

LAWS OF PITCAIRN, HENDERSON, DUCIE
AND OENO ISLANDS

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CHAPTER XXXI

**EVIDENCE (SPECIAL MEASURES DIRECTIONS)
ORDINANCE**

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An ordinance to provide for special measures for giving evidence in criminal proceedings.

No. 7 of 2001

[31 October 2001]

PART I—PRELIMINARY

Citation

1. This ordinance may be cited as the Evidence (Special Measures Directions) Ordinance.

Interpretation

2.—(1) In this ordinance, unless the context otherwise requires

“accused”, in relation to any criminal proceedings means any person charged with an offence to which the proceedings relate (whether or not he or she has been convicted);

“complainant” in relation to any offence (or alleged offence) means a person against or in relation to whom the offence was (or is alleged to have been) committed;

“Court” means the Magistrate’s Court or the Supreme Court or the Court of Appeal, sitting in its criminal jurisdiction;

“eligible witness” means a witness eligible for assistance by virtue of section 3 or 4;

“legal representative” means any person duly admitted to practise as a legal practitioner under the provisions of the Legal Practitioners Ordinance and being the holder of a current annual practising certificate for the Islands;

“live link” has the meaning given by section 9(6);

“prosecutor” means any person duly acting as prosecutor;

“quality” in relation to the evidence of a witness, shall be construed in accordance with section 3(5);

“sexual offence” means an offence against the person of a sexual nature;

“special measures direction” means (in accordance with section 6(5)) a direction under section 6;

“witness”, in relation to any criminal proceeding, means any person called, or proposed to be called, to give evidence in the proceedings.

(2) In this ordinance references to the special measures available in relation to a witness shall be construed in accordance with section 5.

(3) In this ordinance references to a person being able to see or hear, or be seen or heard by, another person are to be read as not applying to the extent that either of them is unable to see or hear by reason of any impairment of eyesight or hearing.

(4) Nothing in this ordinance shall affect any power of a court to exclude evidence at its discretion (whether by preventing questions being put or otherwise) which is exercisable apart from this ordinance.

PART II—ELIGIBLE WITNESSES

3.—(1) For the purposes of this ordinance a witness in criminal proceedings (other than the accused) is eligible for assistance by virtue of this section

Witnesses eligible for assistance on grounds of age or incapacity

- (a) if under the age of 17 at the time of the hearing; or
 - (b) if the Court considers that the quality of evidence given by the witness is likely to be diminished by reason of any circumstances falling within subsection (2).
- (2) The circumstances falling within this subsection are
- (a) that the witness
 - (i) suffers from mental disorder;
 - (ii) otherwise has a significant impairment of intelligence and social functioning;
 - (b) that the witness has a physical disability or is suffering from a physical disorder.

(3) In subsection (1)(a) “the time of the hearing”, in relation to a witness, means the time when it falls to the Court to make a determination for the purposes of section 6(2) in relation to the witness.

(4) In determining whether a witness falls within subsection (1)(b) the Court must consider any views expressed by the witness.

(5) In this ordinance references to the quality of a witness’s evidence are to its quality in terms of completeness, coherence and accuracy; and for this purpose “coherence” refers to a witness’s ability in giving evidence to give answers which address the questions put to the witness and can be understood both individually and collectively.

4.—(1) For the purposes of this ordinance a witness in criminal proceedings (other than the accused) is eligible for assistance by virtue of this subsection if the Court is satisfied that the quality of evidence given by the witness is likely to be diminished by reason of fear or distress on the part of the witness in connection with testifying in the proceedings.

Witnesses eligible for assistance on grounds of fear or distress about testifying

- (2) In determining whether a witness falls within subsection (1) the Court must take into account, in particular
- (a) the nature and alleged circumstances of the offence to which the proceedings relate;
 - (b) the age of the witness;
 - (c) such of the following matters as appear to the Court to be relevant, namely
 - (i) the social and cultural background and ethnic origins of the witness,
 - (ii) the domestic and employment circumstances

- of the witness, and
- (iii) any religious beliefs or political opinions of the witness;
- (d) any behaviour towards the witness on the part of
- (i) the accused
 - (ii) members of the family or associates of the accused, or
 - (iii) any other person who is likely to be an accused or a witness in the proceedings.
- (3) In determining that question the Court must in addition consider any views expressed by the witness.
- (4) Where the complainant in respect of a sexual offence is a witness in proceedings relating to that offence (or to that offence and any other offences), the witness is eligible for assistance in relation to those proceedings by virtue of this subsection unless the witness has informed the Court of the witness's wish not to be so eligible by virtue of this subsection.

Special measures available to eligible witnesses.

5.—(1) For the purposes of this Part

- (a) the provision which may be made by a special measures direction by virtue of Part III of this ordinance is a special measure available in relation to a witness eligible for assistance by virtue of section 3; and
- (b) the provision which may be made by such a direction by virtue of Part III of this ordinance is a special measure available in relation to a witness eligible for assistance by virtue of section 4;

but this subsection has effect subject to subsection (2).

(2) Where (apart from this subsection) a special measure would, in accordance with subsection (1)(a) or (b), be available in relation to a witness in any proceedings, it shall not be taken by a court to be available in relation to the witness unless

- (a) the Court has been notified by the Governor that relevant arrangements may be made available in the area in which it appears to the Court that the proceedings will take place, and
- (b) the notice has not been withdrawn.

(3) In subsection (2) “relevant arrangements” means arrangements for implementing the measure in question which cover the witness and the proceedings in question.

(4) The withdrawal of a notice under that subsection relating to a special measure shall not affect the availability of that measure in relation to a witness if a special measures direction providing for that measure to apply to the witness's evidence has been made by the Court before the notice is withdrawn.

(5) The Governor may by order make such amendments

of this Part as he or she considers appropriate for altering the special measures which, in accordance with subsection (1)(a) or (b), are available in relation to a witness eligible for assistance by virtue of section 3 or (as the case may be) section 4, whether

- (a) by modifying the provisions relating to any measure for the time being available in relation to such a witness,
- (b) by the addition
 - (i) (with or without modifications) of any measure which is for the time being available in relation to a witness eligible for assistance by virtue of the other of those sections, or
 - (ii) of any new measure, or
- (c) by the removal of any measure.

PART III—SPECIAL MEASURES DIRECTIONS

6.—(1) This section applies where in any criminal proceedings

Special measures
direction relating to
eligible witness

- (a) a party to the proceedings makes an application for the Court to give a direction under this section in relation to a witness in the proceedings other than the accused, or
- (b) the Court of its own motion raises the issue whether such a direction should be given.

(2) Where the Court determines that the witness is eligible for assistance by virtue of section 3 or 4, the Court must then

- (a) determine whether any of the special measures available in relation to the witness (or any combination of them) would, in its opinion, be likely to improve the quality of evidence given by the witness; and
- (b) if so
 - (i) determine which of those measures (or combination of them) would, in its opinion, be likely to maximise so far as practicable the quality of such evidence; and
 - (ii) give a direction under this section providing for the measure or measures so determined to apply to evidence given by the witness.

(3) In determining for the purposes of this Part whether any special measure or measures would or would not be likely to improve or to maximise so far as practicable the quality of evidence given by the witness, the Court must consider all the circumstances of the case, including in particular

- (a) any views expressed by the witness; and

(b) whether the measure or measures might tend to inhibit such evidence being effectively tested by a party to the proceedings.

(4) A special measures direction must specify particulars of the provision made by the direction in respect of each special measure which is to apply to the witness's evidence.

(5) In this Part "special measures direction" means a direction under this section.

(6) Nothing in this Part is to be regarded as affecting any power of a Court to make an order or give leave of any description (in the exercise of its inherent jurisdiction or otherwise)

(a) in relation to a witness who is not an eligible witness, or

(b) in relation to an eligible witness where (as, for example, in a case where a foreign language interpreter is to be provided) the order is made or the leave is given otherwise than by reason of the fact that the witness is an eligible witness.

Further provisions
about directions:
general

7.—(1) Subject to subsection (2) and section 8(8), a special measures direction has binding effect from the time it is made until the proceedings for the purposes of which it is made are either

(a) determined (by acquittal, conviction or otherwise), or

(b) abandoned,

in relation to the accused or (if there is more than one) in relation to each of the accused.

(2) The Court may discharge or vary (or further vary) a special measures direction if it appears to the Court to be in the interests of justice to do so, and may do so either

(a) on an application made by a party to the proceedings, if there has been a material change of circumstances since the relevant time, or

(b) of its own motion.

(3) In subsection (2) "the relevant time" means

(a) the time when the direction was given, or

(b) if a previous application has been made under that subsection, the time when the application (or last application) was made.

(4) Nothing in section 9(2) and (3) is to be regarded as affecting the power of the Court to vary or discharge a special measures direction under subsection (2).

(5) The Court must state in open court its reasons for

(a) giving or varying,

(b) refusing an application for or for the variation or

discharge of, or
 (c) discharging,
 a special measures direction and, if it is the Magistrate's Court,
 must cause them to be entered in the register of its proceedings.

(6) Rules of court may make provision

- (a) for uncontested applications to be determined by the Court without a hearing;
- (b) for preventing the renewal of an unsuccessful application for a special measures direction except where there has been a material change of circumstances;
- (c) for expert evidence to be given in connection with an application for or for varying or discharging such a direction;
- (d) for the manner in which confidential or sensitive information is to be treated in connection with such an application and in particular as to its being disclosed to or withheld from a party to the proceedings.

8.—(1) For the purposes of this section

- (a) a witness in criminal proceedings is a “child witness” if he or she is an eligible witness by reason of section 3(1)(a) (whether or not he or she is an eligible witness by reason of any other provision of section 3 or 4);
- (b) a child witness is “in need of special protection” if the offence (or any of the offences) to which the proceedings relate is
 - (i) a sexual offence, or
 - (ii) an offence of kidnapping, false imprisonment, child abduction, assault on, injury or threat of injury to, any person.

Special provisions
 relating to child
 witnesses

(2) Where the Court, in making a determination for the purposes of section 6(2), determines that a witness in criminal proceedings is a child witness, the Court must

- (a) first have regard to subsections (3) to (7) below; and
- (b) then have regard to section 6(2);

and for the purposes of section 6(2), as it then applies to the witness, any special measures required to be applied in relation to him or her by virtue of this section shall be treated as if they were measures determined by the Court, pursuant to section 6(2)(a) and (b)(i), to be measures that (whether on their own or with any other special measures) would be likely to maximise, so far as practicable, the quality of his or her evidence.

- (3) The primary rule in the case of a child witness is that the Court must give a special measures direction in relation to the witness which complies with the following requirements
- (a) it must provide for any video recorded evidence in chief to be admitted; and
 - (b) it must provide for any evidence given by the witness in the proceedings which is not given by means of a video recording (whether in chief or otherwise) to be given by means of a live link in accordance with section 9.
- (4) The primary rule is subject to the following limitations
- (a) the requirement contained in subsection (3)(a) or (b) has effect subject to the availability (within the meaning of section 5(2)) of the special measure in question in relation to the witness;
 - (b) the rule does not apply to the extent that the Court is satisfied that compliance with it would not be likely to maximise the quality of the witness's evidence so far as practicable (whether because the application to that evidence of one or more other special measures available in relation to the witness would have that result or for any other reason).
- (5) However, subsection (4)(b) does not apply in relation to a child witness in need of special protection.

PART IV — SPECIAL MEASURES

Evidence by live link

- 9.—**(1) A special measures direction may provide for the witness to give evidence by means of a live link.
- (2) Where a direction provides for the witness to give evidence by means of a live link, the witness may not give evidence in any other way without the permission of the Court.
- (3) The Court may give permission for the purposes
- (a) of subsection (2) if it appears to the Court to be in the interests of justice to do so, and may do so either on an application by a party to the proceedings, if there has been a material change of circumstances since the relevant time, or
 - (b) of its own motion.
- (4) In subsection (3), “the relevant time” means
- (a) the time when the direction was given, or
 - (b) if a previous application has been made under that subsection, the time when the application (or last application) was made.
- (5) Where in proceedings before any Court evidence is to be given by means of a live link in accordance with a special measures direction, the Court may sit for the purposes of

the whole or any part of those proceedings at a place where suitable facilities for receiving such evidence are available and which has the approval of the presiding Magistrate or Judge.

(6) In this ordinance “live link” means a live television link or other arrangement whereby a witness, while absent from the courtroom or other place where the proceedings are being held, is able to see and hear a person there and to be seen and heard by the Judge or Magistrate and the assessors (if any), the legal representatives acting in the proceedings and any interpreter or other person appointed to assist the witness.

10.—(1) A special measures direction may provide for the exclusion from the Court during the giving of the witness’s evidence, of persons of any description specified in the direction.

Evidence given in private

(2) The persons who may be so excluded do not include

- (a) the accused,
- (b) legal representatives acting in the proceedings, or
- (c) any interpreter or other person appointed (in pursuance of the direction or otherwise) to assist the witness.

(3) A special measures direction providing for representatives of news gathering or reporting organisations to be so excluded shall be expressed not to apply to one named person who

- (a) is a representative of such an organisation, and
- (b) has been nominated for the purpose by one or more such organisations,

unless it appears to the Court that no such nomination has been made.

(4) A special measures direction may only provide for the exclusion of persons under this section where—

- (a) the proceedings relate to a sexual offence; or
- (b) it appears to the Court that there are reasonable grounds for believing that any person other than the accused has sought, or will seek, to intimidate the witness in connection with testifying in the proceedings.

(5) Any proceedings from which persons are excluded under this section (whether or not those persons include representatives of news gathering or reporting organisations) shall nevertheless be taken to be held in public for the purposes of any privilege or exemption from liability available in respect of fair, accurate and contemporaneous reports of legal proceedings held in public.

11. A special measures direction may provide for the wearing of court robes to be dispensed with during the giving

Dispensing with court robes

of the witness's evidence.

Examination of witness through intermediary

12.—(1) A special measures direction may provide for any examination of the witness (however and wherever conducted) to be conducted through an interpreter or other person approved by the Court for the purposes of this section (“an intermediary”).

(2) The function of an intermediary is to communicate

(a) to the witness, questions put to the witness, and

(b) to any person asking such questions, the answers given by the witness in reply to them,

and to explain such questions or answers so far as necessary to enable them to be understood by the witness or person in question.

(3) Any examination of the witness in pursuance of subsection (1) must take place in the presence of such persons as rules of court or the direction may provide, but in circumstances in which—

(a) the Judge or Magistrate and legal representatives acting in the proceedings are able to see and hear the examination of the witness and to communicate with the intermediary, and

(b) (except in the case of a video-recorded examination) the assessors (if any) are able to see and hear the examination of the witness.

(4) Where two or more legal representatives are acting for a party to the proceedings, subsection (3)(a) is to be regarded as satisfied in relation to those representatives if at all material times it is satisfied in relation to at least one of them.

(5) A person may not act as an intermediary in a particular case except after making a declaration, in such form as may be prescribed by rules of court, that he or she will faithfully perform his or her function as intermediary.

(6) Section 1 of the Perjury Act 1911 of the United Kingdom shall apply in relation to a person acting as an intermediary as it applies in relation to a person lawfully sworn as an interpreter in a judicial proceeding; and for this purpose, where a person acts as an intermediary in any proceeding which is not a judicial proceeding for the purposes of that section, that proceeding shall be taken to be part of the judicial proceeding in which the witness's evidence is given.

13. A special measures direction may provide for the witness, while giving evidence (whether by testimony in Court or otherwise), to be provided with such device as the Court considers appropriate with a view to enabling questions or answers to be communicated to or by the witness despite any

Aids to communication

disability or disorder or other impairment which the witness has or suffers from.

PART V—SUPPLEMENTARY

14.—(1) Subsections (2) to (4) apply to a statement made by a witness in criminal proceedings which, in accordance with a special measures direction, is not made by the witness in direct oral testimony in Court but forms part of the witness’s evidence in those proceedings.

Status of evidence
given under this
ordinance

(2) The statement shall be treated as if made by the witness in direct oral testimony in Court; and accordingly

- (a) it is admissible evidence of any fact of which such testimony from the witness would be admissible;
- (b) it is not capable of corroborating any other evidence given by the witness.

(3) In estimating the weight (if any) to be attached to the statement, the Court must have regard to all the circumstances from which an inference can reasonably be drawn (as to the accuracy of the statement or otherwise).

(4) Nothing in this ordinance affects the operation of any rule of law relating to evidence in criminal proceedings.

(5) Where any statement made by a person on oath in any proceeding which is not a judicial proceeding for the purposes of section 1 of the Perjury Act 1911 of the United Kingdom is received in evidence in pursuance of a special measures direction, that proceeding shall be taken for the purposes of that section to be part of the judicial proceeding in which the statement is so received in evidence.

(6) Where in any proceeding which is not a judicial proceeding for the purposes of that Act—

- (a) a person wilfully makes a false statement otherwise than on oath which is subsequently received in evidence in pursuance of a special measures direction, and
- (b) the statement is made in such circumstances that had it been given on oath in any such judicial proceeding that person would have been guilty of perjury,

he or she shall be guilty of an offence and liable to any punishment which might be imposed on conviction of an offence under section 57(2) of that Act (giving of false unsworn evidence in criminal proceedings).

(7) In this section “statement” includes any representation of fact, whether made in words or otherwise.

15. Where on a trial on information evidence has been given in accordance with a special measures direction, the

Warning to assessors

Judge must give the assessors(if any) such warning as the Judge considers necessary to ensure that the fact that the direction was given in relation to the witness does not prejudice the accused.

Ordinance does not derogate from Part VIIA of cap.3

16. Nothing in this ordinance shall be construed as derogating from the powers of the Magistrate's Court and the Supreme Court conferred on them by Part VIIA of the Justice Ordinance (cap.3).