

2007 No. 450

COURT OF SESSION

**Act of Sederunt (Rules of the Court of Session Amendment
No. 9) (Vulnerable Witnesses (Scotland) Act 2004) 2007**

Made - - - - - *4th October 2007*

Coming into force - - - - - *1st November 2007*

The Lords of Council and Session, under and by virtue of the powers conferred by section 5 of the Court of Session Act 1988(a), and of all other powers enabling them in that behalf, do hereby enact and declare:

Citation and commencement

1.—(1) This Act of Sederunt may be cited as the Act of Sederunt (Rules of the Court of Session Amendment No. 9) (Vulnerable Witnesses (Scotland) Act 2004) 2007 and shall come into force on 1st November 2007.

(2) This Act of Sederunt shall be inserted in the Books of Sederunt.

Amendment of the Rules of the Court of Session

2.—(1) The Rules of the Court of Session 1994(b) shall be amended in accordance with the following sub-paragraphs.

(2) After Chapter 35 (recovery of evidence) there shall be inserted the following:—

“CHAPTER 35A

VULNERABLE WITNESSES (SCOTLAND) ACT 2004

Interpretation

35A.1. In this Chapter—

“the Act of 2004” means the Vulnerable Witness (Scotland) Act 2004(c);

“child witness notice” has the meaning given in section 12(2) of the Act of 2004;

“review application” means an application for review of arrangements for vulnerable witnesses pursuant to section 13 of the Act of 2004;

“vulnerable witness application” has the meaning given in section 12(6) of the Act of 2004.

(a) 1988 c.36; section 5 was amended by the Civil Evidence (Scotland) Act 1988 c.32, section 2(3), the Children (Scotland) Act 1995 c.36, Schedule 4, paragraph 45 and by the Vulnerable Witnesses (Scotland) Act 2004 (asp 3), section 14(1).
(b) S.I. 1994/1443, last amended by S.S.I. 2007/449
(c) 2004 asp 3.

Child Witness Notice

35A.2. A child witness notice lodged in accordance with section 12(2) of the Act of 2004 shall be in Form 35A.2.

Vulnerable Witness Application

35A.3. A vulnerable witness application lodged in accordance with section 12(6) of the Act of 2004 shall be in Form 35A.3.

Intimation

35A.4.—(1) The party lodging a child witness notice or vulnerable witness application shall intimate a copy of the child witness notice or vulnerable witness application to all the other parties to the proceedings and complete a certificate of intimation.

(2) A certificate of intimation referred to in paragraph (1) shall be in Form 35A.4 and shall be lodged with the child witness notice or vulnerable witness application.

Procedure on lodging child witness notice or vulnerable witness application

35A.5.—(1) On receipt of a child witness notice or vulnerable witness application, the Lord Ordinary may—

- (a) make an order under section 12(1) or (6) of the Act of 2004 without holding a hearing;
- (b) require further information from any of the parties before making any further order;
- (c) fix a date for a hearing of the child witness notice or vulnerable witness application.

(2) The Lord Ordinary may, subject to any statutory time limits, make an order altering the date of the proof or other hearing at which the child or vulnerable witness is to give evidence and make such provision for intimation of such alteration to all parties concerned as he deems appropriate.

(3) An order fixing a hearing for a child witness notice or vulnerable witness application shall be intimated by the Deputy Principal Clerk—

- (a) on the day the order is made; and
- (b) in such manner as may be prescribed by the Lord Ordinary,

to all parties to the proceedings and such other persons as are named in the order where such parties or persons are not present at the time the order is made.

Review of arrangements for vulnerable witnesses

35A.6.—(1) A review application shall be in Form 35A.6.

(2) Where the review application is made orally, the Lord Ordinary may dispense with the requirements of paragraph (1).

Intimation of review application

35A.7.—(1) Where a review application is lodged, the applicant shall intimate a copy of the review application to all other parties to the proceedings and complete a certificate of intimation.

(2) A certificate of intimation referred to in paragraph (1) shall be in Form 35A.7 and shall be lodged together with the review application.

Procedure on lodging a review application

35A.8.—(1) On receipt of a review application, a Lord Ordinary may—

- (a) if he is satisfied that he may properly do so, make an order under section 13(2) of the Act of 2004 without holding a hearing or, if he is not so satisfied, make such an order after giving the parties an opportunity to be heard;
- (b) require of any of the parties further information before making any further order;
- (c) fix a date for a hearing of the review application.

(2) The Lord Ordinary may, subject to any statutory time limits, make an order altering the date of the proof or other hearing at which the child or vulnerable witness is to give evidence and make such provision for intimation of such alteration to all parties concerned as he deems appropriate.

(3) An order fixing a hearing for a review application shall be intimated by the Deputy Principal Clerk—

- (a) on the day the order is made; and
- (b) in such manner as may be prescribed by the Lord Ordinary,

to all parties to the proceedings and such other persons as are named in the order where such parties or persons are not present at the time the order is made.

Determination of special measures

35A.9. When making an order under section 12(1) or (6) or 13(2) of the Act of 2004 a Lord Ordinary may, in light thereof, make such further orders as he deems appropriate in all the circumstances.

Intimation of an order under section 12(1) or (6) or 13(2)

35A.10. An order under section 12(1) or (6) or 13(2) of the Act of 2004 shall be intimated by the Deputy Principal Clerk—

- (a) on the day the order is made; and
- (b) in such manner as may be prescribed by the Lord Ordinary,

to all parties to the proceedings and such other persons as are named in the order where such parties or persons are not present at the time the order is made.

Taking of evidence by commissioner

35A.11.—(1) An interlocutor authorising the special measure of taking evidence by a commissioner shall be sufficient authority for the citing the vulnerable witness to appear before the commissioner.

(2) A vulnerable witness shall be cited to give evidence at a commission by service on him of a citation in Form 35.11-A—

- (a) by registered post or the first class recorded delivery service; or
- (b) personally, by a messenger-at-arms.

(3) The certificate of citation of a witness—

- (a) under paragraph 2(a) shall be in Form 35.11-B; and
- (b) under paragraph 2(b) shall be in Form 35.11-C.

(4) The agent for a party, or a party litigant, as the case may be, shall be personally liable in the first instance for the fees and expenses of a witness cited to appear at a commission for that party.

(5) At the commission the commissioner shall—

- (a) administer the oath *de fidei administratione* to the clerk appointed for the commission; and

- (b) administer to the witness the oath in Form 35.4-D, or where the witness elects to affirm, the affirmation in Form 35.4-E.
- (3) Where a commission is granted as a special measure, the court may, on the motion of any party and on cause shown, dispense with interrogatories.

Commission on interrogatories

35A.12.—(1) Where interrogatories have not been dispensed with, the party citing or intending to cite the vulnerable witness shall lodge draft interrogatories to be adjusted at the sight of the clerk of court.

(2) Any other party may lodge cross-interrogatories to be adjusted at the sight of the clerk of court.

(3) The interrogatories and cross-interrogatories, when adjusted, shall be extended and returned to the clerk of court for approval.

(4) The party who cited the vulnerable witness shall—

- (a) provide the commissioner with a copy of the pleadings (including any adjustments and amendments), the approved interrogatories and any cross-interrogatories and a certified copy of the interlocutor of his appointment;
- (b) instruct the clerk; and
- (c) be responsible in the first instance for the fee of the commissioner and his clerk.

(5) The commissioner shall, in consultation with the parties, fix a diet for the execution of the commission to examine the witness.

Commission without interrogatories

35A.13.—(1) Where interrogatories have been dispensed with, the party citing or intending to cite the vulnerable witness shall—

- (a) provide the commissioner with a copy of the pleadings (including any adjustments and amendments) and a certified copy of the interlocutor of his appointment;
- (b) fix a diet for the execution of the commission in consultation with the commissioner and every other party;
- (c) instruct the clerk; and
- (d) be responsible in the first instance for the fees of the commissioner and his clerk.

(2) All parties shall be entitled to be represented by counsel or other person having a right of audience, or agent, at the execution of the commission.

Lodging of video record and documents

34A.14.—(1) Where evidence is taken on commission pursuant to an order made under section 12(1) or (6) or 13(2) of the Act of 2004 the commissioner shall lodge the video record of the commission and relevant documents with the Deputy Principal Clerk.

(2) Not later than the day after the date on which the video record and any documents are received by the Deputy Principal Clerk, he shall—

- (a) note—
 - (i) the documents lodged;
 - (ii) by whom they were lodged; and
 - (iii) the date on which they were lodged, and
- (b) give written intimation of what he has noted to all parties concerned.

Custody of video record and documents

35A.15.—(1) The video record and documents referred to in rule 35A.14 shall, subject to paragraph (2), be kept in the custody of the Deputy Principal Clerk.

(2) Where the video record of the evidence of a witness is in the custody of the Deputy Principal Clerk under this rule and where intimation has been given to that effect under rule 35A.14(2), the name and address of that witness and the record of his evidence shall be treated as being in the knowledge of the parties; and no party shall be required, notwithstanding any enactment to the contrary—

- (a) to include the name of that witness in any list of witnesses; or
- (b) to include the record of his evidence in any list of productions.

Application for leave for party to be present at the commission

35A.16. An application for leave for a party to be present in the room where the commission proceedings are taking place shall be by motion.”.

(3) In the Appendix—

- (a) after Form 35.16-C(a), there shall be inserted the forms set out in Part 1 of the Schedule to this Act of Sederunt;
- (b) for Form 36.2-A(b), there shall be substituted the form set out in Part 2 of the Schedule to this Act of Sederunt.

A C HAMILTON
Lord President,
I.P.D.

Edinburgh
4th October 2007

(a) Form 35.16-C was inserted by S.S.I. 2004/514.
(b) Form 36.2-A was amended by S.I. 1994/2901.

SCHEDULE

Paragraph 2(3)

Part 1

Rule 35A.2

FORM 35A.2

Form of child witness notice

VULNERABLE WITNESSES (SCOTLAND) ACT 2004 Section 12

Received theday of20.....

(Date of receipt of this notice)

.....(signed)

Depute Clerk of Session

In the Cause (Cause Reference No.)

[A.B.] (designation and address)

Pursuer [or Petitioner]

against

[C.D.] (designation and address)

Defender [or Respondent]

CHILD WITNESS NOTICE

1. The applicant is the pursuer [or petitioner] [or defender] [or respondent] in the action by [A.B.] (design) against [C.D.] (design).

2. The applicant has cited [or intends to cite] [E.F.] (date of birth) as a witness.

3. [E.F.] is a child witness under section 11 of the Vulnerable Witnesses (Scotland) Act 2004 [and was under the age of sixteen on the date of the commencement of proceedings].

4. The applicant considers that the following special measure[s] is [are] the most appropriate for the purpose of taking the evidence of [E.F.] [or that [E.F.] should give evidence without the benefit of any special measure]:-

(delete as appropriate and specify any special measure(s) sought).

5. [The reason[s] this [these] special measure[s] is [are] considered the most appropriate is [are] as follows:-

(here specify the reason(s) for the special measures(s) sought)].

OR

[The reason[s] it is considered that [E.F.] should give evidence without the benefit of any special measure is [are]–

(here explain why it is felt that no special measures are required).

6. [E.F.] and the parent[s] of [*or* [person[s] with parental responsibility for] [E.F.] has [have] expressed the following view[s] on the special measure[s] that is [are] considered most appropriate [*or* the appropriateness of [E.F.] giving evidence without the benefit of any special measure]:–

(delete as appropriate and set out the view(s) expressed and how they were obtained).

7. Other information considered relevant to this application is as follows:–

(here set out any other information relevant to the child witness notice).

8. The applicant asks the court to–

- (a) consider this child witness notice;
- (b) make an order authorising the special measure[s] sought; [*or*
- (c) make an order authorising the giving of evidence by [E.F.] without the benefit of special measures.]

(delete as appropriate)

.....(Signed)

Solicitor [*or* Agent] for A.B. [*or* C.D.] (*include full designation*)

NOTE: This form should be suitably adapted where section 16 of the Act of 2004 applies.

FORM 35A.3

Form of vulnerable witness application

Rule 35A.3

VULNERABLE WITNESSES (SCOTLAND) ACT 2004 Section 12

Received theday of20.....

(Date of receipt of this notice)

.....*(signed)*

Depute Clerk of Session

In the Cause (Cause Reference No.)

[A.B.] *(designation and address)*

Pursuer *[or Petitioner]*

against

[C.D.] *(designation and address)*

Defender *[or Respondent]*

VULNERABLE WITNESS APPLICATION

1. The applicant is the pursuer *[or petitioner]* *[or defender]* *[or respondent]* in the action by [A.B] *(design)* against [C.D.] *(design)*.

2. The applicant has cited *[or intends to cite]* [E.F.] *(date of birth)* as a witness.

3. The applicant considers that [E.F.] is a vulnerable witness under section 11(1)(b) of the Vulnerable Witnesses (Scotland) Act 2004 for the following reasons:-

(here specify reasons witness is considered to be a vulnerable witness).

4. The applicant considers that the following special measure[s] is [are] the most appropriate for the purpose of taking the evidence of [E.F.]:-

(specify any special measure(s) sought).

5. The reason[s] this [these] special measure[s] is [are] considered the most appropriate is [are] as follows:-

(here specify the reason(s) for the special measures(s) sought).

6. [E.F.] has expressed the following view[s] on the special measure[s] that is [are] considered most appropriate:-

(set out the views expressed and how they were obtained).

7. Other information considered relevant to this application is as follows:-

(here set out any other information relevant to the vulnerable witness application).

8. The applicant asks the court to—
- (a) consider this vulnerable witness application;
 - (b) make an order authorising the special measure[s] sought.

.....(Signed)

Solicitor [*or Agent*] for A.B. [*or C.D.*] (*include full designation*)

NOTE: This form should be suitably adapted where section 16 of the Act of 2004 applies.

FORM 35A.4

Form of certificate of intimation

Rule 35A.4(1)

VULNERABLE WITNESSES (SCOTLAND) ACT 2004 Section 12

CERTIFICATE OF INTIMATION

Cause Reference No.

I, *(name and designation)* certify that I intimated the child witness notice [*or vulnerable witness application*] relating to *(insert name of witness)* to *(insert names of parties or solicitors for parties, as appropriate)* by *(insert method of intimation)* on *(insert date of intimation)*.

Date:

.....*(Signed)*

Solicitor [*or Agent*]

(include full business designation)

FORM 35A.6

Form of application for review

Rule 35A.6

VULNERABLE WITNESSES (SCOTLAND) ACT 2004 Section 13

Received theday of20.....

(Date of receipt of this notice)

.....*(signed)*

Depute Clerk of Session

In the Cause (Cause Reference No.)

[A.B.] *(designation and address)*

Pursuer [*or* Petitioner]

against

[C.D.] *(designation and address)*

Defender [*or* Respondent]

APPLICATION FOR REVIEW OF ARRANGEMENTS FOR VULNERABLE WITNESS

1. The applicant is the pursuer [*or* petitioner] [*or* defender] [*or* respondent] in the action by [A.B.] *(design)* against [C.D.] *(design)*.

2. A proof [*or* hearing] is fixed for *(date)* at *(time)*.

3. [E.F.] is a witness who is to give evidence at, or for the purposes of, the proof [*or* hearing]. [E.F.] is a child witness [*or* vulnerable witness] under section 11 of the Vulnerable Witnesses (Scotland) Act 2004.

4. The current arrangements for taking the evidence of [E.F.] are *(here specify current arrangements)*.

5. The current arrangements should be reviewed as *(here specify reasons for review)*.

6. [E.F.] [and the parent[s] of [*or* person[s] with parental responsibility for] [E.F.]] has [have] expressed the following view[s] on [the special measure[s] that is [are] considered most appropriate] [*or* the appropriateness of [E.F.] giving evidence without the benefit of any special measure]:-

(delete as appropriate and set out the view(s) expressed and how they were obtained).

7. The applicant seeks (*here specify the order sought*).

(Signed)

Solicitor [*or Agent*] for A.B. [*or C.D.*] (*include full designation*)

NOTE: This form should be suitably adapted where section 16 of the Act of 2004 applies.

FORM 35A.7

Form of certificate of intimation

Rule 35A.7(2)

VULNERABLE WITNESSES (SCOTLAND) ACT 2004 Section 13

CERTIFICATE OF INTIMATION

Cause Reference No.

I, *(name and designation)* certify that I intimated the review application relating to *(insert name of witness)* to *(insert names of parties or solicitors for parties, as appropriate)* by *(insert method of intimation)* on *(insert date of intimation)*.

Date:

.....*(Signed)*

Solicitor [*or Agent*]

(include full business designation)

Part 2

FORM 36.2-A

Form of citation of witness to proof or jury trial

(date)

CITATION TO COURT OF SESSION

To [A.B.] *(design)*

(Name) who is pursuing /defending a case against *(name)* [*or is a (specify) in the case of (name) against (name) [or has presented a petition]* in the Court of Session and has asked you to be a witness. You must attend the Court of Session, Parliament Square, Edinburgh on *(insert date)* at *(insert time)* for that purpose, [*and bring with you (specify documents)*]].

If you

- would like to know more about being a witness
- are a child under 16
- think you may be a vulnerable witness within the meaning of section 11(1) of the Vulnerable Witness (Scotland) Act 2004 (that is someone the court considers may be less able to give their evidence due to mental disorder or fear or distress connected to giving your evidence at the court hearing)

you should contact *(specify the solicitor acting for the party or the party litigant citing the witness)* for further information.

If you are a vulnerable witness, then you should be able to use a special measure (such measures include the use of a screen, a live TV link or supporter, or a commissioner) to help you give evidence.

Failure to attend

It is very important that you attend court and you should note that failure to do so may result in a warrant being granted for your arrest.

If you have any questions about anything in this citation, please contact *(specify the solicitor acting for the party or the party litigant citing the witness)* for further information.

(Signed)

Messenger-at-Arms

[or Solicitor [or Agent] for (name of party citing witness)]

(Address)

Please read the notes attached and bring this citation with you when you come to the court.

NOTES

1. What must I do?

The attached document requires you to appear as a witness in the case mentioned in it.

It obliges you to attend at the Court of Session at the time and on the date mentioned. The hearing will start on that date and may continue on the following days. Because it is difficult to estimate how long it will take to hear the evidence of other witnesses, you cannot be given a precise time when you will be called to give evidence. The solicitor for the party who has called you as a witness may, however, be able to arrange to give you some indication of when you are likely to be required.

You should not bring a child under the age of 14 years with you to court unless he or she is to give evidence. You should make arrangements to have the child looked after while you are at the court.

2. Where is the court?

The Court of Session is behind St. Giles Cathedral, High Street, Edinburgh. Parking in central Edinburgh can be very difficult. If you are coming by car you should allow plenty of time to find a parking space.

3. What do I do when I get to court?

When you arrive at the Court of Session, you should enter by the main door, Door 11. You should inform the receptionist of the name of the case. You will be told where you should go. There are signs throughout the building indicating the routes and various courts and other facilities.

You should wait there until you are contacted by the solicitor for the party who cited you.

4. How long will I have to wait?

It is not possible to say how long you will require to wait before being asked to give evidence. The representative of the party who cited you will keep you advised of the situation; but you should note that you may have to stay all day. You may wish to bring a newspaper or magazine to read while you wait.

The court usually sits between 10am and 4pm, rising for lunch normally between 1pm and 2pm. There are occasions, however, when the court may sit after 4pm or may rise later for lunch, in order, for example, to complete an important part of the evidence. You will be advised when you may go for lunch and when you must return.

5. What facilities are available?

The court's restaurant is open between 9am and 3pm, and provides light refreshments as well as lunches. You should speak to the solicitor who cited you about arrangements for going to the restaurant. You should not go to the restaurant without telling the representative of the party who cited you.

There are toilets in witness rooms and other locations throughout the building. If there is not a toilet in your immediate vicinity, a security guard will direct you to the nearest one.

6. What will happen when I am called to give evidence?

A court officer (the macer) will call you into court when you are to give evidence. You will give evidence from a witness box near the front of the courtroom. The judge will ask you to repeat the oath. If you wish to affirm instead of taking the oath, it is a good idea to tell the macer or the solicitor for the party who has called you in advance.

You will be asked questions by the advocate representing the party who has called you as a witness. Then the advocate or advocates for the other party or parties may ask you questions. Finally, the first advocate will have an opportunity to ask you further questions.

You must answer all the questions truthfully and honestly to the best of your ability.

A witness normally gives evidence standing in the witness box. If you find it difficult to stand for a long period, you should ask if you may sit down.

7. Who will be in court?

The judge will be seated on the bench. The clerk of court sits at a table below the judge. The advocates will be sitting facing the judge, and solicitors, parties and their representatives will be sitting behind the advocates. The Press and members of the public may also be in court. If the case is tried by jury, there will be twelve jurors sitting in a jury box opposite you.

8. Will I be compensated?

You do not get paid for giving evidence. You are entitled to some payment for out-of-pocket travelling and subsistence expenses. You should keep any receipts for these expenses and give them to the representative of the party who has called you. If you lose earnings, or need to pay someone else to do your job, you can be paid some compensation, subject to certain limits. These payments are the responsibility of the party who has called you as a witness and his representative. It is *not* the responsibility of the court.

9. If I wish to complain, how do I do so?

There are leaflets available at the reception desk at the entrance which contain the complaints procedures in relation to the services provided by (1) court staff, (2) solicitors and (3) the legal profession generally. If you have a complaint, please bring it to the attention of the appropriate person referred to in the leaflet.

EXPLANATORY NOTE

(This note is not part of the Act of Sederunt)

This Act of Sederunt makes amendments to the Rules of the Court of Session 1994 (S.I. 1994/1443). These amendments are a consequence of the implementation of the Vulnerable Witnesses (Scotland) Act 2004 (asp 3) to civil proceedings. A new Chapter 35A is inserted to provide procedure and forms for dealing with child witness notices, vulnerable witness applications and applications to review orders specifying the special measures to be used when taking evidence from a vulnerable witness. It also sets out the procedure for the special measure of taking evidence by a commissioner. The witness citation form is also amended to give a witness some information about the possibility of giving evidence with a special measure if they are a vulnerable witness.

2007 No. 450

COURT OF SESSION

Act of Sederunt (Rules of the Court of Session Amendment
No. 9) (Vulnerable Witnesses (Scotland) Act 2004) 2007

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