

CHILDREN'S HEARINGS (SCOTLAND) ACT 2011

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 20 – General

Formal communications

Section 193 – Formal communications

317. This section lists the documents which are “formal communications” for the purposes of the Act. It also provides that such communications must be in writing. Subsection (3) provides that electronic communications will satisfy the requirement that formal communications be made in writing. The electronic communication must be sent by electronic means and capable of being reproduced in legible form. A formal communication sent electronically is treated as being received on the day it is sent.

Forms

Section 194 – Forms

318. This section allows the Scottish Ministers to determine the form of documents produced by virtue of the Act and how these documents will be sent. Subsection (2) provides that such documents may be sent electronically.

Subordinate legislation

Section 195 – Subordinate legislation

319. This section relates to the powers of the Scottish Ministers contained in the Act to make subordinate legislation. It provides for these powers to be exercisable by statutory instrument, and provides standard powers for instruments to include ancillary provisions as the Scottish Ministers think necessary or expedient and to make different provisions for different purposes. Subordinate legislation under this Act is subject to the negative procedure unless specific contrary provision is made in particular sections of the Act (subsection (3)). Subsections (2) and (3) do not apply to an order made under section 206 (commencement orders). This prevents a commencement order, which is made without any Parliamentary procedure, from making incidental, consequential or supplementary provision.

Section 196 – Negative procedure

320. This section applies where subordinate legislation under the Act is subject to the negative resolution procedure in the Scottish Parliament. Such subordinate legislation is in the form of a statutory instrument which must be laid before the Parliament and is subject to annulment in pursuance of a resolution of parliament. Such instruments are laid as made instruments (not in draft form) and come into force (or remain in force)

unless the Parliament annuls them within a period of 40 days from the day that they are laid.

Section 197 – Affirmative procedure

321. This section applies where subordinate legislation under the Act is subject to the affirmative resolution procedure in the Scottish Parliament. Such subordinate legislation is in the form of a statutory instrument which must be laid in draft before the Parliament for approval by resolution. Such instruments may only be made, and then come into force, after the Parliament has approved them.

Section 198 - Super-affirmative procedure

322. This section applies where subordinate legislation under the Act is subject to the super-affirmative resolution procedure in the Scottish Parliament – this applies to some of the powers in sections 10 and 17 only. Such subordinate legislation is in the form of a statutory instrument which must be laid in draft before the Parliament for approval by resolution. Such instruments may only be made, and then come into force, after the Parliament has approved them.
323. Subsection (3) requires that the Scottish Ministers, before laying such an instrument in draft before Parliament, must consult persons who are under 21 years of age as they consider appropriate, and such other persons as they consider appropriate. For the purposes of the consultation, Ministers must lay a copy of the proposed draft instrument before the Parliament, publish the proposed draft instrument as Ministers consider appropriate, and have regard to any representations about the proposed draft instrument that are made to them within 60 days of the date on which the copy of the proposed draft instrument is laid before the Parliament. Subsection (5) provides that in calculating the 60 day period, days when the parliament is dissolved or in recess for more than 4 days are not to be counted. Subsection (6) provides that when the draft instrument is laid before the Parliament, Ministers must lay before the Parliament an explanatory document giving details of the consultation carried out, any representations received as a result of the consultation, and the changes (if any) made to the proposed draft instrument as a result of those representations.

Interpretation

Section 199 – Meaning of “child”

324. This section provides a definition of “child” for the purposes of the Act. A child means a person under 16 years of age. However this section also provides some exceptions to that general rule. Subsection (2) provides that for the purposes of referrals under section 67(2)(o) (failure to attend school), references in the Act to a child include references to a person who is school age. “School age” has the meaning given in section 31 of the Education (Scotland) Act 1980.
325. Subsections (3), (4) and (5) provide that where a person becomes 16 after section 66 of the Act applies (after the Principal Reporter has obtained information that suggests the child might need a compulsory supervision order but before the reporter has made a determination on that issue) but before a relevant event, the Act continues to apply to that person until a relevant event occurs. A relevant event is the making of a compulsory supervision order, the notification under section 68(3) that the question of whether a compulsory supervision order should be made in respect of the child will not be referred to the Children’s Hearing (the reporter has determined not to refer to the Children’s Hearing) or the discharge of the referral. Subsections (6) and (7) provide that the provisions of the Act continue to apply to persons who are subject to a compulsory supervision order on becoming 16 or when one is made in respect of that person on or after they become 16 until the compulsory supervision order is terminated (it may be

continued at review under sections 138 or 139 where necessary) or the person reaches 18 years of age.

326. Subsections (8) and (9) relate to persons whose case has been remitted to the Children's Hearings under section 49(7)(b) of the Criminal Procedure (Scotland) Act 1995 for disposal. Where the person concerned will be over the age of 16 but under 18 and not at the time of the remit subject to a compulsory supervision order, the provisions of the Act will apply to them until the hearing or sheriff discharges the referral, any resulting compulsory supervision order is terminated or the person reaches 18 years of age.

Section 200 – Meaning of “relevant person”

327. This section defines the meaning of “relevant person” in relation to a child in the Act. A relevant person means:
- a parent or guardian who has parental responsibilities or parental rights in relation to the child under Part 1 of the 1995 Act;
 - a person in whom parental responsibilities or parental rights are vested under section 11(2)(b) of the 1995 Act; a person in whom parental responsibilities or parental rights are vested under section 11(12) of the 1995 Act;
 - a parent having parental responsibility for the child under Part 1 of the Children Act 1989;
 - a person having parental responsibility for the child under other provisions of the 1989 Act or the Adoption and Children Act 2002;
 - a person in whom parental responsibilities or parental rights are vested by a permanence order under the Adoption and Children (Scotland) Act 2007; or
 - any other person specified by order made by the Scottish Ministers.
328. Any such order will be subject to affirmative procedure. Subsection (2) provides that a parent does not have parental responsibilities or rights merely by virtue of contact order or specific issues order made under section 11(2)(d) or (e) of the 1995 Act.

Section 201 – Meaning of “relevant local authority”

329. Most duties under the Act are imposed on the “relevant local authority” for the child and that term is defined in this section. The relevant local authority for the child is the local authority for the area in which the child predominantly resides or (if that criterion does not apply) the area which the child has the closest connection to. In determining the relevant local authority no account is taken of a period of residence in a residential establishment, any other period of residence, residence in any other place, or connections with an area which may be prescribed in regulations. The child's relevant local authority may change during the child's involvement in the Children's Hearings system.

Section 202 – Interpretation

330. This section defines certain terms that are used in the Act.

General

Section 203 – Consequential amendments and repeals

331. **Section 203(1)** introduces schedule 5 which contains minor amendments and amendments consequential on the provisions of the Act. Subsection (2) introduces schedule 6 which contains the repeal of certain enactments to the extent specified.

Section 204 – Ancillary provision

332. This section allows the Scottish Ministers, by order, to make consequential, supplementary or incidental provision as they consider appropriate for the purposes of, in consequence of, or for giving full effect to, any provision of the Act. Such an order may modify any enactment including this Act itself. If the order makes textual changes to an Act it will be subject to the affirmative procedure.

Section 205 – Transitional provision etc.

333. This section enables the Scottish Ministers, by order, to make transitory, transitional or saving provision, as they consider necessary or expedient, in connection with the coming into force of any provision of the Act.

Section 206 – Short title and commencement

334. This section states the short title of the Act and provides for sections 193 to 202 and section 204 to 206 to come into force on Royal Assent, with the remaining sections to be commenced by order made by the Scottish Ministers. An order under subsection (2) may include transitional, transitory or saving provision.