

# CHILDREN'S HEARINGS (SCOTLAND) ACT 2011

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 5 – Child Assessment and Child Protection Orders**

##### **Child assessment orders**

##### *Section 35 – Child assessment orders*

37. *Sections 35* and *36* provide for the local authority to apply to the sheriff for a “child assessment order”. It provides for an assessment to be made of a child’s health or development or of the way in which she or he has been or is being treated or neglected even in the absence of consent by the parent. Nothing in this section affects the child’s legal capacity to consent or refuse treatment, as made clear in section 186 of the Act. Subsection (3)(b) provides for the child to be removed to and kept at the place where the assessment is to be carried out. Subsection (5) sets a maximum duration for the child assessment order of three days.

##### *Section 36 – Consideration by sheriff*

38. This section relates to circumstances where a local authority has applied to the sheriff for a child assessment order. Subsection (2) sets out what the sheriff must be satisfied of before making the child assessment order. Subsection (3) enables the sheriff to make a child protection order instead of a child assessment order if the conditions in section 38(2) are satisfied.

##### **Child protection orders**

##### *Section 37 – Child protection orders*

39. *Section 37(1)* provides that anyone can apply to the sheriff for a child protection order. Subsection (2) deals with what a child protection order may do. Subsection (2)(d) allows for the sheriff to authorise that an assessment of a child’s health or development be undertaken in the same way as would be achieved through the granting of a child assessment order. Nothing in this section affects the child’s legal capacity to consent or refuse treatment, as made clear in section 186 of the Act. Subsection (3) provides the sheriff with a general power to make any other authorisation or requirement deemed to be necessary in order to safeguard or promote the welfare of a child. Subsection (4) reinforces the differing purposes that child protection orders and child assessment orders serve, and provides that a child protection order can include an assessment of a child’s health only as part of an order that also includes an authorisation of a type mentioned in section 37 (2)(b) or (c).

## **Consideration of application by sheriff**

### ***Section 38 – Consideration by sheriff: application by local authority only***

40. This section relates specifically to the sheriff's consideration of a local authority application for a child protection order. Subsection (2) sets out what the sheriff must be satisfied of before making the child protection order.

### ***Section 39 – Consideration by sheriff: application by a local authority or other person***

41. This section relates to the sheriff's consideration of an application for a child protection order by any person, including a local authority. Subsection (2) sets out what the sheriff must be satisfied of before making the child protection order.

## **Ancillary measures**

### ***Section 40 – Information non-disclosure directions***

42. This section places a duty on the sheriff to consider whether to make a direction regarding the non-disclosure of the location of a child who is the subject of a child protection order or any other information relating to the child as directed by the sheriff. This sheriff will also specify in the direction the person or class of person to whom that non-disclosure direction applies.

### ***Section 41 – Contact directions***

43. This section places a duty on the sheriff to consider contact between the child and certain other persons, specified in subsection (4), during the subsistence of the child protection order. It provides the sheriff with discretion to prohibit contact or to make contact arrangements subject to any conditions that they consider appropriate, in order to safeguard and promote the welfare of the child and to make any other provision that the sheriff considers appropriate about contact between the child and any other person.

### ***Section 42 – Parental responsibilities and rights directions***

44. This section provides for an applicant for a child protection order to also apply to the sheriff for a direction in relation to parental responsibilities and rights. A child protection order does not transfer parental responsibilities and rights to the applicant. It provides for the sheriff to give such direction as might be necessary, for example, in order to ensure that a parent maintains beneficial contact with the child, or when a parent refuses to consent to a medical examination which is considered essential to allow for the proper consideration of the child's needs.

## **Notice of order**

### ***Section 43 – Notice of child protection order***

45. This section places a duty on the applicant to notify the persons listed when the sheriff makes a child protection order. Subsection (2) also requires that, where the Principal Reporter receives notice of the order they must notify any persons who they consider to have, or to have recently had, a significant involvement in the upbringing of a child as those persons may seek to be determined as a relevant person.

## **Obligations of local authority**

### ***Section 44 – Obligations of local authority***

46. This section applies where a child is removed to a place of safety provided by a local authority under a child protection order. It stipulates that in these circumstances the

local authority has the same duties under section 17 of the 1995 Act toward the child as it would have if the child were a "looked after" child, subject to any conditions of the child protection order.

## **Review by children's hearing of certain orders**

### ***Section 45 – Review by children's hearing where child in place of safety***

47. This section relates to the review of a child protection order where the order directs the removal of a child to a place of safety. This section does not apply where there is an existing application to the sheriff for a review of the order under section 49 of the Act. Subsections (2) and (3) require a Children's Hearing to be arranged by the Principal Reporter to sit on the second working day after the implementation of the child protection order.

### ***Section 46 – Review by children's hearing where order prevents removal of child***

48. This section relates to the review of a child protection order where the order prevents the removal of a child from a specified place. This section does not apply where there is an existing application to the sheriff for a review of the order under section 49 of the Act. Subsections (2) and (3) require a Children's Hearing to be arranged by the Principal Reporter to sit on the second working day after the day on which the child protection order is made.

## **Decision of children's hearing**

### ***Section 47 – Decision of children's hearing***

49. This section provides for a Children's Hearing arranged under section 45 or 46 to determine whether or not the conditions for the making of a child protection order are met and whether the order should be continued, varied or terminated.

## **Variation or termination of order by sheriff**

### ***Section 48 – Application for variation or termination***

50. This section relates to an application to the sheriff to vary or terminate a child protection order. Subsection (1) sets out the persons eligible to seek a variation of a child protection order and subsection (2) sets out the persons eligible to apply for the termination of a child protection order. The Principal Reporter cannot apply for a termination. Subsection (3) provides that an application to the sheriff can only be made before a Children's Hearing arranged under section 45 or 46 is commenced or if the order was continued by a Children's Hearing arranged under section 45 or 46 within 2 working days from the continuation of the order.

### ***Section 49 – Notice of application for variation or termination***

51. This section identifies those individuals who must be informed where an application has been made to have a child protection order varied or terminated.

### ***Section 50 – Children's hearing to provide advice to sheriff in relation to application***

52. This section provides the Principal Reporter with the power to convene a Children's Hearing for the purposes of providing advice to assist the sheriff in determining an application to vary or terminate a child protection order under section 48.

### ***Section 51 – Determination by sheriff***

53. This section relates to the sheriff's determination of an application under section 48. It stipulates that the sheriff must provide an opportunity for the persons listed in subsection (2) to make representations before the sheriff makes a determination. Subsections (3) and (4) set out the timescale for determination of the application and provide for the order to cease if the application is not determined within three working days. Subsection (5) provides that the sheriff may terminate, vary or confirm the child protection order. Any termination has immediate effect.

### **Termination of order**

### ***Section 52 – Automatic termination of order***

54. This section provides for a child protection order made under section 37(2)(b), authorising the removal of the child to a place of safety, to cease to have effect if the applicant has not attempted to implement the order within 24 hours of it having been made. Subsection (3) provides that any order which includes an authorisation to remove a child to a place of safety will cease to have effect after 6 days where implementation of the order has not been possible within that timeframe.

### ***Section 53 – Power of Principal Reporter to terminate order***

55. This section provides the Principal Reporter with the power to terminate or vary a child protection order made by the sheriff where the reporter receives further evidence to suggest that the conditions for the making of the order, or specific directions included in an order, are no longer satisfied. The reporter may terminate or vary an order up until the Children's Hearing commences under section 45 or 46, or until the hearing of an application to the sheriff commences under section 48.

### ***Section 54 – Termination of order after maximum of 8 working days***

56. This section establishes the maximum duration of child protection orders. Where a child protection order directs the removal of a child to a place of safety under section 37(2)(b), the order cannot remain effective beyond the eighth day after the child was removed to the place of safety. Where a child protection order does not direct the removal of a child to a place of safety the order cannot remain effective beyond the eighth working day after it was made. A child protection order ceases to have effect before that day on those instances when a Children's Hearing arranged under section 69 begins or when notice is given under section 68(3) that no hearing will take place.

### **Other emergency measures**

### ***Section 55 – Application to justice of the peace***

57. This section provides an alternative procedure where application to the sheriff for a child protection order is not practicable. It provides for a justice of the peace to apply the same considerations set out for the sheriff under sections 38 and 39 above. Subsections (4) and (5) place time restrictions on orders made by a justice of the peace. The maximum possible subsistence of such an order is 24 hours. Subsection (6) provides the Principal Reporter with powers to terminate an order made by a justice of the peace where the Principal Reporter is satisfied that the conditions for the making of the order are no longer satisfied or that it is no longer in the best interests of the child for the order to have effect.

### ***Section 56 – Constable's power to remove child to place of safety***

58. This section provides police officers with powers to remove a child to a place of safety for a period of up to 24 hours without involvement of a sheriff. The police officer must be satisfied that the conditions for the granting of a child protection order exist but

it is not practicable to pursue an application to a sheriff. Subsection (4) provides that police officers must not exercise this power where a child protection order is in effect for the child or where an application for a child protection order or for an order under section 55 has been submitted to the sheriff or to a justice of the peace respectively, and that application has been refused.

59. Subsection (5) provides the Principal Reporter with powers to order the release of the child from the place of safety where they are satisfied that the conditions for placing the child there are no longer met or that it is no longer in the best interests of the child to be kept in a place of safety.

### ***Section 57 – Sections 55 and 56: regulations***

60. This section enables the Scottish Ministers to make regulations in respect of a child removed to, or kept in, a place of safety by police officers or under an order made by a justice of the peace. Subsection (2) provides that such regulations may require that specified individuals be notified of the removal of the child, the location of the child, and the cessation of an order under section 55.

### **Implementation of orders: welfare of child**

#### ***Section 58 – Implementation of orders: welfare of child***

61. This section provides that, where a child protection order, a child assessment order or an order under section 55 is made, the applicant (and any other person specified in the order) must only take such steps to implement that order as that person reasonably believes are necessary to safeguard or promote the welfare of the child.

### **Offences**

#### ***Section 59 – Offences***

62. This section provides that intentionally obstructing the implementation of a child assessment order, a child protection order, or an order under section 55 is a criminal offence, as is obstructing a constable acting under section 56. This offence attracts a maximum fine of level 3 on the standard scale.