

# CHILDREN'S HEARINGS (SCOTLAND) ACT 2011

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 17 – Proceedings under Part 10: Evidence**

##### *Section 172 – Use of evidence obtained from prosecutor*

250. This section applies where an application has been made to the sheriff to determine whether a ground for referral is established or to review a grounds determination. It provides for the Principal Reporter to ask any prosecutor to provide evidence held in connection with the investigation of a crime or suspected crime where the reporter considers that the evidence may assist the sheriff in the determination of the application. For example, the prosecutor may hold evidence in criminal proceedings relating to an alleged assault of a child by a parent. The reporter may have referred the child to a Children's Hearing based on the same alleged incident and if the grounds are denied and an application to the sheriff follows, the reporter may take the view that the evidence held by the prosecutor would assist the sheriff in order to establish the grounds. Subsection (3) makes clear that only evidence which was lawfully obtained may be made available to the reporter. Subsection (4) provides that the prosecutor is not obliged to comply with the reporter's request to provide evidence if the prosecutor reasonably believes that it is necessary to retain that evidence for the purposes of any criminal proceedings. This applies regardless of whether or not the proceedings have already commenced.

##### *Section 173 – Cases involving sexual behaviour: evidence*

251. This section prohibits the admission of certain evidence in any hearing by a sheriff of an application to establish whether or not a ground for referral is established, or to review the establishing of a ground, where that ground involves sexual behaviour engaged in by any person. Subsection (3) applies the prohibition to evidence which shows or tends to show: that such a person is not of good character; that relates to the person's sexual history (other than that forming part of the ground of referral); that relates to any non-sexual past behaviour (other than behaviour around the time of the subject-matter of the ground of referral) that might raise an inference that the person is not credible or the evidence not reliable; or that the person has a condition or precondition, that suggests the person is not credible or that their evidence is unreliable.
252. Subsection (5) provides that the prohibition under subsection (2) applies whether any other person to whom evidence or questioning relates is giving evidence directly at the hearing or if their evidence is given in the form of a statement. Such statements include any representations of fact or opinion however made. This ensures that statements can be made in different formats such as in writing or by audio or visual recording. Subsection (6) provides that references to 'sexual behaviour engaged in' in this section and section 174 include references to having undergone or been made subject to any experience of a sexual nature. These provisions – and the protections offered by them – cover both the victim of sexual behaviour and a child alleged to have committed an offence involving sexual behaviour.

***Section 174 – Cases involving sexual behaviour: taking of evidence by a commissioner***

253. This section applies similar restrictions to those contained in section 173 to the taking of evidence by a commissioner for the purposes of a hearing by a sheriff of an application to determine whether or not a ground for referral is established, or to review the establishing of a ground, where that ground of referral involves the sexual behaviour engaged in by any person.

***Section 175 – Sections 173 and 174: application to sheriff for order as to evidence***

254. This section sets out the circumstances in which a sheriff may make exceptions to the restrictions about allowing evidence or questioning. On the application of the child, the relevant person, the Principal Reporter or Safeguarder, the sheriff may make an order to allow such evidence to be admitted or taken in certain circumstances. Subsection (4) provides that references in this section to an occurrence or occurrences of sexual behaviour include references to undergoing or being made subject to any experience of a sexual nature. As with sections 173 and 174, the provisions in this section cover both the victim of sexual behaviour and a child alleged to have committed an offence involving sexual behaviour. Subsection (5) provides a definition of “proper administration of justice” for the purposes of this section.

***Section 176 – Amendments of Vulnerable Witnesses (Scotland) Act 2004***

255. This section makes consequential amendments to the Vulnerable Witnesses (Scotland) Act 2004 (“the 2004 Act”). Subsection (3) amends section 12 of the 2004 Act and clarifies that the child witness notice or vulnerable witness application must be lodged or made before the commencement of the hearing at which the child or vulnerable witness is to give evidence. Subsection (4) inserts a new section 16A into the 2004 Act which allows the Principal Reporter to lodge a child witness notice or a vulnerable witness application, or to make an application for a review of the current arrangements for taking the witness’s evidence. The reporter may exercise this power where he or she is citing the witness who is also a party to the proceedings. The witness may lodge the notices or applications independently of the reporter.
256. Subsection (5) inserts a new section 22A into the 2004 Act which provides for evidence in chief to be given by prior statement in any hearing by a sheriff of an application under sections 93 or 94 of this Act to establish whether or not a ground for referral is established, or to review the establishing of a ground under section 110 of this Act where the ground of referral is that the child has committed an offence. The use of a prior statement enables a witness’s evidence to be recorded without interruption before the trial and alleviates the need for the witness to adopt or otherwise speak to the statement when giving evidence in court. It also avoids the need for the witness to be led through potentially distressing material in court. A prior statement of the type mentioned in subsection (7) of section 22A will only be admissible if it has been authenticated. The method of authentication is to be provided for by the Scottish Ministers in secondary legislation. For the purposes of section 22A, a statement is contained in a document where the person: makes the statement personally; has direct knowledge of the statement; or approves the statement.