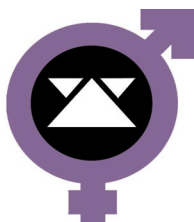


VULNERABLE WITNESSES

**Summary of the Criminal Procedure
Amendment Act 24 Of 2003**



**Legal Assistance Centre
2004**

WHO IS A VULNERABLE WITNESS?

- 1) anyone **under age 18**
- 2) any **victim of a sexual offence** (rape, attempted rape, indecent assault, sexual offences under the Combating of Immoral Practices Act, etc.)
- 3) a **victim of any offence involving domestic violence**
- 4) a witness who has some **mental or physical disability** if the disability creates special needs or may lead to undue stress
- 5) a witness who may be **intimidated** by the accused or any other person, such as in a case involving family members, or members of a criminal gang
- 6) **any person who may suffer undue stress while testifying**
- 7) **any person who needs special arrangements to give full and proper evidence.**

Section 158A(3)

WHAT SPECIAL ARRANGEMENTS CAN BE USED FOR VULNERABLE WITNESSES?

The following special arrangements for giving evidence can be made (a) at the request of any party (b) at the request of the witness in question or (c) on the court's own motion.

The factors to be considered in respect of any special arrangement are:

- the interest of the state in getting complete and accurate evidence
- the interests and well-being of the witness concerned
- the availability of the necessary equipment and venues
- the interests of justice in general.

Section 158A(1) and (7)

1) The trial can be held in an **alternative venue**, which will be less formal and less intimidating than a courtroom.

Section 158A(2)(a).

For example, a small child might feel more comfortable testifying in the magistrate's office.

2) The **furniture in the courtroom can be re-arranged or changed**, or people can be directed to sit or stand in places different from what is usual.

Section 158A(2)(b)

For example, a young child may be too short to see and be seen properly while sitting in the usual witness box.

3) The witness may be allowed to **testify behind a one-way screen** or by means of closed-circuit television.

Section 158A(2)(d) and (6)

The Katutura Regional Magistrates' Court has already been equipped with a Victim Friendly Court Room that has these facilities.

The accused must be able to see the witness, but the witness does not have to see the accused. For example, a victim of rape or domestic violence might feel less intimidated if she does not have to look at the accused.

The accused's legal representative, the prosecutor and the presiding officer must be able to see the witness.

4) A **support person** can accompany witnesses while they are testifying.

Section 158A(2)(c) and (4)-(5)

For example, a young child could speak to the court while sitting on the lap of a support person who is family member or a teacher (as long as that support person is not going to be giving further testimony in the same case).

The support person can stand or sit near the witness and give physical comfort to the witness as necessary. The support person can also interrupt the proceedings to alert the presiding officer to the fact that the witness is becoming upset. The presiding

officer can then take appropriate steps, such as calling a short recess.

The support person may not help the witness answer questions or instruct the witness on what to say.

The presiding officer can instruct the support person not to communicate with the witness during testimony, or to refrain from doing anything which might interfere with the evidence.

5) The presiding officer may authorise **any other steps** that it thinks “expedient and desirable” to facilitate the giving of evidence by a vulnerable witness.
Section 158A(2)(e)

For example, the presiding officer might take some time to explain to a vulnerable witness how the procedure is going to work before the testimony begins.

WHAT OTHER SPECIAL MEASURES APPLY?

The following provisions apply to all witnesses, or to specific categories of witnesses, rather than to “vulnerable witnesses”.

1) Any witness under age 14 is NOT required to give an oath or an affirmation before giving evidence.

The presiding officer must simply warn the witness to tell the truth, the whole truth and nothing but the truth.

Amended section 164(1)

2) Evidence will be received from any witness who appears to be able to give intelligible testimony.

There is no longer any reason for witnesses to be subjected to confusing questions about their ability to tell the difference between right and wrong, or between truth and lies. Anyone, including a child, who appears able to give intelligible testimony will be allowed to testify. The weight which should be given to the evidence will be determined by the presiding officer in light of the usual criteria for judging credibility.

Amended section 164(3)

3) The evidence of a child shall not be regarded as being unreliable just because the witness is a child. The court must not treat the evidence of a child with special caution just because the witness is a child.

The reliability of a child’s evidence and the weight which should be given to it must be assessed in the same way as the evidence of any other witness.

Amended section 164(3)

4) The presiding officer now has strengthened powers to place strict limitations on the use of irrelevant cross-examination to badger or to intimidate any witness. If cross-examination is taking an unreasonably long time, the presiding officer can ask the cross-examiner to show the relevance of the line of questioning before he or she is allowed to proceed. (This discussion can take place in the absence of the witness if necessary.) The presiding officer can also set reasonable limits on the length of cross-examination, or place reasonable restrictions on certain lines of questioning.

Amended section 166(1)

5) Any witness under age 13 may be cross-examined **ONLY through the presiding officer or through an intermediary.** An intermediary is a person who has the qualifications gazetted by the Minister of Justice for this purpose. (For example, the Minister might approve social workers or psychologists as intermediaries.) The intermediary must be available right away, to prevent postponements. The presiding officer or the intermediary may restate the questions, simplifying them or re-phrasing them if necessary. The essential meaning of the question must not be changed. The purpose of this provision is to make sure that lawyers do not try to intimidate or confuse a witness with a hostile tone of voice or complicated questions.

Amended section 166(4)-(5)

6) Medical records prepared by a medical practitioner who treated a victim may be used in a criminal case as *prima facie* proof that the victim suffered the injuries recorded in the documents, even if the medical practitioner in question is not available to testify personally. The records are not admissible as evidence of any *opinions* stated unless the medical practitioner is available to testify. This provision is designed to take care of situations where doctors had left the country or were otherwise unavailable. Similar arrangements were already in place in the Criminal Procedure Act for documents prepared by other professionals.

Amended section 212(7A)

7) There are now added possibilities for admitting information given by children under age 14 prior to the trial, such as statements to social workers or police officers, to avoid the necessity of asking the child to repeatedly recount the details of a traumatic experience. The previous statement can be used as evidence to prove a fact contained in the statement (a) if the child is unavailable; (b) if the statement “considered in the light of all the surrounding circumstances contains indications of reliability” or (c) if the child is present to confirm that he or she made the previous statement. This applies to (a) a statement made on an audiotape or a videotape, if the person who took the statement is in court to give evidence about the procedure (b) a written statement, if the person who took the statement is in court to give evidence about the procedure; or (c) oral evidence about the previous statement (if no audiotape, videotape or written statement is available).

Section 216A