



# Children (Scotland) Act 2020

## 2020 asp 16

PROSPECTIVE

### *Vulnerable witnesses and parties*

#### **4 Vulnerable witnesses: prohibition of personal conduct of case**

- (1) The Vulnerable Witnesses (Scotland) Act 2004 is modified as follows.
- (2) In section 11 (interpretation of Part 2), in subsection (5), in the definition of “relevant proceedings”, for “of the 2011 Act (other than section 98 or 99)” substitute “ and section 154 of the 2011 Act ”.
- (3) After section 11 insert—

##### **“11A Deemed vulnerable witnesses: relevant proceedings**

- (1) In relevant proceedings, the court is to consider a person to be a vulnerable witness if it is alleged in the statement of grounds that the person is the victim of any of the following conduct—
  - (a) conduct amounting to—
    - (i) an offence mentioned in schedule 1 of the Criminal Procedure (Scotland) Act 1995,
    - (ii) an offence under Part 1, 4 or 5 of the Sexual Offences (Scotland) Act 2009,
  - (b) domestic abuse,
  - (c) being forced into a marriage or civil partnership.
- (2) For the purposes of subsection (1)—
  - (a) “the statement of grounds” means the statement of grounds, within the meaning of section 89(3) of the 2011 Act, that—
    - (i) gave rise to the relevant proceedings, or (as the case may be)
    - (ii) gave rise to the grounds determination which, in turn, gave rise to the relevant proceedings,

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- (b) the reference to being forced into a marriage is to be construed in accordance with subsections (4) to (6) of section 1 of the Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011,
  - (c) the reference to being forced into a civil partnership is to be construed in accordance with the provisions mentioned in paragraph (b), subject to the references in those provisions to marriage being read as references to civil partnership.
- (3) The Scottish Ministers may by regulations—
- (a) modify the list of conduct in subsection (1) by—
    - (i) adding a description of conduct, or
    - (ii) modifying or removing a description of conduct added to the list by regulations under this paragraph, and
  - (b) make any other modifications to this section that appear to the Scottish Ministers to be necessary or expedient in consequence of provision modifying the list.
- (4) Regulations under subsection (3) are subject to the affirmative procedure.

**11B Deemed vulnerable witnesses: proceedings concerning order under section 11(1) of the Children (Scotland) Act 1995**

- (1) In proceedings to which subsection (2) applies, the court is to consider a person to whom subsection (3) or (4) applies to be a vulnerable witness.
- (2) This subsection applies to proceedings, other than relevant proceedings, in which the court is considering whether to make an order under section 11(1) of the Children (Scotland) Act 1995.
- (3) This subsection applies to a person if there is in force a non-harassment order, interdict or any similar order or remedy granted by a court prohibiting certain conduct towards the person by a party to the proceedings.
- (4) This subsection applies to a person if—
  - (a) a relevant offence has been committed against the person and a party to the proceedings has been convicted of committing it, or
  - (b) a party to the proceedings is being prosecuted for committing a relevant offence against the person.
- (5) For the purposes of subsection (4)—
  - (a) the following are relevant offences—
    - (i) an offence specified in section 288C(2) of the Criminal Procedure (Scotland) Act 1995,
    - (ii) an offence specified in section 288DC(1) of that Act,
    - (iii) an offence specified in section 288E(3) of that Act,
    - (iv) an offence under section 1(1) of the Prohibition of Female Genital Mutilation (Scotland) Act 2005,
    - (v) an offence under section 3(1) of that Act,
    - (vi) an offence under section 39 of the Criminal Justice and Licensing (Scotland) Act 2010,
    - (vii) an offence under section 122(1) of the Anti-social Behaviour, Crime and Policing Act 2014,

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- (viii) an offence under section 122(3) of that Act,
  - (ix) an offence which, in the opinion of the court, is the equivalent in the law of England and Wales, Northern Ireland or a member State of the European Union to an offence mentioned in any of the preceding sub-paragraphs,
- (b) a person is to be regarded as being prosecuted for committing an offence if—
- (i) a prosecutor has initiated proceedings against the person in respect of the offence, and
  - (ii) those proceedings have not yet been dismissed or resulted in the conviction or acquittal of the person in respect of the offence.
- (6) The Scottish Ministers may by regulations—
- (a) modify the list of offences in subsection (5)(a) by—
    - (i) adding an offence, or
    - (ii) removing, or modifying the description of, an offence added to the list by regulations under this paragraph, and
  - (b) may make any other modifications to this section that appear to the Scottish Ministers to be necessary or expedient in consequence of provision modifying the list.
- (7) Regulations under subsection (6) are subject to the affirmative procedure.”.
- (4) In section 12 (orders authorising the use of special measures for vulnerable witnesses), after subsection (3), insert—
- “(3A) The court may not make an order under subsection (1)(b) above in relevant proceedings if it is required by section 22C or 22D to consider the special measure described by section 22B to be the most appropriate for the purpose of taking the child witness's evidence (or one of them if the court considers other special measures to be appropriate too).”.
- (5) After section 22A insert—

**“22B Prohibition on personal conduct of case**

- (1) In proceedings to which subsection (2) applies, the special measures which may be authorised by virtue of section 12 or 13 for the purpose of taking the evidence of a vulnerable witness include prohibiting the parties to the proceedings from conducting their own cases in person.
- (2) The proceedings to which this subsection applies are—
  - (a) relevant proceedings, and
  - (b) proceedings in which the court is considering whether to make an order under section 11(1) of the Children (Scotland) Act 1995.
- (3) The prohibition may be applied to one or more of the parties or all of them.
- (4) The prohibition does not prevent a party to whom it applies from conducting the party's own case in person until the beginning of the first hearing in the proceedings at, or for the purposes of, which a witness is to give evidence.

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- (5) Where the special measure described by subsection (1) is to be used the court must—
  - (a) inform the parties to whom the prohibition applies that it applies to them,
  - (b) explain to those parties the effect of the prohibition, and
  - (c) ascertain whether each party to whom the prohibition applies has a solicitor to conduct the party's case.
- (6) If, at any point in the proceedings, the court—
  - (a) ascertains that a party to whom the prohibition applies does not have a solicitor to conduct the party's case, and
  - (b) is not satisfied that the party intends to engage a solicitor to do so, the court must appoint a solicitor to conduct the party's case.
- (7) The court may only appoint a solicitor entered on the register established in accordance with section 7 of the Children (Scotland) Act 2020.
- (8) An appointed solicitor—
  - (a) is to ascertain and act upon the instructions of the party for whom the solicitor has been appointed to act, or
  - (b) in the event that the party gives no instructions, or gives instructions that are inadequate or perverse, is to act in the party's best interests.
- (9) An appointed solicitor—
  - (a) may not be dismissed by the party for whom the solicitor has been appointed to act,
  - (b) may be relieved from the appointment by the court if the court is satisfied that the solicitor is no longer able to act upon the party's instructions or in the party's best interests.
- (10) In this section, references to a party to proceedings do not include—
  - (a) the Principal Reporter,
  - (b) a person appointed to act as a curator ad litem in the proceedings,
  - (c) a safeguarder for a child in the proceedings appointed under the 2011 Act.
- (11) For the avoidance of doubt, the special measure described by this section is a measure for the purpose of taking the evidence of a vulnerable witness, notwithstanding that the measure affects the conduct of the proceedings more widely.

### **22C Requirement to prohibit personal conduct of case**

- (1) Subsection (2) applies in relevant proceedings where—
  - (a) the court is considering what special measure or measures would be most appropriate for the purpose of taking a witness's evidence,
  - (b) because of conduct perpetrated or alleged to have been perpetrated by a party to the proceedings, the witness is deemed to be a vulnerable witness by virtue of section 11A, and
  - (c) that party intends to examine, or cross-examine, the witness.

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- (2) The court is to consider that the most appropriate special measure for the purpose of taking the witness's evidence (or one of them) is prohibiting the party referred to in subsection (1) from conducting the party's own case in person in accordance with section 22B.
- (3) If the court is required—
  - (a) by this section to consider the special measure described by section 22B to be the most appropriate for the purpose of taking the witness's evidence, and
  - (b) by section 12(3) to consider another special measure to be the most appropriate for the purpose,the court is to consider those measures together to be the most appropriate for the purpose.

### **22D Presumption that personal conduct of case should be prohibited**

- (1) Where a court is considering what special measure or measures would be most appropriate for the purpose of taking a witness's evidence—
  - (a) the presumption set out in subsection (2) applies (subject to subsection (4)) in relevant proceedings, and
  - (b) the presumption set out in subsection (5) applies (subject to subsection (6)) in any other proceedings in which the court is considering whether to make an order under section 11(1) of the Children (Scotland) Act 1995.
- (2) The presumption referred to in subsection (1)(a) is that prohibiting each party who intends to examine, or cross-examine, the witness from conducting the party's own case in person, in accordance with section 22B, is the most appropriate special measure for the purpose of taking the witness's evidence (or one of them if the court considers other special measures to be appropriate too).
- (3) In subsection (2), “party” does not include a person mentioned in section 22B(10).
- (4) The presumption set out in subsection (2) is rebutted, in relation to a party, if (and only if) the court is satisfied that—
  - (a) applying the special measure described by section 22B to the party would, in the circumstances, give rise to a significant risk of prejudice to the fairness of the proceedings or otherwise to the interests of justice, and
  - (b) that risk significantly outweighs any risk of prejudice to the interests of the witness if the special measure is not applied to the party.
- (5) The presumption referred to in subsection (1)(b) is that if—
  - (a) the witness is deemed to be a vulnerable witness either—
    - (i) by virtue of section 11B(3) because an order or remedy granted by a court prohibits certain conduct towards the witness by a party to the proceedings, or
    - (ii) by virtue of section 11B(4) because a party to the proceedings committed, or is alleged to have committed, an offence against the witness, and

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(b) the party in question intends to examine, or cross-examine, the witness,

prohibiting that party from conducting the party's own case in person, in accordance with section 22B, is the most appropriate special measure for the purpose of taking the witness's evidence (or one of them if the court considers other special measures to be appropriate too).

(6) The presumption set out in subsection (5) is rebutted if (and only if)—

(a) the court is satisfied that—

(i) the witness has expressed a wish to give evidence without the benefit of the special measure described by section 22B being applied to the party, and

(ii) it is appropriate for the witness to do so, or

(b) the court is satisfied that—

(i) applying the special measure described by section 22B to the party would, in the circumstances, give rise to a significant risk of prejudice to the fairness of the proceedings 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 special measure is not applied to the party.

(7) If the court is required—

(a) by this section to consider the special measure described by section 22B to be the most appropriate for the purpose of taking the witness's evidence, and

(b) by section 12(3) to consider another special measure to be the most appropriate for the purpose,

the court is to consider those measures together to be the most appropriate for the purpose.”.

## **5 Vulnerable witnesses: requirement to consider special measures without application in certain cases**

(1) The Vulnerable Witnesses (Scotland) Act 2004 is modified as follows.

(2) In section 12 (orders authorising the use of special measures for vulnerable witnesses), after subsection (6) insert—

“(6A) If the witness is deemed to be a vulnerable witness by virtue of section 11B—

(a) before the proof or other hearing at which the witness is to give evidence the court must either—

(i) make an order under subsection (6) authorising the use of a special measure for the purpose of taking the witness's evidence, or

(ii) make an order that the witness is to give evidence without the benefit of any special measure,

(b) the court is to do so whether or not a vulnerable witness application is made.”.

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## **6 Hearing to ascertain if case involves vulnerable witnesses**

- (1) The Children's Hearings (Scotland) Act 2011 is modified as follows.
- (2) After Part 17 insert—

### **“PART 17A**

#### **PROTECTION FOR VULNERABLE WITNESSES**

##### **176A Duty to ascertain whether vulnerable witnesses to give evidence**

- (1) In proceedings under Part 10 or section 154, the court must fulfil the duty specified in subsection (2) at a hearing held before the first hearing in which a person is to give evidence.
- (2) The duty is to ascertain whether—
  - (a) any of the parties have cited, or intend to cite, a person who is or may be a vulnerable witness to give evidence at any point during the proceedings, and
  - (b) any party who is or may be a vulnerable witness intends to give evidence at any point during the proceedings (without having been cited as a witness by one of the other parties).
- (3) The hearing at which the court fulfils the duty specified in subsection (2)—
  - (a) is referred to in this Part as the preliminary hearing,
  - (b) need not be a hearing solely for the purpose of fulfilling that duty.
- (4) If—
  - (a) the court ascertains at the preliminary hearing that—
    - (i) a party has cited, or intends to cite, a witness who the court is satisfied is a vulnerable witness, or
    - (ii) a party who the court is satisfied is a vulnerable witness intends to give evidence,
  - (b) no child witness notice in respect of that witness has been lodged with the court, and
  - (c) no vulnerable witness application in respect of that witness has been made to the court,

the court must also ascertain at the preliminary hearing the party's views as to the special measure or measures (if any) that would be most appropriate for the purpose of taking the witness's evidence.

- (5) Where a party is considering for the purposes of subsection (4) which of the special measures is or are the most appropriate for the purpose of taking the evidence of a witness the party has cited, or intends to cite, section 15(2) of the Vulnerable Witnesses Act applies to the party as it would if the party were considering that matter for the purposes of a child witness notice or (as the case may be) a vulnerable witness application.

##### **176B Power to order special measures without child witness notice**

- (1) This section applies where—

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- (a) at a preliminary hearing, the court ascertains that a party has cited, or intends to cite, a witness who the court is satisfied is a child witness, and
  - (b) no child witness notice in respect of that witness has been lodged with the court.
- (2) At the end of the preliminary hearing, the court may make an order in relation to the witness under section 12(1) of the Vulnerable Witnesses Act.
- (3) In making an order by virtue of subsection (2), the court must have regard to any views of the party mentioned in subsection (1) that were ascertained in accordance with section 176A(4).
- (4) If the court makes an order by virtue of subsection (2), the party mentioned in subsection (1) is relieved of the duty under section 12(2) of the Vulnerable Witnesses Act to lodge a child witness notice in respect of the witness in question.

#### **176C Power to order special measures without vulnerable witness application**

- (1) This section applies where—
- (a) at a preliminary hearing under section 176A, the court ascertains that a party has cited, or intends to cite, a witness who the court is satisfied—
    - (i) is a vulnerable witness, but
    - (ii) is not a child witness, and
  - (b) no vulnerable witness application has been made to the court in respect of the witness.
- (2) The court may make an order in relation to the witness under section 12(6) of the Vulnerable Witnesses Act, despite the fact that no vulnerable witness application has been made.
- (3) In making an order by virtue of subsection (2), the court must have regard to any views of the party mentioned in subsection (1) that were ascertained in accordance with section 176A(4).

#### **176D Interpretation of Part**

In this Part—

“child witness” has the meaning given by section 11(1)(a) of the Vulnerable Witnesses Act,

“child witness notice” has the meaning given by section 12(2) of the Vulnerable Witnesses Act,

“preliminary hearing” has the meaning given by section 176A(3),

“vulnerable witness” means a person who is a vulnerable witness for the purposes of the Vulnerable Witnesses Act (including any person deemed to be a vulnerable witness by virtue of section 11A of that Act),

“vulnerable witness application” has the meaning given by section 12(6) (a) of the Vulnerable Witnesses Act,

“the Vulnerable Witnesses Act” means the Vulnerable Witnesses (Scotland) Act 2004.”.

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## **7 Register of solicitors for section 22B of the Vulnerable Witnesses (Scotland) Act 2004**

- (1) The Scottish Ministers must—
  - (a) establish, and
  - (b) (subject to provision made under subsection (2)(c)) maintain, a register of solicitors who may be appointed by a court under section 22B(6) of the Vulnerable Witnesses (Scotland) Act 2004.
- (2) The Scottish Ministers, by regulations—
  - (a) must—
    - (i) specify the requirements that a person must satisfy in order to be included, and remain, on the register (which may include requirements as to training and qualifications),
    - (ii) set out the processes for including a person on, and removing a person from, the register (including appeal rights),
  - (b) may provide for the remuneration by the Scottish Ministers of solicitors appointed under section 22B(6) of the Vulnerable Witnesses (Scotland) Act 2004, including expenses and outlays (such as counsel's fees),
  - (c) may—
    - (i) confer the duty of maintaining the register on a person, and
    - (ii) make such modifications to other enactments as the Scottish Ministers consider appropriate for the purposes of, or in connection with, or for giving full effect to provision made by virtue of sub-paragraph (i).
- (3) Before making regulations under subsection (2), the Scottish Ministers must consult—
  - (a) the Faculty of Advocates, and
  - (b) the Law Society of Scotland.
- (4) Regulations under subsection (2)—
  - (a) are subject to the affirmative procedure if, by virtue of paragraph (c)(ii) of that subsection, they add to, replace or omit any part of the text of an Act, but
  - (b) otherwise are subject to the negative procedure.

## **8 Vulnerable parties**

- (1) The Children (Scotland) Act 1995 is modified as follows.
- (2) After section 11A insert—

### **“11B Vulnerable parties**

- (1) In proceedings to which subsection (2) applies—
  - (a) in relation to a party whom the court would be required by section 11B of the Vulnerable Witnesses (Scotland) Act 2004 to consider a vulnerable witness if the party were to give evidence in or for the purposes of the proceedings, the court must—
    - (i) order the use of any special measure that the party requests,
    - (ii) order the use of a special measure that the court considers appropriate and, if the party requested a different special measure, give reasons for not ordering its use, or

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- (iii) give reasons for not ordering the use of any special measure,
- (b) in relation to any other party, the court may order the use of a special measure if the court considers that—
  - (i) attending or participating in hearings is causing, or is likely to cause, the party distress,
  - (ii) the party's distress is likely to be reduced by the use of the special measure, and
  - (iii) the use of the special measure would not give rise to a significant risk of prejudice to the fairness of the proceedings or otherwise to the interests of justice.
- (2) This subsection applies to proceedings, commenced on or after section 8 of the Children (Scotland) Act 2020 comes into force, in which the court is considering, or has considered, whether to make an order under section 11(1).
- (3) An order under subsection (1) may authorise a special measure in relation to the whole of the proceedings or only a part of them.
- (4) A court may vary or revoke an order it made under subsection (1).
- (5) An order under subsection (1) or (4) may be made—
  - (a) at any time, and
  - (b) whether or not a party to the proceedings has applied for one.
- (6) The special measures which may be authorised by virtue of an order under subsection (1) or (4) are—
  - (a) use of a live television link,
  - (b) use of a screen,
  - (c) use of a supporter,
  - (d) any other measure prescribed by the Scottish Ministers by regulations.
- (7) Regulations under subsection (6)(d) are subject to the affirmative procedure.
- (8) In considering whether attending or participating in hearings is causing, or is likely to cause, a person distress, the court must take into account—
  - (a) the nature and circumstances of any matters raised, or likely to be raised, in the proceedings,
  - (b) the relationship (if any) between the person and any other party to the proceedings,
  - (c) the person's age and maturity,
  - (d) any behaviour towards the person on the part of—
    - (i) any other party to the proceedings,
    - (ii) members of the family or associates of any other party,
    - (iii) any other person who is likely to be a party to the proceedings or a witness in the proceedings, and
  - (e) such other matters as appear to the court to be relevant, 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,

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

### **11C Special measures under section 11B**

- (1) If a court orders the use of a live television link, the court must make such arrangements as seem to it appropriate to enable the vulnerable party to watch and hear the proceedings by means of such a link.
- (2) If a court orders the use of a screen, a screen must be used to conceal the vulnerable party from the sight of the other parties to the proceedings.
- (3) If a court—
- (a) orders the use of—
    - (i) a live television link, or
    - (ii) a screen, and
  - (b) considers it necessary or appropriate for the other parties to be able, during the proceedings, to—
    - (i) hear the vulnerable party,
    - (ii) watch the vulnerable party, or
    - (iii) both,
- the court must make such arrangements as seem to it appropriate to enable the other parties to do so.
- (4) Where—
- (a) a court has ordered the use of a live television link or a screen in proceedings in a sheriff court, but
  - (b) the court lacks accommodation or equipment necessary to enable the measure to be used,
- the sheriff may by order transfer all or any part of the proceedings to any sheriff court in the same sheriffdom which has such accommodation or equipment available.
- (5) If a court orders the use of a supporter, another person (“the supporter”) nominated by or on behalf of the vulnerable party may be present alongside the vulnerable party for the purpose of providing support during the proceedings.
- (6) The supporter—
- (a) must not prompt or otherwise seek to influence the vulnerable party in the course of a hearing,
  - (b) may not act as the supporter, within the meaning of subsection (5), while the vulnerable party is giving evidence,
  - (c) may not act as the supporter, if the supporter is to give evidence in the proceedings, at any time before giving evidence.
- (7) Subsection (6)(b) does not preclude the same person from being both—
- (a) a supporter within the meaning of subsection (5), and
  - (b) a supporter within the meaning of section 22 of the Vulnerable Witnesses (Scotland) Act 2004.
- (8) In this section—

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- (a) references to a measure being ordered are to its being ordered under section 11B,
- (b) “vulnerable party” means the party for whose benefit the court ordered the use of the measure in question.”.

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