

CRWIA – Stage 3

Publication Template

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<p>CRWIA title: Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Amendment Rules 2021</p> <p>Date of publication: 18 December 2020</p>	
<p>Executive summary</p>	<p>The Children (Scotland) Act 2020 Act ('the Act') gained Royal Assent on 1 October 2020. The Scottish Government has been working with partners in the period since, particularly to commence section 25 of the Act relating to the opportunity to participate in children's hearings.</p> <p>Regulations are required to define the scope of the opportunity to participate -ensuring the widest possible participation, without diluting the rights or best interests of the child at the centre of a hearing or the rights of relevant persons.</p> <p>Early commencement directly responds to the conclusions of the Promise in ensuring wherever possible sibling relationships can be maintained, it takes on board the findings of the Supreme Court judgment relating to the ABC and XY cases, and delivers on the essential elements of the Stand Up For Siblings Campaign.</p> <p>These regulations therefore set out the criteria for individuals to meet in order to have an opportunity to participate – in the wider process as well as in particular proceedings and decisions.</p> <p>These regulations also take the opportunity to update the drafting of current rules on exclusion from hearings and to clarify procedure on electronic signatures, virtual attendance, and sharing of reports.</p>
<p>Background</p>	<p><u>Opportunity to Participate</u></p>

During a Children's Hearing there may be decisions which directly and significantly affect contact or the possibility of contact between the child at the centre of the hearing and their sibling(s). The Scottish Government is clear that all siblings should get a proper opportunity to provide their view to decision-makers on their contact with their brother or sister who is the subject of the hearing. The SSI provides for appropriate rights of involvement for siblings whilst protecting the focus of proceedings on the child at the centre of the hearing, whose own best interests remain the paramount consideration. Ministers recognise that the preservation and development of sibling relationships and contact will usually have a positive impact on the subject child's best interests, as well as on the rights and interests of their siblings.

Siblings, particularly those who are children or young people, may not always fall within the accepted definition for 'deemed' relevant person status. In order to be deemed a Relevant Person the applying individual should have, or have recently had, significant involvement in the upbringing of the subject child. This 'quasi-parental' role - while applicable to some sibling relationships - is often qualitatively different to the legitimate interest of siblings in growing up together, or in maintaining their relationships and staying in contact where they cannot grow up together. The children's hearings system does provide opportunities for a number of participants in hearings - parents, social workers, safeguarders etc - to elicit and reflect the views of siblings and to provide these to the hearing. It is recognised that a sibling should have opportunity themselves to either provide a report or, to attend the hearing in person and be supported to give their views where a decision is likely to affect their contact with their brother or sister.

The purpose of section 25 of the 2020 Act is to enable others to have an opportunity to take meaningful part in Children's Hearings. Participation would provide certain rights including:

- the right to be notified of the hearing,
- the right to provide a report or other document to the hearing,
- the right to be provided with documents specified in the rules,
- authorisation to attend the hearing,
- the right to be represented at the hearing, and
- the right to seek a review of a compulsory supervision order

Section 25 also provides that the criteria for defining the 'opportunity to participate' will be laid out in regulations via section 177 of the Children's Hearings (Scotland) Act 2011 ('the 2011 Act').

In order to benefit from these provisions, an individual seeking to have an opportunity to participate must be living or have lived with the subject child, have an ongoing relationship with the character of a relationship between siblings (whether or not they have a parent in common). An additional requirement is that, the children's hearing is likely to make a decision significantly affecting contact or the possibility of contact between the individual and the child, and the individual seeking participation is capable of forming a view on the matter of contact between themselves and the subject child.

An opportunity to participate can be in many forms such as providing a written view, a recording or personal attendance and direct verbal participation at the hearing. Attendance of the individual will have the necessary support in place to play a full part in discussions on the issues relating to contact, and siblings will also have the right to representation.

The regulations will provide the chairing member of the Children's Hearing a power to end the individual's participation in the hearing once their legitimate interest in the hearing – namely, the relevant issues related to contact, have been concluded.

Electronic signatures

The 2011 Act provides that the decision and reasons of the hearing, as well as other reports, orders or warrants must be signed by the chairing member of the hearing. The Principal Reporter must send notification of the decision and reasons, copies of orders issued to the subject child and the relevant persons. The chairing member of a hearing must currently add a 'wet' signature to any decision made or order issued.

There is no current permanent provision which allows this to be done electronically. The coronavirus outbreak has meant that it has not been possible for children's hearings to be carried out in the usual format. Often the decisions have been made remotely, with the children's panel members in a different place from the children's reporter – meaning that the paperwork cannot be signed by hand. The Coronavirus (Scotland) Act 2020 made emergency provision authorising the use of electronic signatures. It is clear from the operation of the children's hearings system since April 2020 that the use of virtual or blended hearings will be a necessary longer term option and permitting the use of electronic signatures does represent a time and cost saving with no discernible adverse impacts for children, families or system participants. Electronic signatures are permissible in current court practice in Scotland.

Exclusions

Use of the current power of exclusion of a relevant person as set out in the 2011 Act is limited to where the impact on the child is severe enough to cause significant distress or is directly preventing them from giving their views. The Scottish Government considers it necessary to broaden this power to include situations where there is a similar impact on other relevant persons. This broader power is to apply to the exclusion of relevant persons, their representatives, and journalists. It is not considered necessary for this power to extend to the exclusion of any other people who may attend a hearing.

The test for the use of this power is to be broadened to include the impact on a relevant person. It should not apply to the impact on professionals, such as social workers, or other people who may attend a hearing. It should also not extend to the impact on siblings who may have an opportunity to participate because the attendance of the child and relevant persons must be prioritised, and there are other ways to input views, such as by letter. The criteria for meeting the test will mirror the existing criteria for exclusion where there is a significantly distressing impact on the child. When the exclusion from the hearing has ended, the chairing member must explain to the person what has taken place in their absence.

The Scottish Ministers are also taking the opportunity to include a provision in the rules to exclude from the hearing any person who is being violent or abusive, or so disruptive that the hearing has to be adjourned, or deferred to another day. It would be beneficial to the safe conduct of hearings if this was clearly provided for in the rules of procedure to avoid any uncertainty, and provide stronger justification in cases where decisions to exclude individuals may be challenged. The power to exclude should not be used to pre-emptively exclude a person who is considered likely to be disruptive, for example someone with a history of disrupting hearings. Such a situation may be appropriately dealt with under virtual attendance.

Virtual attendance

Prior to the Covid-19 pandemic, the procedure regulating virtual attendance at hearings was inflexible, due to the requirement for an attendee: to be excused from attending a hearing beforehand; to request the use of video conferencing; and for the reporter to be satisfied that the person has a good reason for not attending in person. The policy intention is to create a more open and flexible approach by allowing the child, relevant persons, and other attendees to request to attend by other methods. The reporter would then be

required to take all reasonable steps to enable and facilitate attendance by other methods if requested by any person- without the need for them to be excused from the children's hearing first via a Pre-Hearing Panel - provided they have a good reason for not attending in person, or they would be better able to participate in that way.

In addition to this duty on the Reporter to take reasonable steps to enable virtual attendance on request, a Pre-Hearing Panel should have a power to direct an attendee to attend virtually. While attendance in person is usually preferable, it should not be considered an infringement of an individual's right of attendance if they are directed to attend virtually. The current Mental Health Tribunal rules provide an appropriate model to follow. A relevant person (and their representative), a sibling with an opportunity to participate (and their representative), and journalists should be able to be required to attend by electronic means, rather than physically attending the hearing. The criteria for requiring virtual attendance should be that the Pre-Hearing Panel is satisfied that the person's physical attendance at the hearing, or any part of it, is likely to prevent the hearing from obtaining the views of the child or a relevant person or cause significant distress to the child or relevant person.

Sharing of reports

It has been clear for some time that a number of practitioners taking part in children's hearings are not being provided with all of the relevant reports beforehand. This may have a detrimental effect on participants' ability to prepare for the hearing on an informed basis, and hence a potentially adverse impact on the discussion and decision and potential outcomes for children. In particular, it has been reported that Safeguarder reports are not systematically shared with social work departments and therefore social workers not being fully able to prepare accordingly, or to offer possible adapted options for the hearing, in order to

	address concerns/recommendations made in the report.
Scope of the CRWIA, identifying the children and young people affected by the policy, and summarising the evidence base	All children who are participating in a children’s hearing or pre-hearing panel will be affected by these changes, including children aged 0 – 18 th birthday will be affected by these changes if they have siblings or an ongoing relationship with the character of a relationship between siblings (whether or not they have a parent in common).
Children and young people’s views and experiences	<p>Given the unprecedented circumstances presented by the COVID-19 pandemic and the need to react quickly to protect all in society ,including children and young people, it was not possible to consult with children and young people on the detail of the proposed legislation. We have however relied on a range of evidence as to the Voice of children and young people, principally in the Promise and in the Stand Up for Siblings materials. Officials have engaged with the stakeholders affected directly by the legislation, with the Promise, the Children’s and Young People’s Commissioner’s office, Scottish Children’s Reporter Administration, Children’s Hearings Scotland and Clan Childlaw.</p> <p>The regulations are in direct response to the conclusions of the Promise, alongside the findings of the Supreme Court and the ethos behind the Stand Up for Siblings Campaign.</p> <p>The views and experiences gathered in all 3 above is the necessary evidence base from children and young people.</p> <p><u>The Promise</u> The independent Care Review for Scotland has made it clear in its conclusions The-Promise.pdf (carereview.scot) that separation from brothers and sisters can have a profound and lifelong consequence and that siblings staying together should be fully implemented and closely monitored.</p>

	<p><u>Supreme Court</u> Supreme Court cases challenging articles 6 & 8 of ECHR around siblings unable to meet current relevant person and therefore no route to providing a view on contact:</p> <ul style="list-style-type: none"> • XY decision In the matter of XY (AP) (Appellant) (Scotland) - The Supreme Court • ABC Decision ABC (AP) (Appellant) v Principal Reporter and another (Respondents) (Scotland) - The Supreme Court <p><u>Stand Up for Siblings (SUFS)</u> SUFS covers rights but also has life experiences on sibling contact and the effect of separation Sibling rights Stand Up For Siblings</p>
<p>Key Findings, including an assessment of the impact on children’s rights, and how the measure will contribute to children’s wellbeing</p>	<p>Evidence will be gathered to assess the rights and wellbeing impacts in the following areas:</p> <p>Impact on relationships and contact developed by siblings involved in Children’s Hearings Effect of exclusions of relevant persons on discussions and decisions at children’s hearings Use of virtual hearings Access to technology and advocacy/ representation/ advice</p>
<p>Monitoring and review</p>	<p>In quickly responding to commencement of section 25 of the Children (Scotland) Act and the immediate opportunity to make significant and early impact on the findings of the Promise the regulations on ‘opportunity to participate’ have solely focussed on sibling relationships and the immediate challenge to ensure that any decision significantly affecting contact must provide an opportunity for siblings to give a view.</p> <p>There will be future opportunity to expand the criteria . The ongoing pandemic and the necessary virus</p>

		<p>suppression measures have imposed significant pressures on the hearings system. Expanding and further widening the classes of attendees could put unmanageable pressure on the system as it in re-establishes through recovery plan mode in the next year.</p> <p>The period between laying of the regulations and their coming into force will provide time for stakeholders including the Scottish Children’s Reporter Administration and Children’s Hearings Scotland to prepare and produce the necessary guidance for children and families, reporters, panel members and other practitioners, and to deliver the necessary updated training.</p>		
Regulations	Aims of measure	Likely to impact on . . .	Compliance with UNCRC requirements	Contribution to local duties to safeguard, support and promote child wellbeing
Opportunity to Participate	To provide siblings or those with a sibling like relationship the opportunity to participate in a hearing when any discussions concerns potential significant impact on contact	On all children at the centre of a hearing if they have sibling relationships		Positive impact, maintaining relationships and ensures lifelong attachment to family support
electronic signature	<p>These provisions enable authentication of documents by electronic signature.</p> <p>The provisions have formed part of the Coronavirus (Scotland) Act 2020 and are seen to be beneficial for future use beyond the pandemic. This brings Children’s Hearings in line with practice used in courts.</p> <p>.</p>	Operational work in the children’s hearing system before March 23 rd 2020 essentially meant that the key decision makers (panel members)’ the record keeper (the Reporter) and children and families were in the same place at the same time for the children’s hearing. This		<p>Positive impact: Legal paperwork has been authenticated without any risk to anyone and without any delay. This has provided protections to children with no negative impacts.</p> <p>These measures will help to keep children and</p>

		<p>meant that the paperwork was exactly that – hard copies. Since March 23rd the operation of the hearing has become much more varied and dynamic and often means that there are no hard copy documents to sign. Consequently electronic signatures simplify and streamline administrative processes to make them more efficient and effective.</p>		<p>young people safe and healthy.</p>
Exclusions	<p>To limit or exclude persons who could cause significant distress and harm with the effect of preventing the child to express their views.</p> <p>To exclude any person who is being violent or abusive, or so disruptive that the hearing has to be adjourned, or deferred to another day</p>	<p>Fuller involvement for those unable to provide their views especially those who are victims of domestic abuse</p> <p>Health and safety and protection</p>		<p>Positive impact: Creating a safer environment for all</p>
Virtual attendance	<p>To create a more open and flexible approach by allowing the child, relevant persons, and other attendees to request to attend by other methods. A requirement that all reasonable steps to be taken to enable and facilitate attendance by other methods if requested by any</p>	<p>Opportunity for all children and participants to select a method of taking part in the hearing which suits them best and achieves better inclusion</p>		<p>Positive Impact: Making participation more voluntary</p>

	person- without the need for them to be excused from the children's hearing			
Sharing of reports	systematically shared with social work departments and therefore social workers not being fully able to prepare accordingly, or to offer possible adapted options for the hearing, in order to address concerns/ recommendations made in the report	Improved outcomes through shared knowledge		Positive Impact: Time saving to reach decision quickly but with greater knowledge and awareness across the practitioners on potential options and outcomes

CRWIA Declaration

Authorisation

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Date

14/12/2020

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Date

14/12/2020