

POLICY NOTE

THE CHILDREN'S HEARINGS (SCOTLAND) ACT 2011 (RULES OF PROCEDURE IN CHILDREN'S HEARINGS) AMENDMENT RULES 2021

SSI 2021/68

The above instrument was made in exercise of the powers conferred on the Scottish Ministers by section 177 of the Children's Hearings (Scotland) Act 2011 and all other powers enabling them to do so. The instrument is subject to the affirmative procedure.

Purpose of the instrument

Section 25 of the Children (Scotland) Act 2020 introduced an opportunity for certain persons to participate in Children's Hearings without the necessity of relevant person status or deemed relevant person status.

Section 25 refers to rules made under section 177 of the Children (Hearings) Scotland Act 2011 setting the definitions of who has the opportunity to participate, to what extent and for what reasons.

Section 177 of the 2011 Act provides that the Scottish Ministers may make rules to regulate the procedure of Children's Hearings. Among other matters, the scope of these procedural rules includes specifying matters that may be determined by pre-hearing panels, the notification and arrangements for convening hearings, attendance at hearings, obtaining views before and during hearings, and the recording and transmission of any information or decisions.

These regulations therefore set out the criteria for individuals to meet in order to have an opportunity to participate.

These regulations also take the opportunity to update the drafting of the rules on exclusion from hearings and to clarify procedure on electronic signatures, virtual attendance, and sharing of reports.

Policy Objectives

Opportunity to Participate

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 a 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 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 (Scotland) Act 2011.

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), 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 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 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 should 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.

We 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. This may have a detrimental effect on participants' ability to prepare for the hearing on an informed basis, and hence an 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.

Consultation

No formal consultation was carried out in relation to these regulations since the Children (Scotland) Act 2020 received Royal Assent. However, engagement with relevant stakeholders has taken place in the development of them. This includes discussions with SCRA, CHS, Clan Childlaw, CYPCS and the Promise.

The maintenance of relationships for children in care was significantly highlighted by the 'Promise' report - delivered by the Independent Review of Care in Scotland - giving particular prominence to the benefits of maintaining contact between siblings.

The Supreme Court also considered cases relating to siblings and contact and whether siblings met the criteria for deemed relevant person status ABC and XY cases reported in 2020. They found the individuals did not meet the criteria that the individual has, or recently has had, significant involvement in the upbringing of the child. The Supreme and provided opinion that there was sufficient opportunity at present to give views. The Scottish Government has noted the comments in the UKSC judgment and wishes to bring more certainty, clarity and accessibility to the participation arrangements for siblings.

Impact Assessments

The following impact assessments have been completed or considered:

- Equalities Impact Assessment – published on same day as regulations
- Data Protection Impact Assessment – there are no new Data Protection impacts for Children's Hearings with the sharing of information in line with current legislation, protocol and procedure. This will be further developed with organisations as guidance is developed for coming into force of the regulations.

- Children's Rights and Wellbeing Impact Assessment – the CRWIA will be also reviewed as the guidance is developed.

No negative equality, rights or privacy issues have been identified in these assessments.

Screening has still to been carried out for other impact assessments (Environmental, Islands and Communities and Fairer Scotland Duty).

Financial Effects

The Minister for Children and Young People confirmed a Business and Regulatory Impact Assessment (BRIA) is not necessary as the instrument has no financial effects on the Scottish Government, local government or on business.

We have considered the financial effects of this SSI. The costs are under £5 million, and the impact is solely on the public sector. The Scottish Government is assured that no new policy or resourcing challenges have arisen.

Scottish Government
Children and Families Directorate

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