



THE LEGAL JUSTIFICATION FOR THE USE OF SPECIAL MEASURES FOR VULNERABLE COMPLAINANTS/WITNESSES IN SEXUAL OFFENCE CASES

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**Consultations with the Antigua and Barbuda Bar Association on the
Establishment of the Sexual Offences Model Court**

Antigua and Barbuda High Court, St. John's, Antigua
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The Judicial Reform and Institutional Strengthening (JURIST) Project is a multi-year (2014-2023) regional Caribbean judicial reform initiative funded under an arrangement with the Government of Canada. The Project is being implemented on behalf of Global Affairs Canada (GAC) and the Conference of Heads of Judiciary of CARICOM (the Conference), by the Caribbean Court of Justice (CCJ), which was appointed by the Conference as its Regional Executing Agency (REA). The JURIST Project commenced activities on April 1, 2014 after the signing of a Contribution Arrangement between the CCJ and GAC.

A key component of the JURIST Project is the Sexual Offences Project. The two key initiatives of the Sexual Offences Project are, one, the development of the Model Guidelines for Sexual Offences Cases within the Caribbean Region. The Model Guidelines were developed with the support and advice of the Sexual Offences Advisory Committee. And two, the establishment of a Sexual Offences Model Court (in Antigua and Barbuda) to assess the effectiveness of the Model Guidelines.

**The Legal Justification for the Use of Special Measures for Vulnerable
Complainants/Witnesses in Sexual Offence Cases**
By
**The Honourable Mme Justice Maureen Rajnauth-Lee, Judge of the Caribbean Court of
Justice**
on the occasion of
**Consultations with the Antigua and Barbuda Bar Association on the Establishment of the
Sexual Offences Model Court in the High Court of Antigua and Barbuda**
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Introduction and Greetings

I wish to express my sincere appreciation to the members of the Antigua and Barbuda Bar Association for your willingness to participate in these important consultations. As chair of the Sexual Offences Advisory Committee, it has been my pleasure and privilege to provide advice and support to the Sexual Offences Project, an important component of the JURIST Project. The Sexual Offences Project has as its key objective the improvement of the capacity of regional courts to deliver gender-responsive and customer-focused court services in such a way that complainants in sexual offence cases are not further traumatized when they enter the justice system.

The two (2) key initiatives of the Sexual Offences Project are:

- (1) The development of Guidelines for treating sexual offences cases within the criminal justice system. The Model Guidelines for Sexual Offence Cases in the Caribbean Region were developed with the support of the Sexual Offences Advisory Committee and published in September 2017; and
- (2) The establishment of a Sexual Offences Model Court to test the effectiveness of the Model Guidelines. The Model Court will be established in the High Court of Antigua and Barbuda.

Three Key Components of the Model Guidelines

The Model Guidelines have incorporated several best, good and promising practices. The Guidelines contain three (3) key components which are critical to the improvement of the justice system in the area of sexual offence cases:

- (1) Proactive case management by the courts to eradicate delay and reduce trauma;
- (2) The early identification of vulnerable witnesses; and
- (3) The use of special measures to ensure that the best evidence is given by vulnerable witnesses.

Why are Special Measures Used?

- In circumstances where witnesses are deemed vulnerable or intimidated, “special measures” can improve the quality of their experience by helping them to give their “best evidence”.

Who is Vulnerable?

- The Evidence (Special Provisions) (Amendment) Act 2016 (section 2) defines a vulnerable witness as a witness whose ability to give evidence or the quality of whose evidence is likely to be affected by reason of:
 - Age of maturity;
 - Physical, intellectual, or psychiatric disability;
 - Trauma suffered by the witness;
 - Witness’s fear of intimidation;
 - Linguistic or cultural background of the witness;
 - Nature of the proceedings;
 - Nature of the evidence that the witness is expected to give;
 - Relationship of the witness to any party to the proceeding;
 - Absence of the witness from Antigua and Barbuda; or
 - Any other ground of a similar nature.
- Child complainants who are less than twelve years of age are automatically deemed to be vulnerable witnesses.
- Complainants in sexual offence cases are likely to easily fit into at least three of those categories. For example:

- (1) In the case of sexual offences, there is a high likelihood that the alleged sexual assault has caused psychological and emotional trauma and that having to recount the intimate details of the event in court may cause severe psychological distress to the complainant, which may impair their ability to give evidence.
- (2) Many complainants in sexual offence cases are children under the age of twelve.
- (3) In several cases, the defendant is known to the complainant either as a family member or other close relationship, and this may lead to the complainant feeling intimidated by the process of giving evidence or may increase the likelihood of the defendant or other family members applying pressure on the complainant, either directly or indirectly, to discontinue the case.

Types of Special Measures Available

Section 3 of The Evidence (Special Provisions) (Amendment) Act 2016 repeals section 7 of the principal Act and substitutes it with a new section 7 that provides the following special measures for vulnerable complainants and witnesses:

- (1) The screening of the witness/complainant from the accused provided they can be seen by the jury, judge, counsel for the parties or interpreter or another person appointed to assist (s. 7(5)(a));
- (2) The giving of evidence outside the courtroom, either in Antigua and Barbuda or elsewhere, by means of technology which allows for the witness to see and or hear a person in the courtroom and be seen and heard by the jury, judge, counsel for the parties or interpreter or another person appointed to assist (s. 7(5)(b));
- (3) The examination, cross-examination or re-examination of the witness being conducted through an interpreter or other person approved by the court (s. 7(5)(g));
- (4) The ordering of the removal of wigs and gowns while the witness gives evidence (s. 7(5)(f));
- (5) The video recording of evidence-in-chief (s. 7(5)(c));
- (6) The video recording of cross-examination and re-examination where the evidence in chief of the witness has already been video recorded (s. 7(5)(d));
- (7) The witness being assisted in the giving of evidence by a person approved by the court (s. 7(5)(h));

(8) Provision of aids to communication for a young or incapacitated witness (s. 7(5)(i));

The judge has the discretion to order that one or more special measure be used - section 7(6).

Special Measures for the Sexual Offences Model Court in Antigua and Barbuda

- Currently, the court in Antigua uses screens for complainants in sexual offence cases.
- The Model Court will expand the measures available to the court by introducing video conferencing technology. This will allow vulnerable complainants to give evidence from a remote location inside Antigua, and from locations outside Antigua.
- We have identified the DoGA since it already provides a one stop centre for complainants in sexual offences. The idea is for vulnerable complainants to give their reports, undergo medical examinations, receive support services and give evidence from the same location.

Who Should Make the Application?

- **Prosecutor**
 - The substituted section 7(3) stipulates that the prosecution has the responsibility to apply to the court directly for the provision of special measures for vulnerable complainants in sexual offence cases.
 - The complainant may waive the need for special measures.
- **Judge**
 - In cases involving child complainants under the age of twelve, the judge can make the order for special measures without an application (s. 7(1)).

Best Practices in the Use of Special Measures

- **Directions to the Jury:**
 - In the United Kingdom, where special measures are to be employed, the judge is required to explain what is to happen or has happened and to ensure that there is no prejudice against the defendant. This should be done before the evidence is presented, and a short reminder of this should be given in the summing up. See *R v Brown; R v Grant [2004] EWCA Crim 1620*.

- In addition, in all special measures cases, an explanation should be given about the purpose of presenting the evidence with special measures.

- **Ground Rules Hearings**

- In any case, with a witness who is vulnerable or who has a communication need, it is good practice for the judge to discuss and establish with counsel how to enable the witness to give their best evidence by agreeing to ground rules in advance. This is the practice in the United Kingdom.

- The ground rules hearings should address:

- management of questioning about third-party disclosure;
- restrictions on the witness's previous sexual history;
- avoiding repetitive questioning, particularly in multi-defendant cases;
- control of comments, stereotypes and insulting vocabulary;
- management of questions accusing the witness of lying;
- time-limits on cross-examination.

- **Determining Vulnerability and the Need for Special Measures**

- Determining vulnerability and the need for special measures at trial should be at the forefront in the preparation of sexual offence cases.
- This process should not wait until the file reaches the office of the Director of Public Prosecutions but should begin at the time of the report.
- In the United Kingdom, the three-test criteria utilized for making this determination are as follows:

(1) Is the witness potentially vulnerable/intimidated based on the legislative framework?

(2) If yes: Is this vulnerability/intimidation likely to affect whether they will be willing to testify in court, to affect their capacity to give their "best evidence" in court (i.e. evidence that is complete, coherent and accurate), and to cause them undue stress in or before the court?

- (3) If yes: What type of support or assistance will be most likely to alleviate these difficulties?

Closing Comments

As I close, I wish once again to thank you for your kind attention and participation in these important discussions on the subject of vulnerabilities and special measures in the area of sexual offence cases. We look forward to launching the Sexual Offences Model Court in the High Court of Antigua and Barbuda in St. John's early next year.