

CHILDREN (SCOTLAND) ACT 2020

EXPLANATORY NOTES

THE ACT

Detailed provisions

Regard to be had to child's views

7. Sections 1 to 3 of the Act make amendments to sections 6, 11, 14 and 16 of the 1995 Act, sections 14 and 84 of the 2007 Act and section 27 of the 2011 Act. These amendments remove a presumption that a child aged 12 or over is considered mature enough to give their views. This will ensure that younger children who are capable of forming a view and who may wish to give their views are able to do so. The presumption being removed covers both when a court or a children's hearing is making a decision that concerns the child (sections 11 and 16 of the 1995 Act, section 14 and 84 of the 2007 Act and section 27 of the 2011 Act) and when a person is exercising their parental responsibilities and rights (section 6 of the 1995 Act).
8. The amendments made by sections 1 to 3 of the Act require the decision maker to give a child an opportunity to express their views in court cases under section 11 of the 1995 Act and on key decisions that may affect them, such as who they should live with or have contact with. The child must be given an opportunity to express their views in the manner they prefer. If a child indicates a preference as to how to give their views, the decision maker may reject the chosen method only if it would be unreasonable to allow it in all the circumstances. If a child does not indicate a preferred manner of expressing their views or it would not be reasonable in the circumstances to accommodate the preferred manner then the decision maker can choose the manner.
9. Where the exception applies, the decision maker must choose a manner which is suitable to the child. This will require the decision maker seeking the views to consider a wide range of options, including options which may be more suitable depending on the age and maturity of the child.
10. Sections 1-3 of the Act acknowledge that in limited circumstances a child may not be able to give their views. This includes where the child is not capable of giving views due to being very young or having severe learning disabilities and where the location of the child is unknown. Each of these sections inserts a presumption into its target act that the child is capable of forming a view.
11. When the views of the child have been obtained, the decision maker is required to have regard to the views taking into account the child's age and maturity. This is repeated from existing legislation.
12. Section 1(3)(a) of the Act repeals section 11(7) to 11(7E) of the 1995 Act. These provisions are largely re-stated in section 1(4) of the Act, with changes made to reflect the removal of the presumption and removal of the definition of "relevant person". Section 1(4) of the Act inserts section 11ZA after section 11 of the 1995 Act. These provisions are largely repeated from sections 11(7) and 11(7A) of the 1995 Act. Vulnerable witnesses and parties

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(asp 16) which received Royal Assent on 1 October 2020*

13. Sections 4 to 7 of the Act introduce new special measures to be used to assist vulnerable witnesses and parties in civil proceedings arising out of children's hearings or where the court is considering making an order under section 11 of the 1995 Act.
14. Section 4(3) amends the 2004 Act. The 2004 Act contains special measures designed to protect vulnerable witnesses which, at the moment, include measures such as use of a live television link, use of a screen and supporters.
15. Section 4(3) of the Act inserts sections 11A and 11B into the 2004 Act which specify circumstances where the court is to deem a person to be a vulnerable witness, irrespective of whether the person satisfies the definition of "vulnerable witness" in section 11(1) of the 2004 Act. In proceedings arising out of a children's hearing (covered by the new section 11A of the 2004 Act), a person will be deemed to be a vulnerable witness where it is alleged in the statement of grounds that the person is the victim of specified conduct.
16. In proceedings where the court is considering making an order under section 11(1) of the 1995 Act (covered by the new section 11B of the 2004 Act), a person will be deemed to be a vulnerable witness if the person is protected by a civil protection order from conduct by a party to the proceedings, or where the person is the victim or complainant in respect of certain criminal offences committed or alleged to have been committed by a party to the proceedings.
17. Section 4(4) of the Act inserts section 22B into the 2004 Act to introduce a new special measure which the court may authorise for the purpose of taking the evidence of a vulnerable witness. The new special measure allows the court to prohibit parties to the proceedings from personally conducting their own case.
18. This special measure is to be available only in court proceedings arising out of children's hearings or where the court is considering making an order under section 11(1) of the 1995 Act, and may be applied to one or more of the parties or all of them.
19. Where a party is to be subject to the prohibition, the party must be informed by the court, which must explain the effect of the prohibition and ascertain if the party has a solicitor. A party to whom the prohibition applies will be given a reasonable opportunity to appoint their own solicitor. Where the party does not have a solicitor and the court is satisfied that the party does not intend to engage a solicitor, the court may appoint one from a register of solicitors maintained by the Scottish Ministers for that purpose (in accordance with section 6 of the Act).
20. A solicitor appointed by the court is subject to duties to ascertain and act upon the instructions of the party where possible, and otherwise to act in the best interests of the party. An appointed solicitor may be not dismissed by the party, but may be relieved by the court.
21. In addition to the court being empowered to authorise the prohibition where it considers it the most appropriate special measure, section 4(4) of the Act inserts section 22C to the 2004 Act. The effect of section 22C is to require the court, in children's hearings proceedings, to apply the prohibition on personal representation to the party referred to in section 11A, who perpetrated or is alleged to have perpetrated the conduct by virtue of which the witness is to be considered vulnerable. However, the prohibition need not be applied to a party who does not intend to examine or cross-examine the vulnerable witness. Where section 22C applies to require the court to consider the prohibition to be the most appropriate special measure, this is to be considered together with the existing measures required by section 12(3) of the 2004 Act.
22. Section 4 of the Act also inserts section 22D into the 2004 Act. Section 22D creates presumptions as to when the prohibition on personal conduct is the most appropriate special measure. Section 22D(2) applies in children's hearings proceedings to presume that prohibiting every party who intends to examine or cross-examine a vulnerable

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witness, or a deemed vulnerable witness, from conducting their own case in person is the most appropriate special measure.

23. Section 22D(4) makes provision on when this presumption can be rebutted. It can be rebutted when the court is satisfied that applying the prohibition would create risk to the fairness of proceedings which outweighs the interests of the witness. Where there are multiple parties, the presumption can be rebutted in respect of a specific party or parties.
24. Section 22D(5) applies in any other proceedings in which the court is considering whether to make an order under section 11(1) of the 1995 Act. It is presumed that the prohibition on personal conduct should apply to a party referred to in the new section 11B(3) of the 2004 Act, (when there is a civil protection order in place protecting the witness against the party) or to a party referred to in the new section 11B(4) (where a party has committed, or is accused of, an offence against the witness) and the party intends to examine or cross-examine the witness.
25. Subsection (6) of section 22D sets out how the presumption created by subsection (5) can be rebutted. It can be rebutted where the court is satisfied that the witness has expressed a wish to give evidence without the benefit of the special measure and it is appropriate for the witness to do so or where applying the prohibition would create risk to the fairness of proceedings which outweighs the interests of the witness.
26. Section 4(3A) of the Act inserts a new subsection into section 12 of the 2004 Act. In proceedings arising out of children's hearings the court is prohibited from making an order under section 12(1)(b) that a child witness is to give evidence without any special measure, if sections 22C or 22D require the court to prohibit the parties from conducting their own cases in person.
27. Section 5 of the Act provides that when a person is deemed to be a vulnerable witness by virtue of section 11B of the the 2004 Act (as inserted by section 4 of the Act), the court must, before the proof or other hearing at which the witness is to give evidence either—
 - (i) make an order 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.
28. Accordingly, if the witness is a vulnerable witness, before the witness is due to give evidence, the court must make a reasoned decision about whether a special measure should be used. This is the same position as applies in respect of special measures in civil proceedings for child witnesses by virtue of section 12(1) of the 2004 Act.
29. The provision applies whether or not a vulnerable witness application is made.
30. Section 6 of the Act adds sections 176A, 176B, 176C and 176D to the 2011 Act. Section 176A makes provision for the court in children's hearings proceedings to ascertain whether a vulnerable witness is being cited to give evidence. Sections 176B and 176C make provision on the court being able to make an order authorising the use of a special measure for a child or for another vulnerable witness even where no child witness notice has been lodged or vulnerable witness application made. Section 176D contains interpretation provisions.
31. Section 7 requires the Scottish Ministers to establish and maintain a register of solicitors from whom the court can appoint a lawyer where it is required to do so under the new section 22B(6) of the 2004 Act, if a party is banned from conducting their own case and fails to appoint a lawyer themselves.
32. Section 7(2) provides that the Scottish Ministers must by regulations specify the criteria a solicitor must meet to be eligible to be on the register and sets out the processes for including a person on the register and for removing them. The Scottish Ministers may also make provision governing the rate of remuneration of appointed solicitors which

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includes the payment of outlays such as fees incurred instructing counsel. The Scottish Ministers are able to confer the duty of maintaining the register of solicitors on another person, and can make such modifications to legislation as might be necessary to do so.

33. Section 7(3) provides that, before making these regulations, the Scottish Ministers must consult the Faculty of Advocates and the Law Society of Scotland.
34. Section 7(4) provides that where these regulations amend primary legislation, they will be subject to the affirmative procedure. Otherwise, they are subject to the negative procedure.
35. Section 8 inserts section 11B to the 1995 Act requiring the court to consider the use of special measures to reduce distress in relation to certain vulnerable parties which may be caused by attending or participating in hearings and authorising the court to order special measures in relation to others, even in the absence of any application.
36. New section 11B(2) provides that the new measures for vulnerable parties relate to proceedings in which the court is considering, or has considered, whether to make an order under section 11(1) of the 1995 Act. This provision is specifically aimed at Child Welfare Hearings which are generally non-evidential and where the existing special measures in the 2004 Act for vulnerable witnesses will be of little assistance.
37. In such proceedings, if a party would be vulnerable according to the test set out in section 11B of the 2004 Act if the party were to give evidence, section 11B(1)(a) requires the court to order the use either of any special measure that the party requests or of an appropriate measure. If the court refuses the requested measure or does not order the use of any special measure, the court must give reasons.
38. In relation to any other party, section 11B(1)(b) authorises the court to order the use of a special measure so long as it is likely that the party will suffer distress and that the special measure will reduce that distress and that there is no significant risk to the interests of justice.
39. The special measures available under new section 11B(6) are live television links, screens and supporters. The Scottish Ministers may also prescribe further special measures to assist vulnerable parties, by regulations subject to the affirmative procedure.
40. [Section 8](#) of the Act also inserts section 11C into the 1995 Act, making provision governing the use of the new special measures for vulnerable parties.