

# Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill

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## Delegated Powers Memorandum

### Introduction

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

2. The contents of this Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

### Outline of Bill Provisions

3. The main purpose of the Bill is to improve how children, in the first instance, and other vulnerable witnesses participate in our criminal justice system by enabling the much greater use of pre-recording their evidence in advance of a criminal trial. In summary:

- Sections 1 and 2 of the Bill are concerned with child witnesses in certain serious criminal cases. In particular, they are concerned with the special measures which are to be used for the purpose of taking the evidence of child witnesses. The Bill requires that, in the most serious criminal cases, the court must enable child witnesses to give all of their evidence in advance of the criminal trial, without having to attend the trial. There are few exceptions to this new rule.
- Section 3 provides a power for the Scottish Ministers to make regulations extending the new rule so that it applies to deemed vulnerable witnesses

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as well as child witnesses. “Deemed vulnerable witness” is defined in section 271(1)(c) and (5) of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”).

- Section 4 affects cases which do not fall within the new rule. It limits the court’s power to vary special measures which have been in put in place for the purpose of taking the evidence of a child witness or vulnerable witness if the current special measures enable the witness’s evidence to be taken in advance of the criminal trial.
- Section 5 makes provision about the special measure of taking of evidence by a commissioner. In particular, it introduces a new type of procedural hearing, to be known as a ground rules hearing, which is to be used for the purpose of preparing for the hearing before the commissioner.
- Section 6 introduces a simplified procedure for securing the use of the current standard special measures of live link, screen and supporter. Standard special measures are special measures which the court must authorise if they are requested by the party citing a child or deemed vulnerable witness. Under the simplified procedure, the party will notify the clerk of the court of the intention to use a standard special measure, rather than having to lodge a vulnerable witness notice with the court in the way they have to do if requesting other (non-standard) special measures. The special measure will be put in place administratively, without the need for a court order.
- Sections 7 and 8 make adjustments to the timeframe within which a court must consider a vulnerable witness notice and the timeframe within which a vulnerable witness notice must be lodged with the court.
- Sections 9 to 12 are general provisions, dealing with consequential amendments, ancillary provision, commencement and the short title.

## Rationale for Subordinate Legislation

4. In deciding whether provisions should be set out on the face of the Bill or left to subordinate legislation, we have carefully considered the need to:

- achieve the appropriate balance between the importance of the issue and the need to provide flexibility to respond to changing and unforeseen circumstances quickly, in light of experience, without the need for primary legislation; and

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- ensure the proper use of parliamentary time is made.
5. The relevant provisions are described below in detail below. For each provision, the memorandum sets out:
- the person upon whom the power to make subordinate legislation is conferred and the form in which the power is to be exercised;
  - why it is considered appropriate to delegate the power to subordinate legislation and the purpose of each provision; and
  - the parliamentary procedure to which the exercise of the power to make subordinate legislation is to be subject, if any.

## Delegated Powers

### Section 1 – Child Witnesses in Certain Solemn Cases

Power Conferred On: The Scottish Ministers

Power Exercisable By: Regulations Made by Scottish  
Statutory Instrument

Parliamentary Procedure: Affirmative  
Provision

6. Section 1 of the Bill inserts new section 271BZA into the 1995 Act. This 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”). Inserted section 271BZA provides that the new rule applies in relation to child witnesses, other than the accused, in solemn criminal proceedings where the alleged offence is one of those listed in subsection (2). 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 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.

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## Reason for taking power

7. Given that the new rule imposes significant demands on the criminal justice system, it is proposed that it should initially apply to child witnesses in the most serious cases, linked to specific offences. However, the Cabinet Secretary for Justice's vision, which the Bill is a step towards, is that, where possible, child witnesses should not have to give evidence during a criminal trial. Therefore this power will allow the Scottish Ministers to alter or remove the list of specific offences. This will give some helpful flexibility to add new offences to the list in the future if that is considered appropriate. This is a similar power to modify a list of offences to that already contained in s271(1AA) of the 1995 Act relating to deemed vulnerable witnesses. This power also means that ultimately it could be possible for the rule to apply to all child witnesses in solemn cases by removal of the list of offences. It is important that any extension of the new rule is fully considered and implemented over time in a manageable and effective way. Accordingly the power in subsection 9 is sought due to the need to provide the flexibility to consider any extension of the new rule without the need for further primary legislation, and the need to make proper use of valuable parliamentary time.

## Choice of procedure

8. Regulations made under this section are subject to the affirmative procedure. This is considered appropriate as the power can be used to provide for substantive policy matters in relation to the way evidence is taken in criminal proceedings from children under 18, and because it involves the amendment of primary legislation.

## Section 3 – Deemed Vulnerable Witnesses in Certain Solemn Cases

Power Conferred On: The Scottish Ministers  
Power Exercisable By: Regulations Made by Scottish  
Statutory Instrument  
Parliamentary Procedure: Affirmative

## Provision

9. Section 3 provides a power for the Scottish Ministers to make regulations extending the application of section 271BZA so that the new rule applies

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where deemed vulnerable witnesses are to give evidence in solemn proceedings. 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.

10. 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.

11. 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 court or different descriptions of deemed vulnerable witness. For example, regulations could be made applying to one category of deemed vulnerable witness in the High Court.

## Reason for taking the power

12. The Scottish Government considers that deemed vulnerable witnesses would also greatly benefit from the greater use of pre-recording and this power therefore ensures that this Bill’s most significant reform can be extended beyond child witnesses in due course. However, the Scottish Government does not underestimate that such a move is a major change therefore a regulation making power is considered the most flexible and appropriate legislative vehicle so any extension of the rule is fully considered and implemented over time in a manageable and effective way. Accordingly the power in section 3 is sought due to the need to provide the flexibility to consider any extension of the new rule without the need for further primary legislation, and the need to make proper use of valuable parliamentary time. The Scottish Government also considers it appropriate that this power only applies to the clearly defined category of deemed vulnerable witnesses

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(rather than all vulnerable witnesses) so that the extension of this new power is within appropriate limits for secondary legislation.

### Choice of procedure

13. Regulations made under this section are subject to the affirmative procedure. This is considered appropriate as the power can be used to provide for substantive policy matters in relation to the way evidence is taken in criminal proceedings from deemed vulnerable witnesses.

### Section 6 – Using Only Standard Special Measures

Power Conferred On: The High Court of Justiciary

Power Exercisable By: Act of Adjournal

Parliamentary Procedure: Laid, No Procedure

### Provision

14. 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. 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. Subsection (2)(d) of the inserted section provides a power for the High Court to prescribe by Act of Adjournal that other information be specified in the notice.

### Reason for taking power

15. The current notice procedure for standard special measures in section 271A of the 1995 Act enables the information contained in the vulnerable witness notice to also include any information prescribed by Act of Adjournal. This gives flexibility to the High Court to ensure that the courts receive all the information that they require to order the appropriate special measures for that witness. Although the new s271AA creates a more simplified intimation process it is still considered appropriate to ensure that the courts have the power to prescribe any other information that may be needed. This is particularly important as under this new process there would no longer be

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any requirement for a judicial order to be made to grant a standard special measure and instead it would be an administrative process.

### Choice of procedure

16. This power is subject only to the default laying requirement under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010. Acts of Adjournment are not generally subject to parliamentary procedure. In this case, the prescription of additional information would be to enable the courts to deal more efficiently with the putting in place of standard special measures. This is a matter for the courts to regulate in accordance with the principle of separation of powers.

### Section 10 – Ancillary Provision

Power Conferred On: The Scottish Ministers

Power Exercisable By: Regulations Made by Scottish Statutory Instrument

Parliamentary Procedure: Affirmative If Amends Primary Legislation, Otherwise Negative Provision

17. Section 10 of the Bill provides that the Scottish Ministers may by regulations make such incidental, supplementary, consequential, transitional, transitory or saving provision as they consider appropriate for the purposes of, or in connection with, or for giving full effect to, any provision made by or under the Bill. Section 10(2) allows regulations under section 10(1) to modify any enactment, including this Bill.

### Reason for taking power

18. As with any new body of law, this Bill may give rise to a need for a range of ancillary provisions. Flexibility to make such changes in the light of experience of the Bill's provisions in operation may be important. For example, consequential provisions may be required to make necessary changes to related legislation. Without the power to make ancillary provision it may be necessary to return to the Parliament, through subsequent primary legislation, to deal with technical, operational or implementation matters clearly within the scope and policy intentions of the original Bill.

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19. That would not be an efficient use of resources by the Parliament or the Scottish Government. The power whilst potentially wide, is limited to the extent that it can only be used if the Scottish Ministers consider it appropriate to do so, for the purposes of, or in connection with, or for the purpose of giving full effect to any provision made by, or by virtue of, the Bill. Given that the provisions in this Bill apply to vulnerable categories of children and adults, it is considered appropriate that there is a power to ensure any necessary ancillary changes can be made to the special measure process to ensure the smooth implementation of these reforms for these vulnerable witnesses.

### Choice of procedure

20. Regulations made under this power which add to, replace or omit any part of the text of an Act are subject to affirmative procedure. Otherwise, such regulations are subject to the negative procedure. This approach is normal for ancillary powers of this type.

### Section 11 – Commencement

Power Conferred On: The Scottish Ministers  
Power Exercisable By: Regulations Made by Scottish  
Statutory Instrument  
Parliamentary Procedure: Laid, No Procedure  
Provision

21. Section 11(2) enables the Scottish Ministers to commence the provisions of the Bill on such day(s) as the Scottish Ministers appoint. Section 11(3) provides that such regulations may appoint different days for different courts or descriptions of court, witnesses of different types, witnesses of different ages or other different purposes. 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 could also, for example, bring section 1 into force earlier for children under the age of 12 than for children aged 12 or over. Regulations may include transitional, transitory or saving provision.



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## Reason for taking power

22. The power will enable the Scottish Ministers to bring the provisions of the Bill into force and to manage the effects of their commencement. Given that the new rule imposes significant demands on the criminal justice system, it will be important that this is phased in to ensure its smooth implementation in practice.

## Choice of procedure

23. This power is subject only to the default laying requirement under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010. This is normal for commencement regulations. The Scottish Government anticipates the use of this power to effect straightforward transitional, transitory and saving provisions only. The Scottish Government would intend to make use of the powers in section 10 to give effect to complex transitional, transitory or saving provisions.

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