

CORONERS AND JUSTICE ACT 2009

EXPLANATORY NOTES

THE ACT

Commentary on Sections

Part 3 - Criminal evidence, investigations and procedure

Chapter 3: Vulnerable and intimidated witnesses

Section 98: Eligibility for special measures: age of child witnesses

490. Chapter 1 of Part 2 of the 1999 Act enables a court in criminal proceedings to give a direction that one or more special measures should apply to a witness when giving evidence. A special measures direction can only be made in relation to a witness who is eligible for assistance. The criteria for eligibility are also set out in that Part.
491. **Section 98** amends section 16(1)(a) of the 1999 Act so that all persons aged under 18 will automatically qualify as witnesses eligible for assistance under Part 2 of the 1999 Act. Currently, only witness aged under 17 are automatically eligible for assistance.

Section 99: Eligibility for special measures: offences involving weapons

492. Section 17(1) of the 1999 Act provides that a witness is eligible for assistance if the court is satisfied that the quality of the witness's evidence would be reduced on the grounds of fear or distress about testifying. Section 17(4) of the 1999 Act gives automatic eligibility for complainants in respect of sexual offences who are witnesses. Automatic eligibility means that the court does not need to be satisfied that the quality of the witness's evidence will be diminished for the purposes of establishing eligibility.
493. **Section 99** extends section 17 and gives automatic eligibility for assistance to witnesses in proceedings related to "relevant offences". The court does not need to be satisfied that the quality of the witness's evidence will be diminished for the purposes of establishing eligibility. However under section 19 of the 1999 Act, the court still has to determine whether any of the available special measures will in fact improve the quality of the witness's evidence and consider whether any such measure or measures might inhibit the evidence being effectively tested. Relevant offences are specified gun and knife crimes which are listed in new Schedule 1A to the 1999 Act (inserted by Schedule 14 to the Act). A witness can inform the court that he or she does not wish to be eligible for assistance.
494. The list of relevant offences is inserted as a new Schedule 1A to the 1999 Act and the list can be amended by order made by the Secretary of State. The effect of *subsection (3)* is that the order-making power is subject to the affirmative resolution procedure.

Section 100: Special measures directions for child witnesses

495. **Section 100** amends section 21 of the 1999 Act so as to modify the "primary rule" that applies to child witnesses. This rule (before amendment of this section) requires all

child witnesses to give evidence in chief by a video recorded statement and any further evidence by live link, unless (except for child witnesses in need of “special protection” in certain sexual and other offence cases) the court is satisfied that to do so will not improve the quality of that child’s evidence.

496. *Subsections (2) and (7)* remove the special category of child witnesses who are “in need of special protection”. The effect is to place all child witnesses on the same footing, regardless of the offence to which the proceedings relate.
497. *Subsections (4) and (5)* modify the primary rule so as to allow a child witness to opt out of giving evidence by a combination of video recorded evidence in chief and live link provided the court is satisfied, after taking into account certain factors, that not giving evidence in that way will not diminish the quality of the child’s evidence. If as a result of opting out of the primary rule, the child witness would fall to give his or her evidence in court (and not by way of a live link) a secondary requirement applies. This obliges the child witness to give evidence in court in accordance with the special measure in section 23 of the 1999 Act, that is, from behind a screen that shields the witness from viewing the defendant. The secondary requirement does not apply if the court considers it would not maximise the quality of the child’s evidence. The child may also opt out of this secondary requirement, subject to the agreement of the court.
498. *Subsection (6)* inserts new subsection (4C) into section 21 of the 1999 Act which sets out the factors the court must consider in deciding whether the child witness may opt out of the primary rule and also in deciding whether the child witness may opt out of the secondary requirement to give evidence from behind a screen. These are: the witness’s age and maturity, the witness’s ability to understand the consequences of giving evidence in court rather than via video-recorded statement, any relationship between the witness and accused, the witness’s social, cultural and ethnic background, and the nature and circumstances of the offence being tried, as well as any other factors the court considers relevant.
499. *Subsection (8)* makes related amendments to section 22 of the 1999 Act, which relates to witnesses who attain the age of 18 after the video recorded statement is made.

Section 101: Special provisions relating to sexual offences

500. *Section 101* inserts new section 22A into the 1999 Act. Section 22A makes special provision for complainants in respect of sexual offences tried in the Crown Court. New section 22A(7) and (9) require the admission of the complainant’s video-recorded statement under section 27 of the 1999 Act, unless that requirement would not maximise the quality of the complainant’s evidence.
501. New section 22A(1) and (3) establish that this new section will apply if the complainant of a sexual offence is a witness in proceedings relating to that sexual offence, but not if the witness is under 18 years old (the rules set out in section 21 apply to a witness under 18). Also the requirement to admit the video recorded evidence in chief only applies if a party to the proceedings makes an application requesting that it should be admitted.
502. New section 22A(2) excludes proceedings in magistrates’ courts from these provisions. This does not mean that video recorded evidence in chief is not admissible in such proceedings, but only that the rule in section 22A in favour of admitting such evidence does not apply.

Section 102: Evidence by live link: presence of supporter

503. Section 24 of the 1999 Act enables the court to make a direction allowing a witness to give evidence by live link. Section 102 amends this section so that the court, when making such a direction can also direct that a person specified by the court can accompany the witness when the witness is giving evidence by live link. The court

must take the witness's wishes into account when it determines who is to accompany the witness.

Section 103: Video recorded evidence in chief: supplementary testimony

504. Section 27 of the 1999 Act enables the court to give a special measures direction that allows a video recorded statement to be admitted as a witness's evidence in chief. Section 103 amends this section so as to relax the restrictions on a witness giving additional evidence in chief after the witness's video-recorded statement has been admitted.
505. *Subsection (2)* removes the prohibition on asking a witness questions about matters the court considers have been covered adequately in the recorded statement. The effect of this is that the witness may be asked additional questions regarding:
- matters that are not covered in the recorded statement (as is now the case under section 27 of the 1999 Act), and
 - matters that are covered in the recorded statement (so long as the permission of the court is given).
506. *Subsections (3) and (4)* remove the requirement that where an application to ask additional questions is made by a party, the court can give permission to ask a witness supplementary questions only if there has been a material change in circumstances since the court gave the direction to admit the recording.

Section 104: Examination of accused through intermediary

507. The powers of the court under Chapter 1 of Part 2 of the 1999 Act to make directions allowing for special measures when giving evidence do not apply where the witness is the accused. Chapter 1A gives the court more limited powers regarding the evidence of accused persons. Section 104 increases these powers by adding sections 33BA and 33BB to Chapter 1A. These new sections provide for the use of an intermediary where certain vulnerable accused persons are giving evidence in court.
508. Subsections (1) and (2) of new section 33BA provide that the court may make a direction allowing an intermediary in any proceedings if the accused satisfies either the condition in subsection (5) or the conditions in subsection (6) and making the direction is necessary to ensure that the accused receives a fair trial.
509. Subsections (3) and (4) of new section 33BA set out the nature of a direction and the role of the intermediary when the accused gives evidence. The intermediary relays questions that are put to the accused and relays the answers to the questioner. In doing so the intermediary can explain to the accused what the questions mean and to the questioner what the answers mean. Subsection (3) requires the intermediary to be a person approved by the court.
510. Subsection (5) of new section 33BA sets out the condition that is to be satisfied before a court may allow an accused aged under 18 to use an intermediary. This is that the accused's ability to participate effectively in the trial in terms of giving oral evidence as a witness is compromised by his or her level of intellectual ability or social functioning.
511. Subsection (6) of new section 33BA sets out the condition applying to an accused who is 18 years or older. The condition is that the accused is prevented from participating effectively as a witness giving oral evidence because the accused has a mental disorder (as defined by the Mental Health Act 1983) or a significant impairment of intelligence and social function.
512. Subsections (7) and (8) of new section 33BA are about the manner in which an examination through an intermediary is to be conducted, whether or not other provision about the examination is made. The examination is to take place in circumstances

which enable the judge or justices, the legal representatives, the jury and a co-accused to see and hear the examination and also enable the judge or justices and the legal representatives to communicate with the intermediary.

- 513. Subsections (9) and (10) of new section 33BA require intermediaries to declare that they will perform the role faithfully and extend the Perjury Act 1911 to persons in the role of an intermediary. This is the same obligation that applies to foreign language interpreters and also to intermediaries assisting witnesses under section 29 of the 1999 Act.
- 514. New section 33BB gives the court power to discharge a direction for the use of an intermediary where this is no longer necessary for the purposes of a fair trial. The court may also vary a direction. A court must state publicly its reasons for discharging or varying an intermediary direction. This accords with similar provisions in section 20 of the 1999 Act that apply to special measures directions made in respect of witnesses.

Section 105: Age of child complainant

- 515. Section 35 of the 1999 Act prevents the cross-examination of a “protected witness” by an accused in person. The definition of a “protected witness” includes a child. Section 105 amends the definition of “child” in section 35 of the 1999 Act to mean a person under the age of 18 (as opposed to 17).