

# **VULNERABLE WITNESSES (CRIMINAL EVIDENCE) (SCOTLAND) ACT 2019**

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## **EXPLANATORY NOTES**

### **THE ACT**

3. The Act amends the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”). Most of the amendments are to sections in Part 12 of the 1995 Act, under the italic cross-heading ‘*Special measures for child witnesses and other vulnerable witnesses*’. The Annex to these Explanatory Notes sets out those sections as amended by the Act. The amendments are shown by using strikethrough for text that is repealed and underline for text that is inserted. As inserted sections 271BZB and 271BZC provide that, in cases to which section 271BZA applies, sections 271A and 271D are to apply with certain modifications, the Annex contains 2 versions of sections 271A and 271D. The first version of each of those sections is the version as amended by the Act. The second version is the version as amended by the Act but as it is to be read in a case to which section 271BZA applies (as a result of the modifications made by sections 271BZB and 271BZC). The text in the Annex is provided for guidance only and its accuracy is not warranted.
4. Explanatory Notes on the various sections of the Act are provided below. A detailed explanation of the Act’s purpose can be found in the Policy Memorandum. The Policy Memorandum also sets out the policy intentions underpinning the Act and the relationship of the Act to the wider programme of work to improve the support available to vulnerable witnesses.

### *Child witnesses*

#### *Section 1 – Child witnesses in certain solemn cases*

5. **Section 1** inserts 3 new sections in the 1995 Act (sections 271BZA, 271BZB and 271BZC). Section 271BZA provides that in certain solemn criminal proceedings the court must enable any child witnesses to give their evidence in advance of the hearing (“the new rule”), section 271BZB sets out modifications that are needed to section 271A in cases where the new rule applies and section 271BZC sets out modifications that are needed to section 271D in cases where the new rule applies.

#### **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

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- 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 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 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.

**Inserted section 271BZB (Child witnesses in certain solemn cases: modifications of section 271A)**

12. In cases in which the new rule in section 271BZA applies, the party intending to cite the child witness is still required to lodge a vulnerable witness notice in accordance with section 271A. Much of the process for lodging a notice and authorising a notice under that section is the same whether or not section 271BZA applies. However, some of the provisions of section 271A do not sit comfortably with the requirements of the new rule. For that reason, section 271BZB set out modifications of section 271A in cases

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where section 271BZA applies. These modifications are to clarify how section 271A is to operate in those cases and also to introduce an additional restriction on the special measures which may be authorised in those cases.

13. Subsection (2) modifies the meaning of the term “standard special measure” where it is used in section 271A (in cases where section 271BZA applies). Under section 271A, the court must make an order authorising the use of any standard special measures that are specified in the vulnerable witness notice but the standard special measures include measures, such as the use of a live television link, which are incompatible with a child witness giving all of their evidence in advance of the hearing. Subsection (2) provides that references to a standard special measure are instead to be read as references to the measures of taking of evidence by commissioner, use of a supporter and use of a prior statement. These are measures which may be used in advance of the hearing. If these measures are specified in a vulnerable witness notice, the court must make an order authorising them.
14. Subsection (3) modifies section 271A(2) by removing words which are not relevant in cases in which section 271BZA applies. The words “Subject to section 271AA” (which are mentioned in subsection (3)(a) of the Act) are words which are inserted in section 271A by section 6(3)(a) of the Act.
15. Subsection (4) provides that section 271A has effect as if a new subsection (2A) were inserted in it to require the party citing the child witness to provide some additional information in the vulnerable witness notice. The vulnerable witness notice must state that section 271BZA applies. If the special measures specified in the notice are not measures which, if authorised, would enable the child witness to give all of their evidence in advance of the hearing, the notice must explain why the party citing the witness considers that an exception is justified under section 271BZA(7) or (8).
16. The effect of subsection (5) is to make section 271A(5), (9) and (10) subject to additional provisions that are to be treated as being inserted in section 271A. Subsection (10B) (which is to be treated as being inserted in section 271A) clarifies the action that the court may take if a vulnerable witness notice does not specify the special measure of taking evidence by commissioner or use of a prior statement for the purpose of taking all of the child witness’s evidence. Although not specified in the notice, the court may nonetheless make an order authorising the use of one or both of those measures for the purpose of taking all of the child witness’s evidence. This allows the court to comply with the new rule even if a vulnerable witness notice has been lodged which does not recognise that the new rule applies, or which seeks to have the child witness give any evidence at the hearing. Subsection (10C) is to ensure that there is consistency between the new rule in section 271BZA and the court’s powers under section 271A. Unless the court is satisfied that an exception is justified under section 271BZA, any order made by the court under section 271A must comply with the new rule in terms of the special measures which it authorises (and the special measures which it must not authorise).
17. Subsections (10D) to (10F) (which are to be treated as being inserted in section 271A) introduce an additional restriction on the special measures which may be authorised in cases where section 271BZA applies. They are relevant where section 271BZA applies but an exception to the new rule is justified under section 271BZA(7) or (8). In those circumstances, the court is not required to make an order enabling all of the child witness’s evidence to be given in advance of the hearing. However, even if the court makes an order which has the effect of requiring the child witness to give evidence at the hearing, it must not have the effect of requiring the child witness to be present in the courtroom unless an exception applies. There is an exception under subsection (10E) if the giving of evidence in a way other than by being present in the courtroom would give rise to a significant risk of prejudice to the fairness of the hearing or interests of justice and that significantly outweighs any risk of prejudice to the child witness’s interests. There is an exception under subsection (10F) if the child witness is aged 12 or over and

expresses a wish to be present in the courtroom to give evidence and that would be in the child witness's best interests.

**Inserted section 271BZC (Child witnesses in certain solemn cases: modifications of section 271D)**

18. In cases in which the new rule in section 271BZA applies, the court may still review the arrangements for taking the child witness's evidence in accordance with section 271D. However, the court's power under section 271D to revoke or vary an earlier order must be exercised in a way which is consistent with the requirements of section 271BZA. For that reason, section 271BZC sets out modifications of section 271D in cases where section 271BZA applies.
19. Subsection (2)(a) provides that section 271D has effect as if subsections (3A) to (3C) were omitted. Those subsections are inserted by section 4 of the Act but those subsections are not to apply in cases in which the new rule in section 271BZA applies. Subsection (2)(aa) provides that section 271D has effect as if subsection (4A) were omitted. That subsection is inserted by section 6 of the Act but it is not to apply in cases in which the new rule in section 271BZA applies.
20. The effect of subsection (2)(b) is to make section 271D(2) to (4) subject to additional provisions that are to be treated as being inserted in section 271D. Subsection (4C) (which is to be treated as being inserted in section 271D) provides that the court must not make an order which revokes an earlier order or varies an earlier order in such a way that it no longer satisfies the requirements of the new rule (the requirements being to authorise the taking of evidence by commissioner or use of a prior statement for the purpose of taking all of a witness's evidence and to refrain from authorising the taking of any of their evidence without a special measure or with an incompatible special measure). The court must not make an order having that effect unless satisfied that an exception is justified under section 271BZA(7) or (8) or unless the hearing has already commenced when the court commences its review. There is a possibility of there being cases where, for example, a commissioner is appointed to take evidence from a child witness and the commission takes place but later, during the course of the trial, it becomes clear that there is a need to recall the child witness. In that case, the court should be able to review the arrangements for taking the child witness's evidence in accordance with section 271D. At that point, the hearing has already commenced so it is no longer possible for the child witness to give all of their evidence in advance of the trial if they are to be recalled. Therefore, the court may revoke or vary the earlier order if the hearing has already commenced.
21. Subsections (4CA) and (4CB) (which are to be treated as being inserted in section 271D) are relevant in review cases where the earlier order has authorised only the special measure of giving evidence in chief by prior statement. If any party to the proceedings requests that the child witness's evidence be taken by commissioner, the court must make an order having that effect unless the hearing has already commenced when the court commences its review or there is an exception under section 271BZA(7) or (8). This situation could arise where, for example, a child witness has given their evidence in the form of a prior statement but then further evidence becomes available and, as a result of that, the other party to proceedings wishes to cross-examine the child witness. That party could seek a review and could request that the court authorise the taking of evidence by commissioner to enable cross-examination. The court would (in most cases) be required to authorise that.
22. Subsections (4D) to (4F) (which are to be treated as being inserted in section 271D) introduce an additional restriction in cases where section 271BZA applies. They are relevant where section 271BZA applies but the hearing has already commenced when the court commences its review or an exception to the new rule is justified under section 271BZA(7) or (8). In those circumstances, the court is not required to make an order enabling all of the child witness's evidence to be given in advance of the hearing.

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However, even if the court makes an order which has the effect of requiring the child witness to give evidence at the hearing, it must not have the effect of requiring the child witness to be present in the courtroom unless an exception applies. There is an exception under subsection (4E) if the giving of evidence in a way other than by being present in the courtroom would give rise to a significant risk of prejudice to the fairness of the hearing or interests of justice and that significantly outweighs any risk of prejudice to the child witness's interests. There is an exception under subsection (4F) if the child witness is aged 12 or over and expresses a wish to be present in the courtroom to give evidence and that would be in the child witness's best interests.

### ***Section 2 – Child witnesses under the age of 12***

23. **Section 2(2)** amends section 271B of the 1995 Act by inserting new subsections (4A) and (7). Section 271B makes provision about the special measures that are appropriate for taking the evidence of child witnesses under the age of 12 in certain criminal proceedings. There is some overlap between section 271B and the new rule in section 271BZA. If section 271B were not amended by the Act, there would be cases in which both sections would apply. For example, both sections would apply in a murder case involving a child witness aged 11. Subsection (7) is therefore inserted. It provides that section 271B does not apply in a case to which section 271BZA applies.
24. Inserted subsection (4A) is to clarify how section 271A(5)(a) should operate in a case to which section 271B applies. Even if the vulnerable witness notice does not specify a special measure which would result in the child witness having to be present in the courtroom for the purpose of giving evidence, an order made by the court under section 271A(5)(a) may have that effect if the court is required by section 271B(4) to make an order having that effect.
25. **Section 2(3)** amends section 271A(9) and (10) to make it clear that the court's power to make orders under those subsections is subject to section 271B.

### ***Deemed vulnerable witnesses***

#### ***Section 3 – Deemed vulnerable witnesses in certain solemn cases***

26. **Section 3** provides a power for the Scottish Ministers to make regulations extending the application of section 271BZA so that the new rule applies where deemed vulnerable witnesses are to give evidence in solemn proceedings. (Deemed vulnerable witnesses are vulnerable witnesses falling within section 271(1)(c) of the 1995 Act). As child witnesses are covered by the new rule under section 271BZA, the regulation making power does not extend to deemed vulnerable witnesses who are also child witnesses.
27. Regulations under this section may apply the new rule to all adult deemed vulnerable witnesses or to subcategories of adult deemed vulnerable witnesses. The regulations may specify descriptions of deemed vulnerable witness to whom the new rule is to apply. One way of describing a subcategory of deemed vulnerable witnesses would be to describe them by reference to the offence that is alleged to have been committed against them. For example, regulations under section 3 may provide that the new rule is to apply to complainers in cases involving allegations of rape.
28. Regulations under this section may apply section 271BZA to deemed vulnerable witnesses with modifications that the Scottish Ministers consider necessary or expedient. An example would be modifications to remove the references to "child witness" from section 271BZA for the purposes of applying the section to adult deemed vulnerable witnesses. Regulations may make different provision for different purposes, including for different courts or descriptions of courts or different descriptions of deemed vulnerable witnesses.
29. Any regulations made under this section are subject to the affirmative procedure.

## ***Review of arrangements for taking evidence***

### ***Section 4 - Review of arrangements for vulnerable witnesses***

30. **Section 4** amends section 271D by inserting new subsections (3A) to (3C). These new subsections apply where the court is reviewing the arrangements for taking the evidence of a vulnerable witness, except in cases where inserted section 271BZA applies (see paragraph 19 above).
31. The new subsections place restrictions on the court's power to vary an earlier order if the earlier order has the effect of enabling all of the vulnerable witness's evidence to be given in advance of the hearing. Inserted subsection (3C) explains that an order enables all of the witness's evidence to be given in advance of the hearing if it authorises the taking of evidence by commissioner or the use of a prior statement for the purpose of taking all of the evidence and the order does not authorise the giving of any of the evidence without a special measure or with a special measure which is capable of being used only if the witness gives evidence at the hearing.
32. However, there is an exception if the hearing has already commenced when the court commences its review. In that case, there may, for example, be a need to recall a witness and the court may vary an earlier order to allow for that. There is an exception if the witness has expressed a wish to give evidence at the hearing and the court is satisfied that it is appropriate. There is also an exception if there would otherwise be a significant risk of prejudice to the fairness of the hearing or the interests of justice and that significantly outweighs the risk of prejudice to the witness's interests if the order is varied.

## ***Taking evidence by commissioner***

### ***Section 5 – Taking evidence by commissioner***

33. **Section 5(2)** amends section 271I of the 1995 Act, which makes provision about the special measure of taking of evidence by a commissioner. Section 5(2) inserts new subsections (1ZA) to (1ZD) which introduce a requirement for a new type of procedural hearing, which is to be known as a ground rules hearing, to take place before evidence is taken in proceedings before a commissioner. The purpose of the ground rules hearing is to make preparations for the hearing and to consider the parties' state of readiness to proceed to the hearing on the date fixed by the court. It is not essential for the ground rules hearing to be a separate hearing. It may be conjoined with another hearing or diet, such as the preliminary hearing. If it is conjoined, the judge presiding over that other hearing or diet (being a judge of the court which appointed the commissioner) is also to preside over the ground rules hearing. If it is not conjoined, the commissioner who is appointed to take the witness's evidence is to preside over the ground rules hearing if it is reasonably practicable for them to do so. If that is not reasonably practicable, a judge of the court which appointed the commissioner is to preside over the ground rules hearing.
34. Inserted subsection (1ZD) lists the matters which must be considered at a ground rules hearing. Paragraph (d) requires consideration of whether there are steps that could reasonably be taken to enable the vulnerable witness to participate more effectively in the proceedings. If the commissioner (or the judge or sheriff) presiding over the ground rules hearing considers that there are such steps that could reasonably be taken, they must direct that those steps be taken. This may include steps such as having a foreign language interpreter available at the proceedings before the commissioner if that would assist the witness or making other similar adjustments. It might also include steps such as enabling the proceedings to take place by means of a live television link between the place where the commissioner is taking, and the place from which the witness is giving, evidence, if the court has not already directed that when authorising the proceedings before the commissioner. Section 5(3) amends section 271I(1A) to recognise that the

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use of a live television link might be authorised at the ground rules hearing if not already authorised by the court.

35. Paragraph (e) of inserted subsection (1ZD) provides that an application under section 275(1) (for an exception to restrictions on evidence relating to sexual offences) or under section 288F(2) (for an order prohibiting the accused from conducting their case in person) may be disposed of at the ground rules hearing if not yet disposed of by the court. Section 5(7) makes a consequential amendment to section 72(6)(b)(iii).
36. The matters listed in paragraphs (a) to (f) of inserted subsection (1ZD) are not the only matters that may require to be considered. Paragraph (g) provides that the commissioner (or the judge or sheriff) presiding over the ground rules hearing must also consider and, if appropriate, make a decision on any other matter that they consider could be usefully dealt with before the proceedings take place.
37. [Section 5\(4\)](#) inserts subsection (4A) in section 271I. This affects solemn cases but not summary cases. Subsection (4A) provides that it is not necessary for an indictment to have been served before a party may lodge a vulnerable witness notice requesting that evidence be taken by commissioner (whether as the only special measure or as one of a combination of special measures). It is not necessary for an indictment to have been served before a court may make an order authorising the taking of evidence by commissioner and any other special measure specified in the same vulnerable witness notice. It is not necessary for an indictment to have been served before a court may appoint a commissioner under section 271I(1) or before proceedings may take place before a commissioner. Whilst service of an indictment is not a prerequisite which must be satisfied before proceedings may take place before a commissioner, the circumstances of each individual case will determine whether or not it is appropriate for proceedings to take place before a commissioner at an early stage.
38. [Section 5\(5\)](#) amends section 271I(8), which determines whether the commissioner is to be a judge of the High Court or a sheriff. The commissioner should be a judge if the trial is to take place in the High Court and it should be a sheriff if it is to take place in the sheriff court. However, if the court is appointing a commissioner at a relatively early stage in the proceedings, it might not yet be certain whether the trial will be in the High Court or the sheriff court. Section 271I(8) is therefore amended so that the decision on whether the commissioner should be a judge or a sheriff is dependent on the court's expectation of the trial forum at the time when the court appoints the commissioner.
39. [Section 5\(6\)](#) amends section 271(3), which expands on what is meant by the "commencement of the proceedings" where that term is used. The date on which the proceedings commenced is relevant to the calculation of a witness's age and that calculation determines whether the witness is a child witness. That, in turn, determines whether the witness is entitled to the benefit of special measures.
40. The amendment made by paragraph (a) is a consequential amendment which is needed because there are references to the commencement of the proceedings in inserted sections 271BZA to 271BZC. The amendment made by paragraph (b) adjusts the date which is to be treated as the date of commencement of the proceedings for certain purposes. In most cases, it is the date when the indictment or complaint is served on the accused. However, where it is relevant to a court's consideration of whether to authorise the taking of evidence by commissioner (as the only special measure or as one of a combination of special measures), it is, in solemn cases, the date when the accused appeared on petition. If the accused did not appear on petition, it is the date of service of the indictment or complaint.
41. The effect of the amendment made by paragraph (b) may be illustrated by examples. In a case where the party citing the witness considers that they should give evidence with the benefit of a live television link but no other special measure, the date of commencement of the proceedings is not relevant to a court's consideration of whether to authorise the taking of evidence by commissioner (assuming it is not a case to which section 271BZA



applies). The date of commencement of the proceedings is therefore the date of service of the indictment or complaint. A child witness is a person who is under the age of 18 on the date of commencement of the proceedings so, even if the person was aged 17 on the date when the accused appeared on petition, they are not a child witness if they turn 18 before the indictment is served on the accused. In this example, the witness is not a child witness and is not therefore entitled to the benefit of the special measure of a live television link (unless they are a vulnerable witness for another reason separate from their age). The position is different if the party citing the witness considers that they should give evidence to a commissioner and should have a supporter there with them and if, on the basis of the vulnerable witness notice, the court is considering authorising the taking of evidence by commissioner. In that scenario, the date of commencement of proceedings is relevant to the court's consideration of whether to authorise the taking of evidence by commissioner so it is the date of the accused's appearance on petition (if the accused appears on petition). If the witness was 17 on that date, they are a child witness even if they turn 18 before the date on which an indictment is served on the accused. The court may therefore choose to authorise the use of the special measures specified in the vulnerable witness notice (taking evidence by commissioner and the use of a supporter).

42. **Section 5(8)** inserts new subsection (6A) in section 271D so that, for the purposes of that section, "court" includes a commissioner appointed under section 271I(1). This allows a commissioner to review the arrangements for taking the vulnerable witness's evidence and to make an order changing those arrangements. The order might, for example, authorise the use of another special measure in addition to the special measure of taking evidence by commissioner. The commissioner has the same powers under section 271D as the court would have if the court were to review the arrangements. The commissioner may therefore review the arrangements of the commissioner's own motion or on the application of any party to the proceedings.

### ***Notification procedure for standard special measures***

#### ***Section 6 – Using only standard special measures***

43. **Section 6(2)** inserts new section 271AA in the 1995 Act. This provides for a simplified procedure to apply in cases where the party citing a child witness or deemed vulnerable witness considers that it is most appropriate for the witness to give evidence with the benefit of one or more standard special measures and no other special measures. (The terms "child witness" and "deemed vulnerable witness" are defined in section 271(5).) In those cases, the party need not lodge a vulnerable witness notice under section 271A but must instead provide the clerk of court and the other parties to the proceedings with the information set out in subsection (2) of the inserted section. If the party provides the information to the clerk of court by the required time, the witness is entitled to the benefit of the standard special measures which the party specified as being the most appropriate.
44. The party may provide the information to the clerk of court at any time before a date has been fixed for a preliminary hearing, first diet or evidential hearing. If they do not do so before a date is fixed for a preliminary hearing or first diet, they must do so no later than 14 clear days before the preliminary hearing or (if it is a first diet) no later than seven clear days before the first diet. If a date is fixed for an evidential hearing in a case where the proceedings are not to take place in the High Court or on indictment in the sheriff court, the deadline is no later than 14 clear days before the evidential hearing. If the party does not meet the deadline, the simplified procedure cannot be used but the court may allow the party to lodge a vulnerable witness notice in accordance with section 271A.
45. The simplified procedure is not available in cases to which section 271BZA or 271B applies. In those cases, the party must lodge a vulnerable witness notice in accordance with section 271A even if they are requesting only standard special measures.

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46. **Section 6(3) to (5)** makes consequential amendments to sections 271A, 271D and 271E. The effect of the amendment made by subsection (4) to section 271D is that the court may review the arrangements for taking a vulnerable witness's evidence under that section even if the arrangements were the result of the party notifying the clerk of the court of the standard special measures which were to apply in accordance with the simplified procedure. The effect of the amendment made by subsection (5) to section 271E(1) is that a party considering which special measures are most appropriate for the purposes of the simplified procedure must have regard to the witness's best interests and take into account their views (and the views of their parents, if the witness is a child) in the same way that they would if they were lodging a vulnerable witness notice.

### ***Timeframes for vulnerable witness notices***

#### ***Section 7 – Timeframe for considering vulnerable witness notice***

47. **Section 7** amends section 271A(3A) so that, in cases where a vulnerable witness notice specifies only a standard special measure, the court may consider the notice as soon as it has been lodged, without having to wait for seven days before considering it. The requirement to wait for seven days remains in place in cases where the notice specifies measures other than standard special measures because, in those cases, another party to the proceedings may object to the measures specified within those first seven days.
48. The amendments will not be relevant in many of the cases in which a party considers that standard special measures are the most appropriate because in many of the cases, there will be no vulnerable witness notice as the new simplified notification procedure will be used (see paragraphs 43 to 46 of these Explanatory Notes). However, the amendment will be relevant in cases where a vulnerable witness notice is lodged because the simplified notification procedure is not available to the party, for example, if section 271BZA or 271B applies or if the party does not meet the deadline for the simplified notification procedure but the court allows the party to lodge a vulnerable witness notice instead.

#### ***Section 8 – Vulnerable witness notice: lodging deadline***

49. **Section 8** amends section 271A(13A) by altering the deadline by which a vulnerable witness notice must be lodged. At the time when a party is considering lodging a vulnerable witness notice, it might not yet be clear whether the criminal proceedings will take place in the High Court or the sheriff court or whether they will be solemn or summary proceedings. If that is not known, there will be no certainty as to which of the deadlines set out in section 271A(13A) is the applicable deadline. The effect of the amendment is that a vulnerable witness notice may be lodged at any time before a date has been fixed for a preliminary hearing, first diet or evidential hearing. If it is not lodged before a date is fixed for a preliminary hearing or first diet, it must be lodged no later than 14 clear days before the preliminary hearing or (if it is a first diet) no later than seven clear days before the first diet. If a date is fixed for an evidential hearing in a case where the proceedings are not to take place in the High Court or on indictment in the sheriff court, the notice must be lodged no later than 14 clear days before the evidential hearing.

### ***Reporting requirement***

#### ***Section 9 – Report on operation of sections 1 and 5***

50. **Section 9** requires the Scottish Ministers to review and report on the operation of section 1 (pre-recording evidence in advance of the trial) and section 5 (ground rules hearings). The review period is the period of 3 years beginning with the first day on which section 1 is brought into force for any purpose. The report must be laid before

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

the Scottish Parliament and published as soon as practicable after the end of the review period.

51. In the report, the Scottish Ministers must evaluate whether the introduction of the new rule on pre-recording evidence and the introduction of ground rules hearings have helped witnesses participate in the criminal justice system. They must set out the next steps they intend to take for commencing the pre-recording rule, including any intention to make regulations to extend the rule to adult deemed vulnerable witnesses such as complainers in sexual offence or domestic abuse cases. The report must also include certain quantitative data relating to the new rule on pre-recording evidence, such as the number of witnesses it has applied to during the review period. In preparing the report, the Scottish Ministers must consult key stakeholders.

## **General**

### **Section 10 – Consequential amendments**

52. **Section 10** makes minor amendments to the 1995 Act which are consequential on the other provisions of the Act.

### **Section 11 – Ancillary provision**

53. **Section 11** enables the Scottish Ministers to make regulations making ancillary provision to give full effect to the Act or any provision made under it, including by modifying any enactment. Regulations made under section 11 which modify an enactment attract the affirmative Parliamentary procedure. If they do not modify an enactment, they attract the negative Parliamentary procedure.

### **Section 12 - Commencement**

54. **Section 12** deals with the commencement of the Act provisions. Sections 11 (ancillary provision), 12 (commencement) and 13 (short title) come into force on the day after Royal Assent. The other provisions come into force on a day appointed by the Scottish Ministers by regulations. The Scottish Ministers may make regulations appointing different commencement dates for different purposes. They may bring provisions into force on different dates for different courts or different descriptions of courts. They could, for example, bring section 1, which introduces the new rule for child witnesses in serious cases, into force for the High Court earlier than for the sheriff court, and for some sheriff courts earlier than others. They may bring provisions into force on different dates for witnesses of different types or of different ages. They could, for example, bring section 1 into force earlier for children under the age of 12 than for children aged 12 or over.