

**HIGH COURT OF JUSTICIARY
PRACTICE NOTE**

No. 2 of 2005

CHILD WITNESSES: DISCRETIONARY POWERS

1. This practice note has effect from 1st April 2005 and supersedes the Memorandum on Child Witnesses of 26 July 1990.
2. The purpose of this practice note is to provide assistance to judges in the exercise of their discretionary powers, where a child is to give evidence by conventional means in open court, to put the child at ease while giving evidence and to clear the court of persons not having a direct involvement in the proceedings. This practice note does not concern the use of any statutory special measures that may be authorised for the giving of evidence by children under the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) as amended by the Vulnerable Witnesses (Scotland) Act 2004.
3. The discretionary powers can be exercised by judges in addition to any statutory special measures that may be authorised for child witnesses under the 1995 Act, or may be used where the court has ordered that a child witness may give evidence without the benefit of any statutory special measure.
4. The general objective is to ensure, so far as is reasonable practicable, that the experience of giving evidence by all children under the age of 16 causes as little anxiety and distress to the child as possible in the circumstances.
5. The following are examples of the measures which may be taken, at the discretion of the presiding judge, with a view to achieving that objective—
 - (a) the removal of wigs and gowns by the judge, counsel and solicitors;
 - (b) the positioning of the child at a table in the well of the court along with the judge, counsel and solicitors, rather than requiring the child to give evidence from the witness box;
 - (c) the clearing from the court room of all persons not having a direct involvement in the proceedings.
6. In deciding whether or not to take these or similar discretionary measures, or any of them, the presiding judge should have regard to the following factors—
 - (a) The special measures, if any, sought by the child witness notice or otherwise authorised by the court.
 - (b) The age and maturity of the child.

In general, the younger the child the more desirable it is that steps should be taken to reduce formality and to put the child at ease while giving evidence.
 - (c) The nature of the charge or charges, and the nature of the evidence which the child is likely to be called upon to give.

Particular care should be taken in cases with a sexual element or involving allegations of child abuse especially where the child is the complainer or an eye witness. Children directly involved in such cases are likely to be especially vulnerable to trauma when called upon to give evidence in the presence of the accused. The giving of evidence of a formal nature, especially in the case of an older child, may not require additional discretionary measures to be taken in addition to the statutory special measures that may have been authorised.

- (d) The relationship, if any, between the child and the accused.

A child who is giving evidence at the trial of a close relative may be especially exposed to apprehension or embarrassment, irrespective of the nature of the charge.

- (e) Whether the trial is summary or on indictment.

While informality may be easier to achieve in summary cases, the presence of a jury in cases taken on indictment is likely to present an anxious or distressed child with an additional cause for anxiety or distress. This makes it all the more necessary under solemn procedure that steps should be taken to put the child at ease.

- (f) Any special factors placed before the court concerning the disposition, health or physique of the child.

All children are different and judges should take each child's particular circumstances into account before deciding what additional discretionary steps, if any, should be taken to put the child at ease.

- (g) The practicability of departing from normal procedure, except as far as is necessary for any authorised statutory special measure, including the size and layout of the court and the availability of any amplification equipment.

Whatever steps are taken, a child witness who gives evidence by conventional means must remain visible and audible to all those who have to hear and assess the evidence, including the jury and the accused.

7. In all cases where statutory special measures have not been authorised by the court, before a witness under 16 years is led in evidence an opportunity should be given to those representing the Crown and the defence to address the judge as to whether any additional discretionary special measures are appropriate. Under solemn procedure such representations should be made outwith the presence of the jury and preferably before the jury is empanelled or at least before the commencement of the evidence.
8. The clearing of the court while a child is giving evidence will normally be appropriate in all cases which involve an offence against, or conduct contrary to, decency and morality: see section 50 of the Criminal Procedure (Scotland) Act 1995. In other cases this should only be done if the judge is satisfied that this is necessary in order to avoid undue anxiety or distress to the child. The statutory provisions that bona fide representatives of a newspaper or news agency should not be excluded should be applied in all cases.

9. When taking any of the additional discretionary measures described above the judge should have regard to the court's general duty to ensure that the accused receives a fair trial and is given a proper opportunity to present his defence.

Lord Justice General

Edinburgh
24th March 2005