

This document relates to the Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill as amended at Stage 2 (SP Bill 34A)

## Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill [as amended at Stage 2]

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### Revised Explanatory Notes

#### Introduction

1. As required under Rule 9.7.8A of the Parliament's Standing Orders, these Revised Explanatory Notes are published to accompany the Vulnerable Witnesses (Criminal Evidence) (Scotland) (Bill) (which was introduced in the Scottish Parliament on 12 June 2018) as amended at Stage 2. Text has been added or deleted to reflect the amendments made to the Bill at Stage 2 and these changes are indicated by sidelining in the right margin.
2. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.
3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section, or a part of a section, does not seem to require any explanation or comment, none is given.
4. The Bill 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 Bill. The amendments are shown as tracked changes. Where changes have been made at Stage 2, these are shown in colour as well as sidelining. As inserted sections

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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 Bill. The second version is the version as amended by the Bill 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.

## The Bill

5. Explanatory Notes on the various sections of the Bill are provided below. A detailed explanation of the Bill's purpose can be found in the Policy Memorandum. The Policy Memorandum also sets out the policy intentions underpinning the Bill and the relationship of the Bill to the wider programme of work to improve the support available to vulnerable witnesses.

## Child witnesses

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

6. 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)**

7. 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

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- 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

8. 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.

9. 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.

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10. 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.

11. 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

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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).

12. 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)**

13. 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

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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.

14. 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.

15. 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 Bill) are words which are inserted in section 271A by section 6(3)(a) of the Bill.

16. 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).

17. 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

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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).

18. 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)**

19. 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.

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20. 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 Bill 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 Bill but it is not to apply in cases in which the new rule in section 271BZA applies.

21. 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



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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.

22.23. 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.

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

23.24. 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 Bill, 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.

24.25. 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

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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.

25.26. 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

26.27. 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.

27.28. 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.

28.29. 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.

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29.30. 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

30.31. 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 20 above).

31.32. 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.

32.33. 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

33.34. 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'

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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 or sheriff presiding over that other hearing or diet 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 or sheriff is to preside over the ground rules hearing.

34.35. 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.

35.36. 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).

36.37. 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.

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37.38. 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.

38.39. 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.

39.40. 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.

40.41. 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

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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.

41.42. 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. 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).

42.43. 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

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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

43.44. 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.

44.45. 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.

45.46. 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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46.47. 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

47.48. 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.

48.49. 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 44 to 47 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

49.50. 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



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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.

## General

### Section 9 – Consequential amendments

50.51. Section 9 makes minor amendments to the 1995 Act which are consequential on the other provisions of the Bill.

### Section 10 – Ancillary provision

51.52. Section 10 enables the Scottish Ministers to make regulations making ancillary provision to give full effect to the Bill or any provision made under it, including by modifying any enactment. Regulations made under section 10 which modify an enactment attract the affirmative Parliamentary procedure. If they do not modify an enactment, they attract the negative Parliamentary procedure.

### Section 11 - Commencement

52.53. Section 11 deals with the commencement of the Bill provisions. Sections 10 (ancillary provision), 11 (commencement) and 12 (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,

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bring section 1 into force earlier for children under the age of 12 than for children aged 12 or over.

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## Annex

### Sections 271 to 271M of the Criminal Procedure (Scotland) Act 1995 as amended by the Bill

This Annex sets out the sections of the Criminal Procedure (Scotland) Act 1995 amended by this Bill. The changes this Bill proposes are shown in tracked changes. This text is provided for guidance only and its accuracy is not warranted.

#### Special measures for child witnesses and other vulnerable witnesses

##### 271 Vulnerable witnesses: main definitions

- (1) For the purposes of this Act, a person who is giving or is to give evidence at, or for the purposes of, a hearing in relevant criminal proceedings is a vulnerable witness if—
  - (a) the person is under the age of 18 on the date of commencement of the proceedings in which the hearing is being or is to be held,
  - (b) there is a significant risk that the quality of the evidence to be given by the person will be diminished by reason of—
    - (i) mental disorder (within the meaning of section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003), or
    - (ii) fear or distress in connection with giving evidence at the hearing,
  - (c) the offence is alleged to have been committed against the person in proceedings for—
    - (i) an offence listed in any of paragraphs 36 to 59ZL of Schedule 3 to the Sexual Offences Act 2003,
    - (ii) an offence under section 22 of the Criminal Justice (Scotland) Act 2003 (traffic in prostitution etc.),
    - (iii) an offence under section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (trafficking people for exploitation),
    - (iiia) an offence of human trafficking (see section 1 of the Human Trafficking and Exploitation (Scotland) Act 2015),

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(iv) an offence the commission of which involves domestic abuse, or

(v) an offence of stalking, or

(d) there is considered to be a significant risk of harm to the person by reason only of the fact that the person is giving or is to give evidence in the proceedings.

(1AA) The Scottish Ministers may by order subject to the affirmative procedure modify subsection (1)(c).

(2) In determining whether a person is a vulnerable witness by virtue of subsection (1)(b) or (d) above, the court shall take into account—

(a) the nature and circumstances of the alleged offence to which the proceedings relate,

(b) the nature of the evidence which the person is likely to give,

(c) the relationship (if any) between the person and the accused,

(d) the person's age and maturity,

(e) any behaviour towards the person on the part of—

(i) the accused,

(ii) members of the family or associates of the accused,

(iii) any other person who is likely to be an accused or a witness in the proceedings, and

(f) such other matters, including—

(i) the social and cultural background and ethnic origins of the person,

(ii) the person's sexual orientation,

(iii) the domestic and employment circumstances of the person,

(iv) any religious beliefs or political opinions of the person, and

(v) any physical disability or other physical impairment which the person has,

as appear to the court to be relevant.

(3) For the purposes of subsection (1)(a), section 271B(1)(b) and sections 271BZA to 271BZC above and section 271B(1)(b) below, proceedings shall be taken to have commenced—

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- (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 commenced when the indictment or, as the case may be, complaint is served on the accused.
- (4) In subsection (1)(b) above, the reference to the quality of evidence is to its quality in terms of completeness, coherence and accuracy.
- (4A) In determining whether a person is a vulnerable witness under subsection (1)(b) or (d), the court must—
- (a) have regard to the best interests of the witness, and
  - (b) take account of any views expressed by the witness.
- (5) In this section and sections 271A to 271M of this Act—
- “child witness” means a vulnerable witness referred to in subsection (1)(a),
  - “court” means the High Court or the sheriff court,
  - “deemed vulnerable witness” means a vulnerable witness referred to in subsection (1)(c),
  - “hearing in relevant criminal proceedings” means any hearing in the course of any criminal proceedings in the High Court or the sheriff court.
- (6) In sections 271A to 271M of this Act, “special measure” means any of the special measures set out in, or prescribed under, section 271H below.

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**Version of section 271A as amended by the Bill (in cases to which section 271BZA does not apply)**

**271A Child and deemed vulnerable witnesses**

- (1) Where a child witness or a deemed vulnerable witness is to give evidence at or for the purposes of a hearing in relevant criminal proceedings, the witness is entitled, subject to—
- (a) subsections (2) to (13) below, and
  - (b) section 271D of this Act,

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to the benefit of one or more of the special measures for the purpose of giving evidence.

- (2) A party Subject to section 271AA, a party citing or intending to cite a child witness or a deemed vulnerable witness shall, by the required time, lodge with the court a notice (referred to in this Act as a “vulnerable witness notice”)—
- (a) specifying the special measure or measures which the party considers to be the most appropriate for the purpose of taking the witness's evidence, or
  - (b) if the party considers that the witness should give evidence without the benefit of any special measure, stating that fact.
- (3) A vulnerable witness notice shall contain or be accompanied by—
- (a) a summary of any views expressed for the purposes of section 271E(2)(b) of this Act, and
  - (b) such other information as may be prescribed by Act of Adjournal.
- (3A) In the case where a vulnerable witness notice under subsection (2)(a) specifies only a standard special 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. measure, subsection (3)(a) does not apply.
- (4) The court may, on cause shown, allow a vulnerable witness notice to be lodged after the required time.
- (4A) Any party to the proceedings may, not later than 7 days after a vulnerable witness notice has been lodged, lodge with the court a notice (referred to in this section as an “objection notice”) stating—
- (a) an objection to any special measure (other than a standard special measure) specified in the vulnerable witness notice that the party considers to be inappropriate, and
  - (b) the reasons for that objection.
- (4B) The court may, on cause shown, allow an objection notice to be lodged after the period referred to in subsection (4A).
- (4C) If an objection notice is lodged in accordance with subsection (4A) or (4B)—

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- (a) subsection (5)(a)(ii) does not apply to the vulnerable witness notice, and
  - (b) the court must make an order under subsection (5A).
- (5) The court shall, not earlier than 7 days and not later than 14 days after a vulnerable witness notice has been lodged, consider the notice in the absence of the parties and, subject to section 271B sections 271B to 271BZB of this Act—
- (a) in the case of a notice under subsection (2)(a) above—
    - (i) if a standard special measure is specified in the notice, make an order authorising the use of that measure for the purpose of taking the witness's evidence, and
    - (ii) if any other special measure is specified in the notice and the court is satisfied on the basis of the notice that it is appropriate to do so, make an order authorising the use of the special measure (in addition to any authorised by virtue of an order under sub-paragraph (i) above) for the purpose of taking the witness's evidence,
  - (b) in the case of a notice under subsection (2)(b) above, if—
    - (i) the summary of views accompanying the notice under subsection (3)(a) above indicates that the witness has expressed a wish to give evidence without the benefit of any special measure, and
    - (ii) the court is satisfied on the basis of the notice that it is appropriate to do so,make an order authorising the giving of evidence by the witness without the benefit of any special measure, or
  - (c) if—
    - (i) paragraph (a)(ii) or (b) above would apply but for the fact that the court is not satisfied as mentioned in that paragraph, or
    - (ii) in the case of a notice under subsection (2)(b), the summary of views accompanying the notice under subsection (3)(a) above indicates that the witness has not expressed a wish to give evidence without the benefit of any special measure,make an order under subsection (5A) below.

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(5A) That order is an order—

- (a) in the case of proceedings in the High Court where the preliminary hearing is yet to be held, appointing the vulnerable witness notice to be disposed of at that hearing;
- (b) in the case of proceedings on indictment in the sheriff court where the first diet is yet to be held, appointing the vulnerable witness notice to be disposed of at that diet; or
- (c) in any other case, appointing a diet to be held before the hearing at which the evidence is to be given and requiring the parties to attend the diet.

(6) Subsection (7) below applies where—

- (a) it appears to the court that a party intends to call a child witness or a deemed vulnerable witness to give evidence at or for the purposes of a hearing in relevant criminal proceedings,
- (b) the party has not lodged a vulnerable witness notice in respect of the witness by the time specified in subsection (2) above or lodged a notice with the clerk of court in accordance with section 271AA by the time specified in that section, and
- (c) the court has not allowed a vulnerable witness notice in respect of the witness to be lodged after that time under subsection (4) above or under section 271AA(5).

(7) Where this subsection applies, the court shall—

- (a) order the party to lodge a vulnerable witness notice in respect of the witness by such time as the court may specify, or
- (b) where the court does not so order—
  - (i) in the case of proceedings on indictment where this subsection applies at or before the preliminary hearing or, as the case may be, the first diet, at that hearing or diet make an order under subsection (9) below; or
  - (ii) in any other case, make an order appointing a diet to be held before the hearing at which the evidence is to be given and requiring the parties to attend the diet.

(8) On making an order under subsection (5A)(c) or (7)(b)(ii) above, the court may postpone the hearing at which the evidence is to be given.

(8A) Subsection (9) below applies to—



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- (a) a preliminary hearing or first diet, so far as the court is—
    - (i) by virtue of an order under subsection (5A)(a) or (b) above, disposing of a vulnerable witness notice at the hearing or diet; or
    - (ii) by virtue of subsection (7)(b)(i) above, to make an order under subsection (9) at the hearing or diet; and
  - (b) a diet appointed under subsection (5A)(c) or (7)(b)(ii) above.
- (9) At Subject to section 271B, at a hearing or diet to which this subsection applies, the court, after giving the parties an opportunity to be heard—
- (a) in a case where any of the standard special measures has been authorised by an order under subsection (5)(a)(i) above, may make an order authorising the use of such further special measure or measures as it considers appropriate for the purpose of taking the witness's evidence, and
  - (b) in any other case, shall make an order—
    - (i) authorising the use of such special measure or measures as the court considers to be the most appropriate for the purpose of taking the witness's evidence, or
    - (ii) that the witness is to give evidence without the benefit of any special measure.
- (10) The court Subject to section 271B, the court may make an order under subsection (9)(b)(ii) above only if satisfied—
- (a) where the witness has expressed a wish to give evidence without the benefit of any special measure, that it is appropriate for the witness so to give evidence, or
  - (b) in any other case, that—
    - (i) the use of any special measure for the purpose of taking the evidence of the witness would give rise to a significant risk of prejudice to the fairness of the hearing at which the evidence is to be given or otherwise to the interests of justice, and
    - (ii) that risk significantly outweighs any risk of prejudice to the interests of the witness if the order is made.
- (11) A hearing or diet to which subsection (9) above applies may—

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(a) on the application of the party citing or intending to cite the witness in respect of whom the diet is to be held, or

(b) of the court's own motion,

be held in chambers.

(12) A diet appointed under subsection (5A)(c) or (7)(b)(ii) above in any case may be conjoined with any other diet to be held before the hearing at which the evidence is to be given.

(13) A party lodging a vulnerable witness notice or an objection notice shall, at the same time, intimate the notice to the other parties to the proceedings.

(13A) In subsections (2) and (4) above, "the required time" means—

(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,

(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.

a) in the case of proceedings in the High Court, no later than 14 clear days before the preliminary hearing;

(b) in the case of proceedings on indictment in the sheriff court, no later than 7 clear days before the first diet;

(c) in any other case, no later than 14 clear days before [ the hearing at which the evidence is to be given.

(14) In this section and section 271AA, references to a standard special measure are to any of the following special measures—

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- (a) the use of a live television link in accordance with section 271J of this Act,
  - (b) the use of a screen in accordance with section 271K of this Act, and
  - (c) the use of a supporter in accordance with section 271L of this Act.
- (15) The Scottish Ministers may, by order subject to the affirmative procedure—
- (a) modify subsection (14),
  - (b) in consequence of any modification made under paragraph (a)—
    - (i) prescribe the procedure to be followed when standard special measures are used, and
    - (ii) so far as is necessary, modify sections 271A to 271M of this Act.

Version of section 271A as amended by the Bill and with the modifications made by sections 271BZB (in cases to which section 271BZA applies)

#### 271A Child and deemed vulnerable witnesses

- (1) Where a child witness or a deemed vulnerable witness is to give evidence at or for the purposes of a hearing in relevant criminal proceedings, the witness is entitled, subject to—
- (a) subsections (2) to (13) below, and
  - (b) section 271D of this Act,
- to the benefit of one or more of the special measures for the purpose of giving evidence.
- (2) A party citing or intending to cite a child witness or a deemed vulnerable witness shall, by the required time, lodge with the court a notice (referred to in this Act as a “vulnerable witness notice”)—
- (a) specifying the special measure or measures which the party considers to be the most appropriate for the purpose of taking the witness's evidence, or

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(b) if the party considers that the witness should give evidence without the benefit of any special measure, stating that fact.

(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.

(3) A vulnerable witness notice shall contain or be accompanied by—

(a) a summary of any views expressed for the purposes of section 271E(2)(b) of this Act, and

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

(3A) In the case where a vulnerable witness notice under subsection (2)(a) specifies only a standard special 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. measure, subsection (3)(a) does not apply.

(4) The court may, on cause shown, allow a vulnerable witness notice to be lodged after the required time.

(4A) Any party to the proceedings may, not later than 7 days after a vulnerable witness notice has been lodged, lodge with the court a notice (referred to in this section as an “objection notice”) stating—

(a) an objection to any special measure (other than a standard special measure) specified in the vulnerable witness notice that the party considers to be inappropriate, and

(b) the reasons for that objection.

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- (4B) The court may, on cause shown, allow an objection notice to be lodged after the period referred to in subsection (4A).
- (4C) If an objection notice is lodged in accordance with subsection (4A) or (4B)—
- (a) subsection (5)(a)(ii) does not apply to the vulnerable witness notice, and
  - (b) the court must make an order under subsection (5A).
- (5) The court shall, not earlier than 7 days and not later than 14 days after a vulnerable witness notice has been lodged, consider the notice in the absence of the parties and, subject to section 271B sections 271B to 271BZB of this Act—
- (a) in the case of a notice under subsection (2)(a) above—
    - (i) if a standard special measure is specified in the notice, make an order authorising the use of that measure for the purpose of taking the witness's evidence, and
    - (ii) if any other special measure is specified in the notice and the court is satisfied on the basis of the notice that it is appropriate to do so, make an order authorising the use of the special measure (in addition to any authorised by virtue of an order under sub-paragraph (i) above) for the purpose of taking the witness's evidence,
  - (b) in the case of a notice under subsection (2)(b) above, if—
    - (i) the summary of views accompanying the notice under subsection (3)(a) above indicates that the witness has expressed a wish to give evidence without the benefit of any special measure, and
    - (ii) the court is satisfied on the basis of the notice that it is appropriate to do so,make an order authorising the giving of evidence by the witness without the benefit of any special measure, or
  - (c) if—
    - (i) paragraph (a)(ii) or (b) above would apply but for the fact that the court is not satisfied as mentioned in that paragraph, or

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- (ii) in the case of a notice under subsection (2)(b), the summary of views accompanying the notice under subsection (3)(a) above indicates that the witness has not expressed a wish to give evidence without the benefit of any special measure,

make an order under subsection (5A) below.

(5A) That order is an order—

- (a) in the case of proceedings in the High Court where the preliminary hearing is yet to be held, appointing the vulnerable witness notice to be disposed of at that hearing;
- (b) in the case of proceedings on indictment in the sheriff court where the first diet is yet to be held, appointing the vulnerable witness notice to be disposed of at that diet; or
- (c) in any other case, appointing a diet to be held before the hearing at which the evidence is to be given and requiring the parties to attend the diet.

(6) Subsection (7) below applies where—

- (a) it appears to the court that a party intends to call a child witness or a deemed vulnerable witness to give evidence at or for the purposes of a hearing in relevant criminal proceedings,
- (b) the party has not lodged a vulnerable witness notice in respect of the witness by the time specified in subsection (2) above or lodged a notice with the clerk of court in accordance with section 271AA by the time specified in that section, and
- (c) the court has not allowed a vulnerable witness notice in respect of the witness to be lodged after that time under subsection (4) above or under section 271AA(5).

(7) Where this subsection applies, the court shall—

- (a) order the party to lodge a vulnerable witness notice in respect of the witness by such time as the court may specify, or
- (b) where the court does not so order—
  - (i) in the case of proceedings on indictment where this subsection applies at or before the preliminary hearing or, as the case may be, the first diet, at that hearing or diet make an order under subsection (9) below; or

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- (ii) in any other case, make an order appointing a diet to be held before the hearing at which the evidence is to be given and requiring the parties to attend the diet.
- (8) On making an order under subsection (5A)(c) or (7)(b)(ii) above, the court may postpone the hearing at which the evidence is to be given.
- (8A) Subsection (9) below applies to—
  - (a) a preliminary hearing or first diet, so far as the court is—
    - (i) by virtue of an order under subsection (5A)(a) or (b) above, disposing of a vulnerable witness notice at the hearing or diet; or
    - (ii) by virtue of subsection (7)(b)(i) above, to make an order under subsection (9) at the hearing or diet; and
  - (b) a diet appointed under subsection (5A)(c) or (7)(b)(ii) above.
- (9) At Subject to section 271B, at a hearing or diet to which this subsection applies, the court, after giving the parties an opportunity to be heard—
  - (a) in a case where any of the standard special measures has been authorised by an order under subsection (5)(a)(i) above, may make an order authorising the use of such further special measure or measures as it considers appropriate for the purpose of taking the witness's evidence, and
  - (b) in any other case, shall make an order—
    - (i) authorising the use of such special measure or measures as the court considers to be the most appropriate for the purpose of taking the witness's evidence, or
    - (ii) that the witness is to give evidence without the benefit of any special measure.
- (10) The courtSubject to section 271B, the court may make an order under subsection (9)(b)(ii) above only if satisfied—
  - (a) where the witness has expressed a wish to give evidence without the benefit of any special measure, that it is appropriate for the witness so to give evidence, or
  - (b) in any other case, that—

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- (i) the use of any special measure for the purpose of taking the evidence of the witness would give rise to a significant risk of prejudice to the fairness of the hearing at which the evidence is to be given or otherwise to the interests of justice, and
- (ii) that risk significantly outweighs any risk of prejudice to the interests of the witness if the order is made.

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(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—

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(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—

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(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



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- (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.
- (11) A hearing or diet to which subsection (9) above applies may—
- (a) on the application of the party citing or intending to cite the witness in respect of whom the diet is to be held, or
  - (b) of the court's own motion,
- be held in chambers.
- (12) A diet appointed under subsection (5A)(c) or (7)(b)(ii) above in any case may be conjoined with any other diet to be held before the hearing at which the evidence is to be given.
- (13) A party lodging a vulnerable witness notice or an objection notice shall, at the same time, intimate the notice to the other parties to the proceedings.
- (13A) In subsections (2) and (4) above, “the required time” means—
- (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,
    - (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

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(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.

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- a) in the case of proceedings in the High Court, no later than 14 clear days before the preliminary hearing;
- (b) in the case of proceedings on indictment in the sheriff court, no later than 7 clear days before the first diet;
- (c) in any other case, no later than 14 clear days before [ the hearing at which the evidence is to be given.

(14) In this section and section 271AA, references to a standard special measure are to any of the following special measures—

- (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.
  - (a) the use of a live television link in accordance with section 271J of this Act,
  - (b) the use of a screen in accordance with section 271K of this Act, and
  - (c) the use of a supporter in accordance with section 271L of this Act.

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(15) The Scottish Ministers may, by order subject to the affirmative procedure—

- (a) modify subsection (14),
- (b) in consequence of any modification made under paragraph (a)—
  - (i) prescribe the procedure to be followed when standard special measures are used, and
  - (ii) so far as is necessary, modify sections 271A to 271M of this Act.

## 271AA Using only standard special measures

(1) This section applies where—

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- (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
    - (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,
  - (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.
- (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).
- (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—
    - (i) a preliminary hearing in the High Court,
    - (ii) a first diet in the sheriff court, or

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- (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.

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## 271B Further special provision for child witnesses under the age of 12

- (1) This section applies where a child witness—
  - (a) is to give evidence at, or for the purposes of, a hearing in relevant criminal proceedings in respect of any offence specified in subsection (2) below, and
  - (b) is under the age of 12 on the date of commencement of the proceedings in which the hearing is being or to be held.
- (2) The offences referred to in subsection (1)(a) above are—
  - (a) murder,
  - (b) culpable homicide,
  - (c) any offence to which section 288C of this Act applies,
  - (d) any offence which involves an assault on, or injury or a threat of injury to, any person (including any offence involving neglect or ill-treatment of, or other cruelty to, a child),
  - (e) abduction, and
  - (f) plagium.
- (3) Subsection (4) applies if the child witness expresses a wish to be present in the court-room for the purpose of giving evidence.

This document relates to the Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill as amended at Stage 2 (SP Bill 34A)

- (4) The court must make an order under section 271A or, as the case may be, 271D which has the effect of requiring the child witness to be present in the courtroom for the purpose of giving evidence unless the court considers that it would not be appropriate for the child witness to be present there for that purpose.
- (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).
- (5) Subsection (6) applies if the child witness—
  - (a) does not express a wish to be present in the court-room for the purpose of giving evidence, or
  - (b) expresses a wish to give evidence in some other way.
- (6) The court may not make an order under section 271A or 271D having the effect mentioned in subsection (4) unless the court considers that—
  - (a) the giving of evidence by the child witness in some way other than by being present in the court-room for that purpose would give rise to a significant risk of prejudice to the fairness of the trial 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 order were to be made.

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

(1)

**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—
  - (a) solemn proceedings, and
  - (b) in respect of an offence listed in subsection (2).
- (2) The offences are—

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- (a) murder,
  - (b) culpable homicide,
  - (c) assault to the danger of life,
  - (d) abduction,
  - (e) plagium,
  - (a)(f) a sexual offence to which section 288C applies,
    - (fa) an offence under section 1(1) of the Domestic Abuse (Scotland) Act 2018,
    - (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—

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- (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,

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- (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) Subsection (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) The section 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—

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- (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."

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- (5) The section has effect as if the following subsections were inserted after subsection (10)—

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

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(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.

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(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.

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(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.

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(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

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(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.

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(10F) This subsection applies if—

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(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,

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(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.

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(2) The section has effect as if—

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subsections (3A) to (3C) were omitted, and

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(aa) subsection (4A) were omitted, and

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(b) the following subsections were inserted after subsection (4A)—

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“(4B) Subsections (2) to (4) are subject to subsections (4C) to (4F).

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(4C) Unless the hearing has already commenced when the court commences its 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—

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- (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).

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(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—

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(a) that is requested by any party to the proceedings, and

(b) the earlier order authorises only the special measure of giving evidence 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 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 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.

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(4E) This subsection applies if—

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- (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.

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(4F) This subsection applies if—

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- (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

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

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## 271BZD Power to apply section 271BZA to deemed vulnerable witnesses

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(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.

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

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(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,

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(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,

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- (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).

(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.

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

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#### 271BA Assessment of witnesses

- (1) This section applies where a party intends to cite a witness other than a child witness or a deemed vulnerable witness to give evidence at, or for the purposes of, a hearing in relevant criminal proceedings.
- (2) The party intending to cite the witness must take reasonable steps to carry out an assessment under subsection (3).
- (3) An assessment must determine whether the person—
  - (a) is likely to be a vulnerable witness, and
  - (b) if so, what special measure or combination of special measures ought to be used for the purpose of taking the person's evidence.
- (4) In determining under subsection (3)(a) whether a person is likely to be a vulnerable witness the party must—
  - (a) take into account the matters mentioned in section 271(2),
  - (b) have regard to the best interests of the person, and
  - (c) take account of any views expressed by the person.

This document relates to the Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill as amended at Stage 2 (SP Bill 34A)

## 271C Vulnerable witness application

- (1) This section applies where a party citing or intending to cite a person (other than a child witness or a deemed vulnerable witness) to give evidence at, or for the purposes of, a hearing in relevant criminal proceedings (such a person being referred to in this section as “the witness”) and, having carried out an assessment under section 271BA, considers—
  - (a) that the witness is likely to be a vulnerable witness, and
  - (b) that a special measure or combination of special measures ought to be used for the purpose of taking the witness's evidence.
- (2) Where this section applies, the party citing or intending to cite the witness shall, by the required time, make an application (referred to as a “vulnerable witness application”) to the court for an order authorising the use of one or more of the special measures for the purpose of taking the witness's evidence.
- (3) A vulnerable witness application shall—
  - (a) specify the special measure or measures which the party making the application considers to be the most appropriate for the purpose of taking the evidence of the witness to whom the application relates, and
  - (b) contain or be accompanied by—
    - (i) a summary of any views expressed for the purposes of section 271E(2)(b) of this Act, and
    - (ii) such other information as may be prescribed by Act of Adjournal.
- (4) The court may, on cause shown, allow a vulnerable witness application to be made after the required time.
- (4A) Any party to the proceedings may, not later than 7 days after a vulnerable witness application has been lodged, lodge with the court a notice (referred to in this section as “an objection notice”) stating—
  - (a) an objection to any special measure specified in the vulnerable witness application that the party considers to be inappropriate, and
  - (b) the reasons for that objection.

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- (4B) The court may, on cause shown, allow an objection notice to be lodged after the period referred to in subsection (4A).
- (4C) If an objection notice is lodged in accordance with subsection (4A) or (4B)—
  - (a) subsection (5) does not apply to the vulnerable witness application, and
  - (b) the court must make an order under subsection (5A).
- (5) The court shall, not earlier than 7 days and not later than 14 days after a vulnerable witness application is made to it, consider the application in the absence of the parties and—
  - (a) make an order authorising the use of the special measure or measures specified in the application if satisfied on the basis of the application that—
    - (i) the witness in respect of whom the application is made is a vulnerable witness,
    - (ii) the special measures or measures specified in the application are the most appropriate for the purpose of taking the witness's evidence, and
    - (iii) it is appropriate to do so after having complied with the duty in subsection (8) below, or
  - (b) if not satisfied as mentioned in paragraph (a) above, make an order under subsection (5A) below.
- (5A) That order is an order—
  - (a) in the case of proceedings in the High Court where the preliminary hearing is yet to be held, appointing the vulnerable witness application to be disposed of at that hearing,
  - (b) in the case of proceedings on indictment in the sheriff court where the first diet is yet to be held, appointing the vulnerable witness application to be disposed of at that diet, or
  - (c) in any other case, appointing a diet to be held before the hearing at which the evidence is to be given and requiring the parties to attend the diet.
- (6) On making an order under subsection (5A)(c) above, the court may postpone the hearing at which the evidence is to be given.
- (6A) Subsection (7) below applies to—

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- (a) a preliminary hearing or first diet so far as the court is, by virtue of an order under subsection (5A)(a) or (b) above disposing of a vulnerable witness application at the hearing or diet, and
  - (b) a diet appointed under subsection (5A)(c) above.
- (7) At a hearing or diet to which this subsection applies, the court may—
- (a) after giving the parties an opportunity to be heard, and
  - (b) if satisfied that the witness in respect of whom the application is made is a vulnerable witness,
- make an order authorising the use of such special measure or measures as the court considers to be the most appropriate for the purpose of taking the witness's evidence.
- (8) In deciding whether to make an order under subsection (5)(a) or (7) above, the court shall—
- (a) have regard to—
    - (i) the possible effect on the witness if required to give evidence without the benefit of any special measure, and
    - (ii) whether it is likely that the witness would be better able to give evidence with the benefit of a special measure, and
  - (b) take into account the matters specified in subsection (2)(a) to (f) of section 271 of this Act.
- (9) A hearing or diet to which subsection (7) above applies may—
- (a) on the application of the party citing or intending to cite the witness in respect of whom the diet is to be held, or
  - (b) of the court's own motion,
- be held in chambers.
- (10) A diet appointed under subsection (5A)(c) above in any case may be conjoined with any other diet to be held before the hearing at which the evidence is to be given.
- (11) A party making a vulnerable witness application or an objection notice shall, at the same time, intimate the application or, as the case may be, the notice to the other parties to the proceedings.
- (12) In subsections (2) and (4) above, “the required time” means—



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- (a) in the case of proceedings in the High Court, no later than 14 clear days before the preliminary hearing,
- (b) in the case of proceedings on indictment in the sheriff court, no later than 7 clear days before the first diet,
- (c) in any other case, no later than 14 clear days before the hearing at which the evidence is to be given.

**Version of section 271D as amended by the Bill (in cases to which section 271BZA does not apply)**

**271D Review of arrangements for vulnerable witnesses**

- (1) In any case in which a person who is giving or is to give evidence at or for the purposes of a hearing in relevant criminal proceedings (referred to in this section as the “witness”) is or appears to the court to be a vulnerable witness, the court may at any stage in the proceedings (whether before or after the commencement of the hearing or before or after the witness has begun to give evidence)—
  - (a) on the application of any party to the proceedings, or
  - (b) of its own motion,review the current arrangements for taking the witness's evidence and, after giving the parties an opportunity to be heard, make an order under subsection (2) below.
- (2) The order which may be made under this subsection is—
  - (a) where the current arrangements for taking the witness's evidence include the use of a special measure or combination of special measures authorised by an order under section 271A or 271C of this Act or under this subsection (referred to as the “earlier order”), an order varying or revoking the earlier order, or
  - (b) where the current arrangements for taking the witness's evidence do not include any special measure, an order authorising the use of such special measure or measures as the court considers most appropriate for the purpose of taking the witness's evidence.
- (3) An order under subsection (2)(a) above varying an earlier order may—

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(a) add to or substitute for any special measure authorised by the earlier order such other special measure as the court considers most appropriate for the purpose of taking the witness's evidence, or

(b) where the earlier order authorises the use of a combination of special measures for that purpose, delete any of the special measures so authorised.

(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.

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(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—

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(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

(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
- (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.

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(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—

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(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,

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(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

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- (c) it does not authorise the giving of any of the witness's evidence without the benefit of any special measure.
- (4) The court may make an order under subsection (2)(a) above revoking an earlier order only if satisfied—
  - (a) where the witness has expressed a wish to give or, as the case may be, continue to give evidence without the benefit of any special measure, that it is appropriate for the witness so to give evidence, or
  - (b) in any other case, that—
    - (i) the use, or continued use, of the special measure or measures authorised by the earlier order for the purpose of taking the witness's evidence would give rise to a significant risk of prejudice to the fairness of the hearing or otherwise to the interests of justice, and
    - (ii) that risk significantly outweighs any risk of prejudice to the interests of the witness if the order is made.
- (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) Subsection (8) of section 271C of this Act applies to the making of an order under subsection (2)(b) of this section as it applies to the making of an order under subsection (5)(a) or (7) of that section but as if the references to the witness were to the witness within the meaning of this section.
- (6) In this section, “current arrangements” means the arrangements in place at the time the review under this section is begun.
- (6A) In this section, “court” includes a commissioner appointed under section 271I(1).
- (7) This section is subject to sections 271B to 271BZCsection 271B.

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**Version of section 271D as amended by the Bill and with the modifications made by sections 271BZC (in cases to which section 271BZA applies)**

This document relates to the Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill as amended at Stage 2 (SP Bill 34A)

#### 271D Review of arrangements for vulnerable witnesses

- (1) In any case in which a person who is giving or is to give evidence at or for the purposes of a hearing in relevant criminal proceedings (referred to in this section as the “witness”) is or appears to the court to be a vulnerable witness, the court may at any stage in the proceedings (whether before or after the commencement of the hearing or before or after the witness has begun to give evidence)—
  - (a) on the application of any party to the proceedings, or
  - (b) of its own motion,review the current arrangements for taking the witness's evidence and, after giving the parties an opportunity to be heard, make an order under subsection (2) below.
- (2) The order which may be made under this subsection is—
  - (a) where the current arrangements for taking the witness's evidence include the use of a special measure or combination of special measures authorised by an order under section 271A or 271C of this Act or under this subsection (referred to as the “earlier order”), an order varying or revoking the earlier order, or
  - (b) where the current arrangements for taking the witness's evidence do not include any special measure, an order authorising the use of such special measure or measures as the court considers most appropriate for the purpose of taking the witness's evidence.
- (3) An order under subsection (2)(a) above varying an earlier order may—
  - (a) add to or substitute for any special measure authorised by the earlier order such other special measure as the court considers most appropriate for the purpose of taking the witness's evidence, or
  - (b) where the earlier order authorises the use of a combination of special measures for that purpose, delete any of the special measures so authorised.
- (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.

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(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
- (b) in any other case, that—
  - (a) 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
  - (i) 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.

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(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—

- (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,
  - (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.
- (4) The court may make an order under subsection (2)(a) above revoking an earlier order only if satisfied—
- (a) where the witness has expressed a wish to give or, as the case may be, continue to give evidence without the benefit of any special measure, that it is appropriate for the witness so to give evidence, or
  - (b) in any other case, that—

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- (i) the use, or continued use, of the special measure or measures authorised by the earlier order for the purpose of taking the witness's evidence would give rise to a significant risk of prejudice to the fairness of the hearing or otherwise to the interests of justice, and
- (ii) that risk significantly outweighs any risk of prejudice to the interests of the witness if the order is made.

(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.

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(4B) Subsections (2) to (4) are subject to subsections (4C) to (4F).

(4C) Unless the hearing has already commenced when the court commences its 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).

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(4D) Even if the hearing has already commenced when the court commences its 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 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 is present in the courtroom to give evidence.

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(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,

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- (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) Subsection (8) of section 271C of this Act applies to the making of an order under subsection (2)(b) of this section as it applies to the making of an order under subsection (5)(a) or (7) of that section but as if the references to the witness were to the witness within the meaning of this section.
- (6) In this section, "current arrangements" means the arrangements in place at the time the review under this section is begun.
- (6A) In this section, "court" includes a commissioner appointed under section 271I(1).
- (7) This section is subject to sections 271B to 271BZC section 271B.

#### 271E Vulnerable witnesses: supplementary provision

- (1) Subsection (2) below applies where—
- (a) a party is considering for the purposes of a vulnerable witness notice, a notice that is to be lodged with the clerk of court under section 271AA or a vulnerable witness application which of the special measures is or are the most appropriate for the purpose of taking the evidence of the person to whom the notice or application relates, or
  - (b) the court is making an order under section 271A(5)(a)(ii) or (b) or (9), 271C or 271D of this Act.
- (2) The party or, as the case may be, the court shall—
- (a) have regard to the best interests of the witness, and
  - (b) take account of any views expressed by—
    - (i) the witness (having regard, where the witness is a child witness, to the witness's age and maturity), and
    - (ii) where the witness is a child witness, the witness's parent (except where the parent is the accused).
- (3) For the purposes of subsection (2)(b) above, where the witness is a child witness—

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- (a) the witness shall be presumed to be of sufficient age and maturity to form a view if aged 12 or older, and
- (b) in the event that any views expressed by the witness are inconsistent with any views expressed by the witness's parent, the views of the witness shall be given greater weight.

(4) In this section—

“parent”, in relation to a child witness, means any person having parental responsibilities within the meaning of section 1(3) of the Children (Scotland) Act 1995 (c.36) in relation to the child witness,

“the witness” means—

- (a) in the case referred to in subsection (1)(a) above, the person to whom the notice or application relates,
- (b) in the case referred to in subsection (1)(b) above, the person to whom the order would relate.

#### 271F The accused

(1) For the purposes of the application of subsection (1) of section 271 of this Act to the accused (where the accused is giving or is to give evidence at or for the purposes of a hearing in relevant criminal proceedings), subsection (2) of that section shall have effect as if—

(a) for paragraph (c) there were substituted—

“(c) whether the accused is to be legally represented at the hearing and, if not, the accused's entitlement to be so legally represented,” , and

(b) for paragraph (e) there were substituted—

“(e) any behaviour towards the accused on the part of—

- (i) any co-accused or any person who is likely to be a co-accused in the proceedings,
- (ii) any witness or any person who is likely to be a witness in the proceedings, or
- (iii) members of the family or associates of any of the persons mentioned in sub-paragraphs (i) and (ii) above.”.



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(2) Where, if the accused were to give evidence at or for the purposes of the hearing, he would be a child witness—

(a) section 271A of this Act shall apply in relation to the accused subject to the following modifications—

- (i) references to a witness shall be read as if they were references to the accused,
- (ii) references to the party citing or intending to cite a witness shall be read as if they were references to the accused, and
- (iii) subsection (6) shall have effect as if for paragraph (a) there were substituted—

“(a) it appears to the court that the accused, if he were to give evidence at or for the purposes of a hearing in relevant criminal proceedings, would be a child witness,”  
, and

(aa) section 271AA applies in relation to the accused with the following modifications—

- (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,
- (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,

(c) the accused’s age, and”, and

(b) section 271B of this Act shall apply in relation to the accused as if—

- (i) for subsection (1) there were substituted—

“(1) This section applies where the accused—

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- (a) if he were to give evidence at or for the purposes of a hearing in relevant criminal proceedings would be a child witness, and
  - (b) is under the age of 12 on the date of commencement of the proceedings.”, and
  - (ii) in subsection (3), references to the child witness were references to the accused.
- (3) Subsection (4) below applies where the accused—
  - (a) considers that, if he were to give evidence at or for the purposes of a hearing in relevant criminal proceedings, he would be a vulnerable witness other than a child witness, and
  - (b) has not decided to give evidence without the benefit of any special measures.
- (4) Where this subsection applies, subsections (2) to (11) of section 271C of this Act shall apply in relation to the accused subject to the following modifications—
  - (a) references to the witness shall be read as if they were references to the accused,
  - (b) references to the party citing or intending to cite the witness shall be read as if they were references to the accused, and
  - (c) in subsection (8)(b), the reference to subsection (2)(a) to (f) of section 271 of this Act shall be read as if it were a reference to that subsection as modified by subsection (1) above.
- (5) Section 271D of this Act shall apply in any case where it appears to the court that the accused, if he were to give evidence at or for the purposes of the hearing, would be a vulnerable witness as it applies in the case referred to in subsection (1) of that section but subject to the following modifications—
  - (a) references to the witness shall be read as if they were references to the accused,
  - (b) references to the party citing or intending to cite the witness shall be read as if they were references to the accused.
- (6) Where the witness within the meaning of section 271E of this Act is the accused, that section shall have effect in relation to the witness as if—
  - (a) in subsection (1), paragraph (a) were omitted, and

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(b) in subsection (2), the words “The party or, as the case may be,” were omitted.

- (7) Section 271M of this Act shall have effect, where the vulnerable witness is the accused, as if the reference in subsection (2) to the party citing the vulnerable witness were a reference to the accused.
- (8) The following provisions of this Act shall not apply in relation to a vulnerable witness who is the accused—
  - (a) section 271H(1)(c) and (ea),
  - (b) section 271I(3).

#### 271G Saving provision

Nothing in sections 271A to 271F of this Act affects any power or duty which a court has otherwise than by virtue of those sections to make or authorise any special arrangements for taking the evidence of any person.

#### 271H The special measures

- (1) The special measures which may be authorised to be used under section 271A, 271C or 271D of this Act for the purpose of taking the evidence of a vulnerable witness are—
  - (a) taking of evidence by a commissioner in accordance with section 271I of this Act,
  - (b) use of a live television link in accordance with section 271J of this Act,
  - (c) use of a screen in accordance with section 271K of this Act,
  - (d) use of a supporter in accordance with section 271L of this Act,
  - (e) giving evidence in chief in the form of a prior statement in accordance with section 271M of this Act, and
  - (ea) excluding the public during the taking of the evidence in accordance with section 271HB of this Act.
- (1A) The Scottish Ministers may, by order subject to the affirmative procedure—
  - (a) modify subsection (1),
  - (b) in consequence of any modification made under paragraph (a)—

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- (i) prescribe the procedure to be followed when special measures are used, and
  - (ii) so far as is necessary, modify sections 271A to 271M of this Act.
- (3) Provision may be made by Act of Adjournal regulating, so far as not regulated by sections 271I to 271M of this Act, the use in any proceedings of any special measure authorised to be used by virtue of section 271A, 271C or 271D of this Act.

#### 271HA Temporary additional special measures

- (1) The Scottish Ministers may, by order subject to the affirmative procedure, specify additional measures which for the time being are to be treated as special measures listed in section 271H(1).
- (2) An order under subsection (1) may make different provision for different courts or descriptions of court or different proceedings or types of proceedings.
- (3) An order under subsection (1) must specify—
  - (a) the area in which the additional measures may be used,
  - (b) the period during which the additional measures may be used, and
  - (c) the procedure to be followed when the additional measures are used.

#### 271HB Excluding the public while taking evidence

- (1) This section applies where the special measure to be used in respect of a vulnerable witness is excluding the public during the taking of the evidence of the vulnerable witness.
- (2) The court may direct that all or any persons other than those mentioned in subsection (3) are excluded from the court during the taking of the evidence.
- (3) The persons are—
  - (a) members or officers of the court,
  - (b) parties to the case before the court, their counsel or solicitors or persons otherwise directly concerned in the case,

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- (c) *bona fide* representatives of news gathering or reporting organisations present for the purpose of the preparation of contemporaneous reports of the proceedings,
- (d) such other persons as the court may specially authorise to be present.

#### 271I Taking of evidence by a commissioner

(1) Where the special measure to be used is taking of evidence by a commissioner, the court shall appoint a commissioner to take the evidence of the vulnerable witness in respect of whom the special measure is to be used.

(1ZA) A court which appoints a commissioner under subsection (1) must—

- (a) fix a date for the proceedings before the commissioner, and
- (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—

- (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, or

(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.

(1ZD) The commissioner presiding over a ground rules hearing must—

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- (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,
- (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,
- (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
  - (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—
  - (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
  - (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.

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- (1A) Proceedings before a commissioner appointed under subsection (1) above shall, if the court so directed when authorising such proceedings or it was so directed at the ground rules hearing, 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.
- (2) Proceedings before a commissioner appointed under subsection (1) above shall be recorded by video recorder.
- (3) An accused—
- (a) shall not, except by leave of the court on special cause shown, be present—
    - (i) in the room where such proceedings are taking place; or
    - (ii) if such proceedings are taking place by means of a live television link, in the same room as the witness, but
  - (b) is entitled by such means as seem suitable to the court to watch and hear the proceedings.
- (4) The recording of the proceedings made in pursuance of subsection (2) above shall be received in evidence without being sworn to by witnesses.
- (4A) It is not necessary (in solemn cases) for an indictment to have been served before—
- (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,
  - (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
  - (d) proceedings may take place before a commissioner appointed under subsection (1).
- (5) Sections—
- (a) 274;
  - (b) 275;

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- (c) 275B except subsection (2)(b);
- (d) 275C;
- (e) 288C;
- (f) 288E; and
- (g) 288F,

of this Act apply in relation to proceedings before a commissioner appointed under subsection (1) above as they apply in relation to a trial.

- (6) In the application of those sections in relation to such proceedings—
  - (a) the commissioner acting in the proceedings is to perform the functions of the court as provided for in those sections;
  - (b) references—
    - (i) in those sections, except section 275(3)(c) and (7)(c), to a trial or a trial diet;
    - (ii) in those sections, except sections 275(3)(e) and 288F(2), (3) and (4), to the court,shall be read accordingly;
  - (c) the reference in section 275B(1) to 14 days shall be read as a reference to 7 days.
- (7) In a case where it falls to the court to appoint a commissioner under subsection (1) above, the commissioner shall be a person described in subsection (8) below.
- (8) The persons are—
  - (a) where the proceedings before the commissioner are for the purposes of a trial which the court (when it appoints the commissioner) expects will be in the High Court, a judge of the High Court; or
  - (b) in any other case, a sheriff.



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#### 271J Live television link

- (1) Where the special measure to be used is a live television link, the court shall make such arrangements as seem to it appropriate for the vulnerable witness in respect of whom the special measure is to be used to give evidence from a place outside the court-room where the hearing is to take place by means of a live television link between that place and the court-room.
- (2) The place from which the vulnerable witness gives evidence by means of the link—
  - (a) may be another part of the court building in which the court-room is located or any other suitable place outwith that building, and
  - (b) shall be treated, for the purposes of the proceedings at the hearing, as part of the court-room whilst the witness is giving evidence.
- (3) Any proceedings conducted by means of a live television link by virtue of this section shall be treated as taking place in the presence of the accused.
- (4) Where—
  - (a) the live television link is to be used in proceedings in a sheriff court, but
  - (b) that court lacks accommodation or equipment necessary for the purpose of receiving such a link,the sheriff may by order transfer the proceedings to any other sheriff court in the same sheriffdom which has such accommodation or equipment available.
- (5) An order may be made under subsection (4) above—
  - (a) at any stage in the proceedings (whether before or after the commencement of the hearing), or
  - (b) in relation to any part of the proceedings.

#### 271K Screens

- (1) Where the special measure to be used is a screen, the screen shall be used to conceal the accused from the sight of the vulnerable witness in respect of whom the special measure is to be used.

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- (2) However, the court shall make arrangements to ensure that the accused is able to watch and hear the vulnerable witness giving evidence.
- (3) Subsections (4) and (5) of section 271J of this Act apply for the purpose of the use of a screen under this section as they apply for the purpose of the use of a live television link under that section but as if—
  - (a) references to the live television link were references to the screen, and
  - (b) the reference to receiving such a link were a reference to the use of a screen.

#### 271L Supporters

- (1) Where the special measure to be used is a supporter, another person (“the supporter”) nominated by or on behalf of the vulnerable witness in respect of whom the special measure is to be used may be present alongside the witness to support the witness while the witness is giving evidence.
- (2) Where the person nominated as the supporter is to give evidence at that or any other hearing in the proceedings, that person may not act as the supporter at any time before giving evidence.
- (3) The supporter shall not prompt or otherwise seek to influence the witness in the course of giving evidence.

#### 271M Giving evidence in chief in the form of a prior statement

- (1) This section applies where the special measure to be used in respect of a vulnerable witness is giving evidence in chief in the form of a prior statement.
- (2) A statement made by the vulnerable witness which is lodged in evidence for the purposes of this section by or on behalf of the party citing the vulnerable witness shall, subject to subsection (3) below, be admissible as the witness's evidence in chief, or as part of the witness's evidence in chief, without the witness being required to adopt or otherwise speak to the statement in giving evidence in court.
- (3) Section 260 of this Act shall apply to a statement lodged for the purposes of this section as it applies to a prior statement referred to in that section but as if—

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- (a) references to a prior statement were references to the statement lodged for the purposes of this section,
  - (b) in subsection (1), the words “where a witness gives evidence in criminal proceedings” were omitted, and
  - (c) in subsection (2), paragraph (b) were omitted.
- (4) This section does not affect the admissibility of any statement made by any person which is admissible otherwise than by virtue of this section.
- (5) In this section, “statement” has the meaning given in section 262(1) of this Act.



This document relates to the Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill as amended at Stage 2 (SP Bill 34A)

## Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill [as amended at Stage 2]

### Revised Explanatory Notes

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