

CHILDREN'S HEARINGS (SCOTLAND) ACT 2011

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 3 – General Considerations

General considerations

Section 25 – Welfare of the child

27. This section is based on section 16(1) of the 1995 Act and links decisions of courts, Children's Hearings and Pre-hearing Panels to an overarching welfare principle in relation to the child. When arriving at a decision about a matter relating to a child under the Act, the Children's Hearing, Pre-hearing Panel or court must, as their paramount consideration, have regard to the need to safeguard and promote the child's welfare throughout childhood.

Section 26 – Decisions inconsistent with section 25

28. *Section 26(1)* is based on section 16(5) of the 1995 Act and provides that a decision can be made which is inconsistent with the welfare of the child requirement in section 25, if the Children's Hearing or court considers this departure from that principle necessary to protect the public from serious harm. Subsection (2) provides that, in keeping with the United Nations Convention on the Rights of the Child, when making such a decision the welfare of the child must still be treated as a primary consideration, rather than as the paramount consideration.

Section 27 – Views of the child

29. This section is based on section 16(2) of the 1995 Act and provides that the Children's Hearing or sheriff must, so far as is practicable, give the child the opportunity to express their views, and take those views into account in coming to decisions. When doing this the Children's Hearing or the sheriff must take account of the age and maturity of the child. Subsection (4) provides that a child aged 12 years or more is presumed capable of forming a view, but the capacity of each child should be assessed individually, and the sheriff or hearing should take account of the views of children under 12 when that child is capable of forming and expressing a view. This section does not apply where the sheriff is deciding whether to make a child protection order (CPO) in relation to a child. As an emergency protection measure, it would not be possible to seek the child's views before making a CPO.

Section 28 – Children's hearing: pre-condition for making certain orders and warrants

30. This section supports the "no order" principle of the Children's Hearings system - that measures should only be put in place if that is better for the child than taking no action. It applies in situations where a Children's Hearing may make, vary or continue certain

orders or grant a warrant. It provides that the hearing should only do this if it is better for the child than not making, varying or continuing the order or granting the warrant.

Section 29 – Sheriff: pre-condition for making certain orders and warrants

31. This section applies the “no order” principle to situations where a sheriff may make, vary, continue or extend certain orders or grant a warrant. Section 29 provides that the sheriff should only do so if that would be better for the child than not making, varying, continuing or extending the order or granting the warrant.

Section 30 – Children's hearing: duty to consider appointing safeguarder

32. This section places a duty on every Children's Hearing to actively consider whether to appoint a Safeguarder. A Safeguarder is a person whose job it is to safeguard the interests of the child involved in the hearing. Subsection (4) requires the Children's Hearing to state the reasons for appointing a Safeguarder. This duty on the Children's Hearing only applies where a Safeguarder has not already been appointed.

Section 31 – Sheriff: duty to consider appointing safeguarder

33. This section places a duty on the sheriff to actively consider whether to appoint a Safeguarder in relation to the child. It relates to court proceedings under parts 10 and 15 where a Safeguarder has not already been appointed in relation to those proceedings. A Safeguarder appointed under this section is to be treated as having been appointed by a Children's Hearing under section 30.