

# Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill

[AS AMENDED AT STAGE 2]

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**Amendments to the Bill since the previous version are indicated by sidelining in the right margin. Wherever possible, provisions that were in the Bill as introduced retain the original numbering.**

# Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill

[AS AMENDED AT STAGE 2]

5 An Act of the Scottish Parliament to make provision about the use of special measures for the purpose of taking the evidence of child witnesses and other vulnerable witnesses in criminal proceedings; to make provision about the procedure relating to taking evidence by commissioner; to make provision about the procedure for authorisation of standard special measures; and for connected purposes.

## *Child witnesses*

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

- (1) The Criminal Procedure (Scotland) Act 1995 is amended as follows.
- (2) After section 271B, insert—

10 **“271BZA Child witnesses in certain solemn cases: special measures**

- (1) This section applies where a child witness, other than the accused, is to give evidence at, or for the purposes of, a hearing in relevant criminal proceedings which are—
  - 15 (a) solemn proceedings, and
  - (b) in respect of an offence listed in subsection (2).
- (2) The offences are—
  - 20 (a) murder,
  - (b) culpable homicide,
  - (c) assault to the danger of life,
  - (d) abduction,
  - (e) plagium,
  - (f) a sexual offence to which section 288C applies,
  - (fa) an offence under section 1(1) of the Domestic Abuse (Scotland) Act 2018,
  - 25 (fb) an offence that is aggravated as described in section 1(1)(a) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016,

(fc) an offence that would have fallen within paragraph (fb) if section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 had been in force when the offence was allegedly committed,

(g) an offence of human trafficking (see section 1 of the Human Trafficking and Exploitation (Scotland) Act 2015),

(h) an offence under section 4 of the Human Trafficking and Exploitation (Scotland) Act 2015 (slavery, servitude and forced or compulsory labour),

(i) an offence under section 1 of the Prohibition of Female Genital Mutilation (Scotland) Act 2005 (offence of female genital mutilation),

(j) an offence under section 3 of the Prohibition of Female Genital Mutilation (Scotland) Act 2005 (aiding and abetting female genital mutilation),

(k) an attempt to commit an offence mentioned in any of paragraphs (a) to (j).

(3) 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).

(4) For the purposes of this section, the court enables all of the child witness's evidence to be given in advance of the hearing if—

(a) the court makes an order under section 271A which satisfies the following requirements—

(i) it authorises the use of one or both of the special measures listed in subsection (5) for the purpose of taking all of the child witness's evidence,

(ii) it does not authorise the use of an incompatible special measure for the purpose of taking any of the child witness's evidence, and

(iii) it does not authorise the giving of any of the child witness's evidence without the benefit of any special measure, and

(b) the court, if it commences a review under section 271D before the hearing has commenced, does not make an order under that section which—

(i) revokes the order made under section 271A, or

(ii) varies it in such a way that it no longer satisfies the requirements set out in paragraph (a)(i), (ii) and (iii).

(5) The special measures mentioned in subsection (4)(a)(i) are—

(a) taking of evidence by a commissioner in accordance with section 271I,

(b) giving evidence in chief in the form of a prior statement in accordance with section 271M.

(6) In this section, “incompatible special measure” means a special measure which is capable of being used only if the child witness gives evidence at the hearing (whether or not its use would require the child witness to be present in the courtroom).

- (7) An exception is justified if—
- (a) the giving of all of the child witness’s evidence in advance of the hearing would give rise to a significant risk of prejudice to the fairness of the hearing or otherwise to the interests of justice, and
  - (b) that risk significantly outweighs any risk of prejudice to the interests of the child witness if the child witness were to give evidence at the hearing.
- (8) An exception is justified if—
- (a) the child witness is aged 12 or over on the date of commencement of the proceedings in which the hearing is being or is to be held,
  - (b) the child witness expresses a wish to give evidence at the hearing, and
  - (c) it would be in the child witness’s best interests to give evidence at the hearing.
- (9) The Scottish Ministers may by regulations—
- (a) modify subsection (2),
  - (b) remove the condition set out in subsection (1)(b) and the list of offences in subsection (2).
- (10) Regulations under subsection (9) are subject to the affirmative procedure.

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

- (1) In a case to which section 271BZA applies, section 271A applies with the following modifications.
- (2) References to a standard special measure are to be read as references to any of the following special measures (and subsection (14) is to be read accordingly)—
- (a) taking of evidence by a commissioner in accordance with section 271I,
  - (b) use of a supporter in accordance with section 271L,
  - (c) giving evidence in chief in the form of a prior statement in accordance with section 271M.
- (3) Section 271A(2) has effect as if—
- (a) the words “Subject to section 271AA,” were omitted,
  - (b) the words “or a deemed vulnerable witness” were omitted.
- (4) Section 271A has effect as if the following subsection were inserted after subsection (2)—
- “(2A) A vulnerable witness notice must—
- (a) state that section 271BZA applies, and
  - (b) explain why the party considers that an exception is justified under section 271BZA(7) or (8) if the notice—
    - (i) does not specify one or both of the special measures listed in section 271BZA(5) for the purpose of taking all of the child witness’s evidence,

(ii) specifies an incompatible special measure (as defined in section 271BZA(6)) for the purpose of taking any of the child witness's evidence, or

(iii) states that the party considers that the child witness should give any of the child witness's evidence without the benefit of any special measure.”.

(5) Section 271A has effect as if the following subsections were inserted after subsection (10)—

“(10A) Subsections (5), (9) and (10) are subject to subsections (10B) to (10F).

(10B) Where the court is considering a notice in accordance with subsection (5) and the notice does not specify one or both of the special measures mentioned in section 271BZA(5) for the purpose of taking all of the child witness's evidence, the court may nonetheless make an order which has the effect of authorising the use of one or both of those special measures for that purpose.

(10C) Unless the court is satisfied that an exception is justified under section 271BZA(7) or (8), an order made by the court under this section—

(a) must authorise the use of one or more of the special measures mentioned in section 271BZA(5) for the purpose of taking all of the child witness's evidence,

(b) must not authorise the use of an incompatible special measure (as defined in section 271BZA(6)) for the purpose of taking any of the child witness's evidence, and

(c) must not authorise the giving of any of the child witness's evidence without the benefit of any special measure.

(10D) Even if the court is satisfied that an exception is justified under section 271BZA(7) or (8), an order made by the court under this section must not have the effect of requiring the child witness to be present in the courtroom to give evidence unless the court is satisfied that subsection (10E) or (10F) applies.

(10E) This subsection applies if—

(a) the giving of evidence by the child witness in some way other than by being present in the courtroom for that purpose would give rise to a significant risk of prejudice to the fairness of the hearing or otherwise to the interests of justice, and

(b) that risk significantly outweighs any risk of prejudice to the interests of the child witness if the child witness were to be present in the courtroom to give evidence.

(10F) This subsection applies if—

(a) the child witness is aged 12 or over on the date of commencement of the proceedings in which the hearing is being held or is to be held,

(b) the child witness expresses a wish to be present in the courtroom to give evidence, and

(c) it would be in the child witness's best interests to be present in the courtroom to give evidence.”.

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

- (1) In a case to which section 271BZA applies, section 271D applies with the following modifications.
- (2) Section 271D has effect as if—
- 5 (a) subsections (3A) to (3C) were omitted,
- (aa) subsection (4A) were omitted, and
- (b) the following subsections were inserted after subsection (4A)—
- “(4B) Subsections (2) to (4) are subject to subsections (4C) to (4F).
- (4C) Unless the hearing has already commenced when the court commences its
- 10 review or the court is satisfied that an exception is justified under section 271BZA(7) or (8), an order made by the court under this section must not—
- (a) revoke the earlier order, or
- (b) vary it in such a way that it no longer satisfies the requirements set out in section 271BZA(4)(a)(i), (ii) and (iii).
- 15 (4CA) An order made by the court under this section must have the effect of authorising the use of the special measure of taking of evidence by a commissioner in accordance with section 271I if—
- (a) that is requested by any party to the proceedings, and
- (b) the earlier order authorises only the special measure of giving evidence
- 20 in chief in the form of a prior statement in accordance with section 271M.
- (4CB) However, an order made by the court under this section need not have the effect described in subsection (4CA) if—
- (a) the hearing has already commenced when the court commences its
- 25 review, or
- (b) the court is satisfied that an exception is justified under section 271BZA(7) or (8).
- (4D) Even if the hearing has already commenced when the court commences its
- 30 review or the court is satisfied that an exception is justified under section 271BZA(7) or (8), an order made under this section must not have the effect of requiring the child witness to be present in the courtroom to give evidence unless the court is satisfied that subsection (4E) or (4F) applies.
- (4E) This subsection applies if—
- (a) the giving of evidence by the child witness in some way other than by
- 35 being present in the courtroom for that purpose would give rise to a significant risk of prejudice to the fairness of the hearing or otherwise to the interests of justice, and
- (b) that risk significantly outweighs any risk of prejudice to the interests of the child witness if the child witness were to be present in the courtroom
- 40 to give evidence.
- (4F) This subsection applies if—
- (a) the child witness is aged 12 or over on the date of commencement of the proceedings in which the hearing is being held or is to be held,

- (b) the child witness expresses a wish to be present in the courtroom to give evidence, and
- (c) it would be in the child witness's best interests to be present in the courtroom to give evidence.”.

5       **2       Child witnesses under the age of 12**

(1) The Criminal Procedure (Scotland) Act 1995 is amended as follows.

(2) In section 271B—

(a) after subsection (4), insert—

10       “(4A) Where the court is required to make an order having the effect mentioned in subsection (4), an order made by the court under section 271A(5)(a) may authorise the use of a special measure or measures other than those specified in the vulnerable witness notice if that would result in the order having the effect mentioned in subsection (4).”.

(b) after subsection (6), insert—

15       “(7) This section does not apply in a case to which section 271BZA applies.”.

(3) In section 271A—

(a) in subsection (9), for “At” substitute “Subject to section 271B, at”,

(b) in subsection (10), for “The court” substitute “Subject to section 271B, the court”.

*Deemed vulnerable witnesses*

20       **3       Deemed vulnerable witnesses in certain solemn cases**

(1) The Criminal Procedure (Scotland) Act 1995 is amended as follows.

(2) After section 271BZC, insert—

**“271BZD Power to apply section 271BZA to deemed vulnerable witnesses**

25       (1) The Scottish Ministers may by regulations extend the application of section 271BZA so that it also applies where a deemed vulnerable witness who is not a child witness is to give evidence at, or for the purposes of, a hearing in relevant criminal proceedings which are solemn proceedings.

(2) Regulations under subsection (1) may, in particular—

30       (a) make different provision for different descriptions of deemed vulnerable witness, including, in particular, provision to extend the application of section 271BZA only in cases involving specified descriptions of deemed vulnerable witness,

(b) make such provision as the Scottish Ministers consider necessary or expedient in connection with the extension of the application of section 271BZA, including, in particular, provision to apply section 271BZA subject to specified modifications,

(c) make different provision for different courts or descriptions of court,

35       (d) make different provision for other different purposes,



(e) make such incidental, supplementary, consequential, transitional, transitory or saving provision as the Scottish Ministers consider necessary or expedient,

(f) modify any enactment (including this Act).

5 (3) In this section—

“specified” means specified in the regulations,

“descriptions of deemed vulnerable witness” may include, in particular, descriptions relating to the specific offences or types of offences that are alleged to have been committed against the deemed vulnerable witness.

10 (4) Regulations under subsection (1) are subject to the affirmative procedure.”.

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

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

(1) The Criminal Procedure (Scotland) Act 1995 is amended as follows.

15 (2) In section 271D, after subsection (3), insert—

“(3A) If an earlier order has the effect of enabling all of the witness’s evidence to be given in advance of the hearing, the court may not make an order under subsection (2)(a) varying the earlier order in such a way that it no longer has that effect.

20 (3B) However, the court may vary the earlier order in the way mentioned in subsection (3A) if the hearing has already commenced when the court commences its review or if the court is satisfied—

(a) where the witness has expressed a wish to give evidence at the hearing, that it is appropriate for the witness to do so, or

25 (b) in any other case, that—

(i) if the court does not vary the earlier order in that way, there would be a significant risk of prejudice to the fairness of the hearing or otherwise to the interests of justice, and

30 (ii) that risk significantly outweighs any risk of prejudice to the interests of the witness if the court were not to vary the earlier order in that way.

(3C) For the purposes of this section, an order has the effect of enabling all of the witness’s evidence to be given in advance of the hearing if—

35 (a) it authorises the use of one or both of these special measures for the purpose of taking all of the witness’s evidence—

(i) taking of evidence by a commissioner in accordance with section 271I,

(ii) giving evidence in chief in the form of a prior statement in accordance with section 271M,

40 (b) it does not authorise the use of a special measure which is capable of being used only if the witness gives evidence at the hearing (whether or not its use would require the witness to be present in the courtroom), and

- (c) it does not authorise the giving of any of the witness's evidence without the benefit of any special measure.”.

*Taking evidence by commissioner*

**5 Taking evidence by commissioner**

- 5 (1) The Criminal Procedure (Scotland) Act 1995 is amended as follows.
- (2) In section 271I, after subsection (1), insert—
- “(1ZA) A court which appoints a commissioner under subsection (1) must—
- (a) fix a date for the proceedings before the commissioner, and
- 10 (b) fix a date for a hearing (to be known as a “ground rules hearing”) for the purpose of preparing for the proceedings.
- (1ZB) The ground rules hearing is to be presided over by—
- (a) a judge or sheriff if—
- 15 (i) the court directs that the ground rules hearing be conjoined with another hearing or diet that is to be held before the date of the proceedings to which the ground rules hearing relates and that hearing or diet is presided over by a judge or sheriff, or
- (ii) it is not reasonably practicable for the ground rules hearing to be presided over by the commissioner appointed to preside over the proceedings to which the ground rules hearing relates,
- 20 (b) in any other case, the commissioner appointed to preside over the proceedings to which the ground rules hearing relates.
- (1ZC) In cases where a judge or sheriff presides over a ground rules hearing in accordance with subsection (1ZB), references to the commissioner in subsection (1ZD) are to be read as references to the judge or, as the case may be, sheriff.
- 25 (1ZD) The commissioner presiding over a ground rules hearing must—
- (a) ascertain the length of time the parties expect to take for examination-in-chief and cross-examination, including any breaks that may be required,
- 30 (b) to the extent that the commissioner considers it appropriate to do so, decide on the form and wording of the questions that are to be asked of the vulnerable witness,
- (c) if the commissioner considers it appropriate to do so, authorise the use of a supporter at the proceedings, in accordance with section 271L,
- (d) if the commissioner considers that there are steps that could reasonably be taken to enable the vulnerable witness to participate more effectively in the proceedings, direct that those steps be taken,
- 35 (e) subject to section 72(8) which applies in relation to the commissioner as it applies in relation to the court, dispose of any application that—
- (i) has been made under section 275(1) or 288F(2), and
- 40 (ii) has not yet been disposed of by the court,

(f) consider whether the proceedings should take place on the date fixed by the court and postpone the proceedings if the commissioner considers that it is in the interests of justice to do so having regard to all the circumstances, including—

5 (i) whether the parties are likely to be ready for the proceedings to take place on the date fixed by the court and if not, the reasons for that,

(ii) any views expressed by the parties on whether the proceedings should be postponed, and

10 (iii) whether postponement is in the interests of the vulnerable witness, and

(g) consider and, if appropriate, make a decision on, any other matter that the commissioner considers could be usefully dealt with before the proceedings take place.”.

15 (3) In section 271I(1A), after “proceedings”, in the second place where it occurs, insert “or it was so directed at the ground rules hearing”.

(4) In section 271I, after subsection (4), insert—

“(4A) It is not necessary (in solemn cases) for an indictment to have been served before—

20 (a) a party may lodge a vulnerable witness notice which specifies the special measure of taking evidence by commissioner as the special measure or one of the special measures which the party considers to be the most appropriate for the purpose of taking the witness’s evidence,

25 (b) a court may make an order authorising the use of the special measure of taking evidence by commissioner, whether on its own or in combination with any other special measure specified in the same vulnerable witness notice,

(c) a court may appoint a commissioner under subsection (1), or

30 (d) proceedings may take place before a commissioner appointed under subsection (1).”.

(5) In section 271I(8)(a), after “trial” insert “which the court (when it appoints the commissioner) expects will be”.

(6) In section 271, in subsection (3)—

35 (a) for “above and section 271B(1)(b) below” substitute “, section 271B(1)(b) and sections 271BZA to 271BZC”,

(b) for “commenced” substitute “commenced—

40 (a) where it is relevant to a court’s consideration of whether to authorise the use of the special measure of taking evidence by commissioner (on its own or in combination with any other special measure) and the accused has appeared on petition, on the date when the accused appeared on petition, or

(b) in any other case, on the date”.

(7) In section 72(6)(b)(iii), after “hearing” insert “(to the extent that the application has not already been disposed of)”.

(8) In section 271D, after subsection (6), insert—

“(6A) In this section, “court” includes a commissioner appointed under section 271I(1).”.

*Notification procedure for standard special measures*

5 **6 Using only standard special measures**

(1) The Criminal Procedure (Scotland) Act 1995 is amended as follows.

(2) After section 271A, insert—

**“271AA Using only standard special measures**

(1) This section applies where—

10 (a) a child witness or a deemed vulnerable witness is to give evidence at, or for the purposes of, a hearing in relevant criminal proceedings, and

(b) the party citing or intending to cite the witness considers that it is most appropriate for the witness to give evidence with the benefit of—

(i) one or more standard special measures, and

15 (ii) no other special measure.

(2) The party must, by the required time, lodge with the clerk of court a notice specifying—

(a) the standard special measure or measures that the party considers to be the most appropriate for the purpose of taking the witness’s evidence,

20 (b) whether the witness is a child witness or a deemed vulnerable witness,

(c) if the witness is a child witness, the witness’s age, and

(d) such other information as may be prescribed by Act of Adjournal.

(3) The party lodging a notice with the clerk of court under subsection (2) must, at the same time, intimate the notice to the other parties to the proceedings.

25 (4) If the party lodges a notice with the clerk of court by the required time, the witness is entitled to the benefit of the standard special measure or measures specified in the notice as if the use of that measure or measures were authorised by an order made by the court under section 271A(5)(a).

30 (5) If the party does not lodge a notice with the clerk of court by the required time, the court may, on cause shown, allow the party to lodge a vulnerable witness notice in accordance with section 271A (despite its being lodged later than the deadline for lodging a vulnerable witness notice).

(6) In this section, the “required time” means—

(a) any time before a date has been fixed for one of the following—

35 (i) a preliminary hearing in the High Court,

(ii) a first diet in the sheriff court, or

(iii) a hearing at which the evidence is to be given, or

(b) if a date has been fixed—

- (i) for a preliminary hearing in the High Court, no later than 14 clear days before the preliminary hearing,
- (ii) for a first diet in the sheriff court in the case of proceedings on indictment, no later than 7 clear days before the first diet, or
- (iii) in a case in which the proceedings are not to take place in the High Court or on indictment in the sheriff court, for a hearing at which the evidence is to be given, no later than 14 clear days before that hearing.

(7) This section does not apply in a case to which section 271B or 271BZA applies.”.

(3) In section 271A—

- (a) in subsection (2), for “A party” substitute “Subject to section 271AA, a party”,
- (b) in subsection (6)(b), after “above” insert “or lodged a notice with the clerk of court in accordance with section 271AA by the time specified in that section”,
- (c) in subsection (6)(c), after “above” insert “or under section 271AA(5)”,
- (d) in subsection (14), after “section” in the first place where it occurs insert “and section 271AA”.

(4) In section 271D, after subsection (4), insert—

“(4A) In a case in which a notice has been provided to the clerk of court in accordance with section 271AA(2), this section is to have effect as if the special measure or measures specified in the notice were authorised by an order under section 271A.”.

(5) In section 271E(1)(a), after “notice” in the first place where it occurs insert “, a notice that is to be lodged with the clerk of court under section 271AA”.

#### *Timeframes for vulnerable witness notices*

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

- (1) The Criminal Procedure (Scotland) Act 1995 is amended as follows.
- (2) In section 271A(3A), for “measure, subsection (3)(a) does not apply” substitute “measure—
  - (a) subsection (3)(a) does not apply, and
  - (b) subsection (5) has effect as if the words “not earlier than 7 days and” were omitted”.

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

- (1) The Criminal Procedure (Scotland) Act 1995 is amended as follows.
- (2) In section 271A(13A), for paragraphs (a) to (c) substitute—
  - “(a) any time before a date has been fixed for one of the following—
    - (i) a preliminary hearing in the High Court,
    - (ii) a first diet in the sheriff court, or

- (iii) a hearing at which the evidence is to be given, or
- (b) if a date has been fixed—
- (i) for a preliminary hearing in the High Court, no later than 14 clear days before the preliminary hearing,
- 5 (ii) for a first diet in the sheriff court in the case of proceedings on indictment, no later than 7 clear days before the first diet, or
- (iii) in a case in which the proceedings are not to take place in the High Court or on indictment in the sheriff court, for a hearing at which the evidence is to be given, no later than 14 clear days before that hearing.”.
- 10

### *General*

## **9 Consequential amendments**

- (1) The Criminal Procedure (Scotland) Act 1995 is amended as follows.
- (2) In section 271A(5), for “section 271B” substitute “sections 271B to 271BZB”.
- 15 (3) In section 271D(7), for “section 271B” substitute “sections 271B to 271BZC”.
- (4) In section 271F(2), after paragraph (a) insert—
- “(aa) section 271AA applies in relation to the accused with the following modifications—
- 20 (i) in subsection (1)(a), the reference to a child witness or a deemed vulnerable witness is to be read as if it were a reference to the accused,
- (ii) in subsections (1) to (5), references to the party citing or intending to cite the witness are to be read as if they were references to the accused,
- 25 (iii) in subsections (1)(b), (2)(a) and (4), references to the witness are to be read as if they were references to the accused,
- (iv) subsection (2) has effect as if for paragraphs (b) and (c) there were substituted—
- “(b) that the notice is lodged by the accused and that the accused is a child witness,
- 30 (c) the accused’s age, and”, and”.

## **10 Ancillary provision**

- (1) The Scottish Ministers may by regulations make any incidental, supplementary, consequential, transitional, transitory or saving provision they consider appropriate for the purposes of, in connection with or for giving full effect to this Act or any provision made under it.
- 35 (2) Regulations under this section may modify any enactment (including this Act).
- (3) Regulations under this section—
- 40 (a) are subject to the affirmative procedure if they add to, replace or omit any part of the text of this or any other Act,

(b) otherwise, are subject to the negative procedure.

**11 Commencement**

- 5 (1) This section and sections 10 and 12 come into force on the day after Royal Assent.
- (2) The other provisions of this Act come into force on such day as the Scottish Ministers  
may by regulations appoint.
- (3) Regulations under this section may—
- (a) appoint different days for—
- 10 (i) different courts or descriptions of court,
- (ii) witnesses of different types,
- (iii) witnesses of different ages,
- (iv) other different purposes,
- (b) include transitional, transitory or saving provision.

**12 Short title**

15 The short title of this Act is the Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2018.

# **Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill**

[AS AMENDED AT STAGE 2]

An Act of the Scottish Parliament to make provision about the use of special measures for the purpose of taking the evidence of child witnesses and other vulnerable witnesses in criminal proceedings; to make provision about the procedure relating to taking evidence by commissioner; to make provision about the procedure for authorisation of standard special measures; and for connected purposes.

Introduced by: Michael Matheson  
On: 12 June 2018  
Bill type: Government Bill

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