legislation may not be readily available, or may not be offered by the witness. In such cases care should be taken about questioning the witness concerning essentially private matters which are not directly relevant to the **content** of the evidence they can provide. For example, it is generally not appropriate to ask witnesses about their mental health unless it appears to have a bearing on the case or has some relevance in terms of explaining the context of the offence.

## **OTHER NON-STATUTORY SUPPORT AND ASSISTANCE**

This Guidance is concerned, primarily, with the special measures available under the Vulnerable Witnesses (Scotland) Act 2004, but it must be borne in mind that the provision of good, early information, advice and support can greatly assist witnesses. Aside from the legislation, there are a number of ways in which the stress of contact with the criminal justice process can be alleviated for witnesses. These include:

- availability of support at court in the form of the Witness Service,
- the conduct of pre-trial familiarisation visits to court,
- making arrangements to transport fearful or intimidated witnesses to court,
- using separate entrances/waiting rooms etc.

These measures can go some way to ease the anxieties witnesses say they experience in relation to giving evidence.

Success in assisting witnesses to give their evidence requires that the procurator fiscal receives clear and comprehensive information about vulnerabilities from the police. Care should be taken by officers to ensure that this guidance is given effect to wherever possible.

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