

CHILDREN (SCOTLAND) BILL

EXPLANATORY NOTES

INTRODUCTION

1. As required under Rule 9.3.2A of the Parliament's Standing Orders, these Explanatory Notes are published to accompany the Children (Scotland) Bill, introduced in the Scottish Parliament on 2 September 2019.
2. The following other accompanying documents are published separately:
 - a Financial Memorandum (SP Bill 52–FM);
 - a Policy Memorandum (SP Bill 52–PM);
 - statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 52–LC).
3. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.
4. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section, or a part of a section, does not seem to require any explanation or comment, none is given.

THE BILL

Overview

5. The policy objectives of the Bill are to:
 - ensure the views of the child are heard in contact and residence cases;
 - further protect victims of domestic abuse and their children;
 - ensure the best interests of the child are at the centre of any contact and residence case and children's hearing; and
 - further compliance with the United Nations Convention on the Rights of the Child (UNCRC) in family court cases.

6. The Bill contains 25 sections. It amends statutes concerning children, principally Part 1 of the Children (Scotland) Act 1995 (“the 1995 Act”) which includes provisions about parents and children, in particular concerning parental responsibilities and rights and related court orders. It makes amendments to section 11 of the 1995 Act on court orders relating to parental responsibilities etc. It also makes amendments to the Matrimonial Proceedings (Children) Act 1958 (“the 1958 Act”); the Family Law Act 1986 (“the 1986 Act”); the Vulnerable Witnesses (Scotland) Act 2004 (“the 2004 Act”); the Adoption and Children (Scotland) Act 2007 (“the 2007 Act”) and the Children’s Hearings (Scotland) Act 2011 (“the 2011 Act”),

7. The Bill includes provision on taking account of children’s views and the explanation of decisions to children, and on the protection of vulnerable witnesses and parties in court in cases concerning children. It makes provision about regulating child welfare reporters, curators ad litem, and contact centres (where services are provided for maintaining contact between children and those they are not living with). It also makes related provision about recognising parental responsibilities and rights obtained outwith the UK, about extending the enforcement powers of the Sheriff Court, and about delay in proceedings.

8. Explanatory Notes on the various sections of the Bill are provided below.

9. A detailed explanation of the Bill’s purpose can be found in the Policy Memorandum. The Policy Memorandum also sets out the policy intentions underpinning the Bill. At the same time as the Bill was introduced a Family Justice Modernisation Strategy was published. This sets out work that is ongoing by the Scottish Government and others, work that can be done via secondary legislation or by improved guidance and areas for longer term consideration.

Detailed provisions

Regard to be had to child’s views

10. Sections 1 to 3 of the Bill 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).

11. These sections of the Bill require the decision maker to give a child an opportunity to express their views, in a manner suitable to the child, on key decisions that may affect them, such as who they should live with or have contact with.

12. This will require the decision maker seeking the views to consider a wide range of options, including options which may be more suitable to younger children such as drawing a picture. The reference in the new provisions to “in a manner suitable to the child” also requires the decision maker to take into account the preferences of the child on how they wish to give their views.

13. These sections of the Bill 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.

14. 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.

15. Section 1(3)(a) of the Bill repeals section 11(7) to (7C) of the 1995 Act. These provisions are largely re-stated in section 1(4) of the Bill, with changes made to reflect the removal of the presumption.

Vulnerable witnesses and parties

16. Sections 4 to 7 of the Bill 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.

17. 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.

18. Section 4(3) of the Bill 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.

19. 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 complainer in respect of certain criminal offences committed or alleged to have been committed by a party to the proceedings.

20. Section 4(4) of the Bill 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.

21. 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.

22. 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 Bill).

23. 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.

24. 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 Bill 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.

25. Section 4 of the Bill 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 witness, or a deemed vulnerable witness, from conducting their own case in person is the most appropriate special measure.

26. 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.

27. 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.

28. 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.

29. Section 5 of the Bill 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.

30. Section 6 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.

31. Section 6(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 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.

32. Section 6(3) provides that, before making these regulations, the Scottish Ministers must consult the Faculty of Advocates and the Law Society of Scotland.

33. Section 6(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.

34. Section 7 inserts section 11B to the 1995 Act authorising the court to order the use of special measures to reduce distress to vulnerable parties which may be caused by attending or participating in hearings.

35. 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.

36. 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.

37. Section 7 of the Bill also inserts section 11C into the 1995 Act, making provision governing the use of the new special measures for vulnerable parties.

Child welfare reporters and curators ad litem

38. Sections 8, 13 and 14 cover the regulation of child welfare reporters and local authority reporters and curators ad litem appointed in cases under section 11 of the 1995 Act. Child welfare reporters provide reports to the courts on a child's welfare. At the moment, child welfare reporters are usually family lawyers but some are social workers. Curators ad litem can be appointed by the court to represent a child's interests in the litigation.

39. Section 8 and section 13 amend the 1995 Act to require the Scottish Ministers to establish registers of child welfare reporters and of curators ad litem. These registers are to be used when the court wishes to appoint a child welfare reporter or curator ad litem in cases under section 11 of the 1995 Act. These sections give the Scottish Ministers the power to set through regulations the eligibility criteria for membership of both registers, to establish the procedure for removing an individual from either list if the individual does not meet the required standards and the procedure for handling complaints about both child welfare reporters and curators ad litem. The Scottish Ministers may also set through regulations the fee rate for child welfare reporters and curators ad litem appointed in section 11 cases and may make the payments to child welfare reporters and curators ad litem.

40. In both cases, the regulations are subject to the negative procedure.

41. The operation and management of the lists of child welfare reporters and curators ad litem may be contracted out if the Scottish Ministers consider this the most appropriate way of running the register.

42. As well as establishing a register for curators ad litem (the new section 101B of the 1995 Act), section 13 of the Bill makes provision on the appointment of curators ad litem, by adding new section 11D to the 1995 Act.

43. Section 14 amends section 11 of the Matrimonial Proceedings (Children) Act 1958 as it applies to cases under section 11 of the 1995 Act. This amendment means that if a local authority employee wishes to continue to act as a child welfare reporter then the employee would need to apply to be on the register of child welfare reporters and meet the required eligibility criteria.

Contact

44. Section 9 relates to child contact centres, and the regulation of contact services at contact centres.

45. Child contact centres are venues for conflict free contact between children, parents and other people in the child's life. Centres offer a mixture of supported and supervised contact. Supported contact is where there is no significant risk to the child. Supervised contact is where contact takes place in the constant presence of an independent person who observes and ensures the safety of those involved. Centres also offer a handover service which allows a child to move between parents without the parents have to see each other.

46. Section 9 amends section 11 of the 1995 Act to provide that, where a court has ordered contact or a handover to take place at a child contact centre, this must be at a regulated centre.

47. Section 9 also adds section 101C to the 1995 Act. This gives the Scottish Ministers the power to set through regulations, subject to the affirmative procedure, minimum standards in relation to accommodation and staff training that a contact centre needs to meet in order for the courts to be able to order contact to take place there.

48. The provision means that if a court considers that contact or handover at a contact centre is in the best interests of the child then the court would be required to either state that the contact has to be at a registered centre or name the registered centre at which the contact is to take place. The court could not order contact to take place at a centre which was unregistered.

49. This section also gives the Scottish Ministers the power to appoint a body to inspect contact centres to ensure they meet the minimum standards. This body would also handle any complaints about the contact centres once internal complaints procedures have been exhausted.

Promotion of contact between looked after children and siblings

50. Section 10 amends section 17 of the 1995 Act to provide that the local authority must take such steps to promote personal relations and direct contact between a looked after child and their siblings, as appear to the local authority to be practicable and appropriate, having regard to the local authority's duty to promote the welfare of the child.

51. This replicates the duty that local authorities have to promote personal relations and contact between a looked after child and those with parental responsibilities and rights. The duty applies not only to siblings by virtue of adoption, marriage or civil partnership and whether of the half-blood or of the whole-blood, but also to any other person with whom the child has lived or is living and with whom the child has an ongoing relationship with the character of a relationship between siblings.

52. This section also amends section 17(3) of the 1995 Act. The effect is that, before making any decision with respect to a child whom they are looking after, or proposing to look after, a local authority shall, so far as is reasonably practicable, ascertain the views of siblings and any other person with whom the child has lived or is living and with whom the child has an ongoing relationship with the character of a relationship between siblings.

Clarification of order-making power

53. Section 11 aims to capture the effect of the Inner House of the Court of Session decision in the case of *Knox v S*¹, in addressing the question of whether the requirement that an order under section 11(2) of the 1995 Act must be "in relation to" parental rights and responsibilities (PRRs) means that the order itself must involve the granting or withdrawing of PRRs.

54. In *Knox v S*, the Inner House held (paragraph 45) that "residence orders and contact orders, and indeed specific issue orders.... could properly be described as 'orders in relation to' parental responsibilities and rights in so far as they relate to matters encompassed in such responsibilities and rights and are likely to affect the exercise of such responsibilities and rights by anyone who has, or who might obtain, them." The court found (paragraph 42) that "it is plain that certain persons who cannot apply for an order imposing or granting parental responsibilities and rights can apply for residence or contact orders" under section 11(2) of the 1995 Act.

55. Section 11 of the Bill inserts new subsection (2A) into section 11 of the 1995 Act. This provision makes it clear that an order under section 11(2) of the 1995 Act is to be regarded as

¹ *Knox v S* [2010] CSIH 45

relating to at least one of the matters mentioned in section 11(1) (that is parental responsibilities, parental rights, guardianship or the administration of a child's property). An order under section 11(2) includes at (d) a "contact order" which regulates the arrangements for maintaining personal relations between a child under 16 and any person with whom the child is not, or will not be, living.

56. This puts beyond doubt that a person under the age of 16 can seek and obtain a contact order under section 11(2)(d) of the 1995 Act, despite the fact that, under section 11(2)(b) of the 1995 Act, a person under 16 cannot obtain an order granting the person parental responsibilities and rights (PRRs), unless the person is a parent of the child.

57. Section 11 also puts beyond doubt that a person over the age of 16 may seek and obtain a contact order without also obtaining PRRs.

58. Section 11 provides clarification by deeming, for the avoidance of doubt, an order doing any of the specific things listed in section 11(2) of the 1995 Act to be an order in relation to at least one of the matters mentioned in section 11(1) of that Act. In practice, this will remove any doubt that it is open to a court to grant a contact order under section 11(2) even where the person being granted contact is too young to be granted PRRs or where the court does not consider it would be appropriate to grant the person PRRs.

Factors to be considered before making order

59. Where the court is deciding whether to make an order under section 11(1) of the 1995 Act, it must have regard to the child's welfare as the paramount consideration. Orders under section 11(1) relate to PRRs and matters such as where a child should live (residence order) and who should have contact with the child (contact order).

60. Section 12 of the Bill amends section 11ZA of the 1995 Act (which is itself inserted by section 1(4) of the Bill) to list as a factor that the court is to take into account as part of its consideration of a child's welfare the effect that the order the court is considering might have on the child's parents' involvement in bringing the child up and the effect it might have on the child's important relationships with other people.

61. The list of factors, to which section 12 adds (the other factors being those related to protection from abuse, which are currently stated in section 11 (7A) to (7C) of the 1995 Act), is not hierarchical. Nor is it an exhaustive list of the matters the court should take into consideration when making an order under section 11(1) of the 1995 Act. The factors must be considered only as part of all the relevant factors and circumstances arising in each case. Factors other than those specified on the list can be given greater weight when coming to a decision. The paramount consideration remains the welfare of the child. This paramount consideration has been restated in section 11ZA(1) of the 1995 Act, inserted by section 1 of the Bill.

Curators ad litem

62. Section 13 of the Bill is covered in paragraphs 38 to 43 above.

Local authority reporters

63. Section 14 of the Bill is covered in paragraphs 38 to 43 above: please see in particular paragraph 43.

Explaining of decisions to the child

64. Section 15 adds section 11E to the 1995 Act. The new section gives the court a duty in certain circumstances to explain various decisions in respect of orders under section 11 of the 1995 Act to the child concerned.

65. A family action may involve a number of Child Welfare Hearings. It would not be necessary for the court to arrange for the decision of every Child Welfare Hearing to be explained, given the terms of section 11E(3)(b). Decisions caught by the provisions would include decisions which establish or amend contact arrangements.

66. If the court decides that a decision should be explained to a child then it can either explain it face to face, electronically or by letter or it can appoint a child welfare reporter.

67. Section 11E(6) gives the Scottish Ministers the power to amend the list of people who are able to explain a decision, by way of regulations subject to the affirmative procedure.

Failure to obey order

68. If an order under section 11 of the 1995 Act is not complied with, a person seeking to enforce the order may go back to court. In going back to court, the person may seek a variation of the order or may seek to hold a person in contempt of court for not complying with a court order.

69. Under section 15(2) of the Contempt of Court Act 1981, where the contempt is dealt with by the sheriff in the course of or in connection with proceedings other than criminal proceedings on indictment, the penalty for contempt is a maximum of three months' imprisonment or a fine of level 4 on the standard scale (currently £2,500) or both.

70. When a court is considering whether or not to hold someone in contempt, the standard of proof is beyond reasonable doubt², as in criminal proceedings. However, any imprisonment ordered by the court is civil imprisonment and the contempt proceedings themselves are not criminal.

71. Section 16 inserts section 11F into the 1995 Act. The new section 11F provides that, where the court is made aware that a party has not complied with an order under section 11 of the 1995 Act, then it has a duty to investigate why the order has not been complied with.

72. Provision is also made so that the court may appoint a child welfare reporter to help investigate why an order has not been complied with. Section 8 of the Bill makes provision for the regulation of child welfare reporters.

² *Johnston v Johnston* 1996 SLT 499 see also *Gribben v Gribben* 1976 SLT 266

73. The existing options of seeking a variation of an order or seeking to hold someone in contempt of court remain if someone breaches an order.

Appeals under Children's Hearings (Scotland) Act 2011

74. Section 17 amends sections 160 and 164 of the 2011 Act to make clear that the existing right of appeal against a decision that an individual is or is not deemed as a relevant person in relation to a child also applies to a decision that an individual is to 'continue to be deemed' or 'no longer to be deemed' a relevant person.

75. This section of the Bill also extends the section 164 right of appeal to the Principal Reporter. This does not take away the right of appeal already available to the child themselves, the individual in question, a relevant person in relation to the child or two or more persons together. The Principal Reporter will continue to have no right of appeal against a children's hearing decision or a sheriff's decision which confirms a decision of a children's hearing. These sections will not allow the Principal Reporter to act together with any of the other specified persons.

76. Section 17(4) and (5) amends the Legal Aid (Scotland) Act 1986. The effect is that children's legal aid may now be available in an appeal when the appeal relates to whether a person is no longer to be deemed or is to continue to be deemed as a relevant person.

77. Section 18 makes provision so that appeals against the sheriff's decision in a children's hearings case are to the Sheriff Appeal Court. Appeals from the Sheriff Appeal Court may go to the Court of Session with the permission of the Sheriff Appeal Court or the Court of Session. This aligns the route of appeal in children's hearings proceedings with other civil proceedings.

Conferral of parental responsibilities and rights – births registered outwith UK

78. Under the law as it stands, the mother of a child has parental responsibilities and rights (PRRs) automatically. The father of the child has PRRs if married to the mother or the parents jointly register the birth of the child in a specified register in any part of the UK, or if the father completes and registers with the mother a Parental Responsibilities and Rights Agreement Form.³ PRRs may also be conferred by court order. Second female parents receive PRRs in broadly similar circumstances.

79. Section 19(2) inserts section 4B into the 1995 Act which provides that the Scottish Ministers may by regulations (subject to the negative procedure) make provision conferring PRRs on a father or second female parent who has not acquired those responsibilities and rights through one of the methods available under the 1995 Act. The power only allows PRRs to be conferred where the child's birth is registered outwith the United Kingdom, where the person has acquired parental duties, rights or responsibilities in relation to the child through a process specified in the regulations, and where the mother of the child has consented to the person acquiring those duties, rights or responsibilities.

³ <https://www2.gov.scot/Publications/2008/06/16155526/0>

80. A father who married outwith Scotland would already have PRRs in Scotland so long as the marriage is recognised in Scotland as section 3(1) of the 1995 Act refers to being married to the mother: there is no requirement for the marriage to have taken place in Scotland.

Extension to sheriff of enforcement powers under Family Law Act 1986

81. Section 20 amends Part 1, Chapter V of the Family Law Act 1986 by inserting section 29A into the 1986 Act. This allows a ‘Part 1 Order’ made by a court in another part of the UK to be enforced in the sheriff court as well as in the Court of Session. A Part 1 Order is defined in section 1 of the 1986 Act and covers orders about contact and residence which are made across the UK. A Part 1 Order would still need to be registered in the Court of Session as it maintains a register of orders.

82. Enforcement is likely to involve seeking to hold any person alleged to have breached the order in contempt of court or seeking to vary the order.

83. If a person wishes to enforce a Part 1 Order in a sheriff court, new section 29A(2) provides that the sheriff court will have jurisdiction if the child is habitually resident in the sheriffdom (section 9(b) of the 1986 Act) or the child is physically present in Scotland and is not habitually resident elsewhere in the UK and either the pursuer or the defender is habitually resident in the sheriffdom (section 10(b) of the 1986 Act), subject to rules on emergency jurisdiction (section 12 of the 1986 Act).

84. It will remain possible to enforce a Part 1 Order in the Court of Session.

Delay in proceedings likely to prejudice child’s welfare

85. Section 21 requires the court, when considering the child’s welfare, to consider whether any delay in proceedings would negatively affect the child’s welfare. The section does not prescribe the length of delay that would have a negative effect on the child’s welfare, as this would vary from case to case.

86. This section applies where the court is considering the child’s welfare. This can be as part of a decision about an order under section 11 of the 1995 Act; under section 16 of the 1995 Act; in relation to adoption cases under section 14 of the 2007 Act; and for children’s hearings or children’s hearings court proceedings under section 25 of the 2011 Act.

87. In relation to children’s hearings this section works in conjunction with the existing statutory deadlines.

Final provisions

88. Sections 22 to 25 contain standard provisions for Bills.

89. They include regulation-making powers for Ministers to make ancillary provision (e.g. consequential amendments and transitional arrangements) in connection with giving full effect to the Act or regulations made under it. They allow the Act to be brought into force, and the

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replacement of references to the date on which certain provisions come into force, so those provisions instead show the actual coming into force date of the provisions.

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