

VICTIMS AND WITNESSES (SCOTLAND) ACT 2014

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Vulnerable witnesses

Section 10

– Vulnerable witnesses: main definitions

32. This section and sections 11 to 21 amend the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”). These sections redefine vulnerable witness, including child witness, to improve the identification and the support available to enable them to give their best evidence and sets out the special measures available to these witnesses along with the procedure to be followed in criminal proceedings to enable such special measures to be used.
33. **Section 10(a)** replaces section 271(1) of the 1995 Act, and provides that the following categories of person are to be regarded as vulnerable witnesses:
- children (i.e. those under age 18 at the date of the commencement of the proceedings in which the hearing is being or is to be held);
 - adult witnesses whose quality of evidence (as defined in section 271(4) of the 1995 Act) is at significant risk of being 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 in connection with giving evidence;
 - victims of alleged sexual offences, human trafficking, an offence the commission of which involves domestic abuse or stalking who are giving evidence in proceedings which relate to that particular offence;
 - witnesses who are considered by the court to be at significant risk of harm by reason of them giving evidence.
34. **Section 10(b)** inserts subsection (1AA) into section 271 of the 1995 Act which gives the Scottish Ministers an order-making power to modify the list of offences in section 271(1)(c) where the victim is automatically considered to be vulnerable for the purposes of proceedings relating to that offence.
35. **Section 10(c)** repeals section 271(1A) of the 1995 Act as it is no longer relevant as section 10(a) (substituting section 271(1) of the 1995 Act) provides that all those under 18 years are to be considered as child witnesses.
36. **Section 10(e)**

inserts subsection (4A) into section 271 of the 1995 Act which requires the court to consider the best interests and views of the witness in deciding whether they are vulnerable either because the quality of their evidence is likely to be diminished (subsection (1)(b)) or they are likely to be at significant risk from harm in giving their evidence (subsection (1)(d)).

Section 11

– Child and deemed vulnerable witnesses

37. This section inserts the definitions of “child witness” (a witness under the age of 18) and “deemed vulnerable witness” (a witness who is considered vulnerable as a result of being an alleged victim of a sexual offence, human trafficking, domestic abuse or stalking) into section 271(5) of the 1995 Act. It makes various changes to section 271A (which currently details how child witnesses are to be treated in relation to special measures) and other parts of the 1995 Act which currently relate only to child witnesses to ensure that deemed vulnerable witnesses are subject to the same provisions as child witnesses were previously.
38. In particular, deemed vulnerable witnesses will be automatically entitled to the use of certain special measures known as standard special measures (previously only child witnesses had this entitlement as a matter of course). These standard special measures are the use of a live television link, a screen (to avoid the witness seeing the accused), and a supporter. In addition, the procedures for child witnesses are expanded to encompass deemed vulnerable witnesses.

Section 12

– Child and deemed vulnerable witnesses: standard special measures

39. This section amends section 271A of the 1995 Act to remove the current restriction that a live television link has to be in another room within the court, and a supporter has to be used in conjunction with either a live television link or a screen, when these measures are being used as standard special measures (under section 271A(14) of the 1995 Act). It also gives the Scottish Ministers an order making power so that they can modify the list of standard special measures in section 271A(14) and, in consequence of such a modification, prescribe the procedure for the use of standard special measures and modify sections 271A – 271M. Sections 271A - 271G set out the process to be followed in applying for special measures, and some related matters, while sections 271H - 271M specify what the special measures are and how they are to be used (for example, section 271K specifies that if a screen is to be used so that a vulnerable witness cannot see the accused, the accused should still be able to see and hear the vulnerable witness).

Section 13

– Objections to special measures; child and deemed vulnerable witnesses

40. This section amends the 1995 Act to allow any party to criminal proceedings to object to a notice requesting special measures for a child witness or deemed vulnerable witness. Objections cannot be made in relation to standard special measures, which are listed in section 271A(14) of the 1995 Act, and to which child witnesses and deemed vulnerable witnesses are automatically entitled. Such an “objection notice” must be lodged within seven days (or later with the permission of the court) of a vulnerable witness notice being lodged, and must detail the special measures that the party considers inappropriate, along with the reasons for their objection.
41. If a notice under this section is lodged, the court must make an order that the notice must be considered at the appropriate diet (depending on the level of the court). Subsections (b) and (c) make the necessary consequential changes to section 271A(5) of the 1995 Act so that the time limit for the court’s consideration of a vulnerable witness application is extended to take account of the possibility of an objection notice

being lodged and to section 271A(13) of the 1995 Act to include intimation by the party lodging the objection notice to special measures to other parties to the proceedings as they do at present in relation to an application for special measures.

Section 14

– Child witnesses

42. This section amends the current procedures about children giving evidence in the court, set out in section 271B of the 1995 Act, to place greater emphasis on the wishes of the child. Where a child wishes to be present in the court to give evidence, the court must make an order requiring the child to be present unless the court considers that would not be appropriate. Where a child does *not* express a wish to give evidence in the court, or expresses a wish to give evidence from some other location, the court may not make an order requiring the child to give evidence in the court, unless the court considers that the child giving evidence from a location other than the court-room would result in a significant risk of prejudice to the fairness of the trial or the interests of justice and that that risk outweighs any risk of prejudice to the interests of the child witness.

Section 15

– Reporting of proceedings involving children

43. This section amends restrictions on reporting proceedings involving children in section 47 of the 1995 Act so that they apply to a person under 18, rather than under 16. Section 47 of the 1995 Act puts certain restrictions on newspapers to prevent them revealing the identity of persons under 16 who are involved in criminal proceedings (as the person against or in respect of whom the proceedings are taken, or as a witness). However, the court has discretion to dispense with these requirements if it is satisfied that it is in the public interest to do so. The provisions also apply to sound and television programmes.

Section 16

– Other vulnerable witnesses: assessment and application

44. The section provides that any party intending to cite a witness, other than a child or deemed vulnerable witness, must take reasonable steps to determine whether they are likely to be vulnerable and if so, what special measures should be used in order to take that person's evidence. It also sets out the matters to be considered in making an assessment of vulnerability which include the nature and circumstances of the alleged offence, the nature of the evidence likely to be given, the person's age and maturity, any behaviour by the accused (or the accused's family or associates) towards the person along with any other matters the court considers relevant, including social and cultural background and ethnic origins, sexual orientation and any physical disability or impairment. In addition, in assessing whether the person is likely to be a vulnerable witness, the party intending to cite the person as a witness must also have regard to the best interests of that person and any views expressed by that person.

Section 17

– Objections to special measures: other vulnerable witnesses

45. This section amends the 1995 Act to allow any party to criminal proceedings to object to a vulnerable witness application requesting special measures for a witness who is not a child witness or deemed vulnerable witness. The process involved is similar to that set out for objection notices in section 13. An "objection notice" must be lodged with the court within seven days (or later with the permission of the court) of a vulnerable witness application being lodged, setting out any objection to the special measures in the application that the party considers inappropriate and the reasons for their objection.
46. If a notice under this section is lodged, the court must make an order that the notice must be considered at the appropriate diet (depending on the level of the court). Subsections

(b) and (c) make the necessary consequential changes to sections 271C(5) of the 1995 Act so that the time limit for the court's consideration of a vulnerable witness application is extended to take account of the possibility of an objection notice being lodged and to section 271C(11) of the 1995 Act to include intimation by the party lodging the objection notice to special measures to other parties to the proceedings as they do at present in relation to an application for special measures.

Section 18

– Review of arrangements for vulnerable witnesses

47. Section 271D(1)(a) of the 1995 Act previously allowed a party citing or intending to cite a witness to request that the court review the arrangements for taking the witness's evidence. Section 18 expands this ability to any party to the proceedings so that the non-citing party (normally the defence) can also request the court to review these arrangements.

Section 19

– Temporary additional special measures

48. Section 271H of the 1995 Act specifies a range of special measures that may be used to assist vulnerable witnesses to give their evidence to the court. Section 19 allows the Scottish Ministers to create additional special measures by order for a temporary period. This may be used to pilot additional special measures before any decision is taken on whether or not to introduce these measures more widely (section 21 deals with order making powers to prescribe further special measures). The order must specify where the temporary special measure should take place, the procedures to be used, and for how long it should operate. The order can also set out in what type of proceedings and in what courts the additional special measures are to be used.

Section 20

– Special measures: closed court

49. This section amends the list of special measures in section 271H(1) of the 1995 Act, to add an additional special measure of having a closed court (i.e. excluding the public during the taking of evidence from the vulnerable witness). Section 20 also inserts new section 271HB into the 1995 Act detailing how this new special measure is to operate. This new section provides that members or officers of the court, parties to the case before the court, counsel or solicitors or other persons otherwise directly concerned in the case, bona fide representatives of news gathering or reporting organisations present or such other persons as the court may specially authorise to be present should not be excluded from the court.
50. **Section 20** also amends section 271F(8) of the 1995 Act so that this special measure does not apply where the vulnerable witness is the accused.

Section 21

– Power to prescribe further special measures

51. This section repeals the existing order making power in section 271H of the 1995 Act which allows the Scottish Ministers to prescribe further special measures. It inserts new subsection (1A) into section 271H which enables the Scottish ministers to add new special measures, amend or delete existing special measures and also, to the extent necessary, modify sections 271A – 271M of the 1995 Act. Sections 271A – 271M detail how the existing special measures are to operate (see explanation of these sections under section 12).

Section 22

*These notes relate to the Victims and Witnesses (Scotland) Act 2014 (asp 1)
which received Royal Assent on 17 January 2014*

– Vulnerable witnesses: civil proceedings

52. This section amends the definition of a “child witness” in civil proceedings in section 11 of the Vulnerable Witnesses (Scotland) Act 2004 to include anyone under the age of 18 (currently this definition only includes those under 16). It also inserts an order making power to allow the Scottish Ministers to extend the definition of vulnerable witness to include specified types of witnesses, and witnesses in specified types of actions.