



# Criminal Justice and Licensing (Scotland) Act 2010

2010 asp 13

## PART 4

### EVIDENCE

#### **84 Admissibility of prior statements of witnesses: abolition of competence test**

- (1) This section applies in relation to a prior statement made by a witness before the commencement of section 24 of the Vulnerable Witnesses (Scotland) Act [2004 \(asp 3\)](#) (“the 2004 Act”) (which abolishes the competence test for witnesses in criminal and civil proceedings).
- (2) For the purpose of the application of subsection (2)(c) of section 260 of the 1995 Act (admissibility of prior statement depends on competence of the witness at the time of the statement) in relation to the statement, section 24 of the 2004 Act is taken to have been in force at the time the statement was made.
- (3) In this section, “prior statement” has the meaning it has in section 260 of the 1995 Act.

#### **85 Witness statements: use during trial**

- (1) The 1995 Act is amended as follows.
- (2) After section 261 insert—

*“Witness statements*

#### **261A Witness statements: use during trial**

- (1) Subsection (2) applies where—
  - (a) a witness is giving evidence in criminal proceedings,
  - (b) the witness has made a prior statement,
  - (c) the prosecutor has seen or has been given an opportunity to see the statement, and

- (d) the accused (or a solicitor or advocate acting on behalf of the accused in the proceedings) has seen or has been given an opportunity to see the statement.
- (2) The court may allow the witness to refer to the statement while the witness is giving evidence.”.
- (3) In section 262 (construction of sections 259 to 261 of Act)—
  - (a) in the title, for “261” substitute “261A”,
  - (b) in each of subsections (1) to (4), for “261” substitute “261A”, and
  - (c) in subsection (3)—
    - (i) in the definition of “criminal proceedings”, after “include” insert “(other than in section 261A)”, and
    - (ii) in the definition of “made”, after “includes” insert “(other than in section 261A)”.

## **86 Spouse or civil partner of accused a compellable witness**

- (1) For section 264 of the 1995 Act (spouse of accused a competent witness) substitute—

### **“264 Spouse or civil partner of accused a compellable witness**

- (1) The spouse or civil partner of an accused is a competent and compellable witness for the prosecution, the accused or any co-accused in the proceedings against the accused.
- (2) Subsection (1) is, if the spouse or civil partner is a co-accused in the proceedings, subject to any enactment or rule of law by virtue of which an accused need not (by reason of being an accused) give evidence in the proceedings.
- (3) Subsection (1) displaces any other rule of law that would (but for that subsection) prevent or restrict, by reference to the relationship, the giving of evidence by the spouse or civil partner of an accused.”.
- (2) Section 130 of the Civil Partnership Act 2004 (c.33) (civil partner of accused a competent witness) is repealed.

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

- (1) The 1995 Act is amended as follows.
- (2) In section 271 (vulnerable witnesses: main definitions)—
  - (a) in subsection (1)—
    - (i) for “a trial” substitute “a hearing in relevant criminal proceedings”, and
    - (ii) for “the trial”, wherever it occurs, substitute “the hearing”, and
  - (b) in subsection (5)—
    - (i) the definition of “trial” is repealed, and
    - (ii) after the definition of “court” insert—

““hearing in relevant criminal proceedings” means any hearing in the course of any criminal proceedings in the High Court or the sheriff court.”.

(3) In section 271A (child witnesses)—

- (a) in subsection (1), for “a trial” substitute “a hearing in relevant criminal proceedings”,
- (b) in subsection (5A)(c), for “the trial diet” substitute “the hearing at which the evidence is to be given”,
- (c) in subsection (6)(a), for “the trial” substitute “a hearing in relevant criminal proceedings”,
- (d) in subsection (7)(b)(ii), for “the trial” substitute “the hearing at which the evidence is to be given”,
- (e) in subsection (8), for “the trial diet” substitute “the hearing at which the evidence is to be given”,
- (f) in subsection (10)(b)(i), for “the trial diet” substitute “the hearing at which the evidence is to be given”,
- (g) in subsection (12), for “the trial diet in the case” substitute “the hearing at which the evidence is to be given”, and
- (h) in subsection (13A)(c), for “the trial diet” substitute “the hearing at which the evidence is to be given”.

(4) In section 271B (further special provision for child witnesses under the age of 12)—

- (a) in subsection (1)(a), for “a trial” substitute “a hearing in relevant criminal proceedings”,
- (b) in subsection (1)(b), for “the trial” substitute “the hearing”, and
- (c) in subsection (3)(b)(i), for “the trial” substitute “the hearing”.

(5) In section 271C (vulnerable witnesses other than child witnesses)—

- (a) in subsection (1), for “a trial” substitute “a hearing in relevant criminal proceedings”,
- (b) in subsection (5A)(c), for “the trial diet” substitute “the hearing at which the evidence is to be given”,
- (c) in subsection (6), for “the trial diet” substitute “the hearing at which the evidence is to be given”,
- (d) in subsection (10), for “the trial diet in the case” substitute “the hearing at which the evidence is to be given”, and
- (e) in subsection (12)(c), for “the trial diet” substitute “the hearing at which the evidence is to be given”.

(6) In section 271D (review of arrangements for vulnerable witnesses)—

- (a) in subsection (1)—
  - (i) for “the trial”, where it first occurs, substitute “a hearing in relevant criminal proceedings”, and
  - (ii) for “the trial”, where it second occurs, substitute “the hearing”, and
- (b) in subsection (4)(b)(i), for “the trial” substitute “the hearing”.

(7) In section 271F (the accused)—

- (a) in subsection (1)—
  - (i) for “the trial”, where it first occurs, substitute “a hearing in relevant criminal proceedings”, and

- (ii) for “the trial”, where it second occurs (in subsection (1)(a)), substitute “the hearing”,
  - (b) in subsection (2)—
    - (i) for “the trial”, where it first occurs, substitute “the hearing”,
    - (ii) for “the trial”, where it second occurs (in subsection (2)(a)(iii)), substitute “a hearing in relevant criminal proceedings”, and
    - (iii) for “the trial”, where it third occurs (in subsection (2)(b)(i)), substitute “a hearing in relevant criminal proceedings”,
  - (c) in subsection (3), for “the trial” substitute “a hearing in relevant criminal proceedings”, and
  - (d) in subsection (5), for “the trial” substitute “the hearing”.
- (8) In section 271J (live television link)—
- (a) in subsection (1), for “the trial” substitute “the hearing”,
  - (b) in subsection (2)(b), for “the trial” substitute “the hearing”, and
  - (c) in subsection (5)(a), for “the trial” substitute “the hearing”.
- (9) In section 271L (supporters), in subsection (2), for “the trial” substitute “that or any other hearing in the proceedings”.
- (10) In section 288E (prohibition of personal conduct of defence in certain cases involving child witnesses under the age of 12), in subsection (5), for “a child witness referred to in subsection (2)(b) above” substitute “the trial”.

## **88 Child witnesses in proceedings for people trafficking offences**

In section 271 of the 1995 Act (vulnerable witnesses: main definitions)—

- (a) in subsection (1)(a), for “age of 16” substitute “relevant age”, and
- (b) after subsection (1), insert—

“(1A) In subsection (1)(a), “the relevant age” means—

- (a) in the case of a person who is giving or is to give evidence in proceedings for an offence under section 22 of the Criminal Justice (Scotland) Act 2003 (asp 7) (trafficking in prostitution etc.) or section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (c.19) (trafficking people for exploitation), the age of 18, and
- (b) in any other case, the age of 16.”.

## **89 Amendment of Criminal Justice (Scotland) Act 2003**

Section 15A of the Criminal Justice (Scotland) Act 2003 (asp 7) (application of certain vulnerable witness provisions in proofs) is repealed.

## **90 Witness anonymity orders**

- (1) After section 271M of the 1995 Act insert—

*“Witness anonymity orders***271N Witness anonymity orders**

- (1) A court may make an order requiring such specified measures to be taken in relation to a witness in criminal proceedings as the court considers appropriate to ensure that the identity of the witness is not disclosed in or in connection with the proceedings.
- (2) The court may make such an order only on an application made in accordance with sections 271P and 271Q, if satisfied of the conditions set out in section 271R having considered the matters set out in section 271S.
- (3) The kinds of measures that may be required to be taken in relation to a witness include in particular measures for securing one or more of the matters mentioned in subsection (4).
- (4) Those matters are—
  - (a) that the witness’s name and other identifying details may be—
    - (i) withheld,
    - (ii) removed from materials disclosed to any party to the proceedings,
  - (b) that the witness may use a pseudonym,
  - (c) that the witness is not asked questions of any specified description that might lead to the identification of the witness,
  - (d) that the witness is screened to any specified extent,
  - (e) that the witness’s voice is subjected to modulation to any specified extent.
- (5) Nothing in this section authorises the court to require—
  - (a) the witness to be screened to such an extent that the witness cannot be seen by the judge or the jury,
  - (b) the witness’s voice to be modulated to such an extent that the witness’s natural voice cannot be heard by the judge or the jury.
- (6) An order made under this section is referred to in this Act as a “witness anonymity order”.
- (7) In this section “specified” means specified in the order concerned.

**271P Applications**

- (1) An application for a witness anonymity order to be made in relation to a witness in criminal proceedings may be made to the court by the prosecutor or the accused.
- (2) Where an application is made by the prosecutor, the prosecutor—
  - (a) must (unless the court directs otherwise) inform the court of the identity of the witness, but
  - (b) is not required to disclose in connection with the application—
    - (i) the identity of the witness, or

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*Status: This is the original version (as it was originally enacted).*

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- (ii) any information that might enable the witness to be identified, to any other party to the proceedings (or to the legal representatives of any other party to the proceedings).
- (3) Where an application is made by the accused, the accused—
  - (a) must inform the court and the prosecutor of the identity of the witness, but
  - (b) if there is more than one accused, is not required to disclose in connection with the application—
    - (i) the identity of the witness, or
    - (ii) any information that might enable the witness to be identified, to any other accused (or to the legal representatives of any other accused).
- (4) Subsections (5) and (6) apply where the prosecutor or the accused proposes to make an application under this section in respect of a witness.
- (5) Any relevant information which is disclosed by or on behalf of that party before the determination of the application must be disclosed in such a way as to prevent—
  - (a) the identity of the witness, or
  - (b) any information that might enable the witness to be identified, from being disclosed except as required by subsection (2)(a) or (3)(a).
- (6) Despite any provision in this Act to the contrary, any relevant list, application or notice lodged, made or given by that party before the determination of the application must not—
  - (a) disclose the identity of the witness, or
  - (b) contain any other information that might enable the witness to be identified,but the list, application or notice must, instead, refer to the witness by a pseudonym.
- (7) “Relevant information” means any document or other material which falls to be disclosed, or is sought to be relied on, by or on behalf of the party concerned in connection with the proceedings or proceedings preliminary to them.
- (8) “Relevant list, application or notice” means—
  - (a) a list of witnesses,
  - (b) a list of productions,
  - (c) a notice under section 67(5) or 78(4) relating to the witness,
  - (d) a motion or application under section 268, 269 or 270 relating to the witness,
  - (e) any other motion, application or notice relating to the witness.
- (9) The court must give every party to the proceedings the opportunity to be heard on an application under this section.
- (10) Subsection (9) does not prevent the court from hearing one or more of the parties to the proceedings in the absence of an accused and the accused’s legal representatives, if it appears to the court to be appropriate to do so in the circumstances of the case.

- (11) Nothing in this section is to be taken as restricting any power to make rules of court.

### **271Q Making and determination of applications**

- (1) In proceedings on indictment, an application under section 271P is a preliminary issue (and sections 79 and 87A and other provisions relating to preliminary issues apply accordingly).
- (2) No application under section 271P may be made in summary proceedings by any party unless notice of the party's intention to do so has been given—
- (a) if an intermediate diet has been fixed, before that diet,
  - (b) if no intermediate diet has been fixed, before the commencement of the trial.
- (3) Subsection (2) is subject to subsections (4) and (8).
- (4) In summary proceedings in which an intermediate diet has been fixed, the court may, on cause shown, grant leave for an application under section 271P to be made without notice having been given in accordance with subsection (2) (a).
- (5) Subsection (6) applies where—
- (a) the court grants leave for a party to make an application under section 271P without notice having been given in accordance with subsection (2)(a), or
  - (b) notice of a party's intention to make such an application is given in accordance with subsection (2)(b).
- (6) The application must be disposed of before the commencement of the trial.
- (7) Subsection (8) applies where a motion or application is made under section 268, 269 or 270 to lead the evidence of a witness.
- (8) Despite section 79(1) and subsection (2) above, an application under section 271P may be made in respect of the witness at the same time as the motion or application under section 268, 269 or 270 is made.
- (9) The application must be determined by the court before continuing with the trial.
- (10) Where an application is made under section 271P, the court may postpone or adjourn (or further adjourn) the trial diet.
- (11) In this section, “commencement of the trial” means the time when the first witness for the prosecution is sworn.

### **271R Conditions for making orders**

- (1) This section applies where an application is made for a witness anonymity order to be made in relation to a witness in criminal proceedings.
- (2) The court may make the order only if it is satisfied that Conditions A to D below are met.

- (3) Condition A is that the proposed order is necessary—
  - (a) in order to protect the safety of the witness or another person or to prevent any serious damage to property, or
  - (b) in order to prevent real harm to the public interest (whether affecting the carrying on of any activities in the public interest or the safety of a person involved in carrying on such activities or otherwise).
- (4) Condition B is that, having regard to all the circumstances, the effect of the proposed order would be consistent with the accused's receiving a fair trial.
- (5) Condition C is that the importance of the witness's testimony is such that in the interests of justice the witness ought to testify.
- (6) Condition D is that—
  - (a) the witness would not testify if the proposed order were not made, or
  - (b) there would be real harm to the public interest if the witness were to testify without the proposed order being made.
- (7) In determining whether the measures to be specified in the order are necessary for the purpose mentioned in subsection (3)(a), the court must have regard in particular to any reasonable fear on the part of the witness—
  - (a) that the witness or another person would suffer death or injury, or
  - (b) that there would be serious damage to property,if the witness were to be identified.

### **271S Relevant considerations**

- (1) When deciding whether Conditions A to D in section 271R are met in the case of an application for a witness anonymity order, the court must have regard to—
  - (a) the considerations mentioned in subsection (2), and
  - (b) such other matters as the court considers relevant.
- (2) The considerations are—
  - (a) the general right of an accused in criminal proceedings to know the identity of a witness in the proceedings,
  - (b) the extent to which the credibility of the witness concerned would be a relevant factor when the witness's evidence comes to be assessed,
  - (c) whether evidence given by the witness might be material in implicating the accused,
  - (d) whether the witness's evidence could be properly tested (whether on grounds of credibility or otherwise) without the witness's identity being disclosed,
  - (e) whether there is any reason to believe that the witness—
    - (i) has a tendency to be dishonest, or
    - (ii) has any motive to be dishonest in the circumstances of the case,having regard in particular to any previous convictions of the witness and to any relationship between the witness and the accused or any associates of the accused,



- (f) whether it would be reasonably practicable to protect the witness's identity by any means other than by making a witness anonymity order specifying the measures that are under consideration by the court.

### **271T Direction to jury**

- (1) Subsection (2) applies where, in a trial on indictment, any evidence has been given by a witness at a time when a witness anonymity order applied to the witness.
- (2) The judge must give the jury such direction as the judge considers appropriate to ensure that the fact that the order was made in relation to the witness does not prejudice the accused.

### **271U Discharge and variation of order**

- (1) This section applies where a court has made a witness anonymity order in relation to any criminal proceedings.
- (2) The court may discharge or vary (or further vary) the order if it appears to the court to be appropriate to do so in view of the provisions of sections 271R and 271S that applied to the making of the order.
- (3) The court may do so—
  - (a) on an application made by a party to the proceedings if there has been a material change of circumstances since the relevant time, or
  - (b) on its own initiative.
- (4) The court must give every party to the proceedings the opportunity to be heard—
  - (a) before determining an application made to it under subsection (3)(a), and
  - (b) before discharging or varying the order on its own initiative.
- (5) Subsection (4) does not prevent the court from hearing one or more of the parties to the proceedings in the absence of an accused and the accused's legal representatives, if it appears to the court to be appropriate to do so in the circumstances of the case.
- (6) In subsection (3)(a) "the relevant time" means—
  - (a) the time when the order was made, or
  - (b) if a previous application has been made under that subsection, the time when the application (or the last application) was made.

### **271V Appeals**

- (1) The prosecutor or the accused may appeal to the High Court against—
  - (a) the making of a witness anonymity order under section 271N,
  - (b) the kinds of measures that are required to be taken in relation to a witness under a witness anonymity order made under that section,
  - (c) the refusal to make a witness anonymity order under that section,

- (d) the discharge of a witness anonymity order under section 271U,
  - (e) the variation of a witness anonymity order under that section, or
  - (f) the refusal to discharge or vary a witness anonymity order under that section.
- (2) The appeal may be brought only with the leave of the court of first instance, granted—
  - (a) on the motion of the party making the appeal, or
  - (b) on its own initiative.
- (3) The procedure in relation to the appeal is to be prescribed by Act of Adjournal.
- (4) If an appeal is brought under this section—
  - (a) the period between the lodging of the appeal and its determination does not count towards any time limit applying in respect of the case,
  - (b) the court of first instance or the High Court may do either or both of the following—
    - (i) postpone or adjourn (or further adjourn) the trial diet,
    - (ii) extend any time limit applying in respect of the case.
- (5) An appeal under this section does not affect any right of appeal in relation to any other decision of any court in the criminal proceedings.

#### **271W Appeal against the making of a witness anonymity order**

- (1) This section applies where—
  - (a) an appeal is brought under section 271V(1)(a) against the making of a witness anonymity order, and
  - (b) the High Court determines that the decision of the judge at first instance was wrong in law.
- (2) The High Court must discharge the order and the trial is to proceed as if the order had not been made.

#### **271X Appeal against the refusal to make a witness anonymity order**

- (1) This section applies where—
  - (a) an appeal is brought under section 271V(1)(c) against the refusal to make a witness anonymity order in relation to a witness in criminal proceedings, and
  - (b) the High Court determines that the decision of the judge at first instance was wrong in law.
- (2) The High Court must make an order requiring such specified measures to be taken in relation to the witness in the proceedings as the court considers appropriate to ensure that the identity of the witness is not disclosed in or in connection with the proceedings.

#### **271Y Appeal against a variation of a witness anonymity order**

- (1) This section applies where—

- (a) an appeal is brought under section 271V(1)(e) against a variation of a witness anonymity order, and
- (b) the High Court determines that the decision of the judge at first instance was wrong in law.

(2) The High Court must discharge the variation.

(3) If the High Court determines that it is appropriate to make an additional variation in view of the provisions of sections 271R and 271S, the court may do so.

### **271Z Appeal against a refusal to vary or discharge a witness anonymity order**

(1) This section applies where—

- (a) an appeal is brought under section 271V(1)(f) against a refusal to discharge or vary a witness anonymity order, and
- (b) the High Court determines that the decision of the judge at first instance was wrong in law.

(2) The High Court must discharge the order, or make the variation, as the case requires.

(3) If, in the case of a variation, the High Court determines that it is appropriate to make an additional variation in view of the provisions of sections 271R and 271S, the court may do so.”.

(2) The 1995 Act is amended as follows—

(a) in section 79 (preliminary pleas and preliminary issues)—

(i) after subsection (1), insert—

“(1A) Subsection (1) is subject to section 271Q(8).”, and

(ii) in subsection (2)(b), after sub-paragraph (ii), insert—

“(iia) an application for a witness anonymity order under section 271P of this Act;”, and

(b) in section 148 (intermediate diets), after subsection (3), insert—

“(3AA) At an intermediate diet, the court shall also dispose of any application for a witness anonymity order under section 271P of this Act of which notice has been given in accordance with section 271Q(2)(a) of this Act.”.

(3) Sections 271N to 271Z of the 1995 Act apply to proceedings in cases where the trial or hearing begins on or after the day on which this section comes into force.

(4) Nothing in this section or sections 271N to 271Z of the 1995 Act affects the power of a court under any rule of law to make an order for securing that the identity of a witness in a trial or hearing in criminal proceedings is withheld from the accused (or, on a defence application, from other accused), where the trial or hearing begins before the day on which this section comes into force.

(5) Schedule 5 makes provision about certain appeals.

## **91      Television link evidence**

- (1) The 1995 Act is amended as follows.
- (2) In section 273 (television link evidence from abroad), in subsection (1), for “solemn” substitute “criminal”.
- (3) After that section insert—

*“Evidence from other parts of the United Kingdom*

### **273A Television link evidence from other parts of the United Kingdom**

- (1) In any criminal proceedings in the High Court or the sheriff court a person other than the accused may give evidence through a live television link if—
  - (a) the witness is within the United Kingdom but outside Scotland,
  - (b) an application under this section for the issue of a letter of request has been granted, and
  - (c) the court is satisfied as to the arrangements for the giving of evidence in that manner by that witness.
- (2) The prosecutor or the defence in any proceedings referred to in subsection (1) may apply for the issue of a letter of request.
- (3) The application must be made to a judge of the court in which the trial is to take place or, if that court is not yet known, to a judge of the High Court.
- (4) The judge may, on an application under this section, issue a letter to a court or tribunal exercising jurisdiction in the place where the witness is ordinarily resident requesting assistance in facilitating the giving of evidence by that witness through a live television link, if the judge is satisfied of the matters set out in subsection (5).
- (5) Those matters are—
  - (a) that the evidence which it is averred the witness is able to give is necessary for the proper adjudication of the trial,
  - (b) that the granting of the application—
    - (i) is in the interests of justice, and
    - (ii) in the case of an application by the prosecutor, is not unfair to the accused.”.

## **92      European evidence warrants**

- (1) The Scottish Ministers may by order make provision for the purposes of and in connection with implementing any obligations of the United Kingdom created by or arising under the Framework Decision (so far as they have effect in or as regards Scotland).
- (2) The provision may, in particular, confer functions—
  - (a) on the Scottish Ministers,
  - (b) on the Lord Advocate,
  - (c) on other persons.

- (3) An order under subsection (1) may modify any enactment.
- (4) An order under subsection (1) may contain provision creating offences and a person who commits such an offence is liable to such penalties, not exceeding those mentioned in subsection (5), as are provided for in the order.
- (5) Those penalties are—
  - (a) on conviction on indictment, imprisonment for a period not exceeding 2 years, or a fine, or both,
  - (b) on summary conviction, imprisonment for a period not exceeding 12 months, or a fine not exceeding the statutory maximum, or both.
- (6) In this section, the “Framework Decision” means Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters.