

## POLICY NOTE

### THE VULNERABLE WITNESSES (CRIMINAL EVIDENCE) (SCOTLAND) ACT 2019 (COMMENCEMENT NO. 1 AND TRANSITIONAL PROVISIONS) REGULATIONS 2019

#### SSI 2019/392 (C. 21)

1. The above instrument was made in exercise of the powers conferred by section 12(2) and (3) of the Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019. The instrument is not subject to any Parliamentary procedure.

#### Policy Objectives

2. This instrument is being made to bring into force on 20 January 2020 sections 1, 2, 4, 5, 7, 8, 9 and 10(1) to 10(3) of the Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019 (“the 2019 Act”).

3. The Bill for the 2019 Act received Royal Assent on 13 June 2019.<sup>1</sup> Sections 11 (ancillary provision), 12 (commencement) and 13 (short title) came into force on the day after Royal Assent. The policy objectives relating to the 2019 Act are fully set out in the Policy Memorandum which accompanied the Bill.<sup>2</sup>

4. These Regulations will form part of an implementation package for the 2019 Act. The provisions of the 2019 Act are being commenced in several stages as detailed in the draft implementation plan.<sup>3</sup>

#### Detail

5. The Regulations can be broken down as follows:

- **Regulation 2 and schedule- Appointed day**

Confirmation of Monday 20 January 2020 as the commencement date for those provisions from the Act detailed in the table in the schedule (sections 1, 2, 4, 5, 7, 8, 9 and 10(1) to (3) with appropriate detail about subject matter and restricted purpose for which sections 1 and 4 are being commenced).

Section 4 of the Act will restrict the power of the court to alter on review a previous order providing for all of a witness’s evidence to be pre-recorded. This will apply even when the case was not one to which the new rule in favour of pre-recording applied - see below. Section 4 is being commenced for the purposes of High Court proceedings only. The restrictions will apply to all reviews carried out from 20 January 2020. For section 1, see below.

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<sup>1</sup> The passage of the Bill through the Parliament is detailed at <https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/109035.aspx>.

<sup>2</sup> The Policy Memorandum is available at [https://www.parliament.scot/S5\\_Bills/Vulnerable%20Witnesses%20\(Criminal%20Evidence\)%20\(Scotland\)%20Bill/SPBill34PMS052018.pdf](https://www.parliament.scot/S5_Bills/Vulnerable%20Witnesses%20(Criminal%20Evidence)%20(Scotland)%20Bill/SPBill34PMS052018.pdf).

<sup>3</sup> Available at [https://www.parliament.scot/S5\\_JusticeCommittee/Inquiries/J-S5-18-VW-31A-SG.pdf](https://www.parliament.scot/S5_JusticeCommittee/Inquiries/J-S5-18-VW-31A-SG.pdf).

- **Regulation 3- Child witnesses in certain solemn cases – transitional provision**

This details the transitional provision for section 1 of the Act.

Section 1 of the 2019 Act introduces a new rule in favour of pre-recording the evidence of child witnesses, other than the accused in solemn proceedings, where the alleged offence is listed in new section 271BZA(2) of the Criminal Procedure (Scotland) Act 1995 (inserted by section 1). Section 1 will come into force only for the purpose of proceedings in the High Court of Justiciary.

As these reforms will affect live cases, a number of transitional provisions are required. The main transitional provision is for the pre-recording rule to apply only in cases where the accused first appears on petition on or after 20 January 2020, so where the accused has already appeared on petition before the commencement date then those cases will not be covered by the new rule. This transitional provision should be enough to cover the majority of older live cases but there still will be a small number of cases where the accused never appears on petition. In this scenario, section 1 will apply only where the indictment is served on or after 20 October 2020. We anticipate that the new rule will begin to take effect for trials in custody cases starting between March and May 2020, and in bail cases between August and October 2020.

The same transitional arrangements will also apply to section 5(6) of the 2019 Act, which alters the way in which the age of a witness is calculated where this is relevant to a decision on authorising the taking of evidence by commissioner.

- **Regulation 4- Taking evidence by Commissioner- transitional provisions**

Section 5 of the Act makes provision about the special measure evidence by a Commissioner. Section 5(2) and (3) of the 2019 Act, which relate to a new requirement to fix a ground rules hearing in all cases where evidence is to be taken by commissioner, will apply only in cases where the commissioner is appointed by the court on or after 20 January 2020. Section 5(6), which alters the way in which the age of a witness is calculated where this is relevant to a decision on authorising the taking of evidence by a commissioner, will be subject to the same transitional arrangements as section 1.

### **Important additional background information relating to the Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019**

- **Section 5 – Taking Evidence by Commissioner**

Section 5(6) amends section 271(3) of the 1995 Act and expands on what is meant by the “commencement of the proceedings” which determines how the age of a witness is calculated and whether the witness is therefore a child witness. This change will only apply to cases where either an accused first appears on petition from 20 January 2020 or if no accused appears on petition, the indictment is served on any accused in the proceedings on or after 20 October 2020. Where the change applies and the accused has appeared on petition, the witness’s age will be calculated at the date of the first appearance on petition rather than the date of service of the indictment.

- **Sections 7 and 8 - Timetable for considering vulnerable witness notice and the lodging deadline**

Sections 7 and 8 make adjustments to the timeframe within which a court must consider a vulnerable witness notice and the timeframe within which a vulnerable witness notice must be lodged with the court.

Section 7 amends section 271A(3A) of the 1995 Act so that where a vulnerable witness notice specifies only a standard special measure, the court may consider the notice as soon as possible without having to wait seven days before considering it.

The effect of section 8 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.

These changes will apply to all cases from 20 January 2020.

- **Section 9 – Report on the operation of sections 1 and 5**

This provision ensures that the operation of the new pre-recording rule is subject to a formal evaluation and review. The review period is to be three years from the first day that section 1 is brought into force for any purpose (i.e. three years from 20 January 2020). After the end of this review period a report on this review must be laid before the Scottish Parliament.

This work will be progressed through discussion within the associated Implementation Group

## **Consultation**

6. No formal consultation was carried out in relation to these Commencement Regulations. However, engagement with relevant stakeholders, through the Scottish Government led Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019 Implementation Group, took place in the development of the Regulations.

7. The Act was informed by the public consultation in 2017 on pre-recording evidence of child and other vulnerable witnesses.<sup>4</sup>

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<sup>4</sup> The Consultation Analysis is available at <https://www.gov.scot/publications/pre-recording-evidence-child-vulnerable-witnesses-consultation-analysis/>.

## Financial Effects

8. A Financial Memorandum<sup>5</sup> and supplementary memorandum<sup>6</sup> were completed in relation to the Bill for the 2019 Act.

Scottish Government  
Justice Directorate  
Criminal Justice Reform Unit  
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<sup>5</sup> Available at [https://www.parliament.scot/S5\\_Bills/Vulnerable%20Witnesses%20\(Criminal%20Evidence\)%20\(Scotland\)%20Bill/SPBill34FMS052018.pdf](https://www.parliament.scot/S5_Bills/Vulnerable%20Witnesses%20(Criminal%20Evidence)%20(Scotland)%20Bill/SPBill34FMS052018.pdf).

<sup>6</sup> Available at [https://www.parliament.scot/S5\\_Bills/Vulnerable%20Witnesses%20\(Criminal%20Evidence\)%20\(Scotland\)%20Bill/SPBill34AFMS052019.pdf](https://www.parliament.scot/S5_Bills/Vulnerable%20Witnesses%20(Criminal%20Evidence)%20(Scotland)%20Bill/SPBill34AFMS052019.pdf).