

RESPONSE FORM

PREPARATION OF THE TENTH PROGRAMME OF LAW REFORM

We hope that by using this form it will be easier for you to respond to the questions set out in the consultation paper. Respondents who wish to address only some of the questions may do so. The form reproduces the questions as set out in the paper and allows you to enter comments in a box after each one. At the end of the form, there is also space for any general comments you may have.

Please note that information about this consultation paper, including copies of responses, may be made available in terms of the Freedom of Information (Scotland) Act 2002. Any confidential response will be dealt with in accordance with the 2002 Act.

We may also (i) publish responses on our website (either in full or in some other way such as re-formatted or summarised); and (ii) attribute comments and publish a list of respondents' names.

In order to access any box for comments, press the shortcut key F11 and it will take you to the next box you wish to enter text into. If you are commenting on only one or two of the questions, continue using F11 until you arrive at the box you wish to access. To return to a previous box press Ctrl+Page Up or press Ctrl+Home to return to the beginning of the form.

Please save the completed response form to your own system as a Word document and send it as an email attachment to info@scotlawcom.gsi.gov.uk. Comments not on the response form may be submitted via said email address or by using the [general comments form](#) on our website. If you prefer you can send comments by post to the Scottish Law Commission, 140 Causewayside, Edinburgh EH9 1PR.

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Questions

1. Do you have any suitable law reform projects to suggest?

Comments on Question 1

Yes-

Children (Scotland) Act 1995

Adoption and Children (Scotland) Act 2007

Children's Hearings (Scotland) Act 2011

2. Do you have any project to suggest that would be suitable for the Commission Bill process in the Scottish Parliament; or, in relation to reserved matters, for the House of Lords procedure for Commission Bills?

Comments on Question 2

Yes. Reform of the law in relation to adoption and permanence in Scotland.

3. If suggesting a new project:-

- (a) Please provide us with information about the issues with the law that you have identified:

The Government is committed to avoiding drift and delay in the making and implementation of decisions about looked after children. Current legislation requires Courts, Children's Hearings and local authorities to act in ways which run contrary to this policy. The immense impact of this on the most vulnerable in society has the practical consequence of unjustly depriving some looked after children of the opportunity to achieve their potential at the earliest point in a safe, stable and secure environment. The source of the difficulties is in the legislation and the potential benefit of reform would enable corporate parents to make decisions which serve the best interests of each child.

Delays in decision making and obtaining a permanent home can undermine a child's long-term life chances (Ward et al, 2010). It is therefore important to know how such decisions are made and if they can be improved.

A new project would review aspects of current adoption law which are causing difficulty, *inter alia* :

1) Advice Hearings by Children's Hearings

Children's Hearings (Scotland) Act 2011-S 131 (2) (c),(d),(e) requires the local authority as the implementation authority to require a review of a compulsory supervision order in circumstances where the court has or will be asked to make decisions in relation to Permanence and the child.

The Hearing will in these circumstances provide advice to the Court as to whether they agree with these plans. This advice is not a decision capable of being appealed by the child or relevant persons and it is uncertain how much weight is placed on this non-binding advice by the Court. As such it causes delay in the permanence process without providing any apparent benefit.

The Children's Hearing is obliged to take account of the views of the child as well as all deemed and automatic relevant persons some of whom will not hold Parental Rights and Responsibilities. The Court will be making a determination in respect of those holding parental rights and responsibilities and therefore, the views of other parties is of significantly less importance.

Furthermore, Permanence proceedings can be prolonged and by the time the application relating to permanence is being considered by the Court, the advice of the Hearing has reduced in terms of relevance and accuracy. The Court will be in possession of the report from the curator ad litem and reporting officer which will provide additional current information about the family's circumstances and the issue of consent. Therefore, the need for the advice from the Children's Hearing is unclear

2) The procedure involving the variation or making of a Compulsory Supervision Requirement (CSO) where there is a court application for a Permanence Order (PO)

The Adoption and Children (Scotland) Act 2007-Ss 95&96 states that where there is an application in Court for a PO and the child is subject to a CSO, the Children's Hearing cannot vary the CSO without first writing to the Court informing it of the decision it wants to make. This is also the case where the Hearing wishes to make a child subject to a CSO where there is a Court application lodged for a PO in respect of that child. The former situation is by far the more common.

The Court will notify the Principal Reporter as to whether it agrees or disagrees with the proposal. Only then can the Hearing make or vary a CSO. They are obliged to make a decision which represents the best interests of the child; this may not accord with what the earlier Hearing or the Court assessed to be in the best interests of the child. Therefore, this additional stage prolongs the process while providing no apparent benefit.

Children's Hearings make decisions in respect of a child which can last for a maximum of a

year. In practice the decisions that they are asked to make where a PO is lodged in court usually relate to contact with relevant persons and moving the child often to a prospective adoptive carer or long term foster carer. Decisions of this magnitude demand that the longer term interests of the child are considered, beyond the present best interests of the child or for the maximum of a year ahead. Furthermore, these decisions are of fundamental importance in the long term for the child and those who have parental rights and responsibilities.

Again, there is confusion in that those with relevant person status have an equal say in what happens in the Hearing as those relevant persons who have Parental Rights and Responsibilities. Therefore, while the Courts make decisions in relation to a person's parental rights and responsibilities, the Hearing takes account of those who have no status in terms of the permanence proceedings before the Court.

Consideration must be given to reviewing this system to avoid the delay it causes where the benefits are inconclusive. There may be a place for the CSO being suspended while permanence proceedings are underway and for the Court to take full decision making powers in respect of the child. The alternative would be for the Hearing to make these decisions without recourse to the Court. At the moment, the involvement of both the Court and Children's Hearing Systems is unnecessary, time consuming and confusing.

SCRA's research in 2015 Permanence Planning And Decision Making For Looked After Children In Scotland: Adoption And Children (Scotland) Act 2007 expressed the problems with this procedure:

“ This is perhaps an opportune time to review whether the section 95 process is necessary and if there is a more straightforward legal route to respond to a change in a child's circumstances after the PO application has been made. This could mean that there would be no need for Children's Hearings to be held to provide advice in these cases”

- 3) Decision making for children where there are no plans for rehabilitation with the birth family

The conditions and considerations applicable to the making of a Permanence Order are set out in s.84 of the Act. Under s.84 (5) (c) (ii) the court must be satisfied, in relation to each of the parents, that the child's residence with that person is likely to be seriously detrimental to her welfare. Recent court cases have highlighted the statutory requirement for the precise and evidenced application of this “threshold test” before a Permanence Order may be made.

There are circumstances where this threshold test is not met but the child cannot return home to the care of a parent. To secure the child's residence away from home-if this remains in the best interests of the child- the child would then remain on compulsory measures of supervision for the remainder of his childhood The decision making of the Children's Hearing demands the application of a different test, namely that the Children's

Hearing's decision must represent the best interests of the child.

Where the child remains in care for a prolonged period of time, the local authority is required to plan for the child's future. Consideration should be given to the Director of Social Work sharing Parental Rights and Responsibilities(PRRs) with the parent so that decisions can be made in the child's best interests in terms of medical treatment, travelling abroad, matters to do with education and other important decisions. This could be done generally or through the Court on application for a specific issues order in respect of the child under The Children (Scotland) Act 1995 Section 11(2) where the Court may as it thinks fit impose responsibilities.

Currently, under S 11(5) the local authority cannot apply for this Order. In reality this can prevent decisions being made which are in the child's best interests. This removal of this restriction should be considered.

The minimum intervention principle demands that a child is subject to compulsory measures of supervision only once voluntary measures have been considered. The parent will have the right to make decisions affecting the child, but may be unable or unwilling to act in the child's best interests, while the local authority needs to plan for the child but cannot effectively do so. Where children have been in care for a significant period of time and there is no plan for rehabilitation, the local authority as a corporate parent will require to make decisions which serve the long term interests of the child. Current legislation prevents this from happening.

4) Courts having the option of investing contact in the Director of Social Work

Permanence Orders with or without authority to adopt are granted once the Court has considered all the evidence and parties have had an opportunity to represent their views. The sheriff or judge at that stage cannot invest contact in the local authority. A decision in relation to whether contact with a parent is in the child's best interests could arguably be best made at this stage where the Court is familiar with the circumstances of the case. There should be the option for the Court to invest contact in the Director of Social Work as the person holding other PRRs. Currently, where the POA has been granted and the prospective adopters petition the Court to adopt the child, the birth parent often takes that opportunity to challenge matters already decided under the granting of the POA and not just in relation to contact. This prolongs proceedings.

5) Medical Advisors' access to comprehensive medical information

Once a decision has been made by the Agency Decision Maker to pursue permanence, the necessity for consent by those with PRRs to medical procedures and investigations should not be required. Medical Advisors will determine what procedures and investigations are needed for them to obtain the necessary information to safeguard and promote the child's health and well-being.

Currently medical advisors are severely hampered in being in a position to provide comprehensive information to Adoption Panels and Fostering Panels where there is an absence of parental consent. This means that any health difficulties that the looked after child may have cannot be identified at the earliest opportunity and appropriate treatment provided. It further and unnecessarily obstructs the local authority in terms of long term planning for the child and putting in place correct resources to help the child to fulfil their potential. It prevents prospective adoptive parents or long term carers deciding whether they are able and willing to meet any particular need that the child might have. This reduces the chances of a successful match which takes account of the capacity of carers/ adoptive parents in relation to the probable needs of the child.

Where undetected physical, emotional or mental health challenges become apparent after placement and the adoptive parent or long term carer is not equipped to meet these, the chances of a disruption to the placement are increased. This can cause distress and means that the local authority will require to seek another placement for the child. Generally, placing a child becomes more difficult as the child becomes older.

6) The consideration by the Courts of sibling contact

Legislation should include a duty on the Court to consider in adoption and permanence proceedings whether ongoing sibling contact would be in the child's interest. Furthermore, siblings (of sufficient maturity, presumed to be 12 and over) could be intimated about proceedings and invited to make representations, or at least their views sought, on contact.

Section 17 of the Children (Scotland) Act 1995 places a duty on local authorities to promote contact with any person with parental responsibilities. This should be extended so that local authorities promote sibling contact where appropriate.

Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") places a duty on public authorities to act in a way that demonstrates a respect for "family life". One of the key relationships included is that of siblings.

Research has recognised the value of a sibling relationship and in 1996 M Kosonen observed that :

"Siblings provide our longest lasting relationships, often extending throughout lifetime. Children growing up apart from their brothers and sisters, lacking contact or knowledge about their siblings may be deprived of family support in adult life. Much more should be done to foster sibling relationships for children who are separated from their families."

(b) Please provide us with information about the impact this is having in practice:

The impact on children is significant. Decisions about their futures are being hampered and prolonged while legislative processes are failing to keep the best interests of the child at the centre of decision making.

Local Authorities as corporate parents are unable to expeditiously discharge their responsibilities in respect of a large number of looked after children.

Courts and Children's Hearings are spending unnecessary time and expense applying the complicated legislation where both Systems are simultaneously making decisions in respect of children.

Adoption Panels and Fostering Panels are being deprived of full and accurate medical assessments to make the best potential matches of children with carers and adoptive parents.

Medical advisors are required to make recommendations and assessments without having access to essential information about the child and the family medical history.

The length of time taken to make decisions, the cumbersome process and the absence of complete information increases the likelihood of delay and disruption in adoption.

(c) Please provide us with information about the potential benefits of law reform:

Children and Families will be subject to decision making either from the Courts or the Children's Hearings which will provide them with clarity.

Time and expense will be saved avoiding the interface between the Courts and the Children's Hearings

Decisions requiring long term planning for children will be made by the Courts who have the authority to make decisions about the appropriateness of removing parental rights and responsibilities

Medical Advisors will have the authority to obtain information about a child which will allow them to make comprehensive and accurate assessments. This will assist the child in ensuring they receive necessary medical treatment and also inform Adoption Panels, Fostering Panels and local authorities in identifying the best carers or adopters for a child.

Prospective adoptive parents and long term carers will be able to receive appropriate training and understand better how to support the child in their care

Children will have the right to the lifelong resource of a sibling through the appropriate promotion of sibling contact

Local authorities will be better placed to make decisions that promote as normal a childhood as possible for children in long term care.

General Comments

Adoption law in Scotland spans several pieces of legislation and numerous sets of Regulations and Governmental and Agencies' Guidance and Policies. Consultation with a wide range of stakeholders is vitally required to reform this area of the law. Professionals involved in the adoption and permanence sector want change and are committed to supporting reform.

The difference that this will make to the lives of children and families cannot be underestimated. It will make more likely the aspiration that Scotland is the best place where a child can grow up.

Thank you for taking the time to respond to this consultation paper. Your suggestions and comments are appreciated and will be taken into consideration when preparing our Tenth Programme of Law Reform.