



# Children (Scotland) Act 2020

## 2020 asp 16

### *Vulnerable witnesses and parties*

PROSPECTIVE

#### **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.”.

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