

Practice Direction 33

Participation Rights and Legislative Changes in July 2021

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A. Introduction

1. This practice direction relates to the legislative changes made from 26 July 2021 by virtue of the:
 - Children (Scotland) Act 2020, which amends the Children's Hearings (Scotland) Act 2011 (the 2011 Act), and
 - The Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Amendment Rules 2021, which amends The Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Rules 2013 (the Rules of Procedure).
2. Any references to section numbers or rules in this Practice Direction are references to sections of the 2011 Act and rules in the Rules of Procedure.
3. The changes relate to various areas of reporters' practice, and were originally brought together into this practice direction for ease of reference. Much of the content has since been incorporated into relevant individual Practice Directions and has been removed from this Practice Direction to minimise duplication. The original numbering of paragraphs has been retained. This Practice Direction is to be followed wherever it conflicts with any other Practice Direction.

B. Participation Rights for individuals who are not relevant persons

Participation Rights

4. As a result of the changes, certain individuals who are not relevant persons¹ are to be given the rights listed in section 79(5ZA) of the 2011 Act (the "participation rights"):
 - to be notified of a children's hearing
 - to provide a report or other document for the hearing
 - to be given certain documents (specified separately in the Rules of Procedure)
 - to be authorised by the chair to attend the hearing
 - to be represented at the hearing.

In this Practice Direction, any individual who has these participation rights is referred to as a "participation individual".

5. The participation rights apply to all children's hearings held under section 69(2) or Parts 9, 10, 11 or 13 of the Act. This includes all grounds and review hearings, and all hearings flowing from them (including remits from the criminal court and in relation to antisocial behaviour orders). It also includes hearings flowing from a review by the sheriff of previously established grounds. It does not include second-working day hearings, suspension hearings, CPO advice hearings, criminal advice hearings or ASB advice hearings.

¹ Reporters must always be alert to identifying persons who appear to have a significant involvement in the upbringing of the child. This may include siblings.

Any directions in this Practice Direction relating to participation individuals only apply when the children's hearing is one in which someone may have participation rights.

6. A participation individual has rights to require a review hearing (see sections H and I below). However, a participation individual does not have any right to appeal against a decision of a children's hearing. Nor is there any right to appeal (for anyone) against the decision of a PHP or children's hearing about whether a person meets the participation criteria.

Participation criteria

See Appendix 1 for flowchart

7. Rule 2A states 4 criteria (the "participation criteria") that must be met in order that a person has the participation rights:
 - (a) the individual is living with or has lived with the child;
 - (b) there is an ongoing relationship with the character of a relationship between siblings (whether or not there is a parent in common);
 - (c) the hearing is likely to make a decision significantly affecting contact or the possibility of contact; and
 - (d) the individual is capable of forming a view on the matter of their contact.
8. There are 2 routes by which a person can acquire the participation rights:
 - The reporter is satisfied that the person meets the participation criteria.
 - A person requests a PHP and the PHP (or children's hearing dealing with PHP matters) decides that the person meets the participation criteria – if the individual requests a PHP for this purpose, the reporter must arrange one (see paragraph 18 below).

Whether the decision is being made by the reporter, PHP or children's hearing, the question of whether a person meets the participation criteria is a factual one. The welfare principle in section 25 does not apply to the decision.

9. When arranging a children's hearing for any child, the reporter is to consider whether there is any individual who meets the participation criteria and so should have participation rights at the hearing. In doing so, the reporter is to:
 - Take account of information from the child's social worker or from any other source about:
 - Whether the child has any siblings or other people who have a sibling-type relationship with the child
 - Whether those people have ever lived with child
 - The details of the child's current contact with those individuals (whatever the basis of those arrangements) of any kind

- The social worker's assessment of whether any different arrangements should be in place, and any recommendation².
 - Inform the child's social worker when the reporter considers that an individual meets the participation criteria.
10. Where the reporter arranges for children from the same family to attend the same hearing, the reporter still requires to consider whether each child meets the participation criteria in relation to the other children in the family. However, if the reporter has decided it is appropriate to arrange for the children to attend the same hearing (for example, as they're at home together or in the same placement), it's unlikely that criterion (c) will be met in relation to them (that the hearing is likely to make a decision significantly affecting contact or the possibility of contact).
11. The reporter is to record their conclusion about whether the following individuals meet the participation criteria, and also reasons for the conclusion if the individual does not meet the criteria:
- any known sibling of the child, and any person who may have an ongoing sibling-type relationship with the child, unless:
 - the sibling/individual is currently living with the child and there is no recommendation from the local authority that the child move elsewhere, away from the sibling/individual;
 - any other person who was previously treated as a participation individual at the time of the last substantive decision.

Where an individual is assessed as meeting the criteria, the recording of the conclusion will be in the Description field in the Connections grid in CSAS. Where an individual listed above is assessed as not meeting the criteria, the conclusion and reasons are to be recorded in the 'additional info' tab on the child's Contacts screen.

12. As criterion (a) requires that the individual is living with or has lived with the child, it will not be met where a sibling or other individual has never lived with the child. An example of where this criterion is not met is where the child is made the subject of a child protection order at birth, and never lives with their parents or older sibling. It will include a situation where the individual has lived with the child in a shared care arrangement³.
13. In relation to criterion (b), whether there is an ongoing relationship with the character of a relationship between siblings:
- Where the other person is a sibling of the child and they have an ongoing relationship, the reporter is to presume that the relationship has "the

² Localities are agreeing with their local authorities a format for the provision of this information. SCRA's preference is for the information about each individual to be provided on a separate form. The form can then be included in the hearing papers (see paragraphs 26 and 27 below). The form is likely to include information relevant to the hearing's decision making (in considering whether a contact direction is required – see section J below) as well as information relevant to whether the participation criteria are met.

³ For example, for part of every week, a child's half-brother lives with the child and their mother, and for part of the week the half-brother lives with his father.

character of a relationship between siblings” unless specific information says otherwise.

- Where the other person is not a sibling of the child and they have an ongoing relationship, the reporter will require adequate information in order to reach the conclusion that the relationship has “the character of a relationship between siblings” and is not simply a friendship. It is most likely to arise when the person has been brought up in a family together, but may arise in other situations.

14. In assessing criterion (c), whether the “hearing is likely to make a decision significantly affecting contact or the possibility of contact”:

- The reporter is to consider a decision to be one “significantly affecting contact or the possibility of contact” if:
 - The decision being recommended by the local authority is likely to have the effect of significantly changing the current contact arrangements, whatever the basis for those arrangements (contact direction, family or local authority arrangements)
- OR
- Although the local authority is not recommending a decision that would significantly change the current contact arrangements, whatever their basis, the individual, the child or a relevant person wants the hearing to make such a decision (or wants the arrangements to be significantly different).
- The reporter is to consider the significance of the decision’s effect on contact from the perspective of the individual and the child. Changes in frequency, duration, and the degree of supervision are likely to be significant from their perspective. However, this list is not exhaustive: such things as a change in venue for contact or a loss of informal contact at school may be significant in some circumstances.
- In considering whether a decision significantly affects contact, it is unlikely to be relevant that the decision is an interim one.
- Although the effect on contact can be positive (e.g. increasing contact) or negative (e.g. reducing contact), the reporter is not to consider criterion (c) as being met if the likely decision is that the child and the individual will resume residing together (e.g. the recommendation is for the child to return home and the sibling is also at home or the recommendation is to place the child in the same place as the sibling).

15. In assessing criterion (d), whether “the individual is capable of forming a view on the matter of their contact” the reporter is to do so in the light of the individual’s capacity to make use of the participation rights: to attend the hearing and participate in it; to provide a report or other document to the hearing; to understand the notification from the reporter, and to instruct a representative. Where a sibling would be unable to exercise the participation rights the reporter is not to consider criterion (d) as being met. Where an individual does not meet this criterion, there are other routes by

which a hearing may be provided with information about the individual and their contact, for example through the child's social worker or a safeguarder.

16. In considering whether an individual meets the participation criteria, the reporter and pre-hearing panel must have regard to the views of the child (who is the subject of the children's hearing) and any relevant person⁴ as to whether an individual meets the participation criteria. There is no need for the reporter to proactively seek these views, only to take account of any information about them which is provided.
17. When a person meets the participation criteria and is given the participation rights, they will retain the participation rights until a substantive decision is made. When a further children's hearing is arranged after that substantive decision, the reporter is to:
 - consider again whether the person continues to meet the participation criteria;
 - record their conclusion in the Description field in the Connections grid in CSAS;
 - record their reasons in the Description field where they decide that the person no longer meets the participation criteria (there is no requirement to record any reasons where the reporter concludes the person still meets the criteria).

However, where the person who had participation rights at the previous hearing that made a substantive decision then requests a review of the CSO⁵, that person is to be treated as someone who meets the participation criteria and so has the participation rights at the review hearing to be arranged⁶.

C. Pre-hearing panels and PHP matters at a children's hearing considering whether the participation criteria are met

Now covered in Practice Direction 12 on Pre-hearing Panel Matters.

D. Notification and papers for a participation individual at a children's hearing

Now covered in Practice Direction 14 on Notifications and Papers, other than the paragraph below.

28. The statutory provisions should ensure that the participation individual has adequate information to be able to participate in the decision-making process to a sufficient degree. However, if need be, it would be open to the chair to give additional information verbally or exceptionally, the hearing could defer and direct the reporter to provide information from the hearing papers in writing under rule 61(1)(g).

E. Attendance of a participation individual at a children's hearing

Now covered in Practice Direction 13 on Attendance.

⁴ Rule 2A

⁵ Section 132(6). See paragraph 40 in relation to these reviews.

⁶ Section 132(7).

F. Other people who have established family life with the child

Now covered in Practice Directions 13 and 14, other than the paragraphs below.

42. Within the hearing, the chair may disclose to the person relevant information from the hearing papers about any recommendation as to the person's contact and the reasons for the recommendation. If the chair does not do so and it appears the person is otherwise unaware of relevant information available to the hearing, the reporter is to intervene to highlight the issue of fairness.
43. If the hearing considers the person requires to receive a copy of any information from the hearing papers in order to be able to participate in the decision-making process to a sufficient degree, the hearing may consider deferring and directing the reporter to provide the information under rule 61(1)(g).

G. Participation of participation individuals and others with established family life in applications to the sheriff for an interim compulsory supervision order

Now covered in Practice Direction 23 on Court Applications.

H. Participation individual's right to request a review hearing

48. If a person had participation rights at the time of the last substantive decision to make, continue or vary a CSO (or at any deferred hearing prior to the substantive decision), they may require a review of the CSO after 3 months⁷.
49. This right is identical to that of the child and any relevant person to require a review after 3 months. When the participation individual has required such a review, the reporter must arrange the review hearing⁸. For the purposes of that review hearing (and any deferred hearing), the person will be treated as having the participation rights and will be a participation individual⁹.

I. Other new rights to request a review hearing (section 132A)

See Appendix 3 for Flowchart

Information about notification and papers for the PHP (see paragraph 53) is contained in Practice Direction 12 on Pre-hearing Panel Matters.

50. Someone may require a review hearing where they claim that the criteria in section 132A apply. These are:
 - that they did not attend the children's hearing that made the last substantive decision to make, continue or vary a CSO;

⁷ Section 132(3A)

⁸ Section 137(2)

⁹ Section 132(7)

AND either:

- *Where they did not have participation rights at the last hearing:*
 - no determination was made at the time by a PHP or hearing about whether they met the participation criteria,
 - the reporter didn't consider the issue or thought the criteria were not met, and
 - if a PHP or hearing had considered the issue, it is more likely than not that it would have decided the participation criteria were met¹⁰.

OR

- *Where they did have participation rights at the last hearing* (whether by virtue of a decision of the reporter, PHP or children's hearing)
 - they were not able to participate properly in the children's hearing's decision making as a result of:
 - a material failure to treat the individual, or any representative of the individual, in accordance with the rules¹¹, or
 - exceptional circumstances¹².

51. Where the person claims the criteria in section 132A are met, the reporter must arrange the review hearing¹³. There is no time constraint in relation that review hearing – it can be arranged prior to the expiry of 3 months from the last hearing.
52. If it is not clear whether the person requesting the review is claiming that the criteria in section 132A are met, and the reporter thinks the criteria might not be met, the reporter is to check with the person.
53. If the reporter is not satisfied that the person claiming to meet the criteria in section 132A does meet the criteria, the reporter must arrange a PHP¹⁴. It is then for the PHP to decide whether the person meets those criteria¹⁵. The possible outcomes of that PHP are:
 - If the PHP decides that the person meets the criteria in section 132A, the review hearing will proceed as arranged.
 - If the PHP decides that the person does not meet the criteria in section 132A and there is no other reason for the review hearing to proceed¹⁶, the PHP must discharge the review hearing that has been arranged.

¹⁰ Section 132A(3)

¹¹ An example of this might be the reporter failing to notify the participation individual of the hearing, or the chair failing to allow them to attend any of the hearing.

¹² Section 132A(4)

¹³ Where the reporter decides to arrange a PHP as they do not consider that the criteria in section 132A are met, the reporter need only make initial arrangements for the review hearing by scheduling it in CSAS and Outlook. The reporter may delay sending formal notifications of the hearing until after the PHP has taken place. The reporter may also delay requesting reports for the review, though must be alert to being able to obtain them in time for the scheduled review if it does take place.

¹⁴ Section 79(2)(bb)

¹⁵ Section 81B.

¹⁶ Other reasons for the review hearing to proceed could be because the review has been required by the local authority.

J. Children's hearing's duty to consider a contact direction

56. When making, varying or continuing a CSO, a children's 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 siblings¹⁷.

Two people are siblings if they have at least one parent in common¹⁸.

57. It is important to note that this duty on a children's hearing in relation to a contact direction extends to a wider group of people than will meet the participation criteria and will have participation rights. As a result, there will be situations where the social worker provides information for the children's hearing on a sibling's contact with the child (likely in a separate document), even though that sibling does not meet the participation criteria and is not a participation individual.

58. In making this decision about a contact direction, the children's hearing is required to apply the usual welfare principle in relation to the child who is the subject of the hearing, regarding the need to safeguard and promote the welfare of that child throughout the child's childhood as the paramount consideration. A contact direction should be made only if making the measure would be better for the child than not making the measure¹⁹. The duty to consider whether to make a contact direction does not create a presumption that a contact direction should be made.

59. It is possible that the hearing may make a contact direction that conflicts in some way with an order in relation to a sibling or a person with a sibling-type relationship. The reporter at the hearing should be aware of the terms of any existing contact direction affecting contact between the child and the individual and intervene to inform the hearing if it is not otherwise aware. However, it is for the hearing to decide what decision to make and it is not obliged to avoid any conflict. If the decision results in conflict between orders, it will be for the local authority to deal with the situation and may involve the local authority requiring a review of the other order.

60. There is no change to the usual practice of the reporter only recording a decision to make a contact direction – the reporter is not to record a decision “not to make a contact direction with X” even though such a direction was requested.²⁰

¹⁷ Section 29A

¹⁸ Section 29A(5)

¹⁹ Where the hearing agrees with the arrangements that will be in place without a contact direction, a contact direction is unlikely to be necessary even where the child, a relevant person or an individual do not agree with the arrangements.

²⁰ If the chair wishes to record anything about consideration of a contact direction, the most appropriate place is under the main decision of the hearing.

K. Additional powers to exclude a person

Now covered in Practice Direction 13 on Attendance.

L. Allowing attendance by electronic means only

Now covered in Practice Direction 13 on Attendance.

M. Extended Duty to Facilitate Attendance by Electronic Means

Now covered in Practice Direction 13 on Attendance.

N. Duty to send papers to the Chief Social Work Officer

Now covered in Practice Direction 14 on Notifications and Papers.

O. Electronic signature in a children's hearing

79. Any document to be signed by the chair of a PHP or children's hearing may be signed using an electronic signature²¹.

80. This provision is separate from those in the Coronavirus (Scotland) Act 2020 about electronic signature and will continue to apply after that Act is no longer in force. Unlike in the Coronavirus (Scotland) Act 2020, the provision in rule 98 enabling the chair to use an electronic signature does not permit the reporter to sign documents on behalf of the chair (whether electronically or otherwise).

P. Change in managing attendance at the hearing

Now covered in Practice Direction 13 on Attendance.

Q. Appeals against decisions of the sheriff

86. The reporter may now appeal to the Sheriff Appeal Court or Court of Session against a sheriff's decision in an appeal under section 160 in relation to a relevant person determination²². However, the reporter may not appeal against a decision by the sheriff confirming a determination of a children's hearing²³. As with other appeals, it is for a Locality Reporter Manager to decide whether to request a stated case in relation to any appeal against a sheriff's decision, in consultation with the Practice Team to help inform the decision and obtain advice on the drafting of the questions to be included in the application^{24, 25}.

²¹ Rule 98

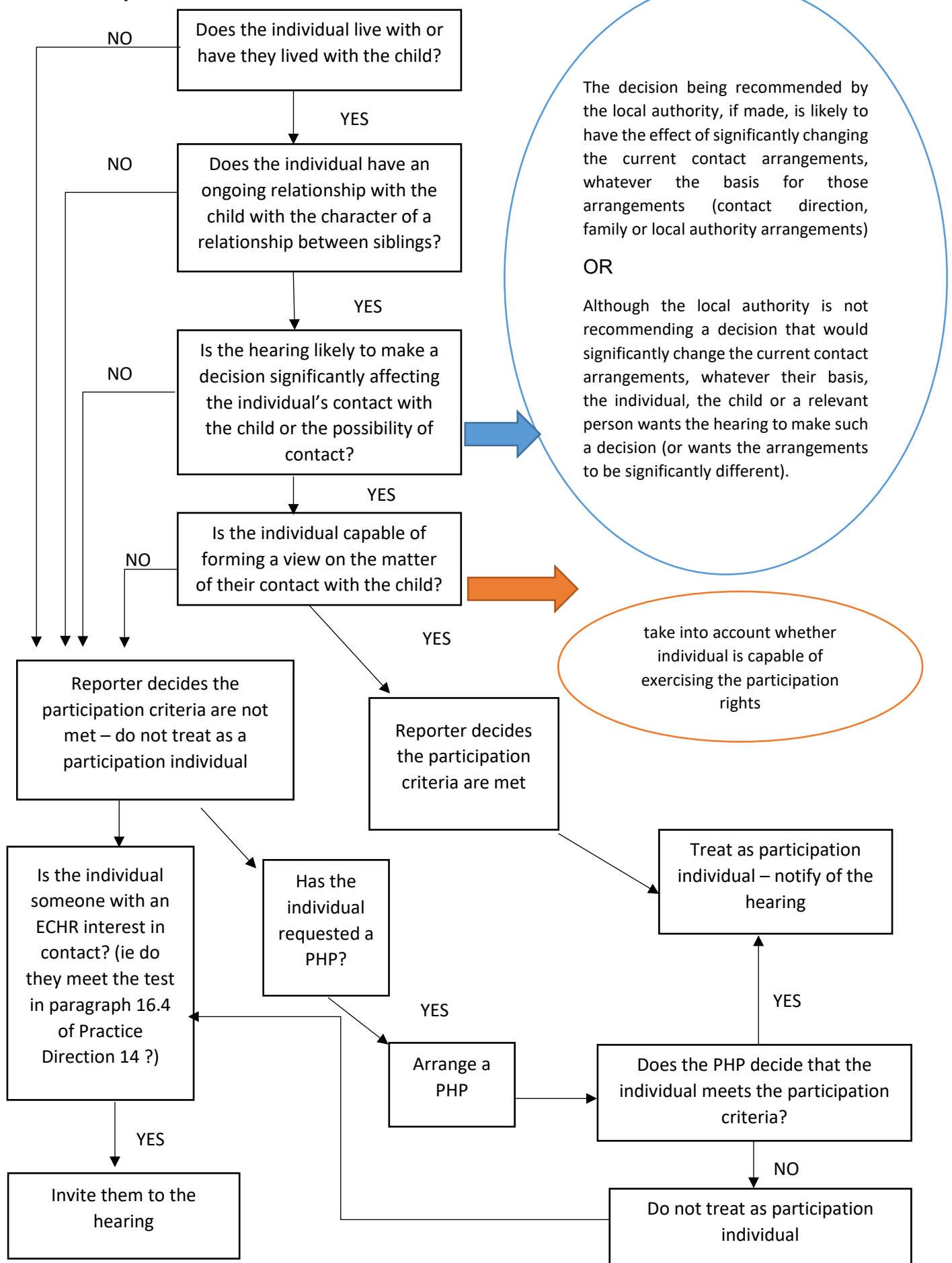
²² Section 164(3)(e)

²³ Section 164(3A)

²⁴ See the Casework Practice Scheme of Delegation

²⁵ Section 27 of the Children (Scotland) Act 2020 amends sections 160, 164 and 165 of the 2011 Act to say that an appeal against the decision of a sheriff (in a proof, appeal, application for an ICSO or section 110 application) can only be to the Sheriff Appeal Court – an appellant cannot appeal directly to the Court of Session. However, this section is not yet in force.

Appendix 1 Participation criteria flowchart



Section 132A flowchart

