



Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019

2019 asp 8

Child witnesses

1 Child witnesses in certain solemn cases

- (1) The Criminal Procedure (Scotland) Act 1995 is amended as follows.
- (2) After section 271B, insert—

“271BZA Child witnesses in certain solemn cases: special measures

- (1) This section applies where a child witness, other than the accused, is to give evidence at, or for the purposes of, a hearing in relevant criminal proceedings which are—
 - (a) solemn proceedings, and
 - (b) in respect of an offence listed in subsection (2).
- (2) The offences are—
 - (a) murder,
 - (b) culpable homicide,
 - (c) assault to the danger of life,
 - (d) abduction,
 - (e) plagium,
 - (f) a sexual offence to which section 288C applies,
 - (g) an offence under section 1(1) of the Domestic Abuse (Scotland) Act 2018,
 - (h) an offence that is aggravated as described in section 1(1)(a) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016,
 - (i) an offence that would have fallen within paragraph (h) if section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 had been in force when the offence was allegedly committed,
 - (j) an offence of human trafficking (see section 1 of the Human Trafficking and Exploitation (Scotland) Act 2015),

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- (k) an offence under section 4 of the Human Trafficking and Exploitation (Scotland) Act 2015 (slavery, servitude and forced or compulsory labour),
 - (l) an offence under section 1 of the Prohibition of Female Genital Mutilation (Scotland) Act 2005 (offence of female genital mutilation),
 - (m) an offence under section 3 of the Prohibition of Female Genital Mutilation (Scotland) Act 2005 (aiding and abetting female genital mutilation),
 - (n) an attempt to commit an offence mentioned in any of paragraphs (a) to (m).
- (3) The court must enable all of the child witness's evidence to be given in advance of the hearing unless the court is satisfied that an exception is justified under subsection (7) or (8).
- (4) For the purposes of this section, the court enables all of the child witness's evidence to be given in advance of the hearing if—
- (a) the court makes an order under section 271A which satisfies the following requirements—
 - (i) it authorises the use of one or both of the special measures listed in subsection (5) for the purpose of taking all of the child witness's evidence,
 - (ii) it does not authorise the use of an incompatible special measure for the purpose of taking any of the child witness's evidence, and
 - (iii) it does not authorise the giving of any of the child witness's evidence without the benefit of any special measure, and
 - (b) the court, if it commences a review under section 271D before the hearing has commenced, does not make an order under that section which—
 - (i) revokes the order made under section 271A, or
 - (ii) varies it in such a way that it no longer satisfies the requirements set out in paragraph (a)(i), (ii) and (iii).
- (5) The special measures mentioned in subsection (4)(a)(i) are—
- (a) taking of evidence by a commissioner in accordance with section 271I,
 - (b) giving evidence in chief in the form of a prior statement in accordance with section 271M.
- (6) In this section, “incompatible special measure” means a special measure which is capable of being used only if the child witness gives evidence at the hearing (whether or not its use would require the child witness to be present in the courtroom).
- (7) An exception is justified if—
- (a) the giving of all of the child witness's evidence in advance of the hearing would give rise to a significant risk of prejudice to the fairness of the hearing or otherwise to the interests of justice, and

- (b) that risk significantly outweighs any risk of prejudice to the interests of the child witness if the child witness were to give evidence at the hearing.
- (8) An exception is justified if—
 - (a) the child witness is aged 12 or over on the date of commencement of the proceedings in which the hearing is being or is to be held,
 - (b) the child witness expresses a wish to give evidence at the hearing, and
 - (c) it would be in the child witness’s best interests to give evidence at the hearing.
- (9) The Scottish Ministers may by regulations—
 - (a) modify subsection (2),
 - (b) remove the condition set out in subsection (1)(b) and the list of offences in subsection (2).
- (10) Regulations under subsection (9) are subject to the affirmative procedure.

271BZB Child witnesses in certain solemn cases: modifications of section 271A

- (1) In a case to which section 271BZA applies, section 271A applies with the following modifications.
- (2) References to a standard special measure are to be read as references to any of the following special measures (and subsection (14) is to be read accordingly)
 -
 - (a) taking of evidence by a commissioner in accordance with section 271I,
 - (b) use of a supporter in accordance with section 271L,
 - (c) giving evidence in chief in the form of a prior statement in accordance with section 271M.
- (3) Section 271A(2) has effect as if—
 - (a) the words “Subject to section 271AA,” were omitted,
 - (b) the words “or a deemed vulnerable witness” were omitted.
- (4) Section 271A has effect as if the following subsection were inserted after subsection (2)—
 - “(2A) A vulnerable witness notice must—
 - (a) state that section 271BZA applies, and
 - (b) explain why the party considers that an exception is justified under section 271BZA(7) or (8) if the notice—
 - (i) does not specify one or both of the special measures listed in section 271BZA(5) for the purpose of taking all of the child witness’s evidence,
 - (ii) specifies an incompatible special measure (as defined in section 271BZA(6)) for the purpose of taking any of the child witness’s evidence, or

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(iii) states that the party considers that the child witness should give any of the child witness's evidence without the benefit of any special measure.”.

(5) Section 271A has effect as if the following subsections were inserted after subsection (10)—

“(10A) Subsections (5), (9) and (10) are subject to subsections (10B) to (10F).

(10B) Where the court is considering a notice in accordance with subsection (5) and the notice does not specify one or both of the special measures mentioned in section 271BZA(5) for the purpose of taking all of the child witness's evidence, the court may nonetheless make an order which has the effect of authorising the use of one or both of those special measures for that purpose.

(10C) Unless the court is satisfied that an exception is justified under section 271BZA(7) or (8), an order made by the court under this section—

- (a) must authorise the use of one or more of the special measures mentioned in section 271BZA(5) for the purpose of taking all of the child witness's evidence,
- (b) must not authorise the use of an incompatible special measure (as defined in section 271BZA(6)) for the purpose of taking any of the child witness's evidence, and
- (c) must not authorise the giving of any of the child witness's evidence without the benefit of any special measure.

(10D) Even if the court is satisfied that an exception is justified under section 271BZA(7) or (8), an order made by the court under this section must not have the effect of requiring the child witness to be present in the courtroom to give evidence unless the court is satisfied that subsection (10E) or (10F) applies.

(10E) This subsection applies if—

- (a) the giving of evidence by the child witness in some way other than by being present in the courtroom for that purpose would give rise to a significant risk of prejudice to the fairness of the hearing or otherwise to the interests of justice, and
- (b) that risk significantly outweighs any risk of prejudice to the interests of the child witness if the child witness were to be present in the courtroom to give evidence.

(10F) This subsection applies if—

- (a) the child witness is aged 12 or over on the date of commencement of the proceedings in which the hearing is being held or is to be held,
- (b) the child witness expresses a wish to be present in the courtroom to give evidence, and
- (c) it would be in the child witness's best interests to be present in the courtroom to give evidence.”.

271BZC Child witnesses in certain solemn cases: modifications of section 271D

- (1) In a case to which section 271BZA applies, section 271D applies with the following modifications.
- (2) Section 271D has effect as if—
 - (a) subsections (3A) to (3C) were omitted,
 - (b) subsection (4A) were omitted, and
 - (c) the following subsections were inserted after subsection (4A)—

“(4B) Subsections (2) to (4) are subject to subsections (4C) to (4H).

(4C) Unless the hearing has already commenced when the court commences its review or the court is satisfied that an exception is justified under section 271BZA(7) or (8), an order made by the court under this section must not—
 - (a) revoke the earlier order, or
 - (b) vary it in such a way that it no longer satisfies the requirements set out in section 271BZA(4)(a)(i), (ii) and (iii).

(4D) An order made by the court under this section must have the effect of authorising the use of the special measure of taking of evidence by a commissioner in accordance with section 271I if—
 - (a) that is requested by any party to the proceedings, and
 - (b) the earlier order authorises only the special measure of giving evidence in chief in the form of a prior statement in accordance with section 271M.

(4E) However, an order made by the court under this section need not have the effect described in subsection (4D) if—
 - (a) the hearing has already commenced when the court commences its review, or
 - (b) the court is satisfied that an exception is justified under section 271BZA(7) or (8).

(4F) Even if the hearing has already commenced when the court commences its review or the court is satisfied that an exception is justified under section 271BZA(7) or (8), an order made under this section must not have the effect of requiring the child witness to be present in the courtroom to give evidence unless the court is satisfied that subsection (4G) or (4H) applies.

(4G) This subsection applies if—
 - (a) the giving of evidence by the child witness in some way other than by being present in the courtroom for that purpose would give rise to a significant risk of prejudice to the fairness of the hearing or otherwise to the interests of justice, and

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- (b) that risk significantly outweighs any risk of prejudice to the interests of the child witness if the child witness were to be present in the courtroom to give evidence.

(4H) This subsection applies if—

- (a) the child witness is aged 12 or over on the date of commencement of the proceedings in which the hearing is being held or is to be held,
- (b) the child witness expresses a wish to be present in the courtroom to give evidence, and
- (c) it would be in the child witness’s best interests to be present in the courtroom to give evidence.””

2 Child witnesses under the age of 12

(1) The Criminal Procedure (Scotland) Act 1995 is amended as follows.

(2) In section 271B—

- (a) after subsection (4), insert—

“(4A) Where the court is required to make an order having the effect mentioned in subsection (4), an order made by the court under section 271A(5)(a) may authorise the use of a special measure or measures other than those specified in the vulnerable witness notice if that would result in the order having the effect mentioned in subsection (4).”

- (b) after subsection (6), insert—

“(7) This section does not apply in a case to which section 271BZA applies.”

(3) In section 271A—

- (a) in subsection (9), for “At” substitute “Subject to section 271B, at”,
- (b) in subsection (10), for “The court” substitute “Subject to section 271B, the court”.