



Children, Contact, Covid, and the new Children  
(Scotland) Bill – Good Omens and Stranger Things

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## 1. Proceedings under Children (Scotland) Act 1995

(1) The Children (Scotland) Act 1995 is modified as follows.

(2) In section 6 (views of children)—

(a) in subsection (1)—

(i) after “shall” insert “comply with subsections (1A) and (1D)”,

(ii) the words after paragraph (b) are repealed,

(b) after subsection (1) insert—

“(1A) The person must—

(a) give the child an opportunity to express the child’s views in—

(i) the manner that the child prefers, or

(ii) a manner that is suitable to the child if the child has not indicated a preference or it would not be reasonable in the circumstances to accommodate the child’s preference, and

(b) have regard to any views expressed by the child, taking into account the child’s age and maturity.

(1B) But the person is not required to comply with subsection (1A) if the person is satisfied that—

(a) the child is not capable of forming a view, or

(b) the location of the child is not known.

(1C) In considering whether the child is capable of forming a view, the person is to start with the presumption that the child is.

(1D) The person must, so far as is practicable, have regard to the views of any other person who has parental responsibilities or parental rights in relation to the child.”.

(3) In section 11 (court orders relating to parental responsibilities etc.)—

(a) subsections (7) to (7E) are repealed,

(b) in subsection (8), the words “, notwithstanding subsection (7) above,” are repealed,

(c) subsections (9) and (10) are repealed.

(4)After section 11 insert—

“11ZAParamountcy of child’s welfare, and the non-intervention presumption

(1)In deciding whether or not to make an order under section 11(1) and what order (if any) to make, the court must regard the welfare of the child concerned as its paramount consideration.

(2)The court must not make an order under section 11(1) unless it considers that it would be better for the child concerned that the order be made than that none should be made at all.

(3)When considering the child’s welfare and whether it would be better for the child to make an order than not, the court must have regard to the following matters in particular—

(a)the need to protect the child from abuse, or the risk of abuse, which affects, or might affect, the child,

(b)the effect that abuse, or the risk of abuse, might have on the child,

(c)the ability of a person to care for, or otherwise meet the needs of, the child, where that person has carried out, or might carry out, abuse which affects, or might affect, the child,

(d)the effect that abuse, or the risk of abuse, might have on the carrying out of responsibilities in connection with the welfare of the child by a person who has (or, by virtue of an order under section 11(1), would have) those responsibilities,

(e)whether it is, or would be, appropriate for an order to require that two or more persons co-operate with one another with regard to matters affecting the child.

(4)In subsection (3)—

“abuse” includes—

(a)violence, harassment, threatening conduct and any other conduct giving rise, or likely to give rise, to physical or mental injury, fear, alarm or distress,

(b)abuse of a person other than the child, and

(c)domestic abuse,

“conduct” includes—

(a)speech, and

(b)presence in a particular place or area.

## **11ZB Regard to be had to the child's views**

(1) In deciding whether or not to make an order under section 11(1) and what order (if any) to make, the court must—

(a) give the child concerned an opportunity to express the child's views in—

(i) the manner that the child prefers, or

(ii) a manner that is suitable to the child if the child has not indicated a preference or it would not be reasonable in the circumstances to accommodate the child's preference, and

(b) have regard to any views expressed by the child, taking into account the child's age and maturity.

(2) But the court is not required to comply with subsection (1) if satisfied that—

(a) the child is not capable of forming a view, or

(b) the location of the child is not known.

(2A) The child is to be presumed to be capable of forming a view unless the contrary is shown.

(3) Nothing in this section requires a child to be legally represented in any proceedings in which the child's views are sought, if the child does not wish to be.”

(6) In section 16 (welfare of child and consideration of his views), for subsection (2) substitute—

“(2) In the circumstances mentioned in subsection (4), the sheriff must—

(a) give the child concerned an opportunity to express the child’s views in—

(i) the manner that the child prefers, or

(ii) a manner that is suitable to the child if the child has not indicated a preference or it would not be reasonable in the circumstances to accommodate the child’s preference, and

(b) have regard to any views expressed by the child, taking into account the child’s age and maturity.

(2A) But the sheriff is not required to comply with subsection (2) if satisfied that—

(a) the child is not capable of forming a view, or

(b) the location of the child is not known.

(2B) The child is to be presumed to be capable of forming a view unless the contrary is shown.”

## **12 Factors to be considered before making order**

(1) The Children (Scotland) Act 1995 is amended as follows.

(2) In section 11ZA (paramountcy of child's welfare, and the non-intervention presumption) (which is inserted by section 1(4) of this Act), in subsection (3) after paragraph (d) insert –

“(e) the effect that the order the court is deciding whether or not to make might have on –

(i) the involvement of the child’s parents in the bringing the child up, and

(ii) the child’s important relationships with other people.”.

## 15 Explanation of decisions to the child

(1) The Children (Scotland) Act 1995 is modified as follows.

(2) After section 11D (which is inserted by section 13(2) of this Act) insert—

“11E Explanation of court decisions to the child

(1) This section applies when—

- (a) the court decides whether or not to make an order under section 11(1),
- (b) the court decides to vary or discharge an order made under section 11(1),
- (c) the court—

- (i) decides to decline to vary or discharge an order made under section 11(1), and
- (ii) considers it appropriate to explain that decision to the child concerned.

(2) The court must ensure that the decision is explained to the child concerned in a way that the child can understand.

(3) But the court is not required to comply with subsection (2) if satisfied that—

- (a) the child would not be capable of understanding an explanation however given,
- (b) it is not in the best interests of the child to give an explanation, or
- (c) the location of the child is not known.

(4) The court may fulfil its duty under subsection (2) by—

- (a) giving the explanation to the child itself, or
- (b) arranging for it to be given by a child welfare reporter (see section 101A).

(5) In this section, references to a decision include an interim decision...”

## 101A Register for child welfare reporters

- (1) A court may only appoint as a child welfare reporter a person who is included on the register maintained in accordance with subsection (2).
- (2) The Scottish Ministers must establish and maintain a register of persons who may be appointed to act as a child welfare reporter.
- (3) The Scottish Ministers may by regulations make provision for or in connection with—
  - (a) the requirements that a person must satisfy in order to be included, and remain, on the register (including requirements as to training and qualifications),
  - (b) the processes for including a person on, and removing a person from, the register (including appeal rights),
  - (c) the process for how, and by whom, a registered person is to be selected as the appointed child welfare reporter in a case,
  - (d) the remuneration by the Scottish Ministers of child welfare reporters, including expenses and outlays,
  - (e) the operation and management of the register.

- (3A) Before making, revising or revoking regulations under subsection (3), the Scottish Ministers must consult persons with lived experience of –
- (a) Domestic abuse,
  - (b) Court-ordered contact.
- (4) Regulations under subsection (3) are subject to the negative procedure.

## **11F Duty to investigate failure to obey order under section 11**

(1) This section applies where a court is considering whether to—

- (a) find a person in contempt of court for failing to obey an order under section 11, or
- (b) vary or discharge an order under section 11 on the basis (solely or partly) that a person has failed to obey it.

(2) If it is satisfied that the person has failed to obey the order, the court must—

- (a) seek to establish the reasons for that failure, and
- (b) in so doing—
  - (i) give the child concerned an opportunity to express the child's views in—

(A) the manner that the child prefers, or

(B) a manner that is suitable to the child if the child has not indicated a preference or it would not be reasonable in the circumstances to accommodate the child's preference, and

(ii) have regard to any views expressed by the child, taking into account the child's age and maturity.

(2A) But the court is not required to comply with subsection (2)(b) if satisfied that—

- (a) the child is not capable of forming a view, or
- (b) the location of the child is not known.

(2B) The child is to be presumed to be capable of forming a view unless the contrary is shown.

(3) The court may appoint a child welfare reporter to investigate and report to the court on the person's failure (or alleged failure) to obey the order (see section 101A).

(4) References in this section to an order include an interim order.

(5) The Scottish Ministers may by regulations modify subsection (5) to—

- (a) add a description of person,
- (b) vary a description of person,
- (c) remove a description of person.

(6) Regulations under subsection (5) are subject to the affirmative procedure.”.

## **Delay in proceedings likely to prejudice child's welfare**

(1) The Children (Scotland) Act 1995 is modified by subsections (2) and (3).

(2) In section 11ZA (paramountcy of child's welfare, and the non-intervention presumption) (which is inserted by section 1(4) of this Act), after subsection (2) insert—

“(2A) When considering the child's welfare, the court is to have regard to any risk of prejudice to the child's welfare that delay in proceedings would pose.”.

(3) In section 16 (welfare of child and consideration of his views), after subsection (1) insert—

“(1A) When considering the child's welfare, the court is to have regard to any risk of prejudice to the child's welfare that delay in proceedings would pose.”.

## **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,

(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

## 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.

(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.

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

(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).

(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

(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.

## 4A 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.”.



Are we there yet?

Any Questions?

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