

VULNERABLE WITNESSES (SCOTLAND) ACT 2004

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1 – Criminal Proceedings

Section 1 – Evidence of children and other vulnerable witnesses: special measures

7. This section replaces section 271 of the Criminal Procedure (Scotland) Act 1995 with new sections 271 to 271M. These sections define “vulnerable witness” and set out the special measures available to these witnesses and the procedure to be followed in criminal proceedings to enable such measures to be used.

Section 271 – Vulnerable witnesses: main definitions

8. Subsection (1) defines a “vulnerable witness” as being:
 - a child (i.e. a person under 16 at the time the complaint or indictment is served on the accused); or
 - an adult witness the quality of whose evidence (as defined in subsection (4)) may be diminished either as a result of a mental disorder (as defined by section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003), or due to fear or distress of the witness associated with giving their evidence.
9. Subsection (2) sets out a range of factors which must be taken into account by the court when it determines whether an adult witness is vulnerable. The court may also take into account any other factors not listed in subsection (2), but which appear to be relevant.
10. Subsection (5) makes it clear that the provisions on vulnerable witnesses apply only to proceedings in the High Court and sheriff court, although the Act confers a power on the Scottish Ministers by order to apply the provisions to proceedings in the district court (see section 10).

Section 271A – Child witnesses

11. Subsection (1) entitles all child witnesses to give their evidence with the help of at least one special measure. Under subsections (2) and (13) the party calling the witness must submit a notice to the court and at the same time intimate it to the other parties at least 14 clear days before the trial, setting out which, if any, special measures the party considers to be the most appropriate. Where a child has expressed a view then details of the child’s view must be included in the notice.
12. The court must consider the child witness notice within 7 days of the notice having been lodged. If the notice specifies a “standard” special measure, then the court must make an order authorising the use of that measure for the child witness giving evidence. Subsection (14) defines “standard” special measures as either the use of a live television

link within the court building, or the use of a screen. In either case this can include a supporter as well.

13. If a notice specifies a non “standard” special measure, then in the event that the court is satisfied with the special measure sought the court can make an order granting the use of that measure for the child witness giving evidence. This order can be made in the absence of the parties. Subsections (5) and (9) enable a hearing to be held in cases where the court is not satisfied and the parties are to be given an opportunity to address the court at this hearing. These hearings can be conjoined with an existing diet already set down for the case.
14. In the event that a child witness notice is not lodged in time the court also has power under subsections (6) and (7) to either order such a notice to be lodged or to arrange a diet to be held before the trial.
15. Subsections (5)(b) and (9)(b)(ii) enable the court to order that the child witness is to give evidence without the benefit of any special measure. Subsections (2)(b), (5)(b) and (10) however have the effect that such an order can be made in only two circumstances: if the child has expressed a wish to give evidence without any special measure and the court considers that appropriate, or if the use of a special measure would give rise to a significant risk of prejudice to the trial and that risk significantly outweighs any risk of prejudice to the interests of the child.
16. Subsection (11) provides the court with the power, on its own motion or on the motion of the party calling the vulnerable witness, to hold a hearing on special measures in private (i.e. in chambers or after clearing the court).

Section 271B – Further special provision for child witnesses under the age of 12

17. This section provides a general rule that children under 12 are to give evidence away from the court building in certain cases. These cases (listed in subsection (2)) involve abduction, plagium (theft of a child), and offences of a sexual or violent nature. This means that the special measures that would be appropriate in these cases would either be evidence on commission or a live television link to a remote location.
18. Subsection (3) creates the general rule and sets out two exceptions to it. The first exception is for cases where a child witness chooses to give evidence in court and it is considered appropriate by the court for the child to do so. The second exception would be where taking the child’s evidence outwith the court would give rise to a significant risk of prejudice to the trial and that risk significantly outweighs any risk of prejudice to the interests of the child.

Section 271C – Vulnerable witnesses other than child witnesses

19. This section sets out the requirements associated with an application for special measures to help an adult vulnerable witness give their evidence.
20. Under subsections (2) and (11) the party calling the witness must submit an application to the court and at the same time intimate it to the other parties at least 14 clear days before the trial, setting out which special measures are most appropriate. Where the witness has expressed a view then details of the witness’s view must be included in the application.
21. The court must consider the vulnerable witness application within 7 days of the application having been lodged. In the event that the court is satisfied that the witness is vulnerable and it is appropriate for them to use the special measure sought then the court can make an order granting the use of that measure for the vulnerable witness giving evidence. This order can be made in the absence of the parties. Subsections (5) (b) and (7) enable a hearing to be held in cases where the court is not satisfied and the parties are to be given an opportunity to address the court at this hearing. The court can

also postpone the trial diet for this purpose. These hearings can be conjoined with an existing diet already set down for the case.

22. The court in deciding whether to make an order granting the use of a special measure for the witness must also give consideration to a number of factors set out in subsection (8). These factors are:
- the possible effect on the witness if they are not allowed to use special measures;
 - whether there is a chance that they will be more able to give their evidence with special measures than without; and
 - the list of factors set out in the new section 271(2).
23. Subsection (4) allows the court to accept an application which has been made late.

Section 271D – Review of arrangements for vulnerable witnesses

24. This section enables the court at any time, up to and including when a vulnerable witness is giving evidence in a trial, to review the arrangements for the taking of their evidence. The court may make an order regarding the arrangements at the request of the party who is calling the witness or of its own accord. Such an order may add a special measure, or substitute a special measure in the previous order for another special measure which is considered more appropriate. Where a previous order contains a combination of special measures, the number of measures to be used can be reduced. An order that special measures may no longer be used can only be made in two types of instance. One is where the court is satisfied that it is appropriate to revoke the use of special measures where the witness does not wish to use them. Another is if the court is satisfied that there is a significant risk of prejudice to the fairness of the trial significantly outweighing the risk of prejudice to the witness.
25. Subsection (2)(b) allows the court to make an order for a special measure to be used by a vulnerable witness in circumstances where an order has not previously been made. In making such an order, the court must take into account the factors listed in section 271C(8).

Section 271E – Vulnerable witnesses: supplementary provision

26. Subsections (1) to (3) require the party calling the witness and the court in determining a special measures order to consider the best interests and views of the witness when deciding the special measure most appropriate for the purpose of taking the evidence. With regard to child witnesses the views of the child's parent are also to be considered unless that person is the accused.
27. This section ensures that children over 12 are presumed to be able to give a view and in the case of children under 12, the age and maturity of the child is to be considered in determining whether they can express a view on the special measures to be used. In the event that the views of the child and the parent differ, then the views of the child are to be given greater weight.

Section 271F – The accused

28. This section sets out the provisions for allowing an accused, if considered to be vulnerable, to give his or her evidence with the use of a special measure. The provisions of sections 271 to 271M will apply to the accused as a vulnerable witness, but with certain modifications.
29. [Section 271](#) is modified for the accused by amending the factors to be taken into account under section 271(2) in determining vulnerability, including the fact that the accused is entitled to or will have legal representation. The accused is also not entitled to use screens as a special measure for the giving of his or her evidence.

30. In most cases it will not be known whether the accused is to give evidence until the last minute. The modifications made by this section ensure that special measures are considered for the accused in advance of the trial but on a contingent basis.

Section 271G – Saving provision

31. This section ensures that the existing common law powers to make or authorise special arrangements for vulnerable witnesses' evidence are not removed by the new sections 271A to 271F.

Section 271H – The special measures

32. Subsection (1)(a) to (e) lists the special measures that will be available to vulnerable witnesses to help them give their evidence. Subsection 1(f) confers on the Scottish Ministers a power to make provision for other special measures by way of statutory instrument.

Section 271I – Taking of evidence by a commissioner

33. This section enables evidence on commission to be used as a special measure for vulnerable witnesses. The court is empowered to appoint a commissioner to take the evidence of a vulnerable witness in advance of the trial.
34. The accused may only be present with the agreement of the court on special cause shown, but at least must be able to watch and listen by some means while the witness's evidence is taken e.g. by a live TV link.

Section 271J – Live television link

35. This section allows witnesses to give evidence by live TV link. Subsection (1) imposes a duty on the court to make suitable arrangements for the evidence of a vulnerable witness to be given from outside the court-room by a live television link. Subsection (2) allows for this to happen from either another part of the court building or any suitable place that can be identified away from the court building. Subsection (3) confirms that when a live link is used in these proceedings it will be treated as taking place in the presence of the accused.
36. Subsection (4) allows for the sheriff to transfer a case or part of a case in which it is intended that a live television link be used from a sheriff court that does not have either the suitable accommodation or equipment to another sheriff court within the same sheriffdom that does.

Section 271K – Screens

37. Subsection (1) provides for the use of screens when a vulnerable witness is giving evidence in a criminal trial. The purpose of the screen will be to conceal the accused from the sight of the vulnerable person whilst that witness is giving evidence.
38. Subsection (2) imposes a duty on the court to ensure that the accused is able to see and hear the witness giving evidence e.g. by way of a TV monitor that relays the image of the witness to the accused.

Section 271L – Supporters

39. This section allows for a person to be nominated by a vulnerable witness to accompany the witness whilst they give evidence. A witness may act as a supporter provided that they have already given their evidence. The supporter will not be allowed to prompt the witness while the vulnerable witness is giving their evidence in the case.

Section 271M – Giving evidence in chief in the form of a prior statement

40. Subsections (1) and (2) allow for a previous statement made by a vulnerable witness and which has been reliably recorded on video or in some other way to be used as their main evidence without the need for the witness having to adopt the statement.
41. Section 260 of the Criminal Procedure (Scotland) Act 1995 Act already allows prior statements to be admitted as evidence in criminal proceedings, but subsection (2) of section 260 requires that during the course of the proceedings the witness must confirm in court that the statement was made by him or herself and is adopted as evidence.
42. Subsection (3) of section 271M enables the provisions already contained in section 260 of the 1995 Act to also apply to statements lodged in evidence under this section, by making some minor modifications to section 260, principally to ensure that the witness does not have to adopt the statement.

Section 2 – Consideration before the trial of matters relating to vulnerable witnesses

43. This section imposes a duty on the court to consider at a hearing whether there are any vulnerable witnesses in the case. The court must fulfil this duty at an intermediate diet in sheriff summary proceedings, a first diet in sheriff solemn proceedings and at either a preliminary diet or the start of the trial diet in High Court proceedings. Subsection (4) ensures that where the court makes an order under the inserted sections 271A(8) or 271D(2) of the 1995 Act at a first diet in the sheriff court, or a preliminary diet in the High Court, then this order may not be the subject of any appeal.

Section 3 – Evidence of vulnerable witnesses at proofs in relation to victim statements

44. This section inserts a new section 15A into the Criminal Justice (Scotland) Act 2003 (“the 2003 Act”) which applies the special measures provisions in sections 271 to 271M of the Criminal Procedure (Scotland) Act 1995 (as inserted by the Act) to proofs ordered in relation to victim statements. Subsection (3) of the new section ensures that any witness who gives evidence using a special measure during the trial will also be able to use that special measure if they are giving evidence at any subsequent proof ordered in relation to a victim statement. A notice can be lodged or application made seeking the use at the proof of special measures for a vulnerable witness who has not previously used a special measure in the case.
45. Section 14 of the 2003 Act enables persons against whom certain offences are alleged to have been committed to lodge statement (a “victim statement”) about how they have been affected by the offence. If anything in a victim statement is disputed, the court can order a proof.

Section 4 – Evidence of identification prior to trial

46. This section inserts a new section 281A into the Criminal Procedure (Scotland) Act 1995. Subsection (1) of the new section provides that if the witness has previously identified the accused in an identification procedure before the start of the trial, then there is no need for the witness to make a dock identification at the trial. A report is lodged instead, naming the person the witness has identified in the procedure as the accused.
47. Subsection (2) of the new section states that a prosecutor has to serve a copy of the report and a notice on the accused, at least 14 clear days before the start of the trial, showing he or she intends to rely on this evidence in court. The accused has no more than 7 days after receiving the notice to say if he or she intends to challenge the report. In special circumstances the court may allow extra time for the accused to challenge the report.

Section 5 – Expert evidence as to subsequent behaviour of complainer

48. This section inserts a new section 275C into the Criminal Procedure (Scotland) Act 1995 which enables certain expert evidence to be admitted in cases involving sexual offences as defined by section 288C of the 1995 Act (as inserted by the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002). This evidence may only be admitted for the purpose of explaining the behaviour of the victim of the offence to rebut any inference adverse to the credibility or reliability of the complainer which might otherwise be drawn from the behaviour.
49. Subsection (4) ensures that this provision does not restrict the use of expert evidence that can currently be admitted by the court.

Section 6 – Prohibition of personal conduct of defence in cases involving vulnerable witnesses

50. Section 6 inserts new sections 288E and 288F into the Criminal Procedure (Scotland) Act 1995. Section 288E prohibits a person from conducting their own defence in certain types of offence involving a child witness under the age of 12 who is to give evidence in the trial. The prohibition applies to the trial and any proof relating to a victim statement.
51. Subsection (3) specifies that this provision relates to cases of abduction, plagium and violent offences.
52. Subsection (4) provides that the same procedure as set down in section 288D of the Criminal Procedure (Scotland) Act 1995 applies. That section provides for the appointment of a solicitor by the court for the accused.
53. Subsection (5) requires the prosecutor, in cases to which the prohibition applies, to serve a notice on the accused under subsection (6) at the same time as the child witness notice is served. Subsection (6) specifies what information the notice must contain.
54. Inserted section 288F provides a power for the court to prohibit a person from conducting their own defence in any case other than a sexual offence case or a case to which section 288E applies (where there is already an automatic prohibition) if a vulnerable witness is giving evidence in the trial.
55. Subsection (2) enables the court to make an order prohibiting the accused from conducting their own defence where it is satisfied that this is in the interests of the vulnerable witness.
56. Subsection (3) prevents the court from making such an order where there is a significant risk of prejudice to the fairness of the trial, which outweighs any prejudice to the interests of the vulnerable witness which may arise from allowing the accused to conduct their own defence.
57. Subsection (5) provides that once the court has decided that a person will be prohibited from conducting their own defence the same procedure as set down in section 288D of the 1995 Act applies. That section provides for the appointment of a solicitor by the court for the accused.
58. Where a person is prohibited under section 288E or 288F from conducting his own defence at the trial he is also prohibited from conducting his own defence at any subsequent victim statement proof.

Section 7 – Special pre-trial procedures for ascertaining in such cases whether accused has engaged a solicitor

59. Section 71 of the Criminal Procedure (Scotland) Act 1995 requires the court at a first diet in the sheriff court, in a sexual offence case, to ascertain whether the accused has engaged a solicitor for the purposes of his defence at the trial. Section 71A of the 1995 Act requires that in sheriff court solemn proceedings a solicitor who has been dismissed

or has withdrawn from acting for an accused in a sexual offence case must inform the court of that fact in writing. Section 72A of the 1995 Act makes the holding of a preliminary diet mandatory in the High Court in sexual offence cases.

60. **Section 7** amends sections 71, 71A and 72A of the 1995 Act so that these provisions will now relate not only to cases involving sexual offences under section 288C of the 1995 Act but also to cases in which an accused is prohibited from conducting his own defence under the new sections 288E or 288F.

Section 8 – Prohibition of precognition by accused in person of child witnesses under 12 in cases to which section 288E applies

61. **Section 8** inserts new subsections (6) and (7) into section 291 of the Criminal Procedure (Scotland) Act 1995. These subsections provide that in cases where an accused is prohibited from conducting his own defence as a result of the automatic ban relating to child witnesses under 12, he cannot personally precognosce the child witness.

Section 9 – Summary proceedings in sheriff court: pre-trial procedure where no intermediate diet is fixed

62. **Section 9** inserts a new section 148B into the Criminal Procedure (Scotland) Act 1995 requiring the court in summary proceedings, where no intermediate diet has been held, to check whether there are any vulnerable witnesses in a case at the trial diet before the first witness is sworn

Section 10 - Application of vulnerable witness provisions to proceedings in the district court

63. This section inserts a new section 288G into the Criminal Procedure (Scotland) Act 1995, which confers on the Scottish Ministers a power to apply (with modifications) sections 271 to 271M, 288E and 288F to proceedings in the district court by way of statutory instrument.

Part 2 – Civil Proceedings

Section 11 – Interpretation of this Part

64. This section defines a vulnerable witness in any civil proceedings as being:
- a child (i.e. a person under the age of 16 at the commencement of proceedings); or
 - an adult witness the quality of whose evidence (as defined in subsection (4)) may be diminished either as a result of a mental disorder (as defined by section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003), or due to fear or distress of the witness associated with giving their evidence.
65. Subsection (2) sets out a range of factors which must be taken into account by the court when it determines whether an adult witness is vulnerable. The court may also take into account any other factors not listed in subsection (2) but which appear to be relevant.
66. Subsection (5) defines civil proceedings to include referrals from children’s hearings. This definition excludes proceedings before a tribunal of inquiry, arbitration proceedings, and other proceedings not in any of the ordinary courts of law.

Section 12 – Orders authorising the use of special measures for vulnerable witnesses

67. This section sets out the procedure for child witness notices and vulnerable witness applications in civil proceedings.

68. Subsections (1) to (4) specify the procedure for child witness notices. The party calling the child witness must lodge a notice outlining the special measures sought. The court is required to make an order authorising the use of the most appropriate special measure to enable the child witness to give their evidence or to make an order stating that the child witness will be giving their evidence without the benefit of a special measure. The latter order can only be made if either the child witness has expressed the wish not to use a special measure and the court considers that appropriate, or the risk of prejudice to the fairness of the proof significantly outweighs the risk of prejudice to the interests of the child witness.
69. Where a child witness notice requires a live television link within the court or screens (in either case with or without a supporter), then the court must authorise the use of these special measures.
70. Subsections (5) to (7) give the court a power, on application by the party intending to call the witness, to authorise the use of a special measure for an adult vulnerable witness. Before making such an order for the most appropriate special measure the court must be satisfied that the witness is vulnerable. In reaching this decision the court must take into account a range of factors.
71. Subsection (7) sets out the range of factors which must be taken into account by the court when determining whether to make an order:
- the possible effect on the witness if they are not allowed to use special measures;
 - whether there is a chance that they will be more able to give their evidence with special measures than without; and
 - the list of factors set out in the section 11(2).

Section 13 – Review of arrangements for vulnerable witnesses

72. This section enables the court at any time, up to and including when a vulnerable witness is giving evidence in a proof, to review the arrangements for the taking of their evidence. The court may make an order regarding the arrangements at the request of the party who is calling the witness or of its own accord. Such an order may add a special measure, or substitute a special measure in the previous order for another special measure which is considered more appropriate. Where a previous order contains a combination of special measures, the number of measures to be used can be reduced. An order that special measures may no longer be used can only be made in two types of instance. One is where the court is satisfied that it is appropriate to revoke the use of special measures where the witness does not wish to use them. Another is if the court is satisfied that the risk of prejudice to the fairness of the proceedings significantly outweighs the risk of prejudice to the witness.

Section 14 – Procedure in connection with orders under sections 12 and 13

73. This section provides for Rules of Court to be put in place for the procedure in connection with the making of orders for vulnerable witnesses.

Section 15 – Vulnerable witnesses: supplementary provision

74. This section requires the party calling the witness and the court in determining an order to consider the best interests and views of the witness when deciding the special measure most appropriate for the purpose of taking the evidence. With regard to child witnesses the views of the child's parent are also to be considered.
75. Subsection (3) ensures that children over 12 are presumed to be able to give a view and in the case of children under 12, the age and maturity of the child is to be considered in determining whether they can express a view on the special measures to be used. In

the event that the views of the child and the parent differ, then the views of the child are to be given greater weight

Section 16 – Party to proceedings as a vulnerable witness

76. This section makes it clear that a party to civil proceedings if vulnerable, is able to apply for the use of special measures should they wish to give evidence.

Section 17 – Vulnerable witness: Crown application and saving provision

77. Subsection (1) makes clear that the special measures provisions apply to the Crown as a party to civil proceedings.
78. Subsection (2) ensures that the existing common law powers to make or authorise special arrangements for vulnerable witnesses' evidence are not removed by sections 12 or 13.

Section 18 – The special measures

79. Subsections (1)(a) to (d) list the special measures that will be available to vulnerable witnesses to help them give their evidence. Subsection 1(e) confers on the Scottish Ministers a power to make provision for other special measures by way of statutory instrument.

Section 19 – Taking of evidence by a commissioner

80. This section enables evidence on commission to be used as a special measure for vulnerable witnesses. The court is empowered to appoint a commissioner to take the evidence of a vulnerable witness in advance of the proof or other hearing.
81. Parties to the proceedings may only be present with the agreement of the court but at least must be able to watch and listen by some means while the witness's evidence is taken e.g. by a live TV link.

Section 20 – Live television link

82. This section allows witnesses to give evidence by live TV link. Subsection (1) imposes a duty on the court to make suitable arrangements for the evidence of a vulnerable witness to be given from outside the courtroom by a live television link. Subsection (2) allows the sheriff to transfer a case in which it is intended that a live television link be used from a sheriff court that does not have either the suitable accommodation or equipment to another court in the same sheriffdom that does.

Section 21 – Screens

83. Subsection (1) provides for the use of screens when a vulnerable witness is giving evidence in a civil proof. The purpose of the screen will be to conceal all parties from the sight of the vulnerable person whilst that witness is giving evidence.
84. Subsection (2) imposes a duty on the court to ensure that the parties who are screened from the witness are able to see and hear the witness giving evidence e.g. by way of a TV monitor that relays the image of the witness to the accused.

Section 22 – Supporters

85. This section allows for a person to be nominated by a vulnerable witness to accompany the witness whilst they give evidence. A witness may act as a supporter provided that they have already given their evidence. The supporter will not be allowed to prompt the witness while the vulnerable witness is giving their evidence in the case.

***Section 23 – Establishment of grounds of referral to children’s hearings:
restrictions on evidence***

86. This section inserts 2 new sections into the Children (Scotland) Act 1995.

Section 68A – Restrictions on evidence in certain cases involving sexual abuse

87. This new section creates a general rule that evidence or questioning with reference to character and sexual behaviour is not admissible in children’s referrals. The prohibition applies to the child who is the subject of the referral or any other witness in respect of whom the evidence is to be admitted.

Section 68B – Exceptions to restrictions under section 68A

88. Subsection (1) allows a hearing to be held where an application has been made to admit evidence which would fall within the general restriction. The court can admit this evidence if satisfied that it comes within the factors set out in paragraphs (a) to (c).

89. Subsection (2) of the new section requires the court to take account of the need to protect the privacy and dignity of the witness in determining whether to admit this type of evidence.

Part 3 – Miscellaneous and General

Section 24 – Abolition of the competence test for witnesses in criminal and civil proceedings

90. This section prohibits the use of the “competence test” in criminal and civil proceedings. The court is no longer entitled to ask preliminary questions of the witness regarding whether the witness understands the difference between truth and lies and the duty to give truthful evidence.