

Criminal Procedure (Scotland) Act 1995 c. 46

Part XIII MISCELLANEOUS

Trials for sexual offences

This version in force from: **March 28, 2011 to present**

(version 6 of 6)

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288C Prohibition of personal conduct of defence in cases of certain sexual offences

[

(1) An accused charged with a sexual offence to which this section applies is prohibited from conducting his case in person at, or for the purposes of, any relevant hearing in the course of proceedings (other than proceedings in a JP court) in respect of the offence.

(1A) In subsection (1), "*relevant hearing*" means a hearing at, or for the purposes of, which a witness is to give evidence.

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(2) This section applies to the following sexual offences—

(a) rape [(whether at common law or under section 1(1) of the Sexual Offences (Scotland) Act 2009 (asp 9))]

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;

(b) sodomy;

(c) clandestine injury to women;

(d) abduction of a woman or girl with intent to rape;

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(da) abduction with intent to commit the statutory offence of rape;

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[4](#)

(e) assault with intent to rape;

[

(ea) assault with intent to commit the statutory offence of rape;

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(f) indecent assault;

(g) indecent behaviour (including any lewd, indecent or libidinous practice or behaviour);

(h) an offence under [section 311 (non-consensual sexual acts) or 313 (persons providing care services: sexual offences) of the Mental Health (Care and Treatment) (Scotland) Act 2003]

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;

(i) an offence under any of the following provisions of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39)—

(i) sections 1 to 3 (incest and related offences);

(ii) section 5 (unlawful sexual intercourse with girl under 13 or 16);

(iii) section 6 (indecent behaviour toward girl between 12 and 16);

(iv) section 7(2) and (3) (procuring by threats etc.);

(v) section 8 (abduction and unlawful detention);

(vi) section 10 (seduction, prostitution, etc. of girl under 16);

(vii) section 13(5)(b) or (c) (homosexual offences);

[

(j) an offence under any of the following provisions of the Sexual Offences (Scotland) Act 2009 (asp 9)—

(i) section 2 (sexual assault by penetration),

(ii) section 3 (sexual assault),

(iii) section 4 (sexual coercion),

(iv) section 5 (coercing a person into being present during a sexual activity),

(v) section 6 (coercing a person into looking at a sexual image),

(vi) section 7(1) (communicating indecently),

(vii) section 7(2) (causing a person to see or hear an indecent communication),

(viii) section 8 (sexual exposure),

- (ix) section 9 (voyeurism),
- (x) section 18 (rape of a young child),
- (xi) section 19 (sexual assault on a young child by penetration),
- (xii) section 20 (sexual assault on a young child),
- (xiii) section 21 (causing a young child to participate in a sexual activity),
- (xiv) section 22 (causing a young child to be present during a sexual activity),
- (xv) section 23 (causing a young child to look at a sexual image),
- (xvi) section 24(1) (communicating indecently with a young child),
- (xvii) section 24(2) (causing a young child to see or hear an indecent communication),
- (xviii) section 25 (sexual exposure to a young child),
- (xix) section 26 (voyeurism towards a young child),
- (xx) section 28 (having intercourse with an older child),
- (xxi) section 29 (engaging in penetrative sexual activity with or towards an older child),
- (xxii) section 30 (engaging in sexual activity with or towards an older child),
- (xxiii) section 31 (causing an older child to participate in a sexual activity),
- (xxiv) section 32 (causing an older child to be present during a sexual activity),
- (xxv) section 33 (causing an older child to look at a sexual image),
- (xxvi) section 34(1) (communicating indecently with an older child),
- (xxvii) section 34(2) (causing an older child to see or hear an indecent communication),
- (xxviii) section 35 (sexual exposure to an older child),
- (xxix) section 36 (voyeurism towards an older child),
- (xxx) section 37(1) (engaging while an older child in sexual conduct with or towards another older child),
- (xxxix) section 37(4) (engaging while an older child in consensual sexual conduct with another older child),

(xxxii) section 42 (sexual abuse of trust) but only if the condition set out in section 43(6) of that Act is fulfilled,

(xxxiii) section 46 (sexual abuse of trust of a mentally disordered person);

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[

(k) attempting to commit any of the offences set out in paragraphs (a) to (j).

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(3) This section applies also to an offence in respect of which a court having jurisdiction to try that offence has made an order under subsection (4) below.

(4) Where, in the case of any offence, other than one set out in subsection (2) above, that court is satisfied that there appears to be such a substantial sexual element in the alleged commission of the offence that it ought to be treated, for the purposes of this section, in the same way as an offence set out in that subsection, the court shall, either on the application of the prosecutor or *ex proprio motu*, make an order under this subsection.

(5) The making of such an order does not affect the validity of anything which—

(a) was done in relation to the alleged offence to which the order relates; and

(b) was done before the order was made.

(6) The Scottish Ministers may by order made by statutory instrument vary the sexual offences to which this section applies by virtue of subsection (2) above by modifying that subsection.

(7) No such statutory instrument shall be made, however, unless a draft of it has been laid before and approved by resolution of the Scottish Parliament.

[...]

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(9) In subsection (2)—

(a) the references to “rape” in paragraphs (d) and (e) are to the offence of rape at common law; and

(b) the references to “the statutory offence of rape” in paragraphs (da) and (ea) are (as the case may be) to—

(i) the offence of rape under section 1 of the Sexual Offences (Scotland) Act 2009,
or

(ii) the offence of rape of a young child under section 18 of that Act.

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Notes

- [1.](#) Added by Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 asp 9 (Scottish Act) s.1 (November 1, 2002: insertion has effect subject to transitional provisions specified in SSI 2002/443 art.4)
- [2.](#) S.288C(1) and (1A) substituted for s.288C(1) by Criminal Justice and Licensing (Scotland) Act 2010 asp 13 (Scottish Act) Pt 3 s.69(2)(a) (March 28, 2011 for all purposes in respect of criminal proceedings commenced on or after March 28, 2011, with proceedings taken to have commenced when a report of the case has been received by the procurator fiscal)
- [3.](#) Words inserted by Sexual Offences (Scotland) Act 2009 asp 9 (Scottish Act) Sch.5 para.2(7)(a) (December 1, 2010)
- [4.](#) Added by Sexual Offences (Scotland) Act 2009 (Supplemental and Consequential Provisions) Order 2010/421 (Scottish SI) Sch.1(1) para.1(4)(a)(i) (December 1, 2010)
- [5.](#) Added by Sexual Offences (Scotland) Act 2009 (Supplemental and Consequential Provisions) Order 2010/421 (Scottish SI) Sch.1(1) para.1(4)(a)(ii) (December 1, 2010)
- [6.](#) Words substituted by Mental Health (Care and Treatment) (Scotland) Act 2003 (Modification of Enactments) Order 2005/465 (Scottish SI) Sch.1 para.27(5) (September 27, 2005)
- [7.](#) Substituted by Sexual Offences (Scotland) Act 2009 asp 9 (Scottish Act) Sch.5 para.2(7)(b) (December 1, 2010)
- [8.](#) Added by Sexual Offences (Scotland) Act 2009 asp 9 (Scottish Act) Sch.5 para.2(7)(c) (December 1, 2010)
- [9.](#) Repealed by Criminal Justice and Licensing (Scotland) Act 2010 asp 13 (Scottish Act) Pt 3 s.69(2)(b) (March 28, 2011 for all purposes in respect of criminal proceedings commenced on or after March 28, 2011, with proceedings taken to have commenced when a report of the case has been received by the procurator fiscal)
- [10.](#) Added by Sexual Offences (Scotland) Act 2009 (Supplemental and Consequential Provisions) Order 2010/421 (Scottish SI) Sch.1(1) para.1(4)(b) (December 1, 2010)

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Criminal Procedure (Scotland) Act 1995 c. 46

Part XIII MISCELLANEOUS

Trials for sexual offences

This version in force from: **March 28, 2011** to **present**

(version 5 of 5)

[

288D Appointment of solicitor by court in such cases

(1) This section applies in the case of proceedings [(other than proceedings in a JP court)]

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in respect of a sexual offence to which section 288C above applies.

(2) Where the court ascertains that—

(a)

[

the accused has not engaged a solicitor for the purposes of—

[

(i) the conduct of his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the proceedings; or

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[

(iii) the conduct of his case at any commissioner proceedings; or

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(b) having engaged a solicitor for those purposes, the accused has dismissed him; or

(c) the accused's solicitor has withdrawn,

then, where the court is not satisfied that the accused intends to engage a solicitor or, as the case may be, another solicitor for those purposes, it shall, at its own hand, appoint a solicitor for those purposes.

(3) A solicitor so appointed is not susceptible to dismissal by the accused or obliged to comply with any instruction by the accused to dismiss counsel.

(4) Subject to subsection (3) above, it is the duty of a solicitor so appointed—

(a) to ascertain and act upon the instructions of the accused; and

(b) where the accused gives no instructions or inadequate or perverse instructions, to act in the best interests of the accused.

(5) In all other respects, a solicitor so appointed has, and may be made subject to, the same obligations and has, and may be given, the same authority as if engaged by the accused; and any employment of and instructions given to counsel by the solicitor shall proceed and be treated accordingly.

(6) Where the court is satisfied that a solicitor so appointed is no longer able to act upon the instructions, or in the best interests, of the accused, the court may relieve that solicitor of his appointment and appoint another solicitor for the purposes [referred to in subsection (2)(a) above.]

[6](#)

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(6A) Where, in relation to commissioner proceedings, the commissioner is satisfied that a solicitor so appointed is no longer able to act upon the instructions, or in the best interests, of the accused, the commissioner is (for the purpose of the application of subsection (6) above) to refer the case to the court.

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[7](#)

(7) The references in subsections (3) to [(6A)]

[8](#)

above to “*a solicitor so appointed*” include references to a solicitor appointed under subsection (6) above.

(8) In this section “*counsel*” includes a solicitor who has right of audience in the High Court of Justiciary under section 25A (rights of audience in various courts including the High Court of Justiciary) of the Solicitors (Scotland) Act 1980 (c.46).

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(9) In this section, “*commissioner proceedings*” means proceedings before a commissioner appointed under section 271(1) or by virtue of section 272(1)(b) of this Act.

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[1](#)

Notes

[1](#). Added by Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 asp 9 (Scottish Act) s.2(1) (November 1, 2002: insertion has effect subject to transitional provisions specified in SSI 2002/443 art.4)

[2](#). Words inserted by Criminal Justice and Licensing (Scotland) Act 2010 asp 13 (Scottish Act) Pt 3 s.69(3)(a) (March 28, 2011 for all purposes in respect of criminal proceedings commenced on or after March 28, 2011, with proceedings taken to have commenced when a report of the case has been received by the procurator fiscal)

3. S.288D(2)(a)(i) added and existing text renumbered as s.288D(2)(ii) by Criminal Procedure (Amendment) (Scotland) Act 2004 asp 5 (Scottish Act) Pt 1 s.4(2) (February 1, 2005 subject to savings and transitional provisions specified in SSI 2004/405 art.3)
4. S.288D(2)(a)(i) substituted for s.288D(2)(a)(i) and (ii) by Criminal Justice and Licensing (Scotland) Act 2010 asp 13 (Scottish Act) Pt 3 s.69(3)(b) (March 28, 2011 for all purposes in respect of criminal proceedings commenced on or after March 28, 2011, with proceedings taken to have commenced when a report of the case has been received by the procurator fiscal)
5. Added by Criminal Proceedings etc. (Reform) (Scotland) Act 2007 asp 6 (Scottish Act) Pt 2 s.35(6)(a) (April 23, 2007)
6. Words substituted by Criminal Justice and Licensing (Scotland) Act 2010 asp 13 (Scottish Act) Pt 3 s.69(3)(c) (March 28, 2011 for all purposes in respect of criminal proceedings commenced on or after March 28, 2011, with proceedings taken to have commenced when a report of the case has been received by the procurator fiscal)
7. Added by Criminal Proceedings etc. (Reform) (Scotland) Act 2007 asp 6 (Scottish Act) Pt 2 s.35(6)(c) (April 23, 2007)
8. Word substituted by Criminal Proceedings etc. (Reform) (Scotland) Act 2007 asp 6 (Scottish Act) Pt 2 s.35(6)(d) (April 23, 2007)
9. Added by Criminal Proceedings etc. (Reform) (Scotland) Act 2007 asp 6 (Scottish Act) Pt 2 s.35(6)(e) (April 23, 2007)

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Criminal Procedure (Scotland) Act 1995 c. 46

Part XIII MISCELLANEOUS

Trials involving vulnerable witnesses

This version in force from: **September 1, 2015 to present**

(version 5 of 5)

[

288E Prohibition of personal conduct of defence in certain cases involving child witnesses under the age of 12

[...]

[2](#)

(2) This section applies to any proceedings (other than proceedings in the [JP court]

[3](#)

)–

(a) in respect of any offence specified in subsection (3) below, and

(b) in which a child witness who is under the age of 12 on the date of commencement of the proceedings is to give evidence at or for the purposes of [any hearing in the course of the proceedings]

[4](#)

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[

(2A) The accused is prohibited from conducting his case in person at, or for the purposes of, any hearing at, or for the purposes of, which the child witness is to give evidence.

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[5](#)

(3) The offences referred to in subsection (2)(a) above are–

(a) murder,

(b) culpable homicide,

(c) any offence which–

(i) involves an assault on, or injury or threat of injury to, any person (including any offence involving neglect or ill-treatment of, or other cruelty to, a child), but

(ii) is not an offence to which section 288C of this Act applies,

(d) abduction, and

(e) plagium.

(4) Section 288D of this Act applies in the case of proceedings to which this section applies as it applies in the case of proceedings in respect of a sexual offence to which section 288C of this Act applies [and as if references to a relevant hearing were references to a hearing referred to in subsection (2A) above]

[6](#)

(5) In proceedings to which this section applies, the prosecutor shall, at the same time as intimating to the accused under section 271A(13) of this Act a [vulnerable]

[7](#)

witness notice in respect of [the trial]

[8](#)

, serve on the accused a notice under subsection (6).

(6) A notice under this subsection shall contain intimation to the accused—

[

(a) that his case at, or for the purposes of, any hearing in the course of the proceedings at, or for the purposes of, which the child witness is to give evidence may be conducted only by a lawyer,

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[9](#)

(b) that it is therefore in his interests, if he has not already done so, to get the professional assistance of a solicitor, and

(c) that if he does not engage a solicitor for the purposes of [the conduct of his case at or for the purposes of the]

[10](#)

[hearing]

[11](#)

, the court will do so.

(7) A failure to comply with subsection (5) or (6) above does not affect the validity or lawfulness of any [vulnerable]

[7](#)

witness notice or any other element of the proceedings against the accused.

[...]

[12](#)

(9) For the purposes of subsection (2)(b) above, proceedings shall be taken to have commenced when the indictment or, as the case may be, the complaint is served on the accused.

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Notes

1. Added by Vulnerable Witnesses (Scotland) Act 2004 asp 3 (Scottish Act) Pt 1 s.6 (April 1, 2005 for the purposes specified in SSI 2005/168 art.2 and Sch.1 subject to the transitional provisions specified in art.4(1); April 1, 2006 for the purposes specified in SSI 2006/59 art.2 and Sch.1 subject to the transitional provisions specified in art.4(1); April 1, 2007 for purposes specified in SSI 2007/101 art.2 and Sch.1 subject to transitional provisions specified in art.4; April 1, 2008 subject to transitional provisions specified in SSI 2008/57 art.3 otherwise)
2. Repealed by Criminal Justice and Licensing (Scotland) Act 2010 asp 13 (Scottish Act) Pt 3 s.69(4)(a) (March 28, 2011 for all purposes in respect of criminal proceedings commenced on or after March 28, 2011, with proceedings taken to have commenced when a report of the case has been received by the procurator fiscal)
3. Words substituted by Criminal Proceedings etc. (Reform) (Scotland) Act 2007 asp 6 (Scottish Act) Sch.1 para.26(q) (March 10, 2008 in relation to the Sheriffdom of Lothian and Borders; June 2, 2008 in relation to the Sheriffdom of Grampian, Highland and Islands; December 8, 2008 in relation to the Sheriffdom of Glasgow and Strathkelvin; February 23, 2009 in relation to the Sheriffdom of Tayside, Central and Fife; December 14, 2009 in relation to the Sheriffdom of North Strathclyde; February 22, 2010 otherwise)
4. Words substituted by Criminal Justice and Licensing (Scotland) Act 2010 asp 13 (Scottish Act) Pt 3 s.69(4)(b) (March 28, 2011 for all purposes in respect of criminal proceedings commenced on or after March 28, 2011, with proceedings taken to have commenced when a report of the case has been received by the procurator fiscal)
5. Added by Criminal Justice and Licensing (Scotland) Act 2010 asp 13 (Scottish Act) Pt 3 s.69(4)(c) (March 28, 2011 for all purposes in respect of criminal proceedings commenced on or after March 28, 2011, with proceedings taken to have commenced when a report of the case has been received by the procurator fiscal)
6. Words inserted by Criminal Justice and Licensing (Scotland) Act 2010 asp 13 (Scottish Act) Pt 3 s.69(4)(d) (March 28, 2011 for all purposes in respect of criminal proceedings commenced on or after March 28, 2011, with proceedings taken to have commenced when a report of the case has been received by the procurator fiscal)
7. Word substituted by Victims and Witnesses (Scotland) Act 2014 asp 1 (Scottish Act) s.11(9) (September 1, 2015 subject to transitional provisions specified in SSI 2015/200 art.4)
8. Words substituted by Criminal Justice and Licensing (Scotland) Act 2010 asp 13 (Scottish Act) Pt 4 s.87(10) (March 28, 2011 for all purposes in respect of criminal proceedings commenced on or after March 28, 2011, with proceedings taken to have commenced when a report of the case has been received by the procurator fiscal)
9. S.288E(6)(a) substituted for s.288E(6)(za) and (a) by Criminal Justice and Licensing (Scotland) Act 2010 asp 13 (Scottish Act) Pt 3 s.69(4)(e)(i) (March 28, 2011 for all purposes in respect of criminal proceedings commenced on or after March 28, 2011, with proceedings taken to have commenced when a report of the case has been received by the procurator fiscal)
10. Words inserted by Criminal Procedure (Amendment) (Scotland) Act 2004 asp 5 (Scottish Act) Pt 1 s.4(3)(b)(ii) (April 1, 2005: insertion came into force on April 1, 2005 on the commencement of 2004 asp 3 s.6)
11. Words substituted by Criminal Justice and Licensing (Scotland) Act 2010 asp 13 (Scottish Act) Pt 3 s.69(4)(e)(ii) (March 28, 2011 for all purposes in respect of criminal proceedings commenced on or after March 28, 2011, with proceedings taken to have commenced when a report of the case has been received by the procurator fiscal)
12. Repealed by Criminal Justice and Licensing (Scotland) Act 2010 asp 13 (Scottish Act) Pt 3 s.69(4)(f) (March 28, 2011 for all purposes in respect of criminal proceedings commenced on or after March 28, 2011, with proceedings taken to have commenced when a report of the case has been received by the procurator fiscal)

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Subject: Criminal procedure

Keywords: Children; Restrictions; Right to conduct own defence; Scotland; Vulnerable and intimidated witnesses

Criminal Procedure (Scotland) Act 1995 c. 46

Part XIII MISCELLANEOUS

Trials involving vulnerable witnesses

This version in force from: **March 28, 2011 to present**

(version 4 of 4)

[

288F Power to prohibit personal conduct of defence in other cases involving vulnerable witnesses

(1) This section applies in the case of proceedings in respect of any offence, other than proceedings–

(a) in the [JP court]

[2](#)

,

(b) in respect of a sexual offence to which section 288C of this Act applies, or

(c) to which section 288E of this Act applies,

where a vulnerable witness is to give evidence at, or for the purposes of, [any hearing in the course of the proceedings]

[3](#)

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(2) If satisfied that it is in the interests of the vulnerable witness to do so, the court may–

(a) on the application of the prosecutor, or

(b) of its own motion,

make an order prohibiting the accused from conducting his [case in person at any hearing at, or for the purposes of, which the vulnerable witness is to give evidence.]

[4](#)

(3) However, the court shall not make an order under subsection (2) above if it considers that–

(a) the order would give rise to a significant risk of prejudice to the fairness of the [hearing]

[5](#)

or otherwise to the interests of justice, and

(b) that risk significantly outweighs any risk of prejudice to the interests of the vulnerable witness if the order is not made.

(4) The court may make an order under subsection (2) above [in relation to a hearing after, as well as before, the hearing has commenced.]

[6](#)

[...]

[7](#)

(5) Section 288D of this Act applies in the case of proceedings in respect of which an order is made under this section as it applies in the case of proceedings in respect of a sexual offence to which section 288C of this Act applies [and as if references to a relevant hearing were references to any hearing in respect of which an order is made under this section]

[8](#)

[...]

[9](#)

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[1](#)

Notes

- [1.](#) Added by Vulnerable Witnesses (Scotland) Act 2004 asp 3 (Scottish Act) Pt 1 s.6 (April 1, 2005 for the purposes specified in SSI 2005/168 art.2 and Sch.1 subject to the transitional provisions specified in art.4(1); April 1, 2006 for the purposes specified in SSI 2006/59 art.2 and Sch.1 subject to the transitional provisions specified in art.4(1); April 1, 2007 for purposes specified in SSI 2007/101 art.2 and Sch.1 subject to transitional provisions specified in art.4; April 1, 2008 subject to transitional provisions specified in SSI 2008/57 art.3 otherwise)
- [2.](#) Words substituted by Criminal Proceedings etc. (Reform) (Scotland) Act 2007 asp 6 (Scottish Act) Sch.1 para.26(r) (March 10, 2008 in relation to the Sheriffdom of Lothian and Borders; June 2, 2008 in relation to the Sheriffdom of Grampian, Highland and Islands; December 8, 2008 in relation to the Sheriffdom of Glasgow and Strathkelvin; February 23, 2009 in relation to the Sheriffdom of Tayside, Central and Fife; February 22, 2010 otherwise)
- [3.](#) Words substituted by Criminal Justice and Licensing (Scotland) Act 2010 asp 13 (Scottish Act) Pt 3 s.69(5)(a) (March 28, 2011 for all purposes in respect of criminal proceedings commenced on or after March 28, 2011, with proceedings taken to have commenced when a report of the case has been received by the procurator fiscal)
- [4.](#) Words substituted by Criminal Justice and Licensing (Scotland) Act 2010 asp 13 (Scottish Act) Pt 3 s.69(5)(b) (March 28, 2011 for all purposes in respect of criminal proceedings commenced on or after March 28, 2011, with proceedings taken to have commenced when a report of the case has been received by the procurator fiscal)
- [5.](#) Word substituted by Criminal Justice and Licensing (Scotland) Act 2010 asp 13 (Scottish Act) Pt 3 s.69(5)(c) (March 28, 2011 for all purposes in respect of criminal proceedings commenced on or after March 28, 2011, with proceedings taken to have commenced when a report of the case has been received by the procurator fiscal)
- [6.](#) Words substituted by Criminal Justice and Licensing (Scotland) Act 2010 asp 13 (Scottish Act) Pt 3 s.69(5)(d) (March 28, 2011 for all purposes in respect of criminal proceedings commenced on or after March 28, 2011, with proceedings taken to have commenced when a report of the case has been received by the procurator fiscal)
- [7.](#) Repealed by Criminal Justice and Licensing (Scotland) Act 2010 asp 13 (Scottish Act) Pt 3 s.69(5)(e) (March 28, 2011 for all purposes in respect of criminal proceedings commenced on or after March 28, 2011, with proceedings taken to have commenced when a report of the case has been received by the procurator fiscal)
- [8.](#) Words inserted by Criminal Justice and Licensing (Scotland) Act 2010 asp 13 (Scottish Act) Pt 3 s.69(5)(f) (March 28, 2011 for all purposes in respect of criminal proceedings commenced on or after March 28, 2011, with proceedings taken to have commenced when a report of the case has been received by the procurator fiscal)
- [9.](#) Repealed by Criminal Justice and Licensing (Scotland) Act 2010 asp 13 (Scottish Act) Pt 3 s.69(5)(g) (March 28, 2011 for all purposes in respect of criminal proceedings commenced on or after March 28, 2011, with proceedings taken to have commenced when a report of the case has been received by the procurator fiscal)

respect of criminal proceedings commenced on or after March 28, 2011, with proceedings taken to have commenced when a report of the case has been received by the procurator fiscal)

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Subject: Criminal procedure

Keywords: Restrictions; Right to conduct own defence; Scotland; Vulnerable and intimidated witnesses

