

*These notes relate to the Vulnerable Witnesses (Criminal Evidence)
(Scotland) Act 2019 (asp 8) which received Royal Assent on 13 June 2019*

VULNERABLE WITNESSES (CRIMINAL EVIDENCE) (SCOTLAND) ACT 2019

EXPLANATORY NOTES

THE ACT

Child witnesses

Section 1 – Child witnesses in certain solemn cases

Inserted section 271BZA (Child witnesses in certain solemn cases: special measures)

6. Inserted section 271BZA provides that the new rule applies in relation to child witnesses other than the accused person. It applies in solemn criminal proceedings where the alleged offence is one of those listed in subsection (2). These offences are:
 - Murder
 - Culpable homicide
 - Assault to the danger of life
 - Abduction
 - Plagium (the crime of stealing a child)
 - A sexual offence to which section 288C of the 1995 Act applies
 - A course of abusive behaviour towards a partner or ex-partner, under section 1(1) of the Domestic Abuse (Scotland) Act 2018
 - An offence which is aggravated by involving the abuse of a partner or ex-partner, as provided for in Part 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016
 - An offence which is alleged to have occurred before 24 April 2017, when the new domestic abuse aggravator came into force, and where the aggravator would have applied if the offence had occurred more recently
 - an offence of human trafficking
 - an offence of slavery, servitude, and forced or compulsory labour
 - an offence of female genital mutilation
 - an offence of aiding and abetting female genital mutilation
 - an attempt to commit an offence mentioned in any of the bullets above
7. Subsection (9) confers a power on the Scottish Ministers to make regulations modifying the list of offences in subsection (2). They may do so by, for example, adding an offence

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to the list, removing an offence from the list or amending the way in which an offence is described in the list. Regulations made by the Scottish Ministers under subsection (9) may remove the list of offences that is in subsection (2) and remove the condition set out in subsection (1)(b). That would result in the new rule applying in all solemn criminal proceedings involving child witnesses rather than it being limited to cases involving particular offences. Regulations made under subsection (9) are subject to the affirmative procedure.

8. Subsection (3) sets out the new rule which is that 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). In terms of subsection (7), the court need not enable all of the evidence to be given in advance of the hearing if satisfied that there would be a significant risk of prejudice to the fairness of the hearing or to the interests of justice and that risk significantly outweighs any risk of prejudice to the interests of the child witness if the child witness gives evidence at the hearing. In terms of subsection (8), the court need not enable all of the evidence to be given in advance of the hearing if satisfied that the child witness is aged 12 or over, the child witness expresses a wish to give evidence at the hearing and it would be in the child witness's best interests to give evidence at the hearing.
9. Subsections (4) to (6) explain what is meant by enabling all of a child witness's evidence to be given in advance of the hearing. There is a close interaction between inserted section 271BZA and existing sections 271A and 271D of the 1995 Act so the inserted section should be considered against the background of those existing sections. Section 271A of the 1995 Act sets out the process for securing special measures for the purpose of taking the evidence of child witnesses (and deemed vulnerable witnesses). Special measures are the measures listed in section 271H. They include, for example, taking evidence by commissioner, using a live television link, a screen or supporter and giving evidence in chief in the form of a prior statement. (A witness's evidence in chief is the main evidence given by the witness in support of the case of the party who cited the witness. Evidence in chief is given before cross-examination by the other party to the proceedings.) Under section 271A, the party intending to cite the witness must lodge a vulnerable witness notice covering their view on which, if any, special measures should be authorised. Any other party to the proceedings may lodge a notice objecting to a special measure specified in the vulnerable witness notice unless it is a "standard special measure" within the meaning of subsection (14) (the use of a live television link, a screen or a supporter). If a standard special measure is specified, the court must make an order authorising the use of the standard special measure. If any other special measure is specified, the court may make an order authorising its use if satisfied that it is appropriate. If the notice requests that the witness give evidence without any special measure, the court may make an order authorising that if the witness has expressed a wish to give evidence without any special measure and the court is satisfied that it is appropriate. Section 271A also makes provision about circumstances in which the court may consider the question of special measures at a hearing. Section 271D of the 1995 Act enables the court to review the arrangements for taking a vulnerable witness's evidence at any stage in the proceedings and, in certain circumstances, to revoke or vary an earlier order made under section 271A which authorises the use of special measures.
10. Some of the special measures which may be authorised under section 271A are capable of being used only if the witness gives evidence at the hearing. For example, the special measure of using a live television link in accordance with section 271J involves the vulnerable witness being present in a place outside the courtroom where the hearing is taking place and giving evidence by means of a live television link between that place and the courtroom. The use of that special measure requires the witness to give evidence at the hearing (although not to be physically present in the courtroom) as opposed to giving evidence in advance of the hearing. If a court were to authorise the use of that special measure, it would not be compatible with the witness giving all of their evidence in advance of the hearing. Subsection (6) of inserted section 271BZA defines the term "incompatible special measure" to mean a special measure which is capable of being

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used only if the child witness gives evidence at the hearing (whether or not present in the courtroom).

11. The effect of subsection (4) is that, in order for the court to comply with the rule that it must enable all of the child witness's evidence to be given in advance of the hearing, the court must make a particular type of order under section 271A and must not make an order under section 271D which revokes the order under section 271A or varies it in such a way that it is no longer the type of order that the court was required to make to comply with the rule. The court may only revoke the order or vary it in that way if the review under section 271D commences after the hearing has commenced. The order under section 271A must authorise the taking of evidence by commissioner or the use of a prior statement (or both) for the purpose of taking all of the child witness's evidence. It must not authorise the use of an incompatible special measure (as defined in subsection (6)) for the purpose of taking any of the child witness's evidence nor the giving of any of that evidence without any special measure. The taking of evidence by commissioner and the use of a prior statement are both special measures which may be used in advance of a hearing. However, the court does not comply with the new rule if, for example, it authorises the use of a prior statement with the expectation that the child witness will still be required to attend the hearing to give evidence in addition to the evidence provided by means of the prior statement. In that example, the court only complies with the new rule if it authorises the use of the prior statement for the purpose of taking all of the child witness's evidence.