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

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 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.