EXPLANATORY MEMORANDUM TO

THE CHILDREN'S HEARINGS (SCOTLAND) ACT 2011 (CONSEQUENTIAL AND TRANSITIONAL PROVISIONS AND SAVINGS) ORDER 2013

2013 No. [XXXX]

1. 1.1 This Explanatory Memorandum has been prepared by the Scotland Office and is laid before Parliament by Command of Her Majesty.

1.2 This Memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 This Order contains provision which is necessary or expedient in consequence of the Children's Hearings (Scotland) Act 2011 ("the 2011 Act"). The 2011 Act restates and amends the law relating to children's hearings in Scotland. This instrument updates existing legislation in consequence of these amendments.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 This Order is to be made in exercise of the powers conferred by sections 104, 112(1) and (4), and 113(2), (3), (4) and (5) of the Scotland Act 1998 ("the 1998 Act"). Section 104 of the 1998 Act provides for subordinate legislation to be made in the UK Parliament which contains provisions which are necessary or expedient in consequence of any provision made by or under any Act of the Scottish Parliament.

3.2 The Order is necessary or expedient in consequence of the 2011 Act as existing UK legislation needs to be updated following amendments made to Scottish children's hearings law.

3.3 This Order is subject to affirmative resolution procedure in the UK Parliament.

4. Legislative Context

4.1 This Order is in consequence of the 2011 Act which will fully come into force on 24 June 2013. The 2011 Act repeals substantial parts of the Children (Scotland) Act 1995 ("the 1995 Act") and restates and updates existing provisions as well as creating new provisions for children's hearings in Scotland.

4.2 Certain pieces of legislation that apply throughout the United Kingdom, or in one or more of England, Wales or Northern Ireland, make reference to the 1995 Act. As the 2011 Act repeals substantial parts of the 1995 Act, large numbers of these references no longer make sense resulting in the legislation not working as intended. Accordingly, this

Order updates existing legislation to ensure it continues to operate effectively by recognising that it is now the 2011 Act and regulations made under it that govern children's hearings in Scotland. The 2011 Act applies only to Scotland. In order to ensure this operates effectively, this Order creates certain powers to mirror some of those in the 2011 Act. These will ensure the effective enforcement of the 2011 Act throughout the UK in the same way as has been achieved under the 1995 Act.

4.3 The order uses the term "place of safety" in connection with placing a child in an emergency situation. The definition here is the same as the definition of "place of safety" in section 202 of the 2011 Act. The same definition of "place of safety" currently applies under the 1995 Act and was used in very similar terms in the previous children's hearings regime under the Social Work (Scotland) Act 1968. The policy intention of this Order is that there should be maximum flexibility for those having to place children in places of safety. These are emergency situations and it will be for those dealing with the child at the time to decide which of the places provided for is best in the circumstances, and this Order does not intend to close off any options unnecessarily. Accordingly, a "surgery" could be a place of safety. This term is used in its ordinary sense in order to give maximum flexibility to those requiring to place a child in a place of safety. Similarly, a child may be placed with a "suitable" person and it is intended that those accompanying the child and implementing the emergency order will decide whether a person is suitable at the time the order is implemented.

Enforcement of orders

4.4 Under the 2011 Act, certain orders can be made in relation to a child which may specify conditions including, for example, where a child will live. The orders are those specified in this Order as "relevant orders" so where any of the relevant orders is made authorising the keeping of the child in a particular place, this Order gives constables in England, Wales and Northern Ireland powers to enforce such orders by giving them the powers specified in article 5. Enforcement procedures similar to those provided for in article 5 previously existed under the 1995 Act.

Warrants to secure attendance

4.5 Warrants to secure attendance are designed to make sure a child is brought before relevant proceedings; either before a children's hearing or a sheriff. Where a warrant to secure attendance is granted under the 2011 Act and the child is in England, Wales or Northern Ireland, article 6 of this Order makes provision to allow a constable in any of those jurisdictions to enforce that warrant. Similar procedures to enforce warrants securing attendance existed under the 1995 Act.

Compulsory supervision orders ("CSO")

4.6 A CSO broadly mirrors a 1995 Act "supervision requirement". A CSO may be imposed by a children's hearing or sheriff on a child who is under the age of 16. A child who is subject to a CSO when they are 16 may continue to be the subject of a CSO until they are 18. A children's hearing can choose, if it is in the best interests of a child, to

place that child in a particular place in England or Wales and article 7 of this instrument gives power to the hearing to do this. This simply mirrors the situation which previously existed under the 1995 Act.

Interim compulsory supervision orders (ICSO)

4.7 An ICSO consolidates several of the existing 1995 Act warrant provisions into one interim order which allows the children's hearing or the sheriff to put interim measures in place before deciding whether compulsory measures of supervision are needed such as imposing a CSO. As with a CSO, a children's hearing can choose, if it is in the best interests of a child, to place that child in a particular place in England or Wales.

Child absconding from place

4.8 A children's hearing or a sheriff may consider that it is in the best interests of a child to stay in a particular place. If that child then absconds from the particular place, for whatever reason, to a place in England, Wales or Northern Ireland, article 8 of this Order allows a constable in any of those jurisdictions to arrest the child without a warrant and take them to the place. If a court is satisfied that there are reasonable grounds to believe that the child has absconded to particular premises, the court may grant a warrant authorising a constable to enter those premises, search for the child and to use reasonable force for the purposes of entering premises and searching for the child. This simply restates the situation which previously existed under the 1995 Act.

Child absconding from person

4.9 A children's hearing or a sheriff may consider that it is in the best interests of a child to stay with a particular person. If that child then absconds from the particular person, for whatever reason, to a place in England, Wales or Northern Ireland, article 9 of this Order allows a constable in any of those jurisdictions to arrest the child without a warrant and take them back to the person. Similarly, if a court is satisfied that there are reasonable grounds to believe that the child has absconded to particular premises, the court may grant a warrant authorising a constable to enter those premises, search for the child and, to use reasonable force for the purposes of entering premises and searching for the child. This simply restates the situation which previously existed under the 1995 Act.

Offences relating to absconding

4.10 A children's hearing or a sheriff may consider it to be in the best interests of a child to require them to be kept in a particular place or with a particular person, such as a foster carer or a relative who has (or is authorised to have) control of a child by virtue of a specified warrant or order. It is an offence for a person to knowingly assist or induce a child to abscond from such a place or person, to knowingly harbour or conceal a child who has absconded, or to knowingly prevent a child from returning to the place where the child is required to be kept or to the person with whom the child is required to stay. Anyone who commits such an offence is liable on summary conviction to a fine or imprisonment or both. Article 10 of this Order creates these offences in England, Wales

and Northern Ireland and provides for the penalties. This simply restates the situation which previously existed under the 1995 Act.

Offence relating to intentional obstruction

4.11 Under the 2011 Act it is an offence to intentionally obstruct the implementation of a child assessment order, a child protection order, or an order made under section 55 of the 2011 Act. It is also an offence to obstruct a constable acting under section 56 of the 2011 Act. Anyone who commits such an offence is liable on summary conviction to a fine. Article 11 of this Order creates this offence in England, Wales and Northern Ireland.

Publishing restrictions

4.12 This Order prohibits the publication of certain information about proceedings at a children's hearing or court proceedings under the 2011 Act if it is intended that publication will, or is likely to, identify the child, the child's address, or the school which the child attends. This restriction applies to any person and could therefore include journalists and their publishers as well as relatives or carers. A breach of this prohibition is an offence and anyone who commits such an offence is liable on summary conviction to a fine. Article 12 of this Order creates this offence in England, Wales and Northern Ireland. This simply restates the situation which previously existed under the 1995 Act.

Transfer of children from Scotland to England, Wales and Northern Ireland: Effect of Compulsory supervision order

4.13 The Children (Reciprocal Enforcement of Prescribed Order etc. (England and Wales and Northern Ireland)) (Scotland) Regulations 1996, SI 1996/3267 ("the 1996 Regulations") allow for orders made for care etc. of children by courts in the UK outwith Scotland to be treated as if they were subject to supervision requirements if the child were to move to Scotland. The 1996 Regulations also allow for a Scottish supervision requirement to be treated as if it was an order under an enactment under which the corresponding England or Wales or Northern Ireland order is made if a child is moving outwith Scotland but within the UK. However the 1996 Regulations will be repealed once the 2011 Act is implemented. The aim is to use this Order to replicate, where practicable, the 1996 Regulations provision for a child moving from Scotland to England, Wales or Northern Ireland. Articles 13 and 14 make this provision.

4.14 Article 13 of this Order makes provision for the situation where a child in Scotland, who is subject to a CSO, moves to live in England or Wales. This article provides for that CSO to be treated as an equivalent order made under the law of England and Wales.

4.15 Similarly, article 14 of this Order makes provision for the situation where a child in Scotland, who is subject to a CSO, moves to live in Northern Ireland. This article provides for that CSO to be treated as an equivalent order made under the law of Northern Ireland.

4.16 The provisions included in article 13 of this Order replace existing provision contained in the Children (Reciprocal Enforcement of Prescribed Orders etc. (England and Wales and Northern Ireland)(Scotland) Regulations 1996 (SI 1996/3267). The intention in this order is largely to carry forward the regime governed by those regulations which works well between Scotland and the rest of the UK. The terminology used in those regulations is well understood by those operating the system. A term such as "education supervision" which is used in those regulations is not defined there but is understood by those concerned. Article 13 continues the use of this term

Transfer of children from England, Wales and Northern Ireland to Scotland: Effect of orders made in England, Wales and Northern Ireland

4.17 A separate set of regulations using the powers at section 190 of the 2011 Act, to be known as The Children's Hearings (Scotland) Act (Transfer of Children to Scotland-Effect of Orders made in England, Wales and Northern Ireland) Regulations 2013, will apply where a child subject to a Care, Supervision or Education Supervision Order made in England, Wales or Northern Ireland moves to Scotland and becomes subject to the jurisdiction of the children's hearings system. These Regulations (attached as Annex A to this Explanatory Memorandum) were laid before the Scottish Parliament on 29th January 2013 but had not received the approval of the Scottish Parliament before this instrument was laid in the UK Parliament. However, the Scottish Parliament's Education and Culture Committee approved these Regulations on 5th March 2013. We expect the Regulations to be both approved by the Scottish Parliament and made on 13th March 2013 and subsequently come in to force on the same date as this Order when they will be incorporated by reference into article 15 of this Order.

4.18 Article 15 of the Order makes provision so that once a child moves to Scotland subject to an English, Welsh or Northern Irish order which has then been converted to a Scottish compulsory supervision order, the English, Welsh or Northern Irish order ceases to have effect as the child becomes the responsibility of Scotland.

Child placed in secure accommodation: decision of the head of unit

4.19 Under the 2011 Act, a children's hearing may, in conjunction with a relevant order or warrant, make a secure accommodation authorisation (SAA) which could specify that the child resides at a residential establishment in England, Wales or Northern Ireland. Under the 2011 Act, the Chief Social Officer (CSWO) must then make a decision as to whether or not to implement the SAA. Once that decision has been made, consent from the head of unit in which the child is to be placed is to be requested. This Order specifies the criteria upon which the head of unit is to base their decision. All heads of unit in Scotland will be required to comply with this requirement and article 16 of this Order makes provision mirroring that requirement for England, Wales and Northern Ireland.

4.20 This Order also makes a number of provisions that make consequential amendments to primary and secondary legislation to ensure that existing legislation can operate effectively with the 2011 Act and legislation made under it.

5. Territorial Extent and Application

5.1 Except as outlined below in 5.2 to 5.5, this Order extends to England and Wales, Scotland and Northern Ireland.

5.2 The modifications made by the Schedules have the same extent as the provisions being modified.

5.3 Articles 7, 13 and 16 extend to England and Wales and Scotland only.

5.4 Articles 10, 11 and 12 extend to England and Wales and Northern Ireland only.

5.5 Article 14 extends to Scotland and Northern Ireland only.

5.6 Article 20 extends to England and Wales only.

6. European Convention on Human Rights

The Parliamentary Under Secretary of State for Scotland, the Rt. Hon David Mundell MP, has made the following statement regarding Human Rights:

> *"In my view the provisions of the Children's Hearings (Scotland) Act 2011 (Consequential and Transitional Provisions and Savings)Order 2013 are compatible with the Convention rights."*

7. Policy background

7.1 The reform of the children's hearings system is part of the Scottish Government's overall work in relation to children and young people aimed at breaking Scotland's historic cycles of poverty, under achievement and inequalities in health, income and outcomes. Although the system is well regarded both within Scotland and further afield, Scotland must have a children's hearings system that is capable of dealing with the challenges presented today and in the future – challenges such as the large growth in the number of children needing care and protection as well as the need to deal with offending behaviour by young people.

7.2 The fundamental philosophy and principles of the children's hearings system were established over 40 years ago in the Kilbrandon Report of 1964 and remain as true today as they did when the report was first published. These were the welfare principle; the consideration of needs alongside deeds; the appropriate forum of the hearing as the best place to make decisions on compulsory measures of supervision intended to support children through difficult times; and, the imperative of the involvement of the child in discussions. It is these principles which make the children's hearings system unique because the children who come within it, either on welfare or offending grounds, are considered to be children who are in need, facing risks either from their own behaviour or, from the behaviour of others.

7.3 The key aims of the 2011 Act are therefore to protect those underlying principles and to strengthen and modernise the children's hearings system, focusing on improving outcomes for children and young people by addressing their needs and promoting their rights. The key objectives are to ensure that the children's hearings system is: focused on improving outcomes for children and young people; child and young person-friendly; nationally consistent, but locally delivered; better equipped to make effective, evidence based decisions; fully accountable for its actions and decisions, underpinned by a more independent tribunal; and European Convention on Human Rights compliant.

8. Consultation outcome

8.1 Although there has been no general consultation specific to the amendments of this Order, the Whitehall, Welsh Government and Northern Ireland Executive departments with responsibility for the legislation which this Order affects have been consulted during the drafting of this Order. All amendments contained in this Order have the approval of the relevant departments.

8.2 With regard to wider consultation, the Scottish Government conducted several consultations on reform of the Children's Hearings system in Scotland. In 2004 it published *Getting it Right for Every Child: Review of the Children's Hearings system.* This was followed in 2005 by the publication of *Getting it Right for Every Child: proposals for action*. In December 2006 the Scottish Government consulted on its draft Children's Services Bill. This Bill was not subsequently introduced to the Scottish Parliament.

8.3 Following these earlier consultations, the Scottish Government ran its *Strengthening for the Future: A consultation on the Reform of the Children's Hearings System* from 31 July 2008 – 24 October 2008. This consultation received 259 responses. 61% of respondents stated that they had direct involvement in the Children's Hearings System as a panel member. 24 Children's Panels and 26 Children's Panel Advisory Committees also responded to the consultation.

8.4 Most respondents agreed that reform of the Children's Hearings System was necessary. There was support for changes at a national level that would improve consistency and practice in areas such as training, recruitment and promotion. A condition often attached to this support was that the Hearings system should retain the use of volunteers with local knowledge of the needs of their communities, and that any national reforms must not be at the cost of local delivery. However, very little support was received for the establishment of a single national body to oversee all aspects of the Children's Hearings System; along with very little confidence that independence of decision makers would be protected were this option to be taken forward.

8.5 As a consequence of the responses to this consultation, the proposals contained within *Strengthening for the Future* were revised. This revision resulted in a draft Children's Hearings (Scotland) Bill being published for consultation in June 2009. This

Bill received broad stakeholder support and was therefore introduced to Scottish Parliament during February 2010, passed during November 2010, and received royal assent on 6 January 2011.

9. Guidance

9.1 This Order stands alone, guidance is not necessary.

10. Impact

10.1 This instrument has no impact of a regulatory nature on the private sector or civil society organisations and will not impose or reduce costs.

10.2 This instrument has no impact on the public sector other than the impact on local authorities applying and dis-applying benefits following changes to the definitions of a "looked after child" and a "young individual".

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 The effect of this Order is purely consequential. It does not create new policy or frameworks and therefore no monitoring or review of the effects of this Order are required.

13. Contact

Emma Lopinska at the Scotland Office (Tel: 0131 244 9026 or email: emma.lopinska@scotlandoffice.gsi.goc.uk) can answer any queries regarding the instrument.

ANNEX A – THE CHILDREN'S HEARINGS (SCOTLAND) ACT (TRANSFER OF CHILDREN TO SCOTLAND – EFFECT OF ORDERS MADE IN ENGLAND, WALES AND NORTHERN IRELAND) REGULATIONS 2013

This draft replaces the one laid on 16th January 2013. It is being issued free of charge to all known recipients of those draft Regulations.

Draft Regulations laid before the Scottish Parliament under section 190(2)(c) of the Children's Hearings (Scotland) Act 2011, for approval by resolution of the Scottish Parliament.

D R A F T S C O T T I S H S T A T U T O R Y I N S T R U M E N T S

2013 No.

CHILDREN AND YOUNG PERSONS

The Children's Hearings (Scotland) Act 2011 (Transfer of Children to Scotland – Effect of Orders made in England and Wales or Northern Ireland) Regulations 2013

Made - - - -

Coming into force in accordance with regulation 1

The Scottish Ministers make the following Regulations in exercise of the powers conferred by section 190 of the Children's Hearings (Scotland) Act 2011([1]) and all other powers enabling them to do so.

In accordance with section 190(2)(c) of the Children's Hearings (Scotland) Act 2011, a draft of these Regulations has been laid before, and approved by resolution of, the Scottish Parliament.

Citation and commencement

1. These Regulations may be cited as the Children's Hearings (Scotland) Act 2011 (Transfer of Children to Scotland – Effect of Orders made in England and Wales or Northern Ireland) Regulations 2013 and come into force on the same day as section 190 (effect of orders made outwith Scotland) of the Children's Hearings (Scotland) Act 2011.

Interpretation

2.—(1) In these Regulations—

"the Act" means the Children's Hearings (Scotland) Act 2011;

"the 1989 Act" means the Children Act 1989([2]);

([1]) 2011 asp 1.

"the 1995 Order" means the Children (Northern Ireland) Order 1995([3]);

"local authority", in relation to England and Wales, has the meaning given by section 105(1)([4]) of the 1989 Act in respect of England and Wales.

(2) Any reference in these Regulations to anything done in writing includes a reference to anything done in electronic form which is—

(a) sent by electronic means; and

(b) capable of being reproduced in legible form.

Effect of care orders made in England and Wales

3.—(1) This regulation applies where—

(a) a child is subject to a care order made under section 31(1)(a) of the 1989 Act;

(b) the court has given approval under paragraph 19(1) of Schedule 2 to the 1989 Act to the local authority ("the home local authority") to arrange, or assist in arranging, for the child to live in Scotland;

(c) the local authority for the area in which the child is to reside, or has moved to, in Scotland ("the receiving local authority") has, through the Principal Reporter, notified the court in writing that it agrees to take over the care of the child; and

(d) the home local authority has notified the court that it agrees to the receiving local authority taking over the care of the child.

(2) The care order has effect as if it were a compulsory supervision order.

(3) In this regulation "court" means the court which has given the approval in terms of paragraph 19(1) of Schedule 2 to the 1989 Act.

Effect of supervision orders and education supervision orders made in England and Wales

4.—(1) This regulation applies where—

(a) a child is subject to a supervision order made under section 31(1)(b)([5]) of the 1989 Act, or an education supervision order made under section 36(1)([6]) of that Act;

(b) the local authority designated under section 31(1)(b) of the 1989 Act, or the local authority designated under section 36(1) of that Act, has notified the local authority for the area in which the child is to reside in Scotland ("the receiving local authority") of the proposed transfer of the child to Scotland; and

(c) the receiving local authority has consented to the proposed transfer in writing.

(2) The supervision order, or education supervision order, has effect as if it were a compulsory supervision order.

Effect of care orders made in Northern Ireland

5.—(1) This regulation applies where—

(a) a child is subject to a care order made under article 50(1)(a) of the 1995 Order;

([2]) 1989 c.41.
([3]) S.I. 1995/755 (N.I. 2).
([4]) The definition of "local authority" was amended by paragraph 13 of Schedule 10 and by Schedule 18 to the Local Government (Wales) Act 1994 (c.19). There are other amendments to section 105(1) which are not relevant to these Regulations.
([5]) Section 31(1)(b) was amended by Schedule 8 to the Criminal Justice and Court Services Act 2000 (c.43).
([6]) Section 36(1) was amended by S.I. 2010/1158.

(b) the court has given approval under article 33(1) of the 1995 Order to the authority to arrange, or assist in arranging, for the child to live in Scotland;

(c) the local authority for the area in which the child is to reside, or has moved to, in Scotland ("the receiving local authority") has, through the Principal Reporter, notified the court in writing that it agrees to take over the care of the child; and

(d) the authority has notified the court that it agrees to the receiving local authority taking over the care of the child.

(2) The care order has effect as it if were a compulsory supervision order.

(3) In this regulation—

"court" means the court which has given the approval in terms of article 33(1) of the 1995 Order; and

"authority" means, in relation to Northern Ireland, a Health and Social Care trust established by article 10(1) of the Health and Personal Social Services (Northern Ireland) Order 1991([7]) and renamed by section 1(3) of the Health and Social Care (Reform) Act (Northern Ireland) 2009([8]).

Effect of supervision orders or education supervision orders made in Northern Ireland

6.—(1) This regulation applies where—

(a) a child is subject to a supervision order made under article 50(1)(b) of the 1995 Order, or an education supervision order made under article 55(1) of that Order;

(b) the authority designated under article 50(1)(b) of the 1995 Order, or the education and library board designated under article 55(1) of that Order, has notified the local authority for the area in which the child is to reside in Scotland ("the receiving local authority") of the proposed transfer of the child to Scotland; and

(c) the receiving local authority has consented to the proposed transfer in writing.

(2) The supervision order, or education supervision order, has effect as if it were a compulsory supervision order.

(3) In this regulation—

"education and library board" means an education and library board established under article 3 of the Education and Libraries (Northern Ireland) Order 1986([9]);

"authority", in relation to Northern Ireland, has the meaning given in regulation 5(3).

Application of the Act to orders which have converted under regulation 3, 4, 5 or 6

7.—(1) This regulation applies where an order made in England and Wales or Northern Ireland has effect as if it were a compulsory supervision order by virtue of regulation 3, 4, 5 or 6.

(2) For the purposes of the application of the Act, the implementation authority is—

(a) where regulation 3 applies, the receiving local authority referred to in regulation 3(1)(c);

(b) where regulation 4 applies, the receiving local authority referred to in regulation 4(1)(b);

(c) where regulation 5 applies the receiving local authority referred to in regulation 5(1)(c); and

(d) where regulation 6 applies the receiving local authority referred to in regulation 6(1)(b).

(3) Section 131(2) of the Act is modified and applies as if there were inserted at the end—

([7]) S.I. 1991/194 (N.I. 1). Section 10(1) was relevantly amended by section 43(1) of the Health and Personal Social Services Act (Northern Ireland) 2001 (c.3).
([8]) 2009 c.1 (N.I.).
([9]) S.I. 1986/594 (N.I. 3), to which there are amendments not relevant to these Regulations.

"(f) the authority becomes aware that the child is subject to a compulsory supervision order by virtue of regulations made under section 190 of this Act.".

(4) Section 137 of the Act is modified and applies as if there were inserted after subsection (3)—

"(3A) If the review is initiated under section 131(2)(f) the children's hearing must be arranged to take place no later than 20 working days after notice is given to the Principal Reporter under section 131(1).".

Name
Authorised to sign by the Scottish Ministers

St Andrew's House,
Edinburgh
Date

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations apply where a child is transferred to Scotland from England and Wales or Northern Ireland whilst subject to an order made in that jurisdiction giving an authority care or supervisory responsibility for that child.

The Regulations make provision for those orders to have effect as if they were compulsory supervision orders. Regulation 7 specifies which local authority is responsible for implementing the measures of the compulsory supervision order for the purposes of the Children's Hearings (Scotland) Act 2011. It also modifies sections 131(2) and 137 of that Act to provide that the children's hearing must review the child's case after the transfer is effected by requiring the local authority to notify the Principal Reporter who must arrange a hearing to take place no later than 20 working days after receiving that notice.