



# Vulnerable Witnesses (Scotland) Act 2004

## 2004 asp 3

### PART 1

#### CRIMINAL PROCEEDINGS

##### *Evidence of children and other vulnerable witnesses: special measures*

#### **1 Evidence of children and other vulnerable witnesses: special measures**

- (1) For section 271 (evidence of vulnerable persons: special provision) of the Criminal Procedure (Scotland) Act 1995 (c. 46) (referred to in this Part as “the 1995 Act”) there is substituted—

##### *“Special measures for child witnesses and other vulnerable witnesses*

#### **271 Vulnerable witnesses: main definitions**

- (1) For the purposes of this Act, a person who is giving or is to give evidence at, or for the purposes of, a trial is a vulnerable witness if—
- (a) the person is under the age of 16 on the date of commencement of the proceedings in which the trial is being or to be held (such a vulnerable witness being referred to in this Act as a “child witness”), or
  - (b) where the person is not a child witness, there is a significant risk that the quality of the evidence to be given by the person will be diminished by reason of—
    - (i) mental disorder (within the meaning of section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13)), or
    - (ii) fear or distress in connection with giving evidence at the trial.
- (2) In determining whether a person is a vulnerable witness by virtue of subsection (1)(b) above, the court shall take into account—
- (a) the nature and circumstances of the alleged offence to which the proceedings relate,
  - (b) the nature of the evidence which the person is likely to give,

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- (c) the relationship (if any) between the person and the accused,
- (d) the person's age and maturity,
- (e) any behaviour towards the person on the part of—
  - (i) the accused,
  - (ii) members of the family or associates of the accused,
  - (iii) any other person who is likely to be an accused or a witness in the proceedings, and
- (f) such other matters, including—
  - (i) the social and cultural background and ethnic origins of the person,
  - (ii) the person's sexual orientation,
  - (iii) the domestic and employment circumstances of the person,
  - (iv) any religious beliefs or political opinions of the person, and
  - (v) any physical disability or other physical impairment which the person has,
 as appear to the court to be relevant.

- (3) For the purposes of subsection (1)(a) above and section 271B(1)(b) below, proceedings shall be taken to have commenced when the indictment or, as the case may be, complaint is served on the accused.
- (4) In subsection (1)(b) above, the reference to the quality of evidence is to its quality in terms of completeness, coherence and accuracy.
- (5) In this section and sections 271A to 271M of this Act—
  - “court” means the High Court or the sheriff court,
  - “trial” means a trial under solemn procedure in any court or under summary procedure in the sheriff court.
- (6) In sections 271A to 271M of this Act, “special measure” means any of the special measures set out in, or prescribed under, section 271H below.

### **271A Child witnesses**

- (1) Where a child witness is to give evidence at or for the purposes of a trial, the child witness is entitled, subject to—
  - (a) subsections (2) to (13) below, and
  - (b) section 271D of this Act,
 to the benefit of one or more of the special measures for the purpose of giving evidence.
- (2) A party citing or intending to cite a child witness shall, no later than 14 clear days before the trial diet, lodge with the court a notice (referred to in this Act as a “child witness notice”)—
  - (a) specifying the special measure or measures which the party considers to be the most appropriate for the purpose of taking the child witness's evidence, or
  - (b) if the party considers that the child witness should give evidence without the benefit of any special measure, stating that fact.
- (3) A child witness notice shall contain or be accompanied by—

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- (a) a summary of any views expressed for the purposes of section 271E(2)(b) of this Act, and
  - (b) such other information as may be prescribed by Act of Adjournal.
- (4) The court may, on cause shown, allow a child witness notice to be lodged after the time limit specified in subsection (2) above.
- (5) The court shall, not later than 7 days after a child witness notice has been lodged, consider the notice in the absence of the parties and, subject to section 271B(3) of this Act—
  - (a) in the case of a notice under subsection (2)(a) above—
    - (i) if a standard special measure is specified in the notice, make an order authorising the use of that measure for the purpose of taking the child witness's evidence, and
    - (ii) if any other special measure is specified in the notice and the court is satisfied on the basis of the notice that it is appropriate to do so, make an order authorising the use of the special measure (in addition to any authorised by virtue of an order under sub-paragraph (i) above) for the purpose of taking the child witness's evidence,
  - (b) in the case of a notice under subsection (2)(b) above, if—
    - (i) the summary of views accompanying the notice under subsection (3)(a) above indicates that the child witness has expressed a wish to give evidence without the benefit of any special measure, and
    - (ii) the court is satisfied on the basis of the notice that it is appropriate to do so,make an order authorising the giving of evidence by the child witness without the benefit of any special measure, or
  - (c) if—
    - (i) paragraph (a)(ii) or (b) above would apply but for the fact that the court is not satisfied as mentioned in that paragraph, or
    - (ii) in the case of a notice under subsection (2)(b), the summary of views accompanying the notice under subsection (3)(a) above indicates that the child witness has not expressed a wish to give evidence without the benefit of any special measure,make an order that, before the trial diet, there shall be a diet under subsection (9) below and ordain the parties to attend.
- (6) Subsection (7) below applies where—
  - (a) it appears to the court that a party intends to call a child witness to give evidence at or for the purposes of the trial,
  - (b) the party has not lodged a child witness notice in respect of the child witness by the time specified in subsection (2) above, and
  - (c) the court has not allowed a child witness notice in respect of the child witness to be lodged after that time under subsection (4) above.
- (7) Where this subsection applies, the court shall—
  - (a) order the party to lodge a child witness notice in respect of the child witness by such time as the court may specify, or

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- (b) order that, before the trial diet, there shall be a diet under subsection (9) below and ordain the parties to attend.
- (8) On making an order under subsection (5)(c) or (7)(b) above, the court may postpone the trial diet.
- (9) At a diet under this subsection, the court, after giving the parties an opportunity to be heard—
  - (a) in a case where any of the standard special measures has been authorised by an order under subsection (5)(a)(i) above, may make an order authorising the use of such further special measure or measures as it considers appropriate for the purpose of taking the child witness's evidence, and
  - (b) in any other case, shall make an order—
    - (i) authorising the use of such special measure or measures as the court considers to be the most appropriate for the purpose of taking the child witness's evidence, or
    - (ii) that the child witness is to give evidence without the benefit of any special measure.
- (10) The court may make an order under subsection (9)(b)(ii) above only if satisfied—
  - (a) where the child witness has expressed a wish to give evidence without the benefit of any special measure, that it is appropriate for the child witness so to give evidence, or
  - (b) in any other case, that—
    - (i) the use of any special measure for the purpose of taking the evidence of the child witness would give rise to a significant risk of prejudice to the fairness of the trial or otherwise to the interests of justice, and
    - (ii) that risk significantly outweighs any risk of prejudice to the interests of the child witness if the order is made.
- (11) A diet under subsection (9) above may—
  - (a) on the application of the party citing or intending to cite the child witness in respect of whom the diet is to be held, or
  - (b) of the court's own motion,be held in chambers.
- (12) A diet under subsection (9) above may be conjoined with—
  - (a) in the case of proceedings in the High Court, a preliminary diet,
  - (b) in the case of proceedings on indictment in the sheriff court, a first diet,
  - (c) in the case of summary proceedings, an intermediate diet.
- (13) A party lodging a child witness notice shall, at the same time, intimate the notice to the other parties to the proceedings.
- (14) In this section, references to a standard special measure are to any of the following special measures—
  - (a) the use of a live television link in accordance with section 271J of this Act where the place from which the child witness is to give evidence

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by means of the link is another part of the court building in which the court-room is located,

- (b) the use of a screen in accordance with section 271K of this Act, and
- (c) the use of a supporter in accordance with section 271L of this Act in conjunction with either of the special measures referred to in paragraphs (a) and (b) above.

### **271B Further special provision for child witnesses under the age of 12**

- (1) This section applies where a child witness—
  - (a) is to give evidence at, or for the purposes of, a trial in respect of any offence specified in subsection (2) below, and
  - (b) is under the age of 12 on the date of commencement of the proceedings in which the trial is being or to be held.
- (2) The offences referred to in subsection (1)(a) above are—
  - (a) murder,
  - (b) culpable homicide,
  - (c) any offence to which section 288C of this Act applies,
  - (d) any offence which involves an assault on, or injury or a threat of injury to, any person (including any offence involving neglect or ill-treatment of, or other cruelty to, a child),
  - (e) abduction, and
  - (f) plagium.
- (3) Where this section applies, the court shall not make an order under section 271A or 271D of this Act which has the effect of requiring the child witness to be present in the court-room or any part of the court building in which the court-room is located for the purpose of giving evidence unless satisfied—
  - (a) where the child witness has expressed a wish to be so present for the purposes of giving evidence, that it is appropriate for the child witness to be so present for that purpose, or
  - (b) in any other case, that—
    - (i) the taking of the evidence of the child witness without the child witness being so present would give rise to a significant risk of prejudice to the fairness of the trial or otherwise to the interests of justice, and
    - (ii) that risk significantly outweighs any risk of prejudice to the interests of the child witness if the order is made.

### **271C Vulnerable witnesses other than child witnesses**

- (1) This section applies where a party citing or intending to cite a person (other than a child witness) to give evidence at, or for the purposes of, a trial (such a person being referred to in this section as “the witness”) considers—
  - (a) that the witness is likely to be a vulnerable witness, and
  - (b) that a special measure or combination of special measures ought to be used for the purpose of taking the witness’s evidence.

- (2) Where this section applies, the party citing or intending to cite the witness shall, not later than 14 clear days before the trial diet, make an application (referred to as a “vulnerable witness application”) to the court for an order authorising the use of one or more of the special measures for the purpose of taking the witness’s evidence.
- (3) A vulnerable witness application shall—
- (a) specify the special measure or measures which the party making the application considers to be the most appropriate for the purpose of taking the evidence of the witness to whom the application relates, and
  - (b) contain or be accompanied by—
    - (i) a summary of any views expressed for the purposes of section 271E(2)(b) of this Act, and
    - (ii) such other information as may be prescribed by Act of Adjournal.
- (4) The court may, on cause shown, allow a vulnerable witness application to be made after the time limit specified in subsection (2) above.
- (5) The court shall, not later than 7 days after a vulnerable witness application is made to it, consider the application in the absence of the parties and—
- (a) make an order authorising the use of the special measure or measures specified in the application if satisfied on the basis of the application that—
    - (i) the witness in respect of whom the application is made is a vulnerable witness,
    - (ii) the special measures or measures specified in the application are the most appropriate for the purpose of taking the witness’s evidence, and
    - (iii) it is appropriate to do so after having complied with the duty in subsection (8) below, or
  - (b) if not satisfied as mentioned in paragraph (a) above, order that, before the trial diet, there shall be a diet under subsection (7) below and ordain the parties to attend.
- (6) On making an order under subsection (5)(b) above, the court may postpone the trial diet.
- (7) At a diet under this subsection, the court may—
- (a) after giving the parties an opportunity to be heard, and
  - (b) if satisfied that the witness in respect of whom the application is made is a vulnerable witness,
- make an order authorising the use of such special measure or measures as the court considers to be the most appropriate for the purpose of taking the witness’s evidence.
- (8) In deciding whether to make an order under subsection (5)(a) or (7) above, the court shall—
- (a) have regard to—
    - (i) the possible effect on the witness if required to give evidence without the benefit of any special measure, and

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- (ii) whether it is likely that the witness would be better able to give evidence with the benefit of a special measure, and
  - (b) take into account the matters specified in subsection (2)(a) to (f) of section 271 of this Act.
- (9) A diet under subsection (7) above may—
- (a) on the application of the party citing or intending to cite the witness in respect of whom the diet is to be held, or
  - (b) of the court’s own motion,
- be held in chambers.
- (10) A diet under subsection (7) above may be conjoined with—
- (a) in the case of proceedings in the High Court, a preliminary diet,
  - (b) in the case of proceedings on indictment in the sheriff court, a first diet,
  - (c) in the case of summary proceedings, an intermediate diet.
- (11) A party making a vulnerable witness application shall, at the same time, intimate the application to the other parties to the proceedings.

#### **271D Review of arrangements for vulnerable witnesses**

- (1) In any case in which a person who is giving or is to give evidence at or for the purposes of the trial (referred to in this section as the “witness”) is or appears to the court to be a vulnerable witness, the court may at any stage in the proceedings (whether before or after the commencement of the trial or before or after the witness has begun to give evidence)—
- (a) on the application of the party citing or intending to cite the witness, or
  - (b) of its own motion,
- review the current arrangements for taking the witness’s evidence and, after giving the parties an opportunity to be heard, make an order under subsection (2) below.
- (2) The order which may be made under this subsection is—
- (a) where the current arrangements for taking the witness’s evidence include the use of a special measure or combination of special measures authorised by an order under section 271A or 271C of this Act or under this subsection (referred to as the “earlier order”), an order varying or revoking the earlier order, or
  - (b) where the current arrangements for taking the witness’s evidence do not include any special measure, an order authorising the use of such special measure or measures as the court considers most appropriate for the purpose of taking the witness’s evidence.
- (3) An order under subsection (2)(a) above varying an earlier order may—
- (a) add to or substitute for any special measure authorised by the earlier order such other special measure as the court considers most appropriate for the purpose of taking the witness’s evidence, or
  - (b) where the earlier order authorises the use of a combination of special measures for that purpose, delete any of the special measures so authorised.

- (4) The court may make an order under subsection (2)(a) above revoking an earlier order only if satisfied—
- (a) where the witness has expressed a wish to give or, as the case may be, continue to give evidence without the benefit of any special measure, that it is appropriate for the witness so to give evidence, or
  - (b) in any other case, that—
    - (i) the use, or continued use, of the special measure or measures authorised by the earlier order for the purpose of taking the witness's evidence would give rise to a significant risk of prejudice to the fairness of the trial or otherwise to the interests of justice, and
    - (ii) that risk significantly outweighs any risk of prejudice to the interests of the witness if the order is made.
- (5) Subsection (8) of section 271C of this Act applies to the making of an order under subsection (2)(b) of this section as it applies to the making of an order under subsection (5)(a) or (7) of that section but as if the references to the witness were to the witness within the meaning of this section.
- (6) In this section, “current arrangements” means the arrangements in place at the time the review under this section is begun.

#### **271E Vulnerable witnesses: supplementary provision**

- (1) Subsection (2) below applies where—
- (a) a party is considering for the purposes of a child witness notice or a vulnerable witness application which of the special measures is or are the most appropriate for the purpose of taking the evidence of the person to whom the notice or application relates, or
  - (b) the court is making an order under section 271A(5)(a)(ii) or (b) or (9), 271C or 271D of this Act.
- (2) The party or, as the case may be, the court shall—
- (a) have regard to the best interests of the witness, and
  - (b) take account of any views expressed by—
    - (i) the witness (having regard, where the witness is a child witness, to the witness's age and maturity), and
    - (ii) where the witness is a child witness, the witness's parent (except where the parent is the accused).
- (3) For the purposes of subsection (2)(b) above, where the witness is a child witness—
- (a) the witness shall be presumed to be of sufficient age and maturity to form a view if aged 12 or older, and
  - (b) in the event that any views expressed by the witness are inconsistent with any views expressed by the witness's parent, the views of the witness shall be given greater weight.
- (4) In this section—



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“parent”, in relation to a child witness, means any person having parental responsibilities within the meaning of section 1(3) of the Children (Scotland) Act 1995 (c. 36) in relation to the child witness,

“the witness” means—

- (a) in the case referred to in subsection (1)(a) above, the person to whom the notice or application relates,
- (b) in the case referred to in subsection (1)(b) above, the person to whom the order would relate.

### **271F The accused**

(1) For the purposes of the application of subsection (1) of section 271 of this Act to the accused (where the accused is giving or is to give evidence at or for the purposes of the trial), subsection (2) of that section shall have effect as if—

(a) for paragraph (c) there were substituted—

“(c) whether the accused is to be legally represented at the trial and, if not, the accused’s entitlement to be so legally represented,” and

(b) for paragraph (e) there were substituted—

“(e) any behaviour towards the accused on the part of—  
(i) any co-accused or any person who is likely to be a co-accused in the proceedings,  
(ii) any witness or any person who is likely to be a witness in the proceedings, or  
(iii) members of the family or associates of any of the persons mentioned in sub-paragraphs (i) and (ii) above.”.

(2) Where, if the accused were to give evidence at or for the purposes of the trial, he would be a child witness—

(a) section 271A of this Act shall apply in relation to the accused subject to the following modifications—

(i) references to a child witness (except in the phrase “child witness notice”) shall be read as if they were references to the accused,

(ii) references to the party citing or intending to cite a child witness shall be read as if they were references to the accused, and

(iii) subsection (6) shall have effect as if for paragraph (a) there were substituted—

“(a) it appears to the court that the accused, if he were to give evidence at or for the purposes of the trial, would be a child witness,” and

(b) section 271B of this Act shall apply in relation to the accused as if—

(i) for subsection (1) there were substituted—

“(1) This section applies where the accused—

(a) if he were to give evidence at or for the purposes of the trial would be a child witness, and

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- (b) is under the age of 12 on the date of commencement of the proceedings.”, and
- (ii) in subsection (3), references to the child witness were references to the accused.
- (3) Subsection (4) below applies where the accused—
- (a) considers that, if he were to give evidence at or for the purposes of the trial, he would be a vulnerable witness other than a child witness, and
  - (b) has not decided to give evidence without the benefit of any special measures.
- (4) Where this subsection applies, subsections (2) to (11) of section 271C of this Act shall apply in relation to the accused subject to the following modifications—
- (a) references to the witness shall be read as if they were references to the accused,
  - (b) references to the party citing or intending to cite the witness shall be read as if they were references to the accused, and
  - (c) in subsection (8)(b), the reference to subsection (2)(a) to (f) of section 271 of this Act shall be read as if it were a reference to that subsection as modified by subsection (1) above.
- (5) Section 271D of this Act shall apply in any case where it appears to the court that the accused, if he were to give evidence at or for the purposes of the trial, would be a vulnerable witness as it applies in the case referred to in subsection (1) of that section but subject to the following modifications—
- (a) references to the witness shall be read as if they were references to the accused,
  - (b) references to the party citing or intending to cite the witness shall be read as if they were references to the accused.
- (6) Where the witness within the meaning of section 271E of this Act is the accused, that section shall have effect in relation to the witness as if—
- (a) in subsection (1), paragraph (a) were omitted, and
  - (b) in subsection (2), the words “The party or, as the case may be,” were omitted.
- (7) Section 271M of this Act shall have effect, where the vulnerable witness is the accused, as if the reference in subsection (2) to the party citing the vulnerable witness were a reference to the accused.
- (8) The following provisions of this Act shall not apply in relation to a vulnerable witness who is the accused—
- (a) section 271H(1)(c),
  - (b) section 271I(3).

### **271G Saving provision**

Nothing in sections 271A to 271F of this Act affects any power or duty which a court has otherwise than by virtue of those sections to make or authorise any special arrangements for taking the evidence of any person.

### **271H The special measures**

- (1) The special measures which may be authorised to be used under section 271A, 271C or 271D of this Act for the purpose of taking the evidence of a vulnerable witness are—
  - (a) taking of evidence by a commissioner in accordance with section 271I of this Act,
  - (b) use of a live television link in accordance with section 271J of this Act,
  - (c) use of a screen in accordance with section 271K of this Act,
  - (d) use of a supporter in accordance with section 271L of this Act,
  - (e) giving evidence in chief in the form of a prior statement in accordance with section 271M of this Act, and
  - (f) such other measures as the Scottish Ministers may, by order made by statutory instrument, prescribe.
- (2) An order under subsection (1)(f) above shall not be made unless a draft of the statutory instrument containing the order has been laid before and approved by a resolution of the Scottish Parliament.
- (3) Provision may be made by Act of Adjournal regulating, so far as not regulated by sections 271I to 271M of this Act, the use in any proceedings of any special measure authorised to be used by virtue of section 271A, 271C or 271D of this Act.

### **271I Taking of evidence by a commissioner**

- (1) Where the special measure to be used is taking of evidence by a commissioner, the court shall appoint a commissioner to take the evidence of the vulnerable witness in respect of whom the special measure is to be used.
- (2) Proceedings before a commissioner appointed under subsection (1) above shall be recorded by video recorder.
- (3) An accused—
  - (a) shall not, except by leave of the court on special cause shown, be present in the room where such proceedings are taking place, but
  - (b) is entitled by such means as seem suitable to the court to watch and hear the proceedings.
- (4) The recording of the proceedings made in pursuance of subsection (2) above shall be received in evidence without being sworn to by witnesses.

### **271J Live television link**

- (1) Where the special measure to be used is a live television link, the court shall make such arrangements as seem to it appropriate for the vulnerable witness in respect of whom the special measure is to be used to give evidence from a place outside the court-room where the trial is to take place by means of a live television link between that place and the court-room.

- (2) The place from which the vulnerable witness gives evidence by means of the link—
  - (a) may be another part of the court building in which the court-room is located or any other suitable place outwith that building, and
  - (b) shall be treated, for the purposes of the proceedings at the trial, as part of the court-room whilst the witness is giving evidence.
- (3) Any proceedings conducted by means of a live television link by virtue of this section shall be treated as taking place in the presence of the accused.
- (4) Where—
  - (a) the live television link is to be used in proceedings in a sheriff court, but
  - (b) that court lacks accommodation or equipment necessary for the purpose of receiving such a link,the sheriff may by order transfer the proceedings to any other sheriff court in the same sheriffdom which has such accommodation or equipment available.
- (5) An order may be made under subsection (4) above—
  - (a) at any stage in the proceedings (whether before or after the commencement of the trial), or
  - (b) in relation to any part of the proceedings.

#### **271K Screens**

- (1) Where the special measure to be used is a screen, the screen shall be used to conceal the accused from the sight of the vulnerable witness in respect of whom the special measure is to be used.
- (2) However, the court shall make arrangements to ensure that the accused is able to watch and hear the vulnerable witness giving evidence.
- (3) Subsections (4) and (5) of section 271J of this Act apply for the purpose of the use of a screen under this section as they apply for the purpose of the use of a live television link under that section but as if—
  - (a) references to the live television link were references to the screen, and
  - (b) the reference to receiving such a link were a reference to the use of a screen.

#### **271L Supporters**

- (1) Where the special measure to be used is a supporter, another person (“the supporter”) nominated by or on behalf of the vulnerable witness in respect of whom the special measure is to be used may be present alongside the witness to support the witness while the witness is giving evidence.
- (2) Where the person nominated as the supporter is to give evidence at the trial, that person may not act as the supporter at any time before giving evidence.
- (3) The supporter shall not prompt or otherwise seek to influence the witness in the course of giving evidence.

### **271M Giving evidence in chief in the form of a prior statement**

- (1) This section applies where the special measure to be used in respect of a vulnerable witness is giving evidence in chief in the form of a prior statement.
  - (2) A statement made by the vulnerable witness which is lodged in evidence for the purposes of this section by or on behalf of the party citing the vulnerable witness shall, subject to subsection (3) below, be admissible as the witness's evidence in chief, or as part of the witness's evidence in chief, without the witness being required to adopt or otherwise speak to the statement in giving evidence in court.
  - (3) Section 260 of this Act shall apply to a statement lodged for the purposes of this section as it applies to a prior statement referred to in that section but as if—
    - (a) references to a prior statement were references to the statement lodged for the purposes of this section,
    - (b) in subsection (1), the words “where a witness gives evidence in criminal proceedings” were omitted, and
    - (c) in subsection (2), paragraph (b) were omitted.
  - (4) This section does not affect the admissibility of any statement made by any person which is admissible otherwise than by virtue of this section.
  - (5) In this section, “statement” has the meaning given in section 262(1) of this Act.”.
- (2) In section 307(1) (interpretation) of the 1995 Act, there is inserted at the appropriate place in alphabetical order the following definitions—
- ““child witness” shall be construed in accordance with section 271(1)(a) of this Act;”,
- ““vulnerable witness” shall be construed in accordance with section 271(1) of this Act;”.