

POLICY NOTE

THE VICTIMS AND WITNESSES (SCOTLAND) ACT 2014 (COMMENCEMENT NO. 4 AND TRANSITIONAL PROVISIONS) ORDER 2015

SSI 2015/200 (C. 32)

1. The above instrument was made in exercise of the powers conferred by section 34(2) and (3) of the Victims and Witnesses (Scotland) Act 2014 (“the 2014 Act”). The instrument is laid before Parliament under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.

Policy Objectives

2. The 2014 Act introduces various measures to improve the support and information available to victims and witnesses of crime in Scotland, and is being implemented in stages. This instrument (the third relating to measures affecting the justice system) brings into force on 1 July 2015 section 4 of the 2014 Act and on 1 September 2015 sections 7 and 10 to 22 of the 2014 Act. Sections 10 to 21 amend the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) and section 22 amends the Vulnerable Witnesses (Scotland) Act 2004 (“the 2004 Act”).
3. The measures being brought into force are as follows:

- **Section 4 – Rules: review of decision not to prosecute**

Section 4 requires the Lord Advocate to make and publish rules about the process for reviewing a decision of the prosecutor not to prosecute a person for an offence. A person who is, or appears to be, a victim in relation to the offence can make such a request for a review and the rules to be published will clarify the process to be followed.

- **Section 7 - Interviews with children: guidance**

Section 7 requires police officers and social workers, when jointly conducting interviews with children under the age of 18 in relation to criminal proceedings, or a matter which may lead to criminal proceedings, to have due regard to guidance issued by the Scottish Ministers. Section 7 will place, on a statutory footing, any guidance issued by the Scottish Ministers on or after 1 September 2015. In practice, this will affect those joint interviews conducted in respect of children (under the age of 18 years) known as “joint investigative interviews.”

- **Section 10 - Vulnerable witnesses: main definitions**

Section 10 extends the definition of a child witness from persons under 16 years of age to those under 18 years of age. In addition, it introduces a new category of

vulnerable witness to be known as a “deemed vulnerable witness”, namely victims, or those who appear to be victims, of the following: sexual offences, human trafficking, domestic abuse and stalking. Furthermore, section 10 defines a further category of vulnerability to encompass those witnesses who are considered by the court to be at significant risk of harm by reason of them giving evidence.

- **Section 11 - Child and deemed vulnerable witnesses**

Section 11 applies the use of standard special measures currently available to child witnesses to deemed vulnerable witnesses. To support deemed vulnerable witnesses to give their best evidence, they will now have automatic entitlement to use the standard special measures that child witnesses are already automatically entitled to, namely: a live television link, a screen, and/or a supporter.

- **Section 12 - Child and deemed vulnerable witnesses: standard special measures**

Section 12 removes the following restrictions in the use of standard special measures (for child and deemed vulnerable witnesses):

- a live television link has to be in another room within the court; and
- a supporter has to be used in conjunction with either a live television link or a screen.

Consequently, a live TV link does not require to be from another room within the court when used as a standard special measure and a supporter will now be available as a stand-alone standard special measure for child and deemed vulnerable witnesses.

- **Section 13 - Objections to special measures: child and deemed vulnerable witnesses**

Section 13 provides for objections to be lodged to the use of special measures, other than the standard special measures, in relation to child and deemed vulnerable witnesses. Objections to a vulnerable witness notice can be lodged by any party to the proceedings and this section sets out the time limit for lodging an objection, and allows for the lodging of a late objection (subject to sufficient reason being given to the court for it being late).

- **Section 14 - Child witnesses**

Section 14 makes an amendment to the current provision, at section 271B of the 1995 Act, so that where a child under 12 expresses a wish to be present in court when giving their evidence, the court must make an order to that effect. However, this obligation does not apply where the court considers that it would not be appropriate for the child to be present in court to give evidence.

In effect, this changes the presumption that a child witness would give evidence away from the court, which could cause anxiety to the child if their parent or carer is required to be in court at the same time, and places more emphasis on the wishes of the child.

Section 14 also makes provision for the situation where the child does not want to give evidence in court. The court can only oblige the child to give evidence in court where the risk of prejudice to the fairness of the trial or the interests of justice outweighs the risk of prejudice to the interests of the child. While greater emphasis is now placed on the child's wishes, those wishes do not override the interests of justice.

- **Section 15 - Reporting of proceedings involving children**

Section 15 amends the current provision, at section 47 of the 1995 Act, by increasing the age, from under 16 years to under 18 years, to which reporting restrictions apply to any child concerned in criminal proceedings, whether as a witness or as an accused. This amendment brings the current legislative provisions into line with the definition of a child elsewhere.

- **Section 16 - Other vulnerable witnesses: assessment and application**

Section 16 requires the party intending to cite a witness, other than a child or deemed vulnerable witness, to carry out an assessment to ascertain whether that witness is likely to be vulnerable. If that witness is assessed as vulnerable, the party intending to cite that witness must then determine what special measures (or combination of special measures) should be utilised in order to take that person's evidence.

- **Section 17 - Objections to special measures: other vulnerable witnesses**

Section 17 makes provision to allow any party to criminal proceedings to object to a vulnerable witness application requesting special measures for a witness who is not a child or deemed vulnerable witness. The procedures under this provision are very similar to that for section 13 (as set out above).

- **Section 18 - Review of arrangements for vulnerable witnesses**

Section 18 extends the right of a party citing or intending to cite a witness to request that the court review the arrangements for taking the witness's evidence, to any party to the proceedings. This will allow the non-citing party (normally the defence) to request a review.

- **Section 19 - Temporary additional special measures**

Section 19 provides the Scottish Ministers with an order making power to allow limited pilots to be carried out of new special measures, to allow these to be tested and evaluated before deciding whether they should be rolled out across Scotland.

- **Section 20 - Special measures: closed courts**

Section 20 adds a closed court to the list of special measures available to assist vulnerable witnesses to give their best evidence (though courts currently have a common law power to exclude members of the public if it is necessary for the administration of justice; and a statutory power when witnesses are giving evidence in certain types of cases).

- **Section 21 - Power to prescribe further special measures**

Section 21 provides the Scottish Ministers with an order making power to add new special measures, amend or delete existing special measures and also to modify the sections of the 1995 Act which detail how the existing special measures are to operate.

- **Section 22 - Vulnerable witnesses: civil proceedings**

Section 22 amends the definition of a child witness to encompass those under the age of 18 years (previously under 16 years) in civil proceedings. This will provide for consistency in relation to child witnesses in both criminal and civil proceedings. This section also contains an order making power which allows the Scottish Ministers to extend the definition of vulnerable witnesses in respect of civil proceedings.

4. In addition, the instrument makes transitional provision in relation to sections 7, 10 to 14, 16 to 18, 20 and 22 of the 2014 Act. An explanation of these transitional provisions is set out below.
5. The remaining provisions commenced by this instrument will come into force fully on the dates specified in the order.

Transitional provisions – Section 7 (Interviews with children: guidance)

6. Section 7 of the 2014 Act provides that the police and social workers must have due regard to any guidance issued by the Scottish Ministers in respect of any interview conducted with a child (defined as being under 18 years of age). Article 3 of the instrument makes transitional provisions to provide that the obligation under section 7 of the 2014 Act will only apply to those interviews conducted on or after 1 September 2015 and to any guidance issued on or after that date. This is to allow for effective implementation from an operational perspective, providing clarity to those working in

the police and social services who are required to have due regard to any guidance issued by the Scottish Ministers.

Transitional provisions – Section 10 to 14, 16 to 18 and 20 (Vulnerable witnesses and special measures)

7. Sections 10 to 14 of the 2014 Act set out the provisions for the re-defining of child witnesses, the new categories of vulnerability, the application of automatic entitlement to certain standard special measures to deemed vulnerable witnesses, objections to special measures (child and deemed vulnerable witnesses) and provisions relating to children under 12 expressing a wish to give evidence from within the court. Sections 16 to 18 and 20 of the 2014 Act provide for the assessment of persons being cited as witnesses (other than child and deemed vulnerable witnesses), objections to special measures (other than child and deemed vulnerable witnesses), the review of special measures and the provision for the new special measure of a closed court. Article 4 of the instrument provides that these sections of the 2014 Act only come into force in relation to criminal proceedings commenced on or after 1 September 2015. The commencement of proceedings is defined at Article 1(3) as the day on which a report of the case has been received by the procurator fiscal.
8. The transitional provisions set out above are to enable commencement of those sections to take place effectively, as to apply the provisions of these sections to on-going cases would create significant operational difficulties for those organisations responsible for the fair and effective operation of the criminal justice system. Furthermore, this approach to commencement is consistent with the approach taken in relation to the 2004 Act, on which the provisions of the 2014 Act build.

Transitional provisions – Section 22 (Vulnerable witnesses: civil proceedings)

9. Section 22 of the 2014 Act re-defines a child witness for the purposes of civil proceedings, and brings that definition into line with that for criminal proceedings. Article 5 of the instrument makes provision for the commencement of section 22 in relation to civil proceedings commenced on or after 1 September 2015. Article 1(4) of the instrument provides that civil proceedings are commenced on the date on which the document initiating those proceedings is served. It is further provided that if proceedings involve serving that document on more than one person, the proceedings are taken to be commenced when that document has been served on the first of those persons.
10. As with the provisions relating to criminal proceedings, this approach provides for the effective implementation of this section from an operational perspective and provides consistency with the approach taken to the commencement of the sections relating to civil proceedings in the 2004 Act.

Consultation

11. A public consultation paper, “Making Justice Work for Victims and Witnesses”¹, was carried out in July 2012, and non-confidential responses² and an analysis³ are available on the Scottish Government’s website.
12. In addition, consultation with stakeholders (including various victim support groups and the justice organisations affected by the legislation) was undertaken throughout the Bill process, and continues in relation to the implementation of the 2014 Act.

Equality Impact Assessment

13. An Equality Impact Assessment (EQIA) was carried out for the purposes of the Victims and Witnesses (Scotland) Bill, and it was determined that the Bill would be unlikely to have any significant differential effect on the protected characteristics. The results of the EQIA were published on the Scottish Government website⁴.

Scottish Government
Justice Directorate
May 2015

¹ <http://www.gov.scot/Publications/2012/05/8645/0>

² <http://www.gov.scot/Publications/2012/09/3650/0>

³ <http://www.gov.scot/Publications/2013/01/8185/0>

⁴ <http://www.gov.scot/Publications/2013/02/3668>