

CRIMINAL JUSTICE AND LICENSING (SCOTLAND) ACT 2010

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 4 - Evidence

Section 84 – Admissibility of prior statements of witnesses: abolition of competence test

410. This section clarifies that the abolition of the competency test for all witnesses – brought into effect by section 24 of the Vulnerable Witnesses (Scotland) Act 2004 Act (“the 2004 Act”) - also applies to evidence given by a prior statement made before 1 April 2005. Section 24 removed the court’s entitlement to ask questions of witnesses to establish that they had a sufficient understanding of the truth, understood the duty to tell the truth and had the ability to give coherent testimony.
411. Where a prior statement made before the coming into force of section 24 of the 2004 Act is sought to be admitted as evidence in a case under section 260 of the Criminal Procedure (Scotland) Act 1995, then for the purposes of subsection 2(c) of section 260, section 24 is taken to have been in force at the time the statement was made. This means that the court, when deciding whether to admit the statement, should not take any steps to establish whether the witness understood the matters set out in section 24 at the time the statement was made.

Section 85 – Witness statements: use during trial

412. **Section 85** creates a power for the court to allow a witness to refer to his statement during the giving of evidence subject to the witness statement having been made available to the Crown and to the defence in advance of the trial. Subsection (3) extends the applicability of section 262 (construction of sections on hearsay) of the 1995 Act to witness statements. Within that, subsection (3)(c) disapplies the meanings of “criminal proceedings” and “made” to witness statements.

Section 86 - Spouse or civil partner of accused a compellable witness

413. This section makes provision for the spouse or civil partner of an accused to be a competent and compellable witness. This section amends section 264 of the 1995 Act and repeals section 130 of the Civil Partnership Act 2004. The common law provisions regarding the spouse as a witness will also be overturned.
414. This section provides that the spouse or civil partner of an accused is a competent and compellable witness for the prosecution, accused or co-accused in the proceedings against the accused. Currently the law provides that a spouse is a competent witness in all circumstances. However, s/he is a compellable witness for the prosecution or a co-accused only where s/he is compellable at common law. In respect of the common law, a spouse is only compellable where the accused is charged with an offence against him

or her. The operation of the common law rule is not restricted to offences of personal injury, but extends to false accusation and to offences against property, including theft and even the forgery of the spouse's signature on a cheque.

415. It does not extend to damage to property of which the spouse is only a tenant, unless perhaps if s/he is liable to pay for the repair of the damage. If a spouse of an accused is the victim of the crime with which the accused is charged then their marital status is of no consequence. A spouse and an unmarried partner would be a compellable witness for the prosecution in such a case.
416. It is only where the spouse is not the victim that s/he can decline to give evidence for the prosecution. If the spouse of an accused is called as a Crown witness, in circumstances in which s/he is not compellable against her husband or wife, s/he has the option of declining to give evidence. But if s/he elects to give evidence against the accused, s/he cannot decline to answer questions which incriminate the spouse. An unmarried partner cannot decline to give evidence in any circumstances.
417. By the 2004 Act, a civil partner is not a compellable witness for the prosecutor or a co-accused. Persons in a registered civil partnership are, accordingly, never compellable against each other.
418. This provision of the Act will provide that the spouse and civil partner of an accused will be competent and compellable witnesses for the prosecution, accused or co-accused in any proceedings against the accused. In effect they will be treated no differently to any other witness. It will also take away the common law right of an accused's spouse to refuse to give evidence of matrimonial communications.

Section 87 – Special measures for child witnesses and other vulnerable witnesses

419. This section amends sections 271-271M of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) to allow the special measures (listed at section 271H) that are available for vulnerable witness to be used in “any relevant criminal proceedings in the High Court or the sheriff court”, as defined in subsection 2(b)(ii).
420. Subsections (3)-(9) replace all references to “trial” in sections 271-271M with references to the relevant criminal proceedings. This allows the special measures to be used in proceedings other than trials.
421. Subsection (10) makes consequential amendment to section 288E (5) of the 1995 Act.

Section 88 – Child witnesses in proceedings for people trafficking offences

422. This section raises the age of automatic entitlement to standard special measures when giving evidence in human trafficking cases from up to age 16 to up to age 18. The special measures are those listed in sections 271H of the Criminal Procedure (Scotland) Act 1995. Human trafficking cases means offences committed under section 22 of the Criminal Justice (Scotland) Act 2003 (Traffic in prostitution etc) or section 4 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 (trafficking people for exploitation). All witnesses (in human trafficking cases or otherwise) can be considered on application for further (non-standard) special measures.

Section 89 – Amendment of Criminal Justice (Scotland) Act 2003

423. **Section 89** repeals section 15A of the Criminal Justice (Scotland) Act 2003. This section allowed the special measures to be used in relation to proofs in relation to victim statements. This section is no longer necessary now that the special measures may be used in any hearing in relevant criminal proceedings.

Section 90 - Witness anonymity orders

424. Subsection (1) inserts new sections 271N to 271Z into the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) and provides courts with an order-making power to secure anonymity for witnesses when giving evidence in court.
425. Section 271N(1) sets out what a witness anonymity order is and defines the order in such a way as to grant the court a wide discretion as to how the court protects the anonymity of a witness in any particular case.
426. Section 271N(2) refers to procedures detailed at sections 271P, 271Q and 271R which deal with how applications should be made and the conditions (set out in section 271S) the court needs to consider when considering whether to make an order.
427. Sections 271N(3) and (4) lists the kinds of measures the court may use to secure the witness’s anonymity. The list is only illustrative; the court may employ other measures if it thinks fit. Technological developments and the practical arrangements in the court may affect such decisions.
428. Section 271N(5) provides that the court may not make a witness anonymity order which prevents the judge or jury either from seeing the witness or from hearing the witness’s natural voice. The judge and jury must always be able to see and hear the witness.
429. Section 271P(1) provides that applications for a witness anonymity order may be made by the accused as well as prosecutors. This reflects the position in the case of *R v Davis* [2008] UKHL 36, where the Court of Appeal allowed a defence witness as well as prosecution witnesses to give evidence anonymously.
430. Section 271P(2) provides that, where an application for a witness anonymity order is made by the prosecutor, the identity of witnesses may be withheld from the accused before and during the making of the application. This ensures that the operation of the legislation is not impeded by procedural challenges to the power of the prosecution to withhold this information pending the court’s determination of the application for the witness anonymity order.
431. Section 271P(2) therefore provides that prosecutors are under no obligation to disclose the witness’s identity to the accused at the application stage but must inform the court of the identity of the witness. Similar provision is made for the accused in the new section 271P(3), except that the accused must always disclose the identity of the witness to the prosecutor and the court but do not have to disclose it to any other defendant.
432. Section 271P(2) also enables the court to direct that it should not be informed of the identity of the witness. This provides for the possibility that, whilst in the vast majority of cases the court will require to be informed of the witness’s identity, there may be rare cases (particularly national security related cases) the court can direct that it not be informed of the witness’s identity.
433. Sections 271P(4) and (5) provide that where the prosecutor or the accused proposes to make an application for a witness anonymity order, information that might identify the witness must be taken out of any relevant information which is disclosed before the application has been determined. Section 271P(6) provides that, before the determination of an application, a witness must be referred to by a pseudonym in any list, application or notice. These sections reflect the reality that anonymity cannot be reinstated once lost. Sections 271P(7) and (8) define respectively “relevant information” and “relevant, list, application or notice”.
434. Sections 271P(9) and (10) set out two basic principles. Subsection (9) states that every party to the proceedings must be given the opportunity to be heard on an application for a witness anonymity order. However, it may be necessary in the course of making the application to reveal some or all of the information to which the application relates: for example, the name and address of the witness who is fearful of being identified.

So subsection (10) provides that the court has the power to hear any party without an accused or the accused's legal representative being present. This reflects the existing practice, by which prosecution applications were expected to be made in the absence of any other parties in the case, with the accused able to make representations later at a hearing with the prosecution (and possibly other accused) present. It is expected that defence applications will be permitted without other accused being present but will always be made in the presence of the prosecution.

435. Section 271Q provides, and sets out the timescales, for the making and determination of applications for a witness anonymity order in proceedings on indictment and in summary proceedings. While it is likely that most anonymity orders will be sought and considered in solemn proceedings, they are also available in summary proceedings. For example, such orders may be sought in summary proceedings in relation to undercover police officers making test purchases of drugs, for example at music festivals.
436. In solemn proceedings, under section 271Q(1), the making of a witness anonymity order is to be treated as a preliminary issue in terms of sections 79 and 87A of the 1995 Act. This is to ensure that decisions can normally be made at the preliminary hearing or first diet. Similarly, section 271Q(2) aims to ensure that notice of an application is given in summary proceedings before the intermediate diet, or, if this has not been fixed, before the trial begins (that is, the first witness for the prosecution is sworn).
437. Sections 271Q(7) and (8) allows for motions and applications to be made under sections 268, 269 and 270 of the 1995 Act which deal with new witnesses being led after the commencement of a trial.
438. Section 271R requires four conditions to be met before a court can make a witness anonymity order. They are described as conditions A, B, C and D.
439. Section 271R(3) sets out condition A, which is that the measures to be specified in the order are necessary for one of two reasons. The first is to protect the safety of the witness or another person or to prevent serious damage to property. There is no requirement for any actual threat to the witness or any other person but the application for an order should bring out evidence of/grounds for believing that a threat exists. The second is to prevent real harm to the public interest. This will include, but will not be restricted to, the public interest in police or security service undercover officers being able to carry out future operations, whether or not they are fearful in any particular case.
440. Section 271R(4) sets out condition B, which is that the effect of the order would be consistent with the accused receiving a fair trial. Thus the grant of the order must be compliant with Article 6 of the ECHR.
441. Section 271R(5) sets out condition C, which is that the witness's testimony is such that in the interests of justice the witness ought to testify. New section 271Q(6) sets out condition D which provides that either the witness would not testify if the order was not made or there would be real harm to the public interest if the witness were to testify without an order being made. Such harm might, for example, arise as a result of the identity of a member of the security services being made public but it can also apply to other witnesses where the interest of justice require that they are able to give evidence anonymously in a case. This public interest element should be brought out in the application for an order.
442. Section 271R(7) specifies that in determining for the purposes of condition A whether the order is necessary to protect the safety of the witness, another person or prevent damage to property, the court must have regard to:-
- the witness's reasonable fear of death or injury either to himself or herself or to another person (for example "we'll get your kids", or "we'll get your friends"), or
 - reasonable fear that there would be serious damage to property, (for example "we'll firebomb your house").

Although not explicitly defined in the section, “injury” is not restricted to physical injury, but could also include serious harm to a person’s mental health; and “serious damage to property” can include serious financial or economic loss.

443. Section 271S(1) requires the court to have regard to the considerations set out in the new section 271S(2) when deciding whether to make an order. The court must also have regard to any other factors it considers relevant.
444. The considerations in section 271S(2) are the accused’s general right to know the identity of a witness, the extent to which credibility of the witness is relevant in assessing the evidence he or she gives, whether the witness’s evidence might be material in implicating the accused, whether the witness’s evidence can be properly tested without knowing the witness’s identity, whether the witness has a tendency or any motive to be dishonest and whether alternative means could be used to protect the witness’s identity.
445. Section 271T requires the judge to direct the jury in a trial on indictment in such way as he/she considers appropriate, to ensure that the fact that the order was made is not detrimental to the accused.
446. Section 271U(1), (2), (3) and (6) provide for the court that has made an order to discharge or vary it in those proceedings, either on an application by a party to the proceedings or on its own initiative. This power may be used where, for example, a witness who previously gave evidence anonymously is content for the anonymity to be lifted.
447. Section 271U(4) the court must give every party to the proceedings an opportunity to be heard before determining an application for variation or discharge of an order or before varying or discharging an order on its own initiative. Section 271U(5) allows the court to discharge or vary an order in the absence of the accused or their representative if the circumstances of the case mean this would be appropriate.
448. Subsection 271V(1) sets out the various grounds for making an appeal to the High Court in relation to witness anonymity orders. An appeal can be made by the prosecutor or the accused.
449. Section 271V(2) inserts a requirement to seek leave to appeal against the granting of an order so as to prevent spurious appeals being raised. Section 271V(4) clarifies that the period between lodging an appeal and its determination does not count towards any time limit applying in the case. It allows the court to postpone, adjourn (or further adjourn) the trial diet and/or to extend any time limit applying to the case.
450. Section 271W provides that the High Court, having considered an appeal, must overturn the granting of a witness anonymity order by the court hearing the relevant trial if it decides that the decision to grant the order was wrong in law. Once this decision has been taken the trial can continue but without the witness who was the subject of the order giving their evidence anonymously.
451. Section 271X enables the High Court, having considered an appeal, to reverse the decision of a court which has refused an application for a witness anonymity order, if it concludes that the decision of the judge in that court was wrong in law. The High Court must then order that appropriate measures should be taken to preserve the anonymity of the relevant witness when he or she is giving their evidence.
452. Sections 271Y(1) and (2) enable the High Court, having considered an appeal, to reverse the decision of a court that has varied the way in which the witness anonymity order has been applied if it concludes that the decision of the judge in that court was wrong according to the law. Section 271Y(3) provides that the High Court can decide that other variations to the order are justified under the relevant terms of the law as set out at 271R and 271S.

*These notes relate to the Criminal Justice and Licensing (Scotland)
Act 2010 (asp 13) which received Royal Assent on 6 August 2010*

453. Section 271Z(1) enables the High Court, having considered an appeal, to reverse the decision of a court that has refused an application made by either the prosecutor or the accused to vary or disallow a witness anonymity order if it concludes that the decision of the judge in that court was wrong according to the law. Thereafter subsections Z(2) and (3) provide for the High Court to disallow an order or vary it depending on the case, and allows it make an additional variation to the order as it deems appropriate and under the relevant terms of the law as set out at 271R and 271S.
454. Subsection (2) makes consequential provision to sections 79 (preliminary pleas and preliminary issues) and 148 (intermediate diet) of the 1995 Act.
455. Subsections (3) and (4) provide that witness anonymity orders made under an existing rule of law in a trial or a hearing that starts before the day the new provisions come into effect are not affected by the coming into force of these provisions.

Section 91 - Television link evidence

456. This section provides that section 273 of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) will be amended to allow witnesses to give evidence from abroad via live television link in all criminal proceedings in the High Court or sheriff court.
457. A new section 273A is inserted into the 1995 Act that allows witnesses to give evidence via live television link from outwith Scotland, but within the United Kingdom, from an acceptable location within the United Kingdom, thereby relieving them of the requirement to travel to Scotland and give their evidence in the Scottish court.

Section 92 – European evidence warrants

458. This section provides an Order-making power to facilitate implementation of the Council of the European Union Framework Decision 2008/978/JHA of December 2008 on the European Evidence Warrant (EEW) for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters. Any order will be subject to the affirmative procedure, and may confer functions on the Scottish Ministers and the Lord Advocate to provide evidence requested by other Member States and to obtain evidence held by other Member States to assist with criminal investigations or proceedings. The power will permit the creation of new offences and penalties (subject to the limits set out in subsection (5)).