

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

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## **EXPLANATORY NOTES**

### **THE ACT**

#### *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
  - 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

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- 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 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

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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. 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.