

## Some changes in the children's hearing – participation rights

September 2021.



### THE FACTS

There are two new pieces of legislation that affect children's hearings from 26<sup>th</sup> July 2021:

- The [Children \(Scotland\) Act 2020](#)
- [The Children's Hearings \(Scotland\) Act 2011 \(Rules of Procedure in Children's Hearings\) Amendment Rules 2021](#)

Changes to The Looked After Children (Scotland) Regulations **2009** alter the duties of a local authority in relation to siblings, when a child is going to be looked after or placed by the local authority.

This [Partner Information Sheet](#) summarises some of the key changes that come into force on 26<sup>th</sup> July. It also gives some scenarios for you to think about the participation criteria and what they mean for your work in the Children's Hearing.

There are some other issues arising from these changes that may have more direct relevance for SCRA's partners;

- 1) the purpose of the individual's attendance is focused on the likely significant impact of decision making on the individual's contact with a sibling
- 2) the participation rights are likely to result in a limited attendance at the Children's Hearing – only for the discussion related to the individual's contact
- 3) the individual with participation rights (if they are still a child) will be able to be supported by an Advocacy Worker
- 4) the individual with participation rights will not receive all of the Children's hearing paperwork, they will receive selected papers relevant to their contact with the child at the hearing
- 5) the individual's participation rights will last until the Children's Hearing make a substantive decision (a Compulsory Supervision Order) and will be re-assessed for any subsequent Children's Hearing
- 6) Individual's with participation rights for a Children's Hearing (or who should have had such rights) will be able to request that a decision of a Children's Hearing is reviewed

The 2020 Act makes other changes for which there is as yet no start date.

### **1. New Participation Rights - Section 25 of the 2020 Act**

This introduces rights of participation ('participation rights') in children's hearings for some individuals who are not relevant persons and creates a new section [section 79(5ZA)] in the Children's Hearings (Scotland) Act 2011] giving them the following rights<sup>1</sup>:

- to be notified of a hearing
- to provide a report for the hearing
- to be given documents specified in the rules, which will be information relevant to their relationship with the child at the hearing
- to be authorised by the chair to attend for part of the hearing
- to be represented for the part of the hearing they attend

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<sup>1</sup> subject to any conditions and limitations in the Children's Hearings Procedural Rules.

The criteria ('participation criteria') for an individual to have these participation rights are set out in the Procedural Rules. The new rule 2A gives the participation rights to an individual where **all** the following apply:

- the individual is living with or has lived with the child,
- there is an ongoing relationship with the character of a relationship between siblings (whether or not there is a parent in common),
- the hearing is likely to make a decision significantly affecting contact or the possibility of contact, and
- the individual is capable of forming a view on the matter of their contact

If the reporter is satisfied that the criteria are met, the individual will have the participation rights. Section 79 of the 2011 Act is also amended so that there can be a PHP when an individual wants one to decide whether they meet the criteria for participation rights.

- ✚ If an individual requests a PHP to consider their participation rights then the reporter must arrange one.
- ✚ The participation rights apply to most hearings. They do not apply to second working day hearings, criminal/ASB advice hearings or suspension hearings.
- ✚ In considering whether the participation criteria are met, regard is to be had to the views of the child and any relevant person. Rule 2A(4).
- ✚ The reporter must give any individual with participation rights the following information from the hearing papers:
  - a copy of any contact direction that regulates their contact with the child, and
  - any information that is about the individual, their contact with the child, or how contact or the possibility of contact between the child and the individual may be affected by a decision of the children's hearing. (This cannot include the statement of grounds.) Amended rule 26 and others.
- ✚ If a hearing makes a contact direction in relation to an individual with participation rights, the reporter must give the individual a copy of the direction and the reasons for the direction. New rule 88A

- ✚ It is for the chair to decide when the attendance of the individual at the hearing starts and finishes. The attendance ends when the chair decides it is no longer necessary for the proper consideration of how a hearing decision may affect the individual's contact or the possibility of contact. Amended rule 19.
- ✚ An individual with participation rights has a right to be accompanied by a representative. (The representative does not have an independent right of attendance.) Amended rule 20.

## **2 - Rights of Review - Section 132 of the 2020 Act**

This section is amended to give a right to require a review of a CSO, after three months, to an individual who the reporter was satisfied met the participation criteria, or a PHP or hearing had determined they met the criteria, at the time of the last substantive decision (or any earlier deferred decision).

A new section 132A is created. This gives a right to require a review (without a three month restriction) to an individual who claims certain criteria are met. These are that the individual did not attend the hearing that made the last substantive decision hearing and either:

- no determination was made at the time by a PHP or hearing about participation rights, a hearing or PHP would have likely decided the criteria were met, and the reporter didn't consider the issue or thought the criteria were not met
- OR
- the reporter was satisfied, or a PHP or hearing determined, that the participation criteria were met but the individual was not able to participate properly in the hearing's decision making as a result of a material failure to treat the individual

(or their representative) in accordance with the rules or as a result of exceptional circumstances.

If the reporter is not satisfied that a person who requests a review under section 132A meets the criteria in section 132A, the reporter must refer the matter to a PHP.

## **3 - Duty to Consider a Contact Direction-Section 14 of the 2020 Act**

The current duty in section 29A of the 2011 Act is amended (by section 14 of the 2020 Act) to specify that the hearing must consider whether to make a contact direction in relation to the following persons (provided the child does not reside with them):

- a relevant person
- a sibling
- any other person with whom the child has resided and with whom the child has an ongoing relationship with the character of a relationship between siblings.

As currently, the duty applies when the hearing is making, varying or continuing a CSO. A sibling is defined as a person with whom the child has at least one parent in common.

#### **4 - Extended Power of Exclusion**

New rule 20D extends the powers of exclusion. The hearing chair may exclude new categories of persons. The new categories are:

- Any person whose conduct is violent or abusive or otherwise so disruptive that, unless excluded, the chair would consider it necessary to end or adjourn the hearing or PHP.
- A relevant person, their representative, or a representative of a newspaper or news agency if their presence is preventing, or likely to prevent, the hearing or PHP obtaining views of a RP, or is causing, or likely to cause, significant distress to a relevant person attending the hearing.

#### **5 - Allowing Attendance ONLY by Electronic Means**

New rules 20C and 44A provide that a PHP can decide that attendance by someone is to take place only by electronic means. It applies to relevant persons and their representatives, persons with participation rights and their representatives, and representatives of newspaper or agency. It does not apply to persons seeking to be a relevant person.

The criteria are that the individual's physical presence is likely to:

- prevent the hearing obtaining the views of child or a relevant person, or
- cause significant distress to child or a relevant person.

## 6 - Extended Duty to Facilitate Attendance by Electronic Means

A new rule 20B creates a simplified and broader provision in relation to SCRA's duty to facilitate attendance by electronic means. If an individual has a right to attend under section 78(1) or (2), they may ask to attend by electronic means.

If the reporter is satisfied the individual has good reason for not attending physically or would be better able to participate effectively if they attend by electronic means, SCRA must take all reasonable steps to enable them to attend by electronic means. Reporter's will also continue to arrange Virtual Children's Hearings in other circumstances, where the above does not apply.

## 7 – Some Other Amendments in the 2020 Act

✚ Section 17 of the Children (Scotland) Act 1995 Act is amended (by section 13 of the 2020 Act) to create duties on the local authority to:

- take appropriate steps to promote personal relations and direct contact between the child and a sibling, and
- ascertain the views of a sibling, so far as is reasonably practicable, before making any decision with respect to the child.

*A sibling is defined as someone with whom the child has at least one parent in common. The same duties apply to any other person with whom the child has lived and with whom the child has an ongoing relationship with the character of a relationship between siblings.*

## 8 – Other Key Amendments to the 2009 Regulations

✚ The Looked After Children (Scotland) Regulations 2009 are amended so that the local authority has the following updated duties:

- in carrying out the assessment under regulation 4, seek and take account of the views of any sibling where appropriate.
- if considering placing a child with carers, assess the contact arrangements with any sibling and whether any such arrangements should be changed.
- in preparing the child's plan, consult with any sibling so far as is reasonably practicable and consistent with the best interests of the child,

- when placing a child who has a sibling who is already looked after or is about to be looked after, place the child in the same place or in homes that are near to each other.

*A sibling is defined as a person who has at least one parent in common with the child, and any other person with whom the child has lived or is living and with whom the child has an ongoing relationship with the character of a relationship between siblings.*

## PRACTICE SCENARIOS

The following scenarios were developed by a multi-agency learning team in Central and West Lothian.

They don't have a right or a wrong answer – although in each scenario Reporters would apply the statutory criteria to determine what, if any, participation rights are enabled. Reporters may well need additional information in order to make those decisions.

The scenarios can be used for you to apply the 'facts' as outlined above – or for discussion with colleagues or partners. There may be things that are not clear from the given information – and Reporters would need to 'fill the gaps' before decisions about the participation criteria can be made. You may not want to use them at all!

The participation criteria need to be considered by the Reporter for EACH individual sibling of a child coming to the children's hearing. Reporters will make these decisions – unless an individual asks for a pre hearing panel to consider their situation. If the Reporter is satisfied someone DOES meet the participation criteria then a PHP won't be required, even if one is requested.

### CHECKLIST:

1) The individual is living OR has lived with the child	
2) There is an ongoing 'sibling like' relationship	
3) The hearing is likely to make a decision significantly affecting contact OR the possibility of contact	
4) The individual can form a view on their contact	
Then	
• to be notified of a hearing	
• to provide a report for the hearing	
• to be given documents specified in the rules	
• to be authorised by the chair to attend the hearing	
• to be represented at the hearing	

**Assume for each scenario that you are already involved in the case.**

*There is a section at the end for you to write any notes.*

## Scenario 1

The Hearing is for Hazel. Hazel is 4.

Lorraine is the sibling who may have participation rights.

Hazel shares a room in foster care with Joan (2) who is not related to her and they have been with the same carer for 2 years. Hazel is about to move to a new carer who lives in a different local authority.

Lorraine (15) is Hazel's big sister and they were separated when Hazel was a baby.

Lorraine had been a carer for Hazel when their mum was drinking.

Lorraine has been seeing Hazel some of the time, during Hazel's contact with Mum, but Lorraine has now moved to residential care and wants to see Hazel on her own, without Mum.

### Key Points to consider

- Role of advocacy for Lorraine

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## Scenario 2

The review Hearing is for Don. Don is 7, and is living with a foster carer.

Liam is the child who may have participation rights.

Don's older brother is Liam (14), who lives with his gran because he exhibited inappropriate sexualised behaviour with Don while they were both in the family home.

Don is very unsettled and tells foster carers and professionals that he wants to be with his older brother.

Liam and Don have not been having contact following a decision made by Don's last Children's Hearing. Liam and Don both want to see each other.

### Key Points to Consider

- Role of advocacy for Liam
- Role of advocacy for Don

<b>CHECKLIST:</b>	
1) The individual is living OR has lived with the child	
2) There is an ongoing 'sibling like' relationship	
3) The hearing is likely to make a decision significantly affecting contact OR the possibility of contact	
4) The individual can form a view on their contact	
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### Scenario 3

There are 5 siblings living with 3 different foster carers. Grounds have not been established. The children see each other each other during family time with their parents.

#### Key Points to consider

- Logistics of large siblings groups who do not live together
- What if the siblings lived in different local authority areas?
- Role of advocacy
- What information is still needed in order for a Reporter to make a decision about the participation criteria for these children?

<b>CHECKLIST:</b>	
1) The individual is living OR has lived with the child	
2) There is an ongoing 'sibling like' relationship	
3) The hearing is likely to make a decision significantly affecting contact OR the possibility of contact	
4) The individual can form a view on their contact	
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## Scenario 4

The Hearing is for Freddie, age 13, who lives in a residential home and has recently been at risk of being moved into a secure placement due to being a risk to himself and others. Freddie sees mum three times a week and has in the last couple of weeks started seeing his dad once a week. Before the last fortnight Freddie had not seen his dad for nearly a year. The new plan is for Freddie to move to dad's care. Services are working together to support Freddie, so his time with his father needs to be increased.

Freddie's behaviour declines drastically when he sees his mum. He tends to go out with no one aware of his whereabouts. The SW recommendation is that Freddie's contact with mum be decreased. Freddie's younger brother, Ben, aged 10, lives with mum and sees Freddie when he has contact at home. Mum thinks Ben has a right to a relationship with Freddie and would miss him if he wasn't around as often. Freddie refuses to attend the hearing to give his views.

### Key Points to Consider

- What do we NOT know?
- Role of advocacy for Freddie.
- Role of Advocacy for Ben.
- Views of Freddie.
- Views of Ben.

### CHECKLIST:

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2) There is an ongoing 'sibling like' relationship	
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## Scenario 5

Stephen is an only child. He is 15.

He has been back home staying with his mum for a year and this is working well. Despite moving to a new area he did not have to change the school he attends.

Stephen is still subject to a compulsory supervision order. Before returning to his mum's care, Stephen spent 5 years with a foster family where he became very close to the family's son Simon. Simon and Stephen are the same age and still attend the same activities and school.

Stephen's social work report indicates that Stephen is always talking about Simon saying "we are like brothers".

### Key Points to consider

- Sibling like relationships
- Is it an ongoing relationship?
- Role of advocacy for Stephen.
- Role of Advocacy for Simon.

### CHECKLIST:

1) The individual is living OR has lived with the child	
2) There is an ongoing 'sibling like' relationship	
3) The hearing is likely to make a decision significantly affecting contact OR the possibility of contact	
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**HELPFUL NOTES (for my own use)**