

Adoption Policy Review Group  
Report of Phase II

# adoption

better choices for our children

Presented by Sheriff Principal Graham Cox to the  
Minister for Education and Young People, Scottish  
Executive, on 6 June 2005



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scotland  
SCOTTISH EXECUTIVE

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# adoption

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6 June 2005

**Peter Peacock MSP**

Minister for Education and Young People  
Scottish Executive Education Department  
Victoria Quay  
Edinburgh EH6 6QQ

Dear Minister,

In April 2001 the First Minister, then Minister for Education, asked me to carry out a review of adoption practice and law in Scotland. The Adoption Policy Review Group of independent experts in a variety of fields first met in May of that year and we reported on the first phase of our work, on practice issues, early in 2003. Membership of the Group was reformed and we commenced work on the second phase dealing with the legal framework for adoption and permanence in Scotland in the Autumn of that year. It was always anticipated that this phase would take a minimum of eighteen months to complete.

I now have pleasure in enclosing our report. It contains comprehensive recommendations designed to improve, modernise and extend the legal framework for providing security to children and young people who can no longer live with their families. The Group's main finding is that adoption still has an important place in the options for these young people, but that adoption should be complemented by an additional legal mechanism to allow children to feel secure and stable in a new family, and, importantly, allow their new carers to fulfil all the roles that parents normally fulfil. This mechanism we have called "the Permanence Order".

We have also made important recommendations to: increase the range of potential adopters and carers by extending the right to adopt to unmarried couples – including same sex couples; revise the grounds for dispensing with the consent of birth parents to the adoption of their child; ensure that proper support is given to children and families in permanence cases; improve court and children's hearing processes; and to improve arrangements for fostering children. There are other detailed recommendations covering the whole field of adoption law. I believe that these proposals could significantly improve the lives of many of the most vulnerable children in Scotland. I hope that you can act speedily to bring them into effect.

I would like to thank all those who have contributed to this report, in particular Penny Simpson, my fellow chair in the second phase; Lexy Plumtree, the Group's legal consultant, whose expertise has been invaluable; all of the Group members who gave up their own time without complaint to attend many meetings and read many papers; the Group's researchers Peter Selman and Kathy Mason; and the secretariat support from the Scottish Executive Education Department officials, notably Gerald Byrne, Susan Neilands, John McCutcheon, Robert Girvan, and Simon Cuthbert-Kerr.

Yours truly,



GRAHAM COX



# 1. introduction

## SUMMARY

**1.1 Current adoption law in Scotland is contained in the Children Act (1975) and was last updated ten years ago. The nature of society and the use of adoption have since changed considerably and this legal framework no longer meets the needs of the range of children who cannot be brought up by their birth families. This report makes recommendations both to improve the existing system of adoption and to provide alternatives for other children who need a new long-term home, but for whom adoption is not appropriate. The report also makes recommendations to improve the process for finding these children new families - in local authorities, the children's hearings and the courts - and to improve the support the children and their family need to make a success of their new home.**

## THE PROBLEM

1.2 Evidence shows that the current adoption system is not meeting the needs of the range of children in Scotland who cannot live with their birth families, but need a new stable and secure home. Over the last twenty years, the number of adoption applications has fallen from around 1,000 a year to less than 400, just over half from adopters not related to the child. The number of children adopted under the age of one year old has decreased by some 90% from around 200 a year to around 20.<sup>1</sup> At the same time around 6,500 children are in the care of local authorities away from their homes. Of these, around 3,500 are in foster care, 1,500 with friends or relatives and 1,500 children live in residential homes. Estimates suggest that around 3,000 of these children have been looked after for over a year.<sup>2</sup>

1.3 Many consider that the current system of adoption is outdated. The stereotype model of adoption – a baby being given up voluntarily for adoption

by the birth parents, and being adopted by a couple who want a child of their own – has been overtaken by changes in society. The children that now need new homes through adoption or some other mechanism are older, and have come into the system after being taken away from their birth parents. The current adoption system struggles to meet the needs of these children and their birth and new families in a number of areas:

- adoption can only offer one form of long-term security and involves severing all existing legal bonds and making new ones, it does not offer flexibility to meet the range of circumstances that older children will present;
- people who might offer to provide long-term homes for older children might be different from those who desire to adopt a baby;
- older children might well have a need to maintain a relationship with their birth parents or other members of their birth family and adoption struggles to provide contact;
- the court procedures for adoption are not well designed for contested cases, which are more likely if parents do not consent to the adoption.

These issues need to be addressed if the system is to be modernised to make it relevant to the needs of the children and adults who use it.

## OUR SOLUTIONS

1.4 The Group's focus has been to provide a legal framework to meet the range of needs that older children might have. Older children can be expected to come into the system after a decision has been taken to remove them from their

<sup>1</sup> *Adoption Statistics 2003*, Scottish Executive National Statistics Publication (2004).

<sup>2</sup> Table 1.2, *Children's Social Work Statistics 2003-04*, Scottish Executive (2004).

birth family. However, they will have formed a bond with their birth parents or other members of their birth family, and maintaining these relationships can be very important. Some of these children might also have had previous carers within the care system, or have lived with grandparents or friends. These bonds can also be important. Some older children may exhibit behaviour that is characteristic of a difficult upbringing.

1.5 All of these factors mean that adoption – with its finality, its breaking of current links, its substitution of new family for the old - may not be the best option for these children. However, they need some sense of security and stability in their lives. They cannot return home. They need a new family, and that new family must be underpinned by a legal framework that makes the child feel safe and allows the carers to claim the child as their own.

1.6 The Group therefore examined the alternatives to adoption. It did not find the current options satisfactory:

- a supervision requirement from the children’s hearing suspends, rather than removes, the rights of the birth parents, but does not give any parental responsibilities or rights to the local authority or the foster carers. It is subject to review at least once a year and does not offer long-term security.
- local authorities can apply for a Parental Responsibilities Order (PRO) which removes most of the birth parents’ parental responsibilities but can only transfer them to the local authority, not to the carer. Although a PRO indicates a child will not return home it does not secure the child in the new home as part of a family. PROs are currently seldom used.
- local authorities can also apply for a freeing order, and normally do so in contested adoptions. The order

removes the rights of birth parents and places them with the local authority as a precursor to adoption. If the child is not adopted, only the local authority has parental responsibility. This has been referred to as being in “adoption limbo”.

- foster carers can apply for a residence order, which allows them to secure the child’s position in their care. However, foster carers who are successful in gaining a residence order lose their fostering support and benefits - an unattractive option.

1.7 To overcome the difficulties with the existing system, the Group suggests the introduction of a new court order which it calls a Permanence Order. This would remove the problems caused by current arrangements as local authorities, carers, and, if appropriate, birth parents would share parental responsibilities and rights. The Permanence Order would provide clear and unambiguous long-term legal security for children and carers. Permanence Orders would also be flexible enough to take account of the different needs of children, and would allow for varying degrees of contact with birth families, where this was preferable. Unlike the current system, Permanence Orders would also be flexible enough to allow for children’s circumstances to change. They would also be used as a pre-adoption order.

1.8 The Group also recognised that adoption would remain the right option for a number of children. It offers some unique advantages, particularly forging a life-long bond to the adoptive family. However, with the changing nature of the group of children needing adopters, there was a need to extend to the greatest possible extent the pool of potential adopters. Currently, unmarried couples (whether opposite or same-sex) are unable to adopt a child jointly. Although one partner can adopt, and the other apply for a residence order, the

Group considered the fact that an unmarried couple cannot jointly adopt may deter potential adopters. The Group therefore recommends that the law be changed to allow unmarried couples in a stable relationship, whether opposite or same-sex, to adopt jointly. This would increase the number of people who are willing to come forward to be assessed to adopt. Although this is a potentially controversial recommendation, the Group found no evidence to suggest that being raised by an unmarried couple held any disadvantages for a child. Indeed, consultation with children suggested that the most important factor was to be raised in a loving and supportive environment.

1.9 A further area of pressure on the current adoption system is the time taken to make decisions. In this phase the Group has looked at the processes within local authorities, the roles of the children's hearing and the procedures in court. The Group has found that the various parts of the system all play a valuable role in ensuring that these difficult decisions are properly scrutinised before they are taken. However, there are a number of areas for improvement:

- within the local authority the rules governing adoption and fostering panels could be improved to ensure that all permanence plans for children are dealt with together and all the options are considered.
- the children's hearing's formal involvement is too late in the process: the regulations should reflect current best practice by ensuring that the hearing is informed of permanence planning from an earlier stage, reducing the risk of delay.
- there should be better arrangements for advice to flow from the hearing to the court.
- court procedures should be streamlined and dedicated adoption centres introduced, where sheriffs

with appropriate experience in family work and active case management can focus on the main issues. This would shorten the length of time that most cases take, and would help to reduce the level of distress typically experienced in contested adoptions.

1.10 Another important area is the help and support offered to families following an adoption or long-term placement. While some older children will have particular needs arising from their experiences as a member of their birth families, all adoptions and long-term placements need some support to ensure their success. The Group has recommended that a more comprehensive legal framework is put in place to ensure that families' needs are properly assessed, and that plans are put in place to provide services to meet them. The needs of birth families should also be addressed.

## CONCLUSION

1.11 The purpose of the Group's recommendations is to create an adoption system that is flexible and responsive to the needs of the children and adults who use it. These proposals will provide long-term security for children who cannot live with their birth families, and will remove many of the uncertainties which currently exist. The proposals will also provide additional support to adopters, foster carers and birth families. Together, these proposals will create a child-centred adoption system that is relevant to today's society.



## 2. permanence, principles and consulation

## SUMMARY

**2.1 The Group has kept the needs of the child at the centre of its work, in particular a child's need for security, stability and permanence. The Group drew up a set of principles to guide its work based on this need for permanence. The Group also consulted widely, and specifically carried out a focused consultation with children and young people with experience of the care system to determine what was important to them and what improvements they would like to see.**

## PERMANENCE

2.2 The Group's aim has been to develop a framework to provide permanence for children who, for whatever reason, cannot be brought up by their birth families. The importance of permanence to children can only be appreciated by looking at it from a child's point of view, although it is hard to describe this adequately. The concept of belonging can be helpful as most adults are aware of situations in which they feel that they belong, and also the discomfort that can be caused if they feel they do not belong.

2.3 For children, a sense of belonging - of being cared for and cared about - is fundamental to their healthy emotional and physical development. However, a sense of belonging - for example being part of a family - is not something that can be established by telling a child that they are now part of a new family, or because they are the subject of a particular legal order. The feeling of permanence comes from the actions and behaviour of those adults who care for the child. For most children their world is what they experience on a day-by-day basis. Daily care routines, familiar meals on set days, planning for holidays, celebrating birthdays all help a child develop both a sense of self-esteem and

well being in the present, and a sense of hope and optimism for the future.

2.4 It is vital therefore that the adult(s) who are parenting a child on a day-to-day basis are also able to plan for a child, be it for next week, next month, next birthday, or the next holiday. The capacity of adults to offer children this continuity and predictability can be impaired by their own personal circumstances, such as drug or alcohol misuse or mental health problems. For those who care for children within public care, there is the added dimension of sharing decision making with a range of other people, which can lead to differences in view and delays in taking action, which in turn impacts on children who need predictability and consistency.

2.5 A number of factors can provoke huge anxiety and uncertainty amongst children in public care:

- how long they might live in their current home?
- who will buy them birthday presents?
- will they be going back to the same school in August?
- why are different adults coming to talk to them and their carers?
- why can't they go to sleepover at their friends?
- why do their carers sometimes look anxious, or talk about what will happen at the next meeting, or refer to "your next family"?

2.6 This profound sense of unpredictability and uncertainty is not reduced by sharing information about future plans with the child, or by allowing the child to participate in decision making. Having your life planned and scrutinised by a wide range of adults is not a normal experience. Children do not want to be different from their peers in this as in other areas of life. The best solution is therefore for children to be brought up within family situations

in which the adults can give children clear messages that they both belong and will continue to be part of that family, and that known and trusted parents are “in charge”. Just like other children:

*Now I have been adopted I feel safe. I can stay with my family for as long as I please and that will be for as long as I live.*

*Watching them close the book, really shutting it... knowing that nothing else was going to happen. It was just going to be an ordinary life from now on.*

These quotes from *Adopted Children Speaking* highlight the importance of a sense of belonging for the children, a sense of belonging that the adults in their families have been able to confer on the children.<sup>1</sup> These children are no longer concerned about how long they will stay in the family, or what their “next family” might be like. They are now thinking about how they are going to grow up in their new home. Just like other children.

2.7 The Group concludes that the legal system should give security to children and give their adult carers the opportunity to pass on to the children these messages of belonging. The aim should be to allow the child to develop a sense of permanence:

- a developing feeling of ‘belonging’ to someone who is parenting them day-by-day.
- the expectation of continuing stability in the placement.
- a feeling of security in being loved and valued both for themselves and as a permanent member of the family.
- a growing sense of mutual obligations between the child and parent/s as the child moved towards adulthood.
- continuity with the ethnicity, religion,

language and culture of their birth family.

- acknowledgement and a positive acceptance of their birth family and history, with ongoing contact where appropriate.
- becoming a full member of an extended family and part of a wider long-term network of friends and family.
- growing confidence in being able to cope with the wider world, including moving on to independence or supported accommodation only when chosen by the young person.

## PRINCIPLES

2.8 Based on this understanding of permanence, the Group formulated and agreed a set of principles to inform its work. These were:

1. Children benefit from being brought up in families by a parent or parents committed to them in parent/child relationships.
2. Children generally benefit when the three “roles” of birth parent, person with daily care and person with legal responsibility are combined in the same person.
3. Those children who cannot be safely brought up by their birth parents should generally be brought up by substitute parents.
4. Children generally require stability, predictability, and the opportunity to form secure attachments, in order to develop into healthy adults.
5. There must be respect for the private and family lives and other fundamental rights of children, birth parents and substitute parents.
6. The interests of children, birth parents and substitute parents should, where possible, be held in balance, albeit the

<sup>1</sup> Caroline Thomas, et al, *Adopted Children Speaking* (London: BAAF, 1999).

welfare of children is the paramount consideration.

7. The principles should apply that the welfare of children throughout life is the paramount consideration, the children's views should be taken into account and any interventions should be the least intrusive to achieve the necessary objective.
8. Any decision in relation to children should respect their racial origin, religious persuasion and cultural and linguistic background.
9. A framework is required whereby individual solutions can be found for individual children.
10. Decisions relating to children should be clear, consistent and taken within a timescale which meets children's needs. Prolonged uncertainty is detrimental to children.
11. Adoption is an appropriate solution for some children, but modifications may be required to enable it to better achieve the above objectives.

## CONSULTATION

2.9 The Group consulted widely in drawing up its recommendations. Written responses were invited to the questions in *Choices for Children*, the discussion paper on legal issues produced by the Group's independent legal consultant and published in 2003.<sup>2</sup> A summary of the responses can be found on the Scottish Executive website.<sup>3</sup> The Group also commissioned Save the Children to consult young people who had experience of fostering and adoption. The report on this work is reproduced in full in the annexes.<sup>4</sup>

<sup>2</sup> Alexandra Plumtree, *Choices for Children* (Edinburgh: Scottish Executive, 2003).

<sup>3</sup> <http://www.scotland.gov.uk>

<sup>4</sup> Annex A, below.

2.10 The responses to these consultation exercises reinforced the principles established by the Group. The findings from consultation with the young people illustrate this point:

- all of the young people who were adopted and three quarters of young people who had lived in foster care indicated that they liked living in a family situation and felt part of the family. The relationships between young people and their adoptive parents or foster carers were important. This provided a basis for dealing with everyday situations as well as long-term security. Many young people also spoke of the importance of living with other children.
- living in safe environments and the relationships they have with their adoptive or foster families enabled young people to feel safe.
- many young people, adopted and in foster care, felt positive about their future. Young people spoke about the importance of their relationships with their adoptive parents or their foster carers in providing this security. For young people in foster care this feeling of security lessened as their placement came to an end. A number of young people identified continuing relationships with their carers after they had moved to live independently as important to them.
- the importance of providing young people with supportive and stable environments within which they can explore their identity was evident in young people's accounts.
- many young people thought that adoption provided more stability, security and was permanent. Young people felt that these factors were important in enabling close family relationships.

2.11 Further reference is made to these principles and views from consultation at appropriate parts of the report.



### 3. adoption



## SUMMARY

**3.1 The Group considered whether adoption in its current form should be retained given modern social conditions, and if so what model should be preferred. The Group also considered detailed changes to current adoption law, including whether joint adoption should be extended to unmarried couples, revocation of adoption orders, the need for parental consent to adoption and step-parent adoptions.**

**3.2 The Group's major recommendations are:**

- **full adoption should be retained in Scotland (3.12 and 3.16)**
- **the agreement of birth parents to adoption should still be sought but the grounds for dispensing with their agreement should be simplified (3.19 and 3.24)**
- **unmarried couples, including same-sex couples, should be allowed to adopt jointly (3.42)**
- **step-parent adoption should continue, including adoption by unmarried step parents, but step-parents should be made aware of alternatives to adoption, eg step-parent adoptions (3.52 and 3.53)**

## CURRENT LAW

3.3 Adoption is a legal process that creates a "new status of parent and child ...between an adult and a child, whether they are related to each other or not".<sup>1</sup> An adoption order vests the parental responsibilities and rights in relation to a child in the adopters and extinguishes any existing parental right or responsibility held by a birth parent who is not an adopter.<sup>2</sup>

<sup>1</sup> P. G. B. McNeill, *Adoption of Children in Scotland* 3rd edition (Edinburgh: W. Green, 1998) (hereafter, McNeill), paragraph 1.01.

<sup>2</sup> Adoption (Scotland) Act 1978, ss.12(1) and (3) (hereafter, 1978 Act).

Adoption therefore breaks the legal relationship between the child and the birth parents, and in law the child becomes the child of the adopters for legal purposes.

3.4 Adoption orders are made on the application of the adopters, who can either be a married couple or a single person.<sup>3</sup> The birth parents, and others with parental rights or responsibilities, must agree to the child being adopted, or their agreement must be dispensed with by the court in the course of a freeing or adoption process.<sup>4</sup> Children aged 12 or over must also be asked if they consent to the order being made if they are capable of giving such consent.<sup>5</sup>

3.5 Adoption orders are considered final, subject to normal rights of appeal. Apart from one narrow exception, there is no statutory provision for revocation.<sup>6</sup> Adoption orders may contain whatever terms and conditions the court thinks fit, including provision for contact with the birth family, but conditions can be made only "in exceptional circumstances".<sup>7</sup>

## ADVANTAGES OF ADOPTION

3.6 The advantages of adoption for children who cannot be brought up with their birth families are well rehearsed. Adoption provides life-long family connections for children with parents who are fully committed to them. Adoption legally secures children within their new families. Adoption combines the roles of carer and person with legal responsibility, allowing the adopter to "claim" the children. Adoption therefore

<sup>3</sup> 1978 Act, ss.14 and 15.

<sup>4</sup> 1978 Act, s.16; Chapter 5, paragraphs 5.3-5.11, 5.53-5.63, below.

<sup>5</sup> 1978 Act, s.12(8).

<sup>6</sup> Alexandra Plumtree, *Choices for Children* (Edinburgh: Scottish Executive, 2003) (hereafter, *Choices for Children*), chapter 7.

<sup>7</sup> 1978 Act, s.12(6); McNeill, paragraphs 8.32-8.34; *Choices for Children*, chapter 2.

provides an answer to three of the principles that underpin the Group's work:

- children benefit from being brought up in families by a parent or parents committed to them in parent/child relationships.
- children generally benefit when the three 'roles' of birth parent, person with daily care and person with legal responsibility are combined in the same person.
- those children who cannot be safely brought up by their birth parents should be brought up by substitute parents.
- children generally require stability, predictability, and the opportunity to form secure attachments, in order to develop into healthy adults.<sup>8</sup>

3.7 Available evidence on outcomes suggests that adopted children do considerably better in a range of indicators than children who remain in long term foster care or in residential care, and, in some cases, as well as or better than children who live with their birth families. These indicators include forming relationships with their adoptive families and friends; intellectual development; social adjustment; and securing and maintaining employment in adulthood. One study has suggested that adopted children fared better in self-esteem, mental health and school achievement than non-adopted children.<sup>9</sup> With time, adoption can help to overcome behavioural problems caused by disruptions in the birth family or in previous placements.<sup>10</sup>

<sup>8</sup> See chapter 2, paragraph 2.1, below.

<sup>9</sup> *Adoption Policy Review Group - Report on Phase I*, Scottish Executive (2002) (hereafter, Phase I report), chapter 1, paragraph 13; Department of Health, "Adoption: A New Approach, a White Paper", December 2000 (hereafter, "Adoption"), p. 14; J. Triseliotis, J. Shireman and M. Hundley, *Adoption: Theory, Policy and Practice* (London: Cassell, 1997), pp. 19-28.

<sup>10</sup> R. Parker, ed., *Adoption Now: Messages From Research* (London: Department of Health, 1999), pp. 76-78, 144-148.

By contrast, outcomes for looked after children, for example in education and employment, are poor.<sup>11</sup>

## ISSUES RAISED BY ADOPTION

3.8 Despite these advantages the number of adoptions in Scotland has fallen over the last twenty years for a number of possible reasons.<sup>12</sup> Among these are a number of issues with adoption in its current form:

- adoption is not suitable for all children, and can have disadvantages and difficulties for children with a well established link to their birth parents, or other carers. Such children may suffer if there is a complete social break.
- the radical effects of adoption can inhibit early or timely decision-making and the prospect of permanent severance can lead to long, contested actions by the birth parents.
- the secrecy that surrounds adoption can be damaging.
- an adoption, if it is to be successful, requires from its outset professional help from social work, education and health services.

These issues are considered in more detail in subsequent chapters: Chapter 5 looks at alternatives to adoption, Chapter 6 at adoption support, Chapter 7 at court procedures and Chapter 12 at information issues.

## VIEWS FROM CONSULTATION

3.9 Advantages of adoption are illustrated by the comments of young people who participated in the consultation carried out by the Group:

*I feel more safe when I am with my (adoptive) Mum (than when in foster*

<sup>11</sup> "Adoption," p. 14; Phase I Report, p. 12.

<sup>12</sup> Chapter 1, paragraphs 1.2 - 1.3, below.

care)... because she is my Mum, she is the only person who has been there for me (Young woman, aged 14 years)

*When I was younger I had issues with where I came from and where I belonged. I am completely happy with my situation now though. My adoptive parents are my parents: they are the ones who have been with me through the ups and downs.* (Young woman, 17 years)

*When adopted part of a family - somebody loves you, foster care involves moving about a lot.* (Girl, 11 years, adopted)

*... being adopted is part of your choice, being put in care is not.* (Young woman, 16 years, foster care)

*...obviously adoption is permanent, but it is kind of in a way, you know that it is going to be permanent. But in foster care ... you do not really fit in as much ... you know that you are not going to stay there forever, there could be other people there, there could be people coming in and out. It's not so stable.* (Young woman, 14 years)<sup>13</sup>

3.10 Some of the young people did point out drawbacks to adoption from their point of view. For example, relationships with birth families were viewed to be different between foster care and adoption:

*When you're adopted you have to stay with the family ... in foster care you sometimes get to go home.* (Boy, 10 years, foster care)

3.11 Many young people thought that adoption provided more stability, security and permanence, and felt that these factors were important in enabling close family relationships to develop.

## CONTINUING NEED FOR ADOPTION

3.12 The Group concluded that adoption offers unique advantages to children needing a long term alternative family: their position is legally secure and their adoptive parents fully claim them as part of their family. The evidence from consultation with young people and from outcomes in education, health, and employment supports the view that adoption can bring advantages. **The Group recommends that adoption should remain as a legal option for children needing permanent placements away from their own families.**

## MODELS OF ADOPTION

3.13 The Group discussed two separate models of adoption:

“full adoption”, in which there is a complete legal break with birth parents; and

“simple adoption”, in which the adoptive parents acquire legal rights without cutting ties with the birth family.<sup>14</sup>

3.14 Simple adoption is used in France and some other European legal systems.<sup>15</sup> In France the child retains its birth family name and inheritance rights. Other countries have different rules. The Group considered whether this model might be more suitable in family (including step-parent) adoptions, but decided against making a recommendation to this effect. It would be confusing to have two different types of adoption. Where full adoption is not appropriate for a particular child the Group considered that other forms of legal process would be preferable.

<sup>13</sup> Annex A, below.

<sup>14</sup> *Choices for Children*, chapter 1.

<sup>15</sup> Annex C, paragraph 5.2, below.

3.15 Full adoption has always been the model in Scotland and the rest of the United Kingdom. The concept is also recognised in most of the other jurisdictions examined. As well as a complete legal break with the birth family (including matters of inheritance), full adoption has traditionally involved a complete social break, denying further contact with the birth family and involving a degree of secrecy about the child's new family and whereabouts. This may still be appropriate for adoptions of some infants. However, the Group recognises that older children being considered for adoption may have forged strong ties with their birth parents, the severance of which may not always be in the best interests of children.

**3.16 The Group recommends that full adoption should remain the only model for adoption in Scotland.** The Group does not favour the introduction of simple adoption into Scots law, considering it to be potentially confusing to have two different forms of adoption. The Group is of the opinion that the term should be reserved for full adoptions, a concept that is well understood by the public. **However, the Group recognises that it may be in the best interests of some adoptees to allow a degree of contact between the child and the birth family, sometimes known as an "open" adoption.** If the degree of contact required in the best interests of the child is such that adoption is inappropriate the Group recommends that a stable placement is sought and monitored via a Permanence Order, which would provide security for the child without severing the legal and social bond between the birth parent and child.<sup>16</sup> The Group also prefers alternative legal approaches to step-parent and family situations where adoption might otherwise be considered.<sup>17</sup>

## AGREEMENT BY BIRTH PARENTS TO ADOPTION AND DISPENSING WITH PARENTAL AGREEMENT

### Need for parental agreement to adoption

3.17 In general no adoption or freeing order can be granted in Scotland unless either the birth parents voluntarily consent or the court, usually after a contested hearing, dispenses with their consent on specific grounds.<sup>18</sup> A parent giving consent can opt to take no further part in the adoption process.

3.18 By contrast, in some countries, for example Sweden and the Netherlands, no adoption order can generally be made unless the birth parents voluntarily consent.<sup>19</sup> This can be for legal reasons – in Sweden there is no legislation to deprive birth parents of their rights – or because social work practice in these countries emphasises preserving families and is reluctant to remove children from their birth families. The Group considered whether adoption should be possible without the agreement of the parents, the court as at present being able to dispense with consent in suitable cases.

**3.19 The Group recommends that the agreement of the parents to adoption should continue to be sought in the first instance.** If parents consent to adoption they should be entitled to elect to take no further part in the process. Their consent should be recorded. If parents object to the adoption this should also be clearly recorded and their views given due weight. **However, there will be cases where the best interests of children would be served by them being adopted by alternative families, despite the objections of the parents. In these circumstances the Group recommends that the court should retain the power to dispense with the parents' agreement.**

<sup>16</sup> See chapter 5, below.

<sup>17</sup> Paragraphs 3.45 – 3.54, below.

<sup>18</sup> 1978 Act, ss.16(1), 16(2) and 18(1).

<sup>19</sup> Annex C, paragraphs 5.3-5.11, 5.53-5.63, below.

The Group believes this accords with its principles to respect and balance the rights of parents and children with the welfare of children being paramount.

### Proposals to change grounds for dispensing with parental agreement

3.20 Currently the court can dispense with agreement if the parent:

- is not known, cannot be found or is incapable of agreeing;
- is withholding agreement unreasonably;
- has persistently failed, without reasonable cause, to carry out one or other of the parental responsibilities:
  - to safeguard the child's welfare **or**
  - to maintain contact;
- has seriously ill-treated the child, who is not likely to return to live with the parent.<sup>20</sup>

In considering whether to dispense with the agreement of the parents, the court will consider whether there is evidence to support one of these grounds and then whether the agreement should be dispensed with.<sup>21</sup>

3.21 The current Scottish grounds for dispensing with agreement have been criticised as complicated and difficult to apply, despite case law as to their interpretation. The last three grounds usually mean that evidence has to be led to show that birth parents have failed or are inadequate in their parenting or have seriously ill-treated the child. On the other hand, the current grounds are familiar to practitioners and therefore well understood.

3.22 In England and Wales the grounds for dispensing with the parents' agreement – which had been much the same as those in Scotland – are radically

changed by the Adoption and Children Act 2002.<sup>22</sup> That Act provides only two grounds for dispensing with consent:

- that the parent or guardian cannot be found or is incapable of giving consent; or
- that the child's welfare requires the consent to be dispensed with.<sup>23</sup>

The Group considered whether the existing Scottish grounds should be amended or extended.

3.23 The grounds being introduced in England and Wales under the 2002 Act have the attraction of simplicity. It is also desirable in an issue such as adoption that the approach taken on both sides of the border should be broadly similar. There is, however, an issue about whether the welfare test gives sufficient weight to birth parents' interests. The Group believed that the test must be more stringent than whether the prospective adopters would give the child a better life than the birth parents (sometimes known as "a beauty parade"). The welfare of the child must require the birth parents' consent to be dispensed with. This test should be at least equivalent to that in Article 8 of the European Convention on Human Rights (ECHR), which requires that any interference in private or family life must be in accordance with law and necessary to protect health or the rights and freedom of others. The Group considered that the test in the 2002 Act would be improved if it reflected Article 8 more exactly. The Group also considered that there must be a clear distinction between the tests the court applies in deciding whether to dispense with parental agreement and the factors which instruct its decision on whether the adoption order should be made. Otherwise there is a risk that these separate considerations will be treated as one issue.

<sup>20</sup> 1978 Act, s.16(2).

<sup>21</sup> *Choices for Children*, chapter 6.

<sup>22</sup> Adoption and Children Act 2002 (hereafter 2002 Act), c.38.

<sup>23</sup> 2002 Act, c.38, s.52(1).

3.24 The Group recommends that the current grounds for dispensing with the agreement of birth parents should be changed and that those in the 2002 Act should be adopted, amended to reflect the “necessity test” in Article 8. These grounds are clear and straightforward and give due consideration and protection to the rights of birth parents.

3.25 Similar arguments apply to the need for consent in freeing and other pre-adoption procedures.<sup>24</sup>

## REVOCATION OF ADOPTION ORDERS

### The current position

3.26 Adoption orders can be appealed within the normal time limits but are otherwise considered final. There is only one statutory provision for revocation of an order, which is where an order is made in favour of one birth parent and that parent later marries the other birth parent, in consequence of which the child is legitimised.<sup>25</sup>

3.27 The courts have held that adoption affects a child’s status and an adoption order cannot therefore be set aside because the adopters were misled, for example by the adoption agency withholding information in its possession regarding the child’s mental or physical health. Where the court has set aside an adoption order, it has done so in the context of a late appeal being allowed against the granting of the adoption order in the first place. It has not been in response to an application for revocation of the order.<sup>26</sup> The common law remedy of reduction might, however, also be available in some circumstances, for example when the order was incompetent because the person adopted was overage.

### Proposals for change

3.28 The Group discussed whether there should be a limited right to seek revocation of an adoption, and on what grounds. In Australia and New Zealand, there are provisions that allow discharge of an order for reasons such as duress, fraud or material mistake. The New Zealand Law Commission has also suggested that an adult adoptee should be able to apply for an adoption order to be set aside where the adoptive relationship has irretrievably broken down.<sup>27</sup>

3.29 The responses to *Choices for Children* indicated that the question of revocation was most relevant for young adoptees, rather than those who were now adults. There was general support for revocation in exceptional circumstances so long as the security of children was protected. The responses identified a number of possible grounds for revocation: fraud; material misrepresentation or mistake; procedural irregularity; and compromise of the children’s welfare. The New Zealand Law Commission’s proposal for revocation in cases of family breakdown was supported in step-parent or other family adoptions, but there were reservations for stranger adoptions (to prevent the introduction of a “divorce culture” into adoption). The responses indicated that the order should only be revoked if it is necessary for the children’s welfare throughout their life. Overall, the responses considered that any change in the law would need to keep the balance firmly on the side of adoption being for life.

3.30 The 2002 Act provides for revocation on the same statutory grounds as the 1978 Act, that is on legitimation through the marriage of children’s birth parents.<sup>28</sup> It does not provide for any other statutory grounds of revocation. It is questionable

<sup>24</sup> Chapter 5, Paragraphs 5.21 – 5.22, below.

<sup>25</sup> 1978 Act, s.46.

<sup>26</sup> *Choices for Children*, chapter 7.

<sup>27</sup> Law Commission of New Zealand, Report 65, *Adoption and its alternatives* (2000), paragraph 461.

<sup>28</sup> 2002 Act, s.55.

whether revocation on legitimation should be retained as it is no longer necessary due to other changes in the law on children and parents.

## Conclusion

**3.31 The Group recommends that there should not be any extension of the statutory grounds for revocation of adoption orders.** Adoption orders involve a change in children's status for life. Even in exceptional circumstances of fraud or grave irregularity, this change in status should not be revoked. The question of damage is a separate issue. The irrevocable nature of adoption orders is important in underpinning the security and stability that adoption is intended to provide. It also emphasises that adopted children are in a similar position to other children.

## EXTENSION OF CATEGORIES OF THOSE ELIGIBLE TO ADOPT – JOINT ADOPTION BY UNMARRIED COUPLES

**3.32** Under Scots law only single persons or married couples can adopt. An unmarried couple (opposite or same sex) cannot jointly adopt a child although they can be assessed together and one partner can adopt as a single person. The other partner can then apply for responsibilities and rights regarding the child under different provisions, such as s.11 of the 1995 Act. Using this approach unmarried couples, both opposite and same sex, have, in effect, adopted under the current law.

**3.33** There has been considerable public and political debate on this subject, particularly in relation to adoption by same sex couples. The Group's discussion paper attracted about 400 responses of which about 350 commented solely on this issue.<sup>29</sup>

<sup>29</sup> A summary of the responses can be found on the Scottish Executive website at <http://www.scotland.gov.uk>.

## Research

**3.34** To assist in the Group's consideration of the issue of joint adoption by same-sex couples, it commissioned research from the University of Newcastle to survey the available findings on same-sex parenting. Their report is reproduced in full the annexes to this report.<sup>30</sup> The survey reviewed the legal position in a number of countries and the available research on same sex parenting. The conclusion was that there is no strong evidence from objective sources which suggests that same sex couples should be excluded from consideration for adoption if a decision is taken to extend the right to apply to adopt to unmarried partners.

## Law in England and Wales

**3.35** The law in England and Wales is being changed by the 2002 Act with effect from 30 December 2005. Its provisions allow an unmarried couple to adopt jointly. It also makes provision for a new unmarried partner of a birth parent to adopt a child in the same way as a married step-parent. The Act defines a couple as two people (whether of different sexes or the same sex) living as partners in an enduring family relationship.<sup>31</sup> The Group studied the Parliamentary debates on these provisions, particularly those in the House of Lords.

## Views from consultation

**3.36** In the consultation with young people, 15 said that they thought it was important that adoptive parents are married whereas twice as many (28) said that they thought that unmarried couples should be able to adopt children, and 24 supported adoption by single people. Approximately the same number thought that it was acceptable for same-sex

<sup>30</sup> Annex B, below.

<sup>31</sup> 2002 Act, s.144(4) and (5).

couples to adopt children as thought it was unacceptable (15 against 13, with seven answering “don’t know”).<sup>32</sup>

3.37 The report quoted the following comments:

*Any couples would be good adoptive parents as long as they can give the child/children a secure home and secure surroundings. (Young woman, 13 years)*

*For same sex, it would be wrong to place a child who was going to have issues with that if the child is self conscious. Bullying would also have to be thought of. (Young woman, 17 years)*

*I think single people should be allowed to adopt as long as they have got enough to support them and that. But I think in the children’s interests I would say a couple would be better, to have a mother figure and a father figure. (Young woman, 17 years)*

*... if I was being adopted again, I wouldn’t want to go to an unmarried couple for them to split up again, say a year later. ... If you are a couple and they are partners, it is going to be harder if they split up than if you have always been with the one person. (Young woman, 14 years)*

*It shouldn’t be too restricted. It doesn’t have to be the archetypal family. The important things are consistency and sticking by you ... (Young man, 17 years)*

The report concludes that the majority of young people did not appear to be strongly in favour or against different options.<sup>33</sup>

### Arguments for and against change

3.38 The main argument in favour of change was to increase the number of

potential adopters to address the current shortfall of potential family placements for children. The Group considered that a number of unmarried couples, opposite and same sex, might be put off adopting because only one of them would establish a full legal relationship with the child. Although joint adoption could be seen as a small technical change from the current position, it might be of considerable significance to the couples involved. It would also strengthen the position of the adopted child who would have the same legal relationship with both parents.

3.39 Against change, the consultation clearly showed that this issue remained one of conscience for sections of the community in Scotland, particularly some faith groups with regard to same-sex adoption and those who saw joint adoption by unmarried couples as diminishing the value of marriage. Proposals for change should be aware of these sensitivities. For example, currently agencies can set out their own criteria for assessing adopters. Religious adoption agencies might want to deal only with adoption by married couples. Proposals for changes in the law would require to clarify whether this would continue to be possible under adoption law, the care standards for the treatment of potential adopters, arrangements between local authorities and voluntary agencies and any future anti-discrimination legislation.

3.40 A number of other important arguments were considered by the Group:

- the Group did not believe that there were human rights arguments in favour of a change as adoption is not a right for adults, but should be looked at from the point of view of children.
- the Group had no doubt that single people should continue to be allowed to adopt, and accepted that this would mean that in effect unmarried couples

<sup>32</sup> Annex A, below.

<sup>33</sup> Annex A, paragraph 3.2, below.

could continue to adopt if no other change were made to the law.

- the Group did not believe that the issue would be resolved by extending joint adoption only to same sex couples who had registered their partnership under the Civil Partnership Act 2004.<sup>34</sup> This would not address the issue of unmarried opposite sex couples to whom the provisions of the 2004 Act do not apply, and who were considered by the Group to be the largest potential pool of adopters the changes might attract.
- the Group also considered that any extension of joint adoption should be limited to unmarried couples living as partners, as in the definition in England and Wales.<sup>35</sup> The majority of the Group did not support further extension to couples who were related to each other, such as sisters, nor to couples in platonic relationships. The majority of the Group also rejected suggestions that more than two adults should be allowed to adopt jointly as the intention of adoption was to place the child in a family analogous to a birth family.
- the Group considered that a provision in common with England and Wales was important to maintain substantial commonality of adoption law on both sides of the border.

3.41 The Group considered the implications of change for wider family law. The Group was of the opinion that the provisions governing adoptions should be consistent with general family law in areas such as the rights of unmarried couples in breakdown, civil registration and the rights of unmarried fathers in matters of succession and contact. Adoption by unmarried parents would, without further change, result in their adopted child having rights of succession superior to those of birth

children of unmarried couples, and to those of the surviving unmarried partner. If this recommendation is accepted these other issues will require to be resolved by legislation.

## Conclusion

**3.42 The Group recommends that joint adoption should be extended to all unmarried couples, same and opposite sex.** The Group believes this change could make a contribution to extending the potential pool of adoptive families. The change does not in fact represent a major change since these couples can in effect adopt already, but the change could be significant to those involved. **The majority of the Group supports the definition of unmarried couples used in the 2002 Act and is in favour of the law being substantially similar north and south of the border.**

3.43 In making this recommendation, the Group emphasises the importance of the assessment of couples, married and unmarried, to ensure they can offer a stable and secure loving home to child. The consultation with young people shows this to be the most important outcome of adoption for children.

3.44 These conclusions are also relevant to the question of same sex couples fostering.<sup>36</sup>

## STEP-PARENT ADOPTION

### The current position

3.45 About half of all adoptions in Scotland are by step-parents who are married to the birth parents of children. Such adoptions are largely by the step-parent alone, although it is still possible for the birth and step-parent to adopt together.<sup>37</sup> The adoption order treats the

<sup>34</sup> Children Act 2004 (hereafter "2004 Act"), c.33.

<sup>35</sup> 2002 Act, s.144(4) and (5).

<sup>36</sup> Chapter 10, paragraphs 10.15 – 10.19, below.

<sup>37</sup> 1978 Act, s.15(1)(aa).

child as the child of the birth parent and the step-parent.<sup>38</sup> The parental responsibilities and rights of the other birth parent are removed.

3.46 A step-parent can also gain parental responsibilities and rights by applying to court under s.11 of the 1995 Act. This can be a better option than adoption, which cuts off all legal ties with the absent birth parent and their family. The appropriate legal route will depend on the best interests of the child in all the circumstances of the case.<sup>39</sup>

### Options for change

3.47 There are some misgivings about the appropriateness of adoption as a legal process to establish parental responsibilities and rights within step-families. While adoption can be the right course, for example if an absent birth parent has died, in other circumstances adoption can be used as a means of excluding completely an absent birth parent from children's lives, whatever the children's ages and relationships with them. It is, however, important that an adult involved in the day-to-day care of a child can obtain the responsibilities and rights they need to perform this function.

3.48 The 2002 Act introduces for England and Wales a new mechanism for absent birth parents to agree to step-parents acquiring parental responsibilities and rights by agreement, without the need for a court order.<sup>40</sup> The process is similar to that by which unmarried fathers can currently obtain paternal responsibilities and rights by agreement with a birth mother.<sup>41</sup> The Scottish Executive has consulted on introducing step-parent agreement in Scotland, most recently in

2004.<sup>42</sup> However, the Executive has not included these provisions in the Family Law Bill introduced following that consultation.

3.49 A further issue is whether a step-parent needs to be married to the birth parent either to adopt or to take advantage of step-parent agreement provisions. The 2002 Act allows the partner of a birth parent to adopt as a step-parent, but the step-parent agreement is restricted to a step-parent married to the birth parent.<sup>43</sup>

### Views from consultation

3.50 Consultation responses indicated concerns about the step-parent adoption and its use when other options might be more appropriate. Some respondents felt that there should be specific processes for this type of adoption, but there were few clear proposals for these. One suggestion was that step-parent relationships should be assessed against various legal options (for example, no action, or a name change, or a residence order, or simple adoption, or full adoption) and that full adoption should only be used in very specific circumstances. Most respondents supported a form of step-parent agreement as an alternative to court processes.

3.51 Most respondents felt that unmarried step-parents should be able to adopt, if other unmarried couples were able to adopt. Some felt there should be a qualifying length of relationship, but others felt that this would be discriminatory.

### Conclusion

**3.52 As there will still be circumstances in which adoption by a step-parent is the best outcome for a child, the Group**

<sup>38</sup> 1978 Act, s.39(1).

<sup>39</sup> McNeill, paragraphs 1.04, 4.06-4.07.

<sup>40</sup> 2002 Act, s.112.

<sup>41</sup> 1995 Act, s.4; Children Act (1989), s.4.

<sup>42</sup> *Family Matters: improving family law in*

*Scotland* (Edinburgh: Scottish Executive, 2004).

<sup>43</sup> 2002 Act, s.51(2).

**recommends that step-parent adoption should remain as it is, as an option for families.** However, the Group was concerned that adoption should only be pursued when it is the best course of action for a child, and that there should be increased information and publicity to encourage step-families to consider other options. **The Group recommends that unmarried step-parents should be able to adopt.** The Group believed this was the only practical approach. Any alternative would encourage birth parents to re-adopt their own children with their new partner under the general provisions for unmarried couples, re-introducing the anomaly that has previously been removed from adoption by married step-parents.<sup>44</sup>

**3.53 The Group recommends that step-parent agreements are available as an alternative to step-parent adoption,** and noted with disappointment that provisions similar to those in England and Wales had not been included in the Executive's Family Law Bill.

### Registration of step-parent adoptions

3.54 A step-parent adoption gives parental responsibilities and rights to the adopting step-parent without extinguishing the rights of the birth parent to whom the adopter is married.<sup>45</sup> However the birth parent may be registered as an adopter in the Adopted Children Register. **The Group recommends that in a step-parent adoption, in future only the step-parent is shown as an adopter on the birth certificate.**

### OTHER PROPOSED AMENDMENTS TO THE ADOPTION (SCOTLAND) ACT 1978

3.55 Section 7 says that when placing a child, adoption agencies must "have regard (so far as practicable to any

wishes of the child's parents and guardians as to the religious upbringing of the child." This is reflected in the duties of adoption panels.<sup>46</sup> **The Group recommends that there should be a duty on agencies to consider parental views on a wider range of matters than religious upbringing.**

3.56 Section 13(3) says (emphasis added):

- (3) An adoption order shall not be made *unless the court is satisfied that sufficient opportunities to see the child with the applicant, or, in the case of an application by a married couple, both applicants together in the home environment have been afforded—*
- (a) where the child was placed with the applicant by an adoption agency, to that agency, or
  - (b) in any other case, to *the local authority within whose area the home is.*

3.57 The last part of this section has caused difficulties in the small number of adoptions which take place in the Court of Session without the child being in the UK (which can happen if one of the adopters is domiciled in Scotland). In such cases the local authority can incur considerable expense in visiting children in their own homes. **The Group recommends that courts should have a discretion to dispense with the requirement on the local authority to see a child in the applicant's home.**

3.58 Section 25 allows interim adoption orders to be granted. It is rarely used and there are other orders that courts can make if they do not wish to make a full adoption order. **The Group recommends that interim adoption orders should be abolished.**

<sup>44</sup> 1978 Act s.15(1)(aa) inserted by 1995 Act, s.97.

<sup>45</sup> 1978 Act, s.12(3A).

<sup>46</sup> Adoption Agencies Regs, reg. 11(5).

## CROSS-BORDER PROVISIONS AND OTHER LEGISLATION REQUIRING AMENDMENT

3.59 The Group considered the issue of cross-border recognition of Scottish permanence orders and adoptions. The Group believed that future legislation should secure such recognition to ensure that children's plans were not adversely affected by geographical moves.

Scottish legislation about children and adoption would be enacted by the Scottish Parliament. This does not have the power to amend legislation applying elsewhere in the UK, but the Group noted that s.104 of the Scotland Act 1998 provides a mechanism by which such consequential amendments can be made by subordinate legislation in Westminster.

**3.60 The Group recommends that any changes in Scots Law resulting from this report should be properly reflected in the legislation for the rest of the UK to secure cross-border recognition of Scottish orders.**

3.61 The Group recognises that all legislation will need to be examined for possible amendments consequential on new adoption legislation resulting from its recommendations. The Group has identified the following primary and secondary legislation which will need amendment. This list is not exhaustive and includes legislation for England and Wales:

- Succession (Scotland) Act 1964
- Social Work (Scotland) Act 1968
- Registration of Births Death and Marriages (Scotland) Act 1965
- Foster Children (Scotland) Act 1984 and the Foster Children (Private Fostering) (Scotland) Regulations 1985
- Child Abduction Act 1984
- Child Abduction and Custody Act 1985
- Family Law Act 1986
- Human Fertilisation and Embryology Act 1990 and the Parental Orders (Human Fertilisation and Embryology) (Scotland) Regulations 1994
- Age of Legal Capacity (Scotland) Act 1991
- Children (Scotland) Act 1995
- Adoption (Intercountry Aspects) Act 1999
- Adoption and Children Act 2002.

## **RECOMMENDATIONS OF CHAPTER 3 – ADOPTION**

- 1. Adoption should remain as a legal option for children needing permanent placements away from their own families. (3.12)**
- 2. Full adoption should remain the only model for adoption in Scotland. However, it may be in the best interests of some adoptees to allow a degree of contact between the child and the birth family, sometimes known as an “open” adoption. (3.16)**
- 3. Agreement of birth parents to adoption should continue to be sought. However, there will be cases where the best interests of the child would be served by the child being adopted by an alternative family, despite the objections of the parents. In these circumstances, the court should have the power to dispense with the parents’ agreement. (3.19)**
- 4. The current grounds for dispensing with the agreement of birth parents should be changed and those in the Adoption and Children Act 2002 should be adopted, amended to reflect the “necessity test” in Article 8 of the ECHR. (3.24)**
- 5. There should not be any extension of the statutory grounds for revocation of adoption orders. (3.31)**
- 6. Joint adoption should be extended to all unmarried couples, same and opposite sex. (3.42)**
- 7. The majority supports the definition of unmarried couples used in the 2002 Act and is in favour of the law being substantially similar north and south of the border. (3.42)**
- 8. Step-parent adoption should remain as it is, as an option for families. Unmarried step-parents should be able to adopt along with other step-parents. (3.52)**
- 9. There should be step-parent agreement as an alternative to step-parent adoption. (3.53)**
- 10. In a step-parent adoption, only the step-parent should be shown as an adopter on the birth certificate. (3.54)**
- 11. There should be a duty on agencies to consider parental views on a wider range of matters than religious upbringing when placing for adoption. (3.55)**
- 12. Courts should have a discretion to dispense with the requirement on the local authority to see a child in the applicant’s home. (3.57)**
- 13. Interim adoption orders should be abolished. (3.58)**
- 14. Any changes in Scots Law resulting from this report should be properly reflected in the legislation for the rest of the UK to secure cross-border recognition of Scottish orders. (3.60)**



4. contact and conditions in orders for permanence



## SUMMARY

**4.1 The Group considered the circumstances in which contact might be appropriate in permanence and how these contact arrangements should be underpinned legally.**

**4.2 The Group's major recommendations are:**

- **there should only be contact for the benefit of the child and for a clear purpose (4.4)**
- **young people and children should be enabled to keep in contact with siblings and other important people in their life (4.9)**
- **conditions – including contact – should still be allowed in adoption orders in exceptional circumstances, but contact arrangements and other conditions should normally be dealt with alongside adoption orders (4.14)**
- **section 11 of the 1995 Act should be amended to allow the possibility of contact after a freeing order, with suitable protection against repeated applications (4.16 and 4.18)**

## CURRENT LAW

4.3 The current law allows for conditions, including those relating to contact, to be made in adoption orders, although the courts have made clear that such conditions should only be made in exceptional circumstances.<sup>1</sup> No conditions can be made as part of a freeing order. Contact can also be allowed under the hearing system if the child is subject to a supervision requirement, or through an application under the private law provisions in s.11 of the 1995 Act, although this is not available to birth parents whose parental responsibilities and rights have been removed by a freeing or adoption order.<sup>2</sup>

<sup>1</sup> Adoption (Scotland) Act (1978) (hereafter, 1978 Act), s.12(6).

## CONTACT

4.4 The issue of contact in adoption and other permanent placements was an area of concern for both law and practice, particularly as the age of children available for adoption has increased. Such children are more likely to have formed important bonds with birth parents, siblings, other relatives or other carers. There are two key questions:

- for whose benefit is the contact sought?
- what is the purpose of the contact?

**The Group recommends that contact should be for the benefit of the child not the adults. The purpose of the contact – for example, enabling a child to understand the circumstances of the separation, reassuring a child about the well-being of the birth family – also should be clear, to help shape decisions on type and frequency of contact. These principles should be set out in guidance.**

### Consultation with young people

4.5 Contact with birth families was an important issue in the consultation with young people.<sup>3</sup> The majority of young people were content with their contact arrangements, both those who had been adopted and those in foster care. However, their responses showed the complex nature of this issue. Young people spoke about making an effort to maintain contact but being put down by a birth parent, feeling pressure to see

<sup>2</sup> Children (Scotland) Act (1995) (hereafter, 1995 Act), s.11(3)(a)(iii) and (4); for further details on the current law see P. G. B. McNeill, *Adoption of Children in Scotland* 3rd edition (Edinburgh: W. Green, 1998), paragraphs 8.32 – 8.34, and Alexandra Plumtree, *Choices for Children* (Edinburgh: Scottish Executive, 2003) (hereafter, *Choices for Children*), chapter 2.

<sup>3</sup> See Annex A, below.

birth parents, their dislike of visiting birth parents, and birth parents changing or cancelling contact. The young people also talked about the importance of wider family, particularly contact with siblings.

4.6 The comments show these different points of view:

*I was adopted when I was 8 years old. When I was younger I had issues with where I came from and where I belonged. I am completely happy with my situation now though. My adoptive parents are my parents: they are the ones who have been with me through the ups and downs.* (Young woman, 17 years)

*I don't really agree with the adoption stuff because when my brother was adopted it was agreed that we were supposed to see him twice a year. But because his adoptive parents are kind of difficult they are making it hard, and we are only getting to see him once a year and this year we haven't seen him at all.* (Young woman, 17 years)

*Please accept that if young people don't want contact with their birth parents then they don't have to! We shouldn't be put under pressure to do this.* (Young woman, 13 years)

4.7 The young people also commented about making contact with their birth families after some years. Their views were fairly evenly split on whether birth family members should make a first approach, with or without the young person's consent. For some it was important that their birth families made the first move to make contact as they would want to know that their birth parents wanted to have contact.

*I think they should do it, it shouldn't be the younger one that has to. I would like to, but I would like to think that my mum would like to* (Young woman, 14 years)

*I think it would be weird making the first approach, but it would also be strange someone from my birth family making contact with me. I think the last one (a question about who should make the first contact) is both ways round, birth family or the young person, but only if the birth family and the young person have said it is okay.* (Young woman, 14 years)

4.8 A number of young people identified a strong need to know about siblings and the birth family more widely:

*It's probably not for all people, but for me it was. You see I only started being interested in who I was 4 years ago when I got this letter from social work about all the reasons why and everything like that and then I started getting interested in my identity, like who I was if you know what I mean.* (Young woman, 14 years)

*I suppose it was (important) before I found out that I had a brother and sister, but it's not any more.* (Young woman, 14 years)

4.9 As a result of the consultation, and discussions in the Group, **the Group recommends that young people and children should be enabled to keep in contact with other important people in their lives, not just birth parents, when they are moved to new placements. In particular, contact with siblings may be beneficial to everyone and is different from contact with birth parents.**

### Practice issues

4.10 The Group concluded that the law in the area of conditions should be flexible and allow for the wide range of possible circumstances and needs that can arise. However, there were a number of practice issues for which detailed guidance should be prepared. These included:

- consideration of contact as part of the assessment of prospective adopters. Some prospective adopters are initially shocked when they become aware of

contact arrangements. Others may feel there is a pressure to agree to contact in order to be approved as adopters.

- recognising the importance of preparing all parties for contact.
- the specific type of contact arrangements to be made in each case: direct or indirect, supervised or unsupervised. Guidance should look at all different forms of contact, recognising that birth parents need support as well as adopted children and that contact could be in the other direction, that is the adoptive family providing information to the birth parents. Clarity about the purposes of contact can help shape decisions about the type of contact.
- a continuing system for adoption support, including: mechanisms for all parties to make, change and adapt contact arrangements; review of contact needs throughout childhood; skilled support, using a pool of professional, birth parent and adopter experience; and mechanisms for adopters to share contact experiences.
- clarity about who makes the decisions about contact: the adopters or the agency, or young people themselves, where appropriate.
- clarity about whose responsibility it is to initiate arrangements.
- a system that lifts barriers to contact at the same time as ensuring protective filters.

4.11 The aim should be a system that:

- regulates contact appropriately without excessive control
- provides a clear but flexible legal mechanism for contact orders in all types of orders for permanence where these are required, and which can change to meet the changing needs of young people
- provides clear guidance to those involved on the issues and decisions to be made in considering contact in all permanence cases.

## CONDITIONS IN ADOPTION ORDERS – LEGAL ISSUES

4.12 The Group considered whether conditions, including contact, should continue to be possible in adoption and other permanence orders. An adoption order is an order altering the status of the child, and it is arguable that the child and the adoptive parents should not be subject to conditions contained in the order which establishes this new relationship of parent and child, particularly a condition which might change through a child's life (such as contact). There are also questions about how such a condition could be enforced.

4.13 The Group identified alternatives to conditions in adoption orders. For example, parties to the adoption could be invited to agree a statement of intent as to contact, and any other relevant matters. Such a statement would not be a condition of the adoption order and would be dependent on goodwill to have effect. However, it would be preferable to a condition as it would set out in more detail where the parties stand on contact and any other practical arrangements to which the parties have agreed. In cases where a legally binding arrangement is appropriate, the Group favoured the removal of the current prohibition on applications under s.11 of the 1995 Act by birth parents (and others) who have had their parental responsibilities and rights removed by adoption or freeing, although the Group recognised there should be safeguards.<sup>4</sup> However, the Group also recognised that the law in this area should be flexible and there might be exceptional cases where it would be appropriate for adoption orders to contain conditions, and the legislation should allow for that possibility.

**4.14 The Group recommends that conditions – including contact – should**

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<sup>4</sup> Chapter 7, paragraphs 7.16 - 7. 18, below.

**still be possible in adoption orders but only in exceptional circumstances. Matters such as contact should generally be dealt with alongside the adoption order.**

## CONDITIONS IN FREEING

4.15 Under the current law, a person whose parental responsibilities and rights have been removed through a freeing or adoption order cannot apply to the Court for a contact order or any other order under s.11 of the 1995 Act.<sup>5</sup> The law therefore allows an adoption order – the final order in the procedure – to contain provision for contact for a birth parent, but does not allow a freeing order – a possible intermediate stage in adoption which nonetheless removes parental responsibilities and rights – to do so.

4.16 Although the Group recommends that freeing for adoption should be abolished, it will be some time before this recommendation, if accepted, receives legislative effect.<sup>6</sup> **The Group recommends that at the earliest opportunity s.11 of the 1995 Act should be amended to remove the current restriction on those who have lost parental rights through adoption or freeing applying under that provision.** In line with its views on conditions in orders about children's status, the Group believes that this provides a better solution than amending the provisions on freeing to allow conditions. It is also the approach that has been favoured by the Court of Session in recent litigation.<sup>7</sup>

4.17 The Group recognised that this change could cause some anxiety amongst adopters and adopted children, who might be concerned that birth parents would make repeated

applications to court for orders under s.11 of the 1995 Act. Such a situation could unsettle and undermine the security provided by adoption.

**4.18 The Group recommends that applications for orders under s.11 of the 1995 Act in these circumstances should only be allowed with the leave of the court, to protect adoptive and potential adoptive families from inappropriate or vexatious applications.** This is similar to the law in England and Wales, which was commented on favourably by the Court of Session.<sup>8</sup> A system of leave to apply is less common in Scotland than in England and Wales, but there are provisions which use such a system: for example, a re-application to revoke a freeing order, or where birth parents will also have to seek leave to oppose an adoption application if the child has been placed for adoption in Scotland from England and Wales under the provisions of the 2002 Act.<sup>9</sup>

4.19 In addition to these recommendations, which spring from problems with current freeing provisions, the Group has made other recommendations to amend s.11 and introduce a need for leave from the court to apply for orders.<sup>10</sup>

<sup>5</sup> 1995 Act, s.11(3)(a)(iii) and (4); Choices for Children, chapter 2.

<sup>6</sup> Chapter 5, paragraph 5.3 - 5.7, below.

<sup>7</sup> West Lothian Council v M 2002 S.L.T. 1155.

<sup>8</sup> Children Act (1989), ss.8 and 10; West Lothian Council v M 2002 S.L.T. 1155.

<sup>9</sup> 1978 Act, s.20(5); 1978 Act, s.16, as prospectively amended by 2002 Act, Schedule 3, paragraph 23(b), inserting subsections (3A) to (3D).

<sup>10</sup> Chapter 7.16 – 7.18, below.

## **RECOMMENDATIONS OF CHAPTER 4 – CONTACT AND CONDITIONS IN ORDERS FOR PERMANENCE**

- 15. Contact should be for the benefit of the child not the adults. The purpose of the contact also should be clear, to help shape decisions on type and frequency of contact. These principles should be set out in guidance. (4.4)**
- 16. Young people and children should be enabled to keep in contact with other important people in their lives, not just birth parents. In particular, contact with siblings may be beneficial to everyone and is different from contact with birth parents. (4.9)**
- 17. Conditions – including contact – should still be possible in adoption orders but only in exceptional circumstances. Matters such as contact should generally be dealt with alongside the adoption order. (4.14)**
- 18. Section 11 of the 1995 Act should be amended to remove the current restriction on those who have lost parental rights through adoption or freeing applying under that provision. Any application for an order under s.11 in these circumstances should only be allowed with the leave of the court, to protect adoptive families from inappropriate or vexatious applications. (4.16 and 4.18)**



## 5. permanence order

## SUMMARY

**5.1 The Group considered the legal arrangements for children who cannot safely return home to live with their families. The Group also considered the need for a pre-adoption legal process for those children for whom adoption is planned. There are difficulties with the current legal arrangements for these children, especially Parental Responsibilities Orders (PROs) and Freeing Orders. The Group therefore concluded that these two orders should be replaced by a new single court order – a Permanence Order – intended to be a gateway to long-term security for children who cannot return home but for whom adoption is not the right answer, and to improve pre-adoption procedures for children for whom adoption is the preferred option.**

**5.2 The Group’s major recommendations are:**

- **there should be a new Permanence Order to give security to children who cannot live with their birth families in the long-term (5.14)**
- **the Permanence Order should be very flexible and give rights to the birth parents, carers and local authority (5.14 and 5.22)**
- **children subject to such an order should remain looked after and only local authorities should be able to apply for a Permanence Order (5.24 and 5.29)**
- **Permanence Orders should allow children to be placed for adoption (5.28)**
- **there should be provision for children’s hearings to deal with children on Permanence Orders (5.43 and 5.46)**
- **arrangements to inform unmarried fathers and other birth relatives of permanence proceedings should include Permanence Orders as well as adoption (5.57, 5.62 and 5.63)**

## CURRENT LAW

**5.3 For those children awaiting adoption, the local authority can apply for a Freeing Order which transfers parental responsibilities and rights to the local authority as an adoption agency. The Freeing Order should be a short-term measure preceding an application for an adoption order. Although originally intended for cases where the birth parents were requesting adoption and wanted a quick legal process, they are now used mainly where it is anticipated that an adoption will be contested.<sup>1</sup>**

**5.4 There are a number of possible legal arrangements for children who are in long-term fostering.<sup>2</sup> Many children in long-term care are subject to supervision requirements made by a children’s hearing. These require to be reviewed at least annually and do not give any parental responsibilities or rights to the local authority or the foster carers and suspend, rather than remove, the rights of the birth parents to regulate residence, contact and, possibly, other matters. Foster carers can apply for residence orders under the private law provisions of s.11 of the 1995 Act to secure the residence of the child with them but if they are successful they lose their fostering allowance and support.<sup>3</sup> Local authorities can apply for Parental Responsibilities Orders, which take away most of the parental responsibilities and rights of the birth parents and gives them to the local authority. These orders are not widely used.**

<sup>1</sup> Alexandra Plumtree, *Choices for Children* (Edinburgh: Scottish Executive, 2003)

(hereafter, *Choices for Children*), chapter 3.  
<sup>2</sup> *Choices for Children*, chapter 1.

<sup>3</sup> Some local authorities pay “residence allowances” under s.50 of the Children Act (1975), but these are discretionary.

## ISSUES WITH FREEING FOR ADOPTION

5.5 A Freeing Order is commonly applied for by a local authority when a child has not been placed for adoption within the timescales laid down in the 1996 Regulations.<sup>4</sup> It is the only possible court application that can be made which in these circumstances can keep the local authority within the requirements of the regulations. Freeing is also beneficial as a legal process which avoids a conflict in court between the birth parents and the eventual adopters. This is particularly beneficial if birth parents and adopters are related.

5.6 However, there are drawbacks to Freeing Orders:

- pending adoption a freed child is left in the difficult position of having no-one, other than the local authority, responsible for him or her. The situation has been described as “an adoption limbo”.
- the provisions were based on the view that adoption always and necessarily involved a complete break with a birth family. This need no longer be the case.
- the child may have some residual contact with a member of their birth family, but the law provides no protection for that contact to continue pending adoption.
- if the child is not ultimately adopted, there may be no ‘way back’. There is no provision for changing the order into a Parental Responsibilities Order, and revocation is only possible if there is someone able to exercise parental responsibilities.
- They were introduced as a fast process, but now often take a long time to complete.

5.7 The Group recommends that freeing should be abolished. However, the Group recommends that there should be a pre-adoption order to preserve the current advantages of freeing:

- to avoid direct conflict in court between the adopters and the birth parents; and
- to provide a mechanism for birth parents to consent to adoption at an early stage.

## ISSUES WITH PARENTAL RESPONSIBILITIES ORDERS

5.8 A Parental Responsibilities Order (PRO) is a measure of permanency short of adoption. It removes almost all the birth parents’ parental responsibilities and rights and transfers them to the local authority.<sup>5</sup> The child remains looked after by the local authority.<sup>6</sup>

5.9 There are problems with PROs:

- a PRO is seen as an order that indicates the child will not return home. However, the statutory provisions do not say in terms that this is the purpose of the order.
- parental responsibilities and rights are transferred to the local authority rather than a substitute family.
- a PRO automatically transfers almost all parental responsibilities and rights to the local authority. There is no flexibility to vary the parental responsibilities and rights which are transferred to meet the circumstances of the case.<sup>7</sup>
- a person who has had their parental responsibilities removed by a PRO cannot apply for a contact or residence order at a later date, although they can take the matter

<sup>4</sup> 1996 Regulations, rr.12-18.

<sup>5</sup> Children (Scotland) Act 1995 (hereafter, 1995 Act), ss.86 – 88.

<sup>6</sup> 1995 Act, s.17(6)(c).

<sup>7</sup> 1995 Act, s.86(3).

back to court under s.86 of the 1995 Act.<sup>8</sup>

- a local authority can be left trying to justify in court a degree of transfer of parental responsibilities and rights which might not be in the best interests of the child, and which the authority might not want, to achieve a purpose which is not clear from the legislation.

5.10 As a result of these difficulties PROs are not much used. In 2004 there were 341 such orders in place compared to 4,427 children on supervision requirements away from home, some 3,000 of whom have been looked after for over a year.<sup>9</sup>

**5.11 The Group recommends that PROs in their current form should be abolished. However, the Group recognises the need for an order that would:**

- **secure children in a long-term placement; and**
- **be flexible enough to meet the needs of individual cases.**

### **A NEW PERMANENCE ORDER**

5.12 If the Group's recommendations to abolish Freeing Orders and PROs are accepted, the Group recognises the need for a new court order to give legal stability to children who cannot live safely with their birth families but whose future lies with a substitute family. Such long-term legal stability cannot be provided by current supervision requirements. The new court order requires to be flexible since these children will have different needs: for example, they may have varying degrees of contact with their birth families; they may be awaiting adoption; or they may

remain in long-term fostering. Foster carers should also be able to use the order to "claim" the child by acquiring some parental responsibilities and rights. The new court order should provide greater legal security and stability for the child and the new family, as well as a mechanism for securing clear rights for birth parents where appropriate.

5.13 The Group considers that the new court order which met the above criteria would meet the principles which governed its work.<sup>10</sup> In particular, it would allow children to be brought up by substitute parents with greater stability and predictability for the children. The new court order would also allow the interests of children, birth parents and substitute parents to be held in balance and be able to provide individual solutions to be found for individual children.

**5.14 The Group recommends there should be a new court order to be known as a Permanence Order.** The Permanence Order is intended to provide legal security for children who cannot return home, and require a permanent alternative home. It would cover children who are entrusted to a local authority pending adoption, and children who may spend the rest of their childhood accommodated by the local authority, recognising the common needs of children in these positions. **The order should be completely flexible, thus enabling the court to make an order that fits the needs of the individual child, securing the interests of the child, the birth family and the new family.**

<sup>8</sup> 1995 Act, s.11(3)(a)(iii) and 4(d).

<sup>9</sup> Table 1.2, Children's Social Work Statistics 2003-04, Scottish Executive (2004).

<sup>10</sup> Chapter 2, below.

## VIEWS FROM CONSULTATION

5.15 The consultation with young people identified a number of themes which are important to the Group's recommendation for a Permanence Order.<sup>11</sup>

5.16 First, it was clear that living in a family and feeling part of a family were important to the young people. The quality of the relationship between young people and their adoptive parents or foster carers is of crucial importance to the provision of long-term security as well as to the solution of problems which may arise from day-to-day. The relationship between young people and their adoptive parents or foster carers were very important to making this successful and to provide long-term security as well as a basis for dealing with everyday situation. However, the young people also identified a difference in their position depending on their status:

*When you are fostered you never feel 100% part of that family, there are always things that make you different ... that set you apart from them* (Young woman, 17 years)

*When adopted part of a family - somebody loves you, foster care involves moving about a lot.* (Girl, 11 years, adopted)

*... obviously adoption is permanent, but it is kind of in a way, you know that it is going to be permanent. But in foster care ... you do not really fit in as much...you know that you are not going to stay there forever, there could be other people there, there could be people coming in and out. It's not so stable.* (Young woman, 14 years)

5.17 Second, the young people identified factors that could unsettle their sense of security. For example, the involvement of social work and Children's Hearings can be negative:

*Meetings (panels, reviews) in adoption there would not be any. Be able to become a closer family without the hassle and interference of meetings and social work.* (Young woman, 15 years, foster care)

*I do not particularly like having reviews ... I just feel that the social work must have better things to do. I do not know if they have to do them by law until I'm 18 or something... I do not feel like I am in a placement, I feel like I am in a family and have done for many years... I do not really feel there is any need for social work involvement, especially when it is not needed for anything.* (Young man, 17 years)

5.18 Third, young people saw as problematic the need to get permission from people other than their current carers for certain activities, such as staying over with friends. A number of young people felt that their foster carers were best placed to make these decisions.

5.19 Finally, a number of young people spoke about how a permanent arrangement had never been achieved for them and the difficulties this had caused. A number described their experiences of being moved between foster care, their birth families, and other family members:

*I did hear once that I was up for adoption at 4 ... It would have been nice instead of having been brought back and forward between care and my Mum ... Because of my Mum and Dad's problems, nothing was ever perfect at my Mum's house ... we were not looked after properly ... It was like a relief when I went into care,*

<sup>11</sup> See Annex A, below.

*it was like, I knew that I would be looked after, that I would be fed properly. But then I would be put back home. ... I think my Dad ... would make them believe that he loved his kids and could look after them, and that would be it, back and forth. Until (year) and then it came to a halt. (Young woman, 21 years)*

5.20 The views of these young people support the Group's conclusion that there is a need for a legal mechanism to increase the security of such young people within their new families, to reduce the uncertainty that some features of the current system might create, and to increase the responsibilities and rights of foster carers.

## DETAIL OF PERMANENCE ORDER PROPOSALS

### Effect of a Permanence Order

5.21 A Permanence Order should be extremely flexible to allow the court to tailor the order to meet the needs of the child in each particular case. The court should be able to confer and remove (or prevent the exercise of) parental responsibilities and rights, make provision for residence, contact, and make orders on any other specific issues (such as consent to medical treatment or foreign travel).

**5.22 As a minimum a Permanence Order should remove the right of parents to have the child reside with them or to regulate the child's residence.<sup>12</sup> All Permanence Orders should place parental responsibilities on the local authority and give the local authority the right (subject to any order the court might make) to regulate residence, to control, direct and guide the child, and to act as the child's legal representative where necessary.<sup>13</sup> The court should**

then consider whether the parent should retain some responsibilities and rights. It may be in the child's interests in some cases that the parents continue to share and exercise the responsibility of direction and guidance even if the child cannot live with them. There will be many cases in which the parents should continue to have contact. In other cases it may be crucial for the welfare of the child that the parents have no responsibilities and rights at all, and that contact be limited or terminated.

5.23 In some cases foster carers should be given parental responsibilities and rights to be exercised alongside the local authority. Where carers have day-to-day care, they should, for example, be able to consent to all medical or dental treatment, where the child is unable to do so. Foster carers might also be given the right to regulate the child's residence. While they may not wish to have sole responsibilities and rights in relation to the child, sharing these with the local authority would give the child the chance to be "claimed" and foster carers the opportunity to "claim" the child, as well as providing a stable legal basis for the child's new home with the family. This change in the legal structure would also reflect, in appropriate cases, the reality of the position for children in permanent fostering placements, as well as meeting some of the problems that these children currently face when permission might have to be sought from people other than their current carers.

**5.24 Whatever the provisions of the Permanence Order about parental responsibilities and rights, a child on a Permanence Order should remain looked after by the local authority (as a child subject to a PRO does presently<sup>14</sup>). Foster carers with parental responsibilities and rights under a new Permanence Order**

<sup>12</sup> 1995 Act, s.2(1)(a).

<sup>13</sup> 1995 Act, s.1(a), (b) and (d) and s.2(1)(a), (b) and (d).

<sup>14</sup> 1995 Act, s.17(6)(c).

should retain their entitlement to support, including financial support, from the local authority. This should encourage foster carers to consider plans for Permanence Orders, unlike the current situation with orders under s.11 of the 1995 Act.<sup>15</sup> Children would also retain their right to services on leaving care.<sup>16</sup>

### Test for granting a Permanence Order

5.25 A new Permanence Order should only be granted where the court is satisfied that the child cannot reside with a person who has parental responsibilities and parental rights because:

- there is no-one with parental responsibilities or parental rights; or
- residence with any of the persons who have parental responsibilities or rights is likely to be seriously detrimental to the child's health or development.

There are other circumstances apart from the child's safety in which it may not be desirable for a child to live with its birth family, for example the child may have no relationship with the birth parents because of previous episodes of care. However, the Group considered that a high test was required to justify the making of an order the minimum effect of which would be to remove the right to have the child live with them, or to regulate the child's residence, from the birth parents of a child.

5.26 As its name suggests the Permanence Order is intended to have a long-term effect on the child, at a minimum to remove certain rights, and to provide security in a long-term foster placement, or to authorise a placement with a view to adoption. The test for making an order therefore requires a time component. The Group concluded

that the test should be that the order is in the best interests of the child throughout childhood, that is until the age of 18. The new order is not intended to be used when a child requires short-term accommodation away from home in an emergency, nor when efforts are still planned or being made to secure the conditions for returning the child to the birth parents. These cases should remain properly within the jurisdiction of the children's hearing.

5.27 Normal overarching principles concerning orders about children should apply. These are:

- the welfare of the child is the paramount consideration;
- no order should be made unless it is better for child; and
- the views of the child should be taken into account if the child is of an age and maturity to express these (it may be appropriate to seek the consent of a 12 year old where the order includes a provision allowing placement for adoption).

The Group did not believe that the consent of birth parents should be required or dispensed with before a Permanence Order can be made unless a stated purpose of the order is to place a child for adoption. Although the current provisions on PROs have requirements concerning agreement, this provision is modelled on adoption subject to the foregoing exemption, and the Group does not believe that the need for consent is justified in this new order.<sup>17</sup> The preferred approach follows that of s.11 of the 1995 Act, which does not require consent despite the court making orders about parental responsibilities and rights.

<sup>15</sup> *Choices for Children*, chapter 10.

<sup>16</sup> 1995 Act, ss.29 and 30.

<sup>17</sup> 1995 Act, s.86(2).

## Placement for adoption

**5.28 The Permanence Order provisions should allow that an order may be made authorising the local authority to place the child for adoption.** Following a Permanence Order which authorises placement for adoption, the birth parents' agreement would not be required for a subsequent adoption (this is how freeing operates at the moment<sup>18</sup>). Such an order should not therefore be made unless every person with parental responsibilities and rights agrees, cannot be found or is incapable of giving agreement, or the child's welfare requires agreement to be dispensed with. This is consistent with the changes recommended in respect of agreement to adoption.<sup>19</sup> However, pending adoption, the court may make orders, such as a contact order, or any other order which would serve the welfare of the child. As at present, the parent should retain the right to be heard in the subsequent adoption court process, not in relation to consent to adoption, but in relation to contact and similar issues relating to the welfare of the child, unless the court authorising placement has ordered that the parent should not be heard in relation to any such matter.

## Application for an order

**5.29 Only the local authority should be able to apply for a new Permanence Order.** The order is a public law order affecting children in public care. The child would remain looked after under the order and the local authority would be given parental responsibilities and rights. Only a local authority should therefore have the power to apply for a new order. This follows the model of Freeing Orders and PROs. Other parties who might acquire rights as part of a Permanence Order, particularly foster

carers, can apply for private law orders under s.11 of the 1995 Act if they do not wish the local authority to be involved.

## Revocation and variation

**5.30** The procedures for Permanence Orders should balance security and stability for the child with flexibility to meet the child's changing needs. The court therefore needs to be able to vary or revoke the Permanence Order or any related order, or to make a new related order. If a Permanence Order is revoked the court should have a range of powers to make further orders, including orders under s.11 of the 1995 Act if appropriate. The court should also be able to remit the case to the Principal Reporter with grounds for referral established if it considers there may be a need for compulsory measures of supervision.

**5.31 In order to protect the child's security and stability by avoiding repeated or vexatious applications to revoke or vary Permanence Orders, the applicant should first be required to show cause why leave of the court should be granted to bring the application.** This currently applies to certain applications for revocation of Freeing Orders.<sup>20</sup> This is similar to the Group's recommendation to amend current provisions for applications under s.11 of the 1995 Act following adoption or freeing.<sup>21</sup> The requirement for leave should apply to all applications to vary or revoke a Permanence Order or related order, including authorisation to place the child for adoption. However, the local authority should be able to initiate proceedings for variation or revocation or a new order without leave. Local authorities would not make unnecessary or vexatious applications, so this requirement would be unnecessary.

<sup>18</sup> Adoption (Scotland) Act 1978 (hereafter, 1978 Act), s.16(1)(a).

<sup>19</sup> Chapter 3, paragraphs 3.19 – 3.23, below.

<sup>20</sup> 1978 Act, s.20(5).

<sup>21</sup> Chapter 4, paragraphs 4.15 - 4.18, below.

## Interim orders and other procedural matters

5.32 Once an application for a new Permanence Order has been made the court should have the power to make any interim orders it sees fit. These interim orders should take precedence over any conflicting supervision requirements under the hearing system.<sup>22</sup>

5.33 Following an application for a new Permanence Order, any other existing or new applications for orders relating to the child should, so far as possible, be dealt with in the context of the Permanence Order. This should also apply when the order is in force. In particular, there should be no separate proceedings under s.11, except for matters which could not be part of a Permanence Order application (for example, the appointment of a judicial factor). The Group has made more detailed recommendations on these matters in Chapter 7.<sup>23</sup>

5.34 Most Permanence Order applications should be brought in the sheriff court, building on the experience of sheriffs built up from dealing with the 1995 Act and in freeing applications. The existing system of child welfare hearings could be adapted to allow consideration of issues such as leave, interim orders and matters referred to the sheriff by a children's hearing.

5.35 The sheriff court should not, however, have exclusive jurisdiction. There are likely to be cases of difficulty or exceptional importance that would justify action in the Court of Session. It might also be useful to retain Court of Session jurisdiction to deal with cases that transcend sheriff court boundaries. There may be children of the same family living apart, or cases raising

related issues which could best be dealt with together, and this may not be possible in the sheriff court.

## Transitional provisions

5.36 There will need to be transitional arrangements to deal with existing Freeing Orders and PROs should the Group's recommendations be followed.

### **The Group recommends that under transitional provisions:**

- **existing Freeing Orders should become Permanence Orders a year after implementation if no adoption order has been made;**
- **an application to revoke a freeing order should be possible during that year as it would be under current provisions. If a revocation is granted, the court should be allowed to make either a Permanence Order or an order under s.11 of the 1995 Act; and**
- **existing PROs should become Permanence Orders on implementation.**

## PERMANENCE ORDERS AND THE CHILDREN'S HEARING SYSTEM

5.37 The relationship between the proposed new order and the hearing system has been considered carefully by the Group. The demarcation between decisions of hearings and courts has previously been clear. Courts make decisions about the legal status of a child (such as adoption or freeing) and the conferral or removal of legal responsibilities and rights (such as s.11 orders and PROs). Hearings make decisions on measures of supervision necessary for a child's welfare, which can include temporary suspension of the exercise of certain parental responsibilities and rights, particularly contact and the residence of the child. Decisions of hearings currently take precedence over decisions of the courts in the matters within the hearing system's jurisdiction. For example, a hearing can require an

<sup>22</sup> Paragraphs 5.36 – 5.48, below.

<sup>23</sup> Chapter 7, paragraphs 7.16 - 7.19, below.

adopted child to be looked after away from home. In the case of section s.11 orders, a pre-existing supervision requirement takes precedence over a subsequent court order if the order is inconsistent with the terms of the requirement.<sup>24</sup>

5.38 In making a Permanence Order the court would be making decisions on conferring and removing legal responsibilities and rights in the normal way. However, these decisions are intended to secure the status of the child in its new family and bring stability to its legal position by making long-term decisions about exactly the sort of requirements that a hearing could impose, that is contact and residence. Moreover, in the case of a child in long-term fostering, the Permanence Order is intended to remove the child from the hearing system, and the short term legal position provided by a supervision requirement. There is therefore a risk that the purpose of the Permanence Order could be frustrated, or seen to be frustrated, if the hearing system retained its full powers.

5.39 On the other hand, all children are treated the same way by the hearing system at present, and there is an argument for continuing this equality of treatment. It might be more complex and unsettling to have a category of children – those on Permanence Orders – who have to be treated differently by the hearing system or have to be sent to the sheriff court for all decisions relating to the sort of matters that come before a hearing.

5.40 The Group has considered these issues in relation to a child in three distinct phases of a Permanence Order:

- following an application for a Permanence Order;
- on the application for a Permanence Order being granted; and
- after a Permanence Order is made.

<sup>24</sup> 1995 Act, s.3(4).

## Following an application for a Permanence Order

5.41 A child in respect of whom an application for a Permanence Order is made would be a looked after child, most likely subject to a supervision requirement under the hearing system. The hearing system is therefore likely to have knowledge of the child's case which would assist the court in considering the application. The Group recommends that following an application for a Permanence Order a hearing will be asked for its advice by the court in the same way that it is currently asked for advice in applications for Freeing Orders, adoption orders and PROs.<sup>25</sup> The recommendations the Group makes with reference to the preparation of this advice in adoption cases should also apply to applications for Permanence Orders.<sup>26</sup>

5.42 The Group has also considered how the courts and the hearing system should deal with the child in the period between the application being made and the court's decision (including interim decisions) on the application. Currently the hearing system continues to have jurisdiction alongside the court, and has the power to make changes to the supervision requirement which might appear to contradict the purpose of the application before the court. This is potentially confusing to the parties in the case. For example, where there is an application for a new permanency order before the courts, which includes an application to place the child for adoption, the hearing could hypothetically increase contact with a birth parent.

**5.43 The majority of the Group recommends that following an application for a Permanence Order any existing supervision requirement should continue in force, but any changes**

<sup>25</sup> 1978 Act, s.22A; 1995 Act, s.73.

<sup>26</sup> See Chapter 9, paragraphs 9.10 – 9.23, below.

**should be made by the court rather than the children's hearing that made the supervision requirement. Any interim orders made by the court should supersede inconsistent conditions of the supervision requirement.** There should be provision for the court to ask the hearing to deal with particular issues, for example, imposing a condition about attendance at school. If, in considering such a request from the court, a hearing wished to change other aspects of the existing supervision requirement or disagreed with a condition of any interim order, the hearing could offer advice in its preferred approach to the court, which would then make the decision. This approach would clearly give the court primacy in managing processes during the application for a Permanence Order. The minority view was that this proposal was potentially confusing for families and might increase the number of formal proceedings which they have to attend, and extend timescales for decision-making. The minority would prefer each tribunal to retain its normal functions during this period.

#### **On the application for a Permanence Order being granted**

5.44 On an application for a Permanence Order being granted the court should have the power to terminate the supervision requirement, to ask the hearing to consider whether the supervision requirement should continue, or to leave the requirement in place. This largely follows the current model for freeing and adoption.<sup>27</sup>

5.45 The Group anticipates that in the majority of cases the court will terminate the supervision requirement, because the child should no longer need compulsory measures of supervision in its new home. However, in some cases the supervision requirement, or part of it, will be

continued, since the hearing might be better placed to consider a particular issue. If the hearing is asked to consider an issue, it should not be able to make requirements which infringe upon matters dealt with in the Permanence Order.

#### **After a Permanence Order has been made**

5.46 A child on a Permanence Order might be referred to a hearing on fresh grounds. The Group agreed that the hearing should have jurisdiction to consider such a referral in the normal way. The Group also agreed that the hearing should be free to make a supervision requirement with conditions that do not conflict with the Permanence Order. **There is a divergence of view in the Group about what should happen if the hearing wishes to impose a condition which conflicts with the Permanence Order.**

5.47 The majority view is that, if all involved in the hearing agree that the condition should be made, the condition should apply immediately, and the court should then be informed. The court can countermand the condition if it disagrees, otherwise the condition would supersede the contrary term of the Permanence Order for as long as the supervision requirement is in place. If, on the other hand, there is disagreement amongst the parties at the hearing, the terms of the Permanence Order would remain in force for the time being, and the matter should be reported to the court by the reporter, which could either remit the issue to the hearing for a decision or make its own decision, varying the Permanence Order or making any other order as it sees fit. This solution recognises the importance of the Permanence Order in securing the position of these children, although it does treat them differently in the hearing system.

<sup>27</sup> 1978 Act, ss.12(9) and 18(9).

5.48 The minority view is that the hearing should retain all its powers in making conditions for these children as it would with any other children. The hearing could therefore specify requirements – including contact arrangements and the residence of the child – that conflict with the Permanence Order. As these are supervision requirements, and short-term in nature, they do not undermine the underlying legal position of the child. The hearing system would take into account the terms of the Permanence Order in its decision, and the local authority and foster carers could have a right of appeal against the decision of the hearing. The minority believe that differentiating a single category of children in Scotland from the jurisdiction of the hearing system is a disproportionate response to the perceived problem, and that the alternative process would introduce confusion over the roles of the hearing and the court.

5.49 The Group agrees that normal emergency provisions should apply to children on Permanence Orders. Safety is an overriding consideration and such measures are in their nature short-term measures. Any conflict with a Permanence Order would be of limited duration.

### **SPECIAL GUARDIANSHIP**

5.50 The Group considered the concept of Special Guardianship being introduced in England and Wales under the Adoption and Children Act 2002.<sup>28</sup> Special Guardianship is intended to meet the needs of children who are in long-term placements away from home but are not being adopted. To an extent, it therefore has the same aim as the Permanence Order. However, Special Guardianship has more features in common with adoption than the

Permanence Order. In particular, the child's carer rather than the local authority would apply for the order; and the child will cease to be looked after, and fostering allowances and support will not be available (although other support would be).

5.51 The Group considered that there were similarities between Special Guardianship and an application by a foster or other carer for an order under s.11 of the 1995 Act. An order under s.11 may be applied for by the carer and the child generally ceases to be looked after. This course of action can be attractive to carers and children who do not need the continuing involvement and support of the local authority, and it can be particularly appropriate for kinship care. The Special Guardianship provisions entitle the guardian to support from the local authority, so the Group believes that its recommendation to improve support to carers who have successfully applied for a s.11 order would provide Scotland with a system analogous to Special Guardianship.<sup>29</sup>

5.52 The Group strongly believes its proposed Permanence Order complements any changes to orders under s.11 with a different and very important legal mechanism for carers and children who still need the support of the local authority. Under a Permanence Order the child would remain looked after and the local authority would continue to be involved with the child and the carer. Carers would also be able to obtain formal legal responsibilities and rights over the child. The Group believes that this approach would be more attractive to carers than an order under s.11, even with some support. This model also complements existing elements of the Scottish system of looking after children.

<sup>28</sup> Adoption and Children Act ,2002 (hereafter, 2002 Act), s.115.

<sup>29</sup> See Chapter 10, paragraphs 10.8 – 10.11, below.

## ISSUES FOR BIRTH FAMILIES IN PERMANENCE AND ADOPTION

5.53 There are a number of issues around the position in permanence and adoption of unmarried birth fathers (without parental responsibilities and rights) and other birth relatives, in particular their right to be informed of decisions by local authorities and adoption agencies, their right to be notified about forthcoming court proceedings, and their right to attend or be represented.<sup>30</sup> Provisions for a new Permanence Order would also need to address these issues.

### Unmarried birth fathers without parental responsibilities and rights

5.54 Unlike other parents, the consent of an unmarried father without parental responsibilities and rights is not required for a court to make an adoption or Freeing Order. However, such fathers do have certain rights to be informed about the adoption or have their views taken into account:

- if an adoption agency knows the identity of an unmarried father without parental responsibilities and rights, the agency should provide him with notification of a decision to proceed with a freeing or adoption, as it would other parents, to the extent that the agency considers it practicable and in the interests of the child to do so.<sup>31</sup>
- the agency should try to get the same information about the father as it would for other parents and find out, so as far as possible, whether he intends to apply for any parental responsibilities or rights, or enter into a parental responsibilities agreement.<sup>32</sup>

- such a father must be informed of the date of a hearing for a freeing application, if the agency knows of his whereabouts.<sup>33</sup>
- in an application for a Freeing Order, the court must be satisfied that an unmarried father has no intention of either applying for parental rights of responsibilities, or entering into a paternal responsibilities agreement; or that any such intention he does have is unlikely to be realised.<sup>34</sup>
- the Second Division of the Court of Session has held that an unmarried father without responsibilities is 'someone who is entitled to be heard, and ... to make representations or lead evidence relevant to the welfare of the child.'<sup>35</sup>

5.55 Consultation responses indicated that these provisions were confusing. In particular, some requirements referred only to applications for freeings and others to applications for both freeings and adoptions. Some provisions gave a discretion to adoption agencies or courts, leading to inconsistencies in practice across Scotland. The provisions did not apply to the planning process for permanence, but only came into effect once decisions had been made to apply for a freeing or adoption. This could lead to unmarried fathers becoming involved at a late stage, with a consequent risk of delay.

5.56 The Group was aware of the Scottish Executive's proposals to give parental responsibilities and rights to unmarried fathers whose names are on their children's birth certificates. The Group recognised that this measure would reduce the number of unmarried fathers who find themselves without parental responsibilities and rights, but noted that there would still be unmarried fathers whose names did not appear on

<sup>30</sup> *Choices for Children*, chapter 13.

<sup>31</sup> Adoption Agencies Regs, reg. 14(2)(a).

<sup>32</sup> Adoption Agencies Regs, reg. 14(2)(b).

<sup>33</sup> RCS 1994, r.67.13(3)(aa); AS 1997, r.2.11(2)(b).

<sup>34</sup> 1978 Act, s.18(7).

<sup>35</sup> A v G, unreported, 12 April 1994.

the birth certificate and so did not receive these responsibilities and rights. The Group needed to make recommendations to deal with this.

**5.57 The Group recommends that unmarried fathers without parental responsibilities and rights should be informed by local authorities, adoption agencies and the courts about applications for Permanence Orders and adoption orders.** Unmarried fathers would then be aware of developments, and, if they did appear in court proceedings, they could be heard on welfare issues. **However, the Group recommends that neither a Permanence Order placing children for adoption nor an adoption order should require the consent of an unmarried birth father without parental responsibilities and rights.** There are other legal mechanisms for such fathers to establish their parental responsibilities and rights, and make their agreement necessary, so such a change is not required.

### Other birth relatives

5.58 Similar issues can arise over the position of other birth relatives who do not have parental responsibilities and rights, including grandparents, older siblings, uncles and aunts, as well as wider stepfamilies in some cases. Such relatives may have no formal legal rights with regard to the child, and are not separately mentioned in existing adoption legislation, but they can have extensive involvement in the life of the child, as well as an interest in the child's future.

5.59 As a matter of good practice, local authorities should consider involving relatives when making plans for a child to live away from home on a permanent basis. However, practical difficulties can arise, for example when the local authority has little or no knowledge about relatives, or when relatives either appear or change their minds about caring for a child late in the process.

5.60 Consultation responses indicated that there was general agreement that local authorities should consider involving relatives when making plans for a child to live away from home on a permanent basis. Good practice is to engage with families at an early stage and involve them in decision making if possible. Opinion was divided as to whether a legal duty on local authorities/agencies to assess family members for long-term care would be beneficial. Some felt that local authorities have an existing duty to consider alternatives to adoption and this is sufficient in conjunction with clear guidance. An automatic right to an assessment for family members could delay the process. It was agreed that there should be rules about which relatives are included, and tight time-limits within which they can come forward.

5.61 The Group was aware the Scottish Executive does not propose to extend the rights of grandparent and other birth relatives in the forthcoming Family Law (Scotland) Bill, although the Executive is proposing a grandparents' charter to recognise the role played by grandparents.

**5.62 The Group recommends that the formal rights of other birth relatives should not be extended.** There is an extremely wide range of possible circumstances in which a local authority might plan for permanence. Extending rights to other birth relatives in all such cases would be unnecessarily inflexible. Instead, the Group believes that guidance should emphasise to local authorities and adoption agencies that they should fully consider all alternatives – including long-term care by relatives - at an early stage in planning. The Group did not believe that local authorities or adoption agencies should be under a positive legal duty to inform relatives if a child is to be adopted.

5.63 At present courts have discretion to give notice of adoption hearings to any person.<sup>36</sup> **The Group recommends that courts should have discretion to give notice about hearings for Permanence Orders and adoption orders to anyone with an interest in the case.** This would give courts the flexibility to identify the interested parties in each individual case.

### **RESTRICTIONS ON THE REMOVAL OF CHILDREN IN PERMANENCE OR PLACED FOR ADOPTION**

5.64 If a child has been placed with prospective adopters by an adoption agency with the consent of the birth parents, those parents cannot remove the child from the adopters.<sup>37</sup> Similarly, no person can remove a child from a carer who has given notice of intention to adopt having looked after the child for five years.<sup>38</sup> A person who removes a child in breach of either of these restrictions commits a criminal offence.<sup>39</sup>

5.65 Consultation responses supported the view that these provisions can be confusing, and do not cover all the circumstances which can arise before an adoption application is raised or granted.<sup>40</sup> New provisions would also be required to take account of Permanence Orders.

5.66 **The Group recommends that there should be new, simpler provisions to protect children placed for adoption and on Permanence Orders, and their carers.** These provisions should cover the whole range of situations which could arise, including children subject to Permanence Orders for whom adoption is not planned. **The Group recommends these provisions should include both criminal**

**sanctions and a straightforward civil mechanism to recover children unlawfully removed.**<sup>41</sup> The views of children – particularly those over 12 years of age – should be taken into account in these provisions.

5.67 The Group considers the provisions should cover the following circumstances:

- a child has been placed by an agency for adoption but no application has been made for a Permanence Order placing the child for adoption;
- an application has been made for a Permanence Order (of any sort);
- a Permanence Order (of any sort) has been granted;
- notice of intention to adopt has been given to the local authority.

In these cases, the Group considers the residence of the child should not be changed without either:

- the agreement of the carers (or prospective adopters), the local authority and the child where the child is over 12; or
- the leave of the court or a supervision requirement from a children's hearing (except that in Permanence Order cases, a supervision requirement might only vary the residence if all parties are in favour of the change).

<sup>36</sup> RCS 1994, r.67.25(2)(ii); AS 1997, r.2.28(4)(d).

<sup>37</sup> 1978 Act, s.27.

<sup>38</sup> 1978 Act, s.28.

<sup>39</sup> 1978 Act, ss.27(3) and 28(7).

<sup>40</sup> *Choices for Children*, chapter 14.

<sup>41</sup> *cf.* 1978 Act, s.29.

## **RECOMMENDATIONS OF CHAPTER 5 – PERMANENCE ORDER**

19. The current “freeing” should be abolished. However, there should be a pre-adoption order to preserve the current advantages of freeing. (5.7)
20. Current Parental Responsibilities Orders (PROs) should be abolished. However, there should be an order that would secure children in a long-term placement and be flexible enough to meet the needs of individual cases. (5.11)
21. There should be a new Permanence Order. Its scope should be sufficiently flexible to enable the court, in making such an order, to fit the needs of the individual child, and should balance the interests of the child, the birth family and the new family. (5.14)
22. As a minimum a Permanence Order should remove the right of the parents to have the child reside with them or to regulate the child’s residence. All Permanence Orders should also give to the local authority at least the right to regulate residence, to control, direct and guide, and to act as the child’s legal representative. (5.22)
23. A child on a Permanence Order should remain “looked after” by the local authority. (5.24)
24. The Permanence Order provisions should allow an order to be made authorising the local authority to place the child for adoption where that is appropriate. (5.28)
25. Only the local authority should be able to apply for a new Permanence Order. (5.29)
26. In order to protect the child’s security and stability by avoiding repeated or vexatious applications to revoke or vary Permanence Orders, there should be a requirement for leave to make an application to be granted by the court on cause shown. (5.31)
27. Under transitional provisions existing PROs should become Permanence Orders, as should existing Freeing Orders after a year, subject to any successful applications to revoke the order. (5.36)
28. Following an application for a Permanence Order, any existing supervision requirement should continue in force, but the majority view is that any changes to it should be made by the court rather than the children’s hearing that made the supervision requirement. (5.43)
29. There is a divergence of view in the Group about what should happen if the hearing wishes to impose a condition that conflicts with the Permanence Order if a child on a Permanence Order is referred to a hearing on fresh grounds. (5.46)
30. Unmarried fathers without parental responsibilities and rights should be informed about applications for Permanence Orders and adoption orders. However, their agreement should not be required to place children for adoption, or for an adoption order. (5.57)
31. The formal rights of other birth relatives should not be extended, but courts should continue to have discretion to give notice about hearings for Permanence Orders and adoption orders to anyone with an interest in the case. (5.62 and 5.63)
32. There should be new, simpler provisions to protect children placed for adoption and on Permanence Orders, and their carers. These should include criminal sanctions and a straightforward civil mechanism to recover children unlawfully removed. (5.66)



## 6. support for adoption



## SUMMARY

**6.1 The Group considered the legal framework needed to underpin the assessment of the support needs of adoptive families and the planning and delivery of services to meet those needs. The Group also emphasised its support for the recommendations made by Phase I, and the need for adoption support services that are based on a sound framework, are properly resourced, and to which central government, local authorities and other providers are committed.**

**6.2 The Group's major recommendations are:**

- **adoption support services should be: counselling, advice, information and financial support, as well as other services prescribed by regulation (6.12)**
- **adoption allowances should be paid under a national scheme, provided for in regulations (6.13)**
- **in general a local authority placing a child for adoption should have responsibility for providing adoption support services to the child and the adoptive family for three years after the adoption order, or until the child is 18 years of age, whichever occurs sooner (6.19)**
- **adoption support services should be available to all parties involved in adoption, who should be entitled to an assessment of their need for support (6.21 and 6.22)**
- **there should be a contract between the local authority adoption agency, the adopters, and any adopted child who is aged 12 or over, detailing the services that the agency will provide (6.23)**

## CURRENT LAW

6.3 The provisions for post-adoption support are contained in s.1 of the 1978 Act. The provisions require local authorities to provide a service to meet the needs of adopted children, adoptive

parents and the birth parents of adopted children. In particular, the local authority should provide counselling and assistance (although not in cash, except for allowances) to adopted children and adoptive parents, and counselling for other persons affected by adoption.<sup>1</sup> Adoption allowances may be paid in certain circumstances, including to meet children's needs arising from mental or physical illness.<sup>2</sup> Children in long term foster placements remain looked after children and the local authority has duties to support them under the relevant legislation.<sup>3</sup>

## DIFFICULTIES WITH THE CURRENT SYSTEM

6.4 The first phase of the Adoption Policy Review considered practice issues related to post-adoption support, and made a number of recommendations to address the problems it identified. These included: the need to ensure the availability of appropriate professional support; the need for local authorities to include post-adoption services in their Services Plans; the need for a support agreement between the adoption agency and the other parties to the adoption; and the need for a national adoption support network.<sup>4</sup> The second phase of the review has concentrated on the legal framework for post adoption support. The Adoption and Children Act 2002 will introduce changes to the system of support in England and Wales, which the Group also considered.

<sup>1</sup> Adoption (Scotland) Act 1978 (hereafter, 1978 Act), s.1(2)(bb) and (c).

<sup>2</sup> 1978 Act, ss.51 - 51B; Adoption Allowance (Scotland) Regulations 1996 (1996 No. 3257 (S.247)).

<sup>3</sup> 1995 Act, s.17; Arrangements to Look After Children (Scotland) Regulations 1996 (1996 No. 3262 (S.252)); Fostering of Children (Scotland) Regulations 1996 (1996 No. 3263 (S.253)).

<sup>4</sup> *Adoption Policy Review Group – Report on Phase I* (Edinburgh: Scottish Executive, 2002) (hereafter, Phase I report), Chapter 3.

6.5 There are a number of difficulties with the current legal system.<sup>5</sup> For example:

- who should provide services for adopted children and adults, and adoptive families, who no longer live in the area where the adoption took place, or who do not live in the area of the local authority placing the child? Currently, the duty to provide support lies on the local authority where the person is living, irrespective of where the adoption took place, or the child's original residence.<sup>6</sup>
- adoption contracts between adoption agencies and prospective adopters, as recommended in the first phase, are a good practice tool, but currently have no legal underpinning.
- there is currently a great deal of variation in practice on adoption allowances and no way to arrange allowances after an adoption has taken place.

6.6 The 2002 Act contains a number of provisions changing the support system in England and Wales that could also be considered for Scotland. These include:

- support is available to all those connected with an adoption.
- an agency must assess the needs of anyone seeking support and prepare a plan to meet those needs.
- local authorities must plan for adoption support service in their area.<sup>7</sup>

## VIEWS FROM CONSULTATION

6.7 The consultation with young people highlighted the importance of effective support once adopted.<sup>8</sup> Young people identified being able to speak to someone they trust, and knowing that their views were being listened to as the two most important support needs. For many young people their adoptive parents were an important source of support, as were other people known to the young person, such as social workers, other family and friends. In one example, a young woman highlighted that, as they grow older, young people need support independent of that given to their parents. She had found regular meetings with an adoption counsellor useful. Other young people emphasised the need for opportunities to meet other young people who have been adopted, and to have a chance to discuss issues of concern to them. In another example, a young woman, who was adopted but was currently living in foster care, said she had found the most helpful form of support to be other young people who had been through similar experiences. This particular young woman had found being in a residential home had let her share her experiences with other young people.

6.8. The support needs identified by young people were often specific to that person and required knowledge of their circumstances, so more general sources of advice, such as magazines and the internet, were seen as less helpful.

## PROPOSALS FOR CHANGE

6.9 As well as considering the legal framework for adoption support the Group established a general principle that children growing up away from their birth family should have access to support. The Group also emphasised

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<sup>5</sup> Alexandra Plumtree, *Choices for Children* (Edinburgh: Scottish Executive, 2003) (hereafter, *Choices for Children*), Chapter 10.

<sup>6</sup> 1978 Act, ss.1(1)-1(2).

<sup>7</sup> Research in England and Wales identified a number of concerns over support, particularly with regard to adoption allowances. See Prime Minister's Report on Adoption, July 2000, pp. 43-46.

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<sup>8</sup> Annex A, below.

its support for the recommendations of Phase I. **The Group recommends that there should be adoption support services that are based on a sound legal framework, are properly resourced, and that have the commitment of central government, local authorities and other providers.** The Group also considered that there should, as far as practicable, be equal access to support services and equal provision of support services across Scotland.

6.10 The Group considered that the current legal provisions are too brief. Although guidance can provide further details, it is crucial that the duties imposed by primary legislation on local authorities are as clear and as wide-ranging as necessary. The Group believes the legislation about adoption support services needs to specify:

- what are adoption support services?
- who has duties to provide adoption support services?
- who is entitled to adoption support services and when?

#### What are adoption support services?

6.11 Adoption support services should meet a range of needs from those of new adoptive families, to families with older adopted children, to adults who have been adopted or have been affected by adoption in some way. As well as support for families, they include tracing services, and counselling for adopted adults and others involved in trying to make contact.<sup>9</sup>

6.12 **The Group recommends that adoption support services should be: counselling, advice, information and financial support, as well as other services prescribed by regulation.** This follows the definition in the 2002 Act.<sup>10</sup>

<sup>9</sup> Chapter 12, paragraphs 12.3 – 12.11.

<sup>10</sup> Adoption and Children Act 2002 (hereafter, 2002 Act), ss.2(6)-2(7).

The powers to prescribe other services by regulation has now been exercised in the Adoption Support Services Regulations 2005, which come into force in December 2005.<sup>11</sup> These regulations specify, as part of the adoption support service, further services:

- support to groups of adopted children, adopters and birth parents;
- assistance, including mediation, in arrangements for contact between adopted children and their birth parents, siblings and other relatives;
- services to meet the therapeutic needs of adopted children;
- assistance to adopters such as training to meet special needs and respite care;
- mediation and other services if there is a disruption in an adoption placement, or risk of one.

There will similarly be other services required in Scotland in addition to those identified by the Group. The Group believes that further consultation on these services should be carried out to identify the detailed need for support, which was beyond the Group's remit.

6.13 The Group recommends that adopters and adopted children should be able to receive financial support up to the child's 18th birthday. Financial support should be available to ensure that any carers that choose to adopt are not financially penalised. The current principles underpinning financial support should be revised and there should be consistency in adoption allowances across Scotland.<sup>12</sup> **The Group recommends that adoption allowances should be paid under a national scheme, provided for in regulations.** Each local authority agency would be responsible

<sup>11</sup> SI 2005 No. 691.

<sup>12</sup> 1978 Act, ss.51 to 51B; Adoption Allowance (Scotland) Regulations 1996 (1996 No. 3257 (S.247)).

for deciding who was entitled to allowances, but the scheme should be standard throughout Scotland, and decisions should be reviewed as part of inspection of services.

**6.14 The Group recommends that the current restriction on adoptive families receiving cash instead of services should be removed.**<sup>13</sup> This would provide flexibility of provision of services where these are not available directly from a local authority, but might be available from a private or voluntary sector provider. The adoptive family could arrange to receive the services directly if the local authority underwrite its cost. This is the position in England.<sup>14</sup>

#### **Who has duties to provide adoption support services?**

**6.15 The Group recommends that the adoption service provided by every local authority should clearly include adoption support services,** and local authorities should have a duty to prepare an adoption service plan including their adoption support services.<sup>15</sup> It should also be clear that the adoption support service is the responsibility of the whole local authority, not just social services. It would therefore be preferable for the adoption support plan to form part of the children services plan for the local authority area.<sup>16</sup> Local authorities should be able to seek assistance in delivering these services from other local authorities and from all health service providers, which should be obliged to assist (within certain limits).<sup>17</sup>

**6.16 To ensure that the adoption support services plan is properly prepared and delivered, the Group recommends that each local authority should have an adoption support officer within the senior management team for social services who has lead responsibility for service provision.**

**6.17 The Group recommends that there should be a Code of Practice for the provision of adoption support services.** This should complement the existing National Care Standards for adoption agencies published by the Scottish Executive.

**6.18 The Group recommends that legislation should allow for voluntary, specialist adoption support agencies to be established,** subject to the same registration and inspection as other voluntary adoption agencies.<sup>18</sup> Local authorities would be allowed to use other adoption agencies as now and adoption support agencies to assist them in carrying out their duties to provide adoption support services.<sup>19</sup>

**6.19 Adoption support services are a life-long commitment to the adopted person and others, but families move around and there is a need for clarity about responsibility in these circumstances. The Group recommends that, in general, a local authority placing a child for adoption should retain responsibility for providing adoption support services to the child and the adoptive family for three years after the adoption order, after which point, if the adopted person is under 18 years of age, the responsibility would become the responsibility of the local authority where the adopted person and the family lives.** Responsibility could be transferred earlier with the agreement of the family, and both local authorities.

<sup>13</sup> 1978 Act, s.1(2)(bb).

<sup>14</sup> Adoption Support Services Regulations 2005, r.3(3).

<sup>15</sup> *cf.* 2002 Act, s.5(1).

<sup>16</sup> Children (Scotland) 1995 Act (hereafter 1995 Act), s.19.

<sup>17</sup> *cf.* 1995 Act, s.21.

<sup>18</sup> *cf.* 2002 Act, s.8.

<sup>19</sup> 1978 Act, s.1(3).

Adoption support services for birth parents should be provided by the placing local authority for three years after the adoption order, and then by the local authority where the parents live. For others affected by adoption, adoption support services should be provided by the local authority where the person lives.

6.20 This follows the model proposed for England, except that the Group does not recommend that continuing financial support to adoptive families should always be provided by the placing local authority.<sup>20</sup> This adds too much complexity to the system and obliges the adoptive family to maintain relations with two local authorities for their services. Financial support should also come from the local authority in whose area the family lives.

### Who is entitled to adoption support services and when?

6.21 **The Group recommends that adoption support services should be available for all parties involved in adoption:**

- adoptees and children placed for adoption, including both those over and under 16;
- adopters, including prospective adopters, after placement of a child;
- birth parents who have/had parental responsibilities and whose children have been placed for adoption or been adopted;
- others affected by adoption, including members of the extended birth family.

The Group emphasises that these groups should be entitled to services appropriate to their needs and the rights of the various parties involved would have to be balanced if there was any conflict. For example, the right of adopters to decline

or reduce support services should be balanced with the right of their adopted children to access the services they need.

6.22 **Each of these groups should be entitled to an assessment of their need for adoption services.<sup>21</sup> The local authority should then plan how any assessed needs are to be met.** These

plans should incorporate services available from the social work, health and education services, for example any additional support for learning plans. It is for consideration whether, as in England and Wales, the local authority should retain the discretion not to provide services.<sup>22</sup> However, if a person is refused an adoption support service after assessment, either because there is no assessed need or the local authority decides not to provide the service, the decision of the local authority should be subject to review. Plans for providing adoption support services must be kept under review by the local authority.

6.23 **Following assessment and a plan, there should be a contract between the local authority adoption agency, the adopters, and any adopted child who is aged 12 or over, detailing the services that the agency will provide.** There should be scope for review of the contract by any of the parties and in all cases annually, until the liability of the agency ceases at the end of three years from the order, when the family resides in another area, or the adopted person reaches 18 years of age. If the contract expires after three years from the order, the agency in whose area the adoptive family now lives should take account of the previous contract with the placing agency in assessing and providing services.

<sup>20</sup> Adoption Support Services Regulations 2005, r.7.

<sup>21</sup> *cf.* 2002 Act, s.4.

<sup>22</sup> 2002 Act, s.4(4).

## **SUPPORT IN OTHER PERMANENCE PLACEMENTS**

6.24 This subject is dealt with in more detail in other parts of this report.<sup>23</sup> Children subject to the proposed Permanence Order will remain looked after and therefore entitled to support from the local authority.<sup>24</sup> The Group also recommends that looked after children whose carers have applied for or obtained an order under s.11 of the 1995 Act should be entitled to an assessment of their support needs.<sup>25</sup>

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<sup>23</sup> Chapter 10, paragraphs 10.4 – 10.7, below.

<sup>24</sup> Chapter 5, paragraph 5.24, below.

<sup>25</sup> Chapter 10, paragraphs 10.4 – 10.11, below.

## **RECOMMENDATIONS OF CHAPTER 6 – SUPPORT FOR ADOPTION**

- 33. There should be adoption support services that are based on a sound legal framework, are properly resourced, and that have the commitment of central government, local authorities and other providers. (6.9)**
- 34. Adoption support services should be: counselling, advice, information and financial support, as well as other services prescribed by regulation. (6.12)**
- 35. Adoption allowances should be paid under a national scheme, provided for in regulations. (6.13)**
- 36. The current restriction on adoptive families receiving cash instead of services from adoption agencies should be removed. (6.14)**
- 37. The adoption service provided by every local authority should unequivocally include adoption support services. (6.15).**
- 38. Each local authority should have an adoption support officer within the senior management team for social services who will have lead responsibility for service provision. (6.16)**
- 39. There should be a Code of Practice for the provision of adoption support services. (6.17)**
- 40. Legislation should provide for voluntary, specialist adoption support agencies to be established. (6.18)**
- 41. In general, a local authority placing a child for adoption should retain responsibility for providing adoption support services to the child and the adoptive family for three years after the adoption order, after which point, if the adopted person is under 18 years of age, the responsibility would become the responsibility of the local authority where the adopted person and the family lives. (6.19)**
- 42. Adoption support services should be available for all parties involved in adoption. (6.21)**
- 43. Each party to an adoption should be entitled to an assessment of their need for adoption services. The local authority should then plan how any assessed needs are to be met (6.22)**
- 44. Where services are being provided for a child and the adopters following assessment and a plan, there should be a contract between the local authority adoption agency, the adopters, and any adopted child who is aged 12 or over, detailing the services that the agency will provide. (6.23)**



## 7. improving court procedures and avoiding delays

## SUMMARY

**7.1 The Group considered the issue of delay in court proceedings for adoption and freeing and how court procedures might be improved to minimise the time these cases take. The Group also considered changes which might be made to the Sheriff Court Rules which they think might clarify and improve court procedures.**

**7.2 The Group's major recommendations are:**

- **pending the implementation of new sheriff court rules, all sheriffdoms should have a Practice Note with guidance for sheriffs and practitioners in permanence cases (in line with the views expressed by the First Division of the Court of Session<sup>1</sup>) (7.10)**
- **there should be active case management by judges and sheriffs, and court rules and judicial education should reflect this (7.11)**
- **sheriffdoms should develop Adoption Centres (7.12)**
- **all court actions concerning a child should be consolidated under a statutory scheme (7.14 and 7.15)**
- **the leave of the court should be required for applications in respect of a child subject to a Permanence Order or adopted (7.17)**
- **the current absolute ban on applications under s.11 of the 1995 Act by people whose parental responsibilities and rights have been removed by freeing or adoption should be ended (7.18)**

## CURRENT LAW

**7.3 In any disputed adoption or freeing, the court must draw up a timetable and give directions for keeping to the timetable 'with a view to determining the question**

**without delay'.<sup>2</sup> Existing rules for both the Court of Session and the Sheriff Court have general provisions about avoiding delay, but neither sets out detailed timetables.<sup>3</sup> Despite these provisions, and judicial pronouncements on the need to avoid delay, there is no uniform system of case management aimed at reducing delay and shortening the length of proofs in adoptions and freeings.<sup>4</sup>**

## CURRENT PRACTICE AND PROBLEMS

**7.4 In Phase I the Group looked at possible causes of delay prior to the Court's involvement and made recommendations to address the issue of delay in local authority planning and decision making. It also recommended that delay in making applications to court and in court processes should be addressed in the second phase of the review.<sup>5</sup> The Group has proceeded on the basis that it is essential that as little time as possible should elapse between a formal decision by an adoption agency that a child should be adopted and the decision of the Court to grant or refuse the application for an adoption order.** The work of the Group has been informed by the individual experience of Group members (some of whom have intimate knowledge of similar proceedings in England and Wales), the responses to *Choices for Children* and the comments made at and following the conference organised by the Group in

<sup>2</sup> Adoption (Scotland) Act 1978 (hereafter 1978 Act), s.25A.

<sup>3</sup> Act of Sederunt (Rules of the Court of Session) 1994 ("RCS 1994"), Chapter 67 for the Court of Session; Act of Sederunt (Child Care and Maintenance Rules) 1997 ("AS 1997") for the Sheriff Court ; RCS 1994, r.67.4A; AS 1997, r.2.4.

<sup>4</sup> Alexandra Plumtree, *Choices for Children* (Edinburgh: Scottish Executive, 2003) (hereafter, *Choices for Children*), chapter 6.

<sup>5</sup> *Adoption Policy Review Group – Report on Phase I* (Edinburgh: Scottish Executive, 2002), paragraphs 34-35, and chart 1.

<sup>1</sup> Dundee City Council v M, 2004 S.L.T. 640 at 644.

November 2004. The Group also benefited from a visit to the High Court for England and Wales and its thanks are due to Mr Justice Holman of the Family Division for his advice and hospitality.

7.5 The Group found a widespread view that adoption cases, including applications for freeing, take too long to resolve. Delays seem particularly prevalent in contested cases, but even some uncontested cases appear to take too much time.

7.6 There appears to be a range of causes for these delays:

- a lack of written pleadings. Adoption proceedings do not follow the pattern of other court actions in identifying the issues in writing before the proof hearing. As a result the evidence at the proof hearing is not always focussed on issues relevant to the question the court is considering and as a consequence proof hearings take longer than necessary.
- a lack of statutory timetables. It appears that courts do not always adhere to the statutory requirement to draw up a timetable to determine the question without delay, and, as has already been observed, there are no statutory timetables in the court rules
- courts do not always insist that reports are lodged on time
- proof hearings can be spread over a protracted period because not all sheriffs insist upon them proceeding from day to day until concluded. Some grant unnecessary adjournments
- reported cases indicate that on occasions sheriffs take too long to write their judgements.<sup>6</sup>

## VIEWS FROM CONSULTATION

7.7 The Consultation responses indicated real concerns about court delays and welcomed some of the suggestions. There was particular favour for: the specialist approach; specified timetables; separate process for supervision review; less adversarial approach to adoption; joint instruction of experts; and greater awareness of legal aid options. It was felt that the role of the sheriff principal is crucial to reducing delay.

## RECOMMENDATIONS FOR CHANGE

7.8 The Group has made recommendations that fall into two broad categories: those that can be taken forward without any legislative action, such as Practice Notes; and those that could be implemented through secondary legislation by the Rules Council prior to any primary legislation resulting from the other recommendations of this report. Since such primary legislation – and the secondary legislation required to implement it – is unlikely to come into force for two or three years, the Group considers that there would be merit in the recommended changes in the court rules being made now to provide for the interim period. However, the Group recognises that it is for others, primarily the Sheriff Court Rules Council, to consider how and when our proposals are implemented.

### Practice Note

7.9 The vast majority of adoption cases are dealt with in the sheriff court. Each sheriff principal has a statutory duty to ensure the speedy and efficient disposal of business in the courts within that sheriffdom.<sup>7</sup> In discharge of this duty a sheriff principal may issue a Practice Note dealing with matters of practice

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<sup>6</sup> Similar problems were identified in England and Wales. See Prime Minister's Report on Adoption, July 2000, pp. 29-33.

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<sup>7</sup> Sheriff Courts (Scotland) Act 1971, s.15.

within the sheriffdom. In March 2004 the then Sheriff Principal of Lothian and Borders - Sheriff Principal I D Macphail QC (now Lord Macphail) - promulgated a Practice Note dealing with applications for freeing and adoption.<sup>8</sup> This greatly assisted the work of the Group when considering its recommendations regarding the improvements to be made in court procedures. The First Division of the Court of Session has commended the Practice Note, and has expressed the desirability of having similar Notes in the remaining Sheriffdoms.<sup>9</sup> **The Group respectfully agrees that all sheriffdoms should have a Practice Note for adoption, related proceedings and other permanence cases.**

### New court rules

7.10 **The Group recommends that when the Sheriff Court Rules Council next considers a revision of the court rules concerning adoption that the thrust of the provisions in these Practice Notes should be incorporated.** Other developments, such as video linking in courts and the 2004 consultation by the Rules Council on extending the use of IT in civil cases, should also be reflected in revised court rules.

### Active case management

7.11 An important part of the scheme laid out in the above Practice Note is the instruction that sheriffs actively manage the progress of cases. **The Group believes that active case management is crucial and that this should be clearly reflected in new court rules.** Scotland now has a Judicial Studies Board to assist Judges and Sheriffs in the performance of their duties. The perception of the role of the sheriff has changed and the sheriff is now expected to conduct the proceedings no less fairly,

but with an eye to the efficient use of the time of the court and all those involved in the case. Hence the increasing use of the term “active case management”. A sheriff who actively manages a case will, for example, insist that reports are lodged on time; will have a pre-proof hearing to determine the facts which are relevant and those which can be agreed; and at the subsequent proof will keep parties within the framework agreed. Judicial education should assist in promoting case management in permanence cases and all aspects of permanence, including relevant social welfare matters.<sup>10</sup>

### Adoption centres

7.12 The Group was impressed by the progress made in England and Wales following upon the introduction of adoption courts which cover a large geographical area. These specialised courts are presided over by judges with an identified aptitude for such work. Until recently, specialism was unusual in the Scottish courts, but there are now experimental specialist drug courts, commercial courts and courts dealing with certain young offenders. These innovations recognise that better outcomes can be achieved through specialisation. The Group believes that cases concerning the permanent placement of a child outwith the home of the birth parents are amongst the most emotionally traumatic possible, and need and deserve a special expertise from all the professionals involved. **The Group recommends that court rules should include provision for “Adoption Centres”, so that pre-proof proceedings are held in courts where there is a sheriff with specialist knowledge.** Video links and electronic systems for the submission of papers and the discussion of

<sup>8</sup> Annex E, below.

<sup>9</sup> Dundee City Council v M 2004 S.L.T. 640 at 644.

<sup>10</sup> Research in England and Wales made similar conclusions. See Prime Minister’s Report on Adoption, July 2000, pp.71-72.

preliminary procedural matters mean that these could be dealt with without parties actually having to attend court. They could look at developing informal processes to make proceedings child-centred. Sheriffs could travel to local courts or other venues to conduct disputed evidential hearings. These centres should ensure a greater concentration of knowledge and expertise, particularly in case management.

### SEPARATE COURT APPLICATIONS IN RESPECT OF THE SAME CHILD

7.13 The Group considered the difficulties that can arise when different types of court applications are made involving the same child, either when a separate application is made when an existing application has not yet been decided, or when a further, different application is made after an order has been granted.<sup>11</sup>

#### Application made when an existing application has not yet been decided

7.14 The Group recommends that there should be a statutory scheme for dealing with situations where there is more than one type of case pending involving the same child. Although there is case law to the effect that there should not be more than one evidential hearing in connection with a child, this can often be overlooked.<sup>12</sup> The Group considers that a statutory scheme would be more effective.

7.15 The Group recommends that a statutory scheme for pending cases has the following rules:

- there should be no separate proceedings in respect of a child if an application for a Permanence Order or an adoption is pending.<sup>13</sup>

- any existing applications and all subsequent applications in respect of the child or children should form part of the court process for the Permanence Order or the adoption order, and be considered in that application.
- any court dealing with an application for a Permanence Order or an adoption order should be able to make interim orders similar to those available under other provisions.
- if the Permanence Order or adoption is refused, the court should be able to make directions and orders under s.11 of the 1995 Act or, in the case of an adoption, the permanence order provisions.

**This approach would ensure that all court actions in respect of the child are consolidated, and would allow people who have made an application, but who would not normally be parties to the Permanence Order or adoption, to take part in the process and be kept informed of the course of all proceedings involving the child.**

#### Applications following the granting of a Permanence Order or adoption

7.16 After a Permanence Order has been made, **the Group recommends there should be a bar on new, separate applications to the court on matters that can be dealt with in the Permanence Order**, such as contact or residence.<sup>14</sup> Instead, anyone with an interest should be able to apply to vary or revoke the Permanence Order. Applications should be allowed for matters that cannot be dealt with in the Permanence Order, such as the appointment of a judicial factor under s.11 of the 1995 Act, with notice being given to those with an interest in the Permanence Order. The Group believes that this system would ensure

<sup>11</sup> Chapter 5, paragraphs 5.37 – 5.49, below.

<sup>12</sup> F v F 1991 S.L.T. 357, also reported as AB and CD Petitioners 1992 S.C.L.R. 274.

<sup>13</sup> Chapter 5, paragraphs 5.41 – 5.43, below.

<sup>14</sup> Chapter 5, paragraphs 5.46 – 5.49, below.

the court takes into account all relevant factors, including the background to the Permanence Order, in making future decisions.

7.17 The Group believes that arrangements for applications to court following a Permanence Order or adoption order should provide the maximum stability for a child without restricting the right of those with an interest to apply for an order. **The Group therefore recommends that the leave of the court should generally be required for incidental applications in respect of children who have been adopted or are the subject of a Permanence Order.** To ensure that children on Permanence Orders have the maximum legal stability, the Group has separately recommended that the leave of the court should be required to apply to vary or revoke a Permanence Order.<sup>15</sup>

7.18 Although the Scottish courts do not commonly use a system of leave to apply, there are provisions which use such a system: for example, a re-application to revoke a freeing order.<sup>16</sup> The Group believes that a system of leave to apply will protect children, adoptive families and others from inappropriate, repeated or vexatious applications to court for contact or other orders. **The Group therefore recommends that those whose parental responsibilities and rights have been removed by freeing or adoption should be permitted to make an application under s.11 of the 1995 Act.** This recommendation complements the Group's recommendation that a similar change should be made urgently in connection with contact applications following a freeing order.<sup>17</sup>

<sup>15</sup> Chapter 5, paragraphs 5.64 – 5.67, below.

<sup>16</sup> 1978 Act, s.20(5).

<sup>17</sup> Chapter 4, paragraphs 4.15 – 4.18, below.

## OTHER CHANGES TO THE COURT RULES RELATING TO APPLICATIONS TO ADOPT

7.19 **The Group recommends there should be a number of detailed changes to the court rules, to improve the system and reduce delays.** The main ones are:

- the application should contain a short note of the reasons why the order is in the best interests of the child.
- formal intimation of applications to birth families should be made as soon as applications are lodged in court and they should be required to respond giving notice of their intention to defend if that is their wish. This compares with Notices of Intention to Defend in other court processes. At present, formal notice of applications is not given until after reports have been prepared and lodged in court, which can lead to delays in birth parents taking advice and applying for legal aid.
- in cases which are to be defended, birth parents and/or their solicitors should be required to state which of the facts are disputed, and which facts are agreed. The pleadings need not be restrictive and sheriffs should have a discretion to admit a line of evidence of which notice has not been given.
- sheriffs should have discretion to order written answers in permanence cases, when they think these will be beneficial.
- sheriffs should have discretion to intimate freeing proceedings to any person as in adoption applications.<sup>18</sup>
- when evidential proofs have started, they should continue from day to day and not be postponed unnecessarily save in exceptional circumstances.
- sheriffs in all the types of permanence cases should be able to give

<sup>18</sup> *cf.* AS 1997, r.2.28(4)(d).

extempore judgements at the conclusion of the hearing on evidence to be followed by a written judgement within a set timescale. It is for consideration whether the written judgement should be automatic or only at the request of any of the parties.

- the rules for curators and reporting officers should be amended to provide uniformity of wording, where appropriate, and greater clarity.<sup>19</sup>

The full list of the detailed proposals for changes to the court rules, prepared by the Legal Adviser to the Group, is at Annex D. It is for the Sheriff Courts Rules Council to propose amendments to the rules and it is hoped by the Group that these suggestion would be useful to the Council in considering amendments to the rules before new primary legislation arising from this report.

## **PUBLIC INFORMATION**

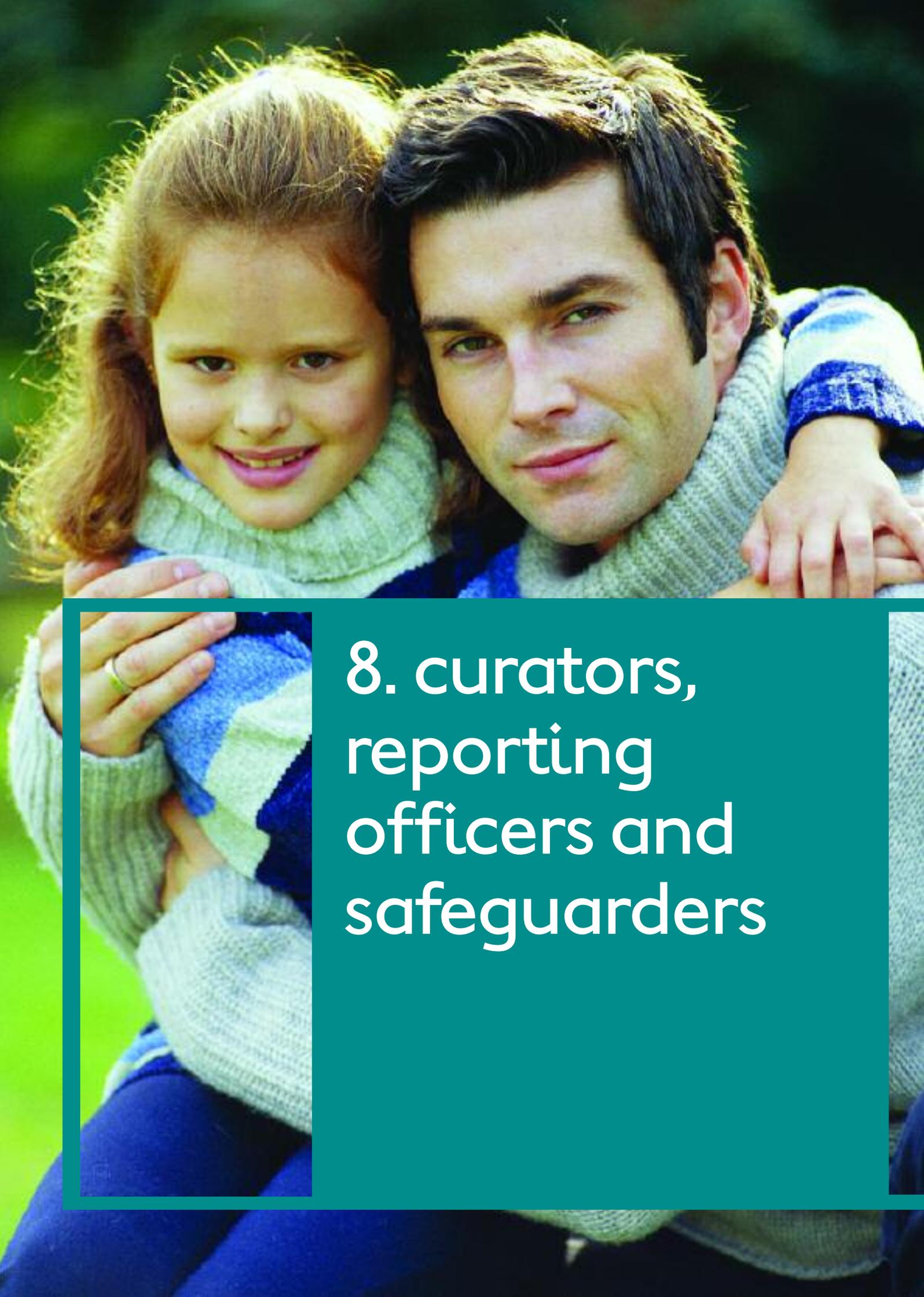
7.20 The Group considers that there should be available a series of information leaflets written in plain English – and other languages - to assist birth families about the different stages of the process and their implications, from the internal looked after review to the conclusion of the court process. There could be a series of leaflets. They could be issued as appropriate by social workers, by sheriff clerks in sending formal papers, by solicitors and by curators and reporting officers. These should help to provide birth families with easily digested information.

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<sup>19</sup> Chapter 8, paragraphs 8.14 – 8.23, below.

## **RECOMMENDATIONS OF CHAPTER 7 – IMPROVING COURT PROCEDURES AND AVOIDING DELAYS**

- 45. All Sherifffdoms should have a Practice Note for adoption, related proceedings and other permanence cases. (7.9)**
- 46. When the Sheriff Court Rules Council next considers a revision of the court rules concerning adoption that the thrust of the provisions in the Practice Notes should be incorporated. (7.10)**
- 47. Active case management is crucial and that should be clearly reflected in new court rules. (7.11)**
- 48. Court rules should include provision for “Adoption Centres”, so that pre-proof proceedings are held in courts where there is a sheriff with specialist knowledge. (7.12)**
- 49. There should be a statutory scheme for dealing with situations where there is more than one type of case pending for a child with the aim of consolidating all court actions in respect of the child and giving an opportunity for those with an interest to take part in the process. (7.14 and 7.15)**
- 50. There should be a bar on new, separate applications to the court on matters that can be dealt with in the Permanence Order. (7.16)**
- 51. The leave of the court should generally be required for new applications in respect of children on Permanence Orders or adopted. (7.17)**
- 52. The current absolute ban on applications under s.11 of the 1995 Act by people whose parental responsibilities and rights have been removed by freeing or adoption should be ended. (7.18)**
- 53. There should be a number of detailed changes to the court rules, to improve the system and reduce delays. (7.19)**



## 8. curators, reporting officers and safeguards

## SUMMARY

**8.1 The Group considered the separate roles of curators and reporting officers, officers appointed by the court in most permanence cases. The Group considered the circumstances in which such officers should be appointed, their functions, how they are organised and what training they receive. The Group also examined the role of safeguarders, who are appointed by children’s hearings for purposes which are not dissimilar. A safeguarder may also be appointed by the court. In particular the Group considered whether there was scope for merging the roles and administration of curators, reporting officers and safeguarders.**

**8.2 The Group’s major recommendations are:**

- **curators and reporting officers should normally be appointed whenever a Permanence Order is applied for, unless a court decides that this is unnecessary in the particular circumstance of the case (8.19)**
- **there should be no change to rules for the appointment by the hearing of safeguarders in permanence cases (8.20 and 8.21)**
- **there should be a small national organisation responsible for the training of curators, reporting officers, and safeguarders**
- **the appointment of a curator, reporting officer or safeguarder for the case before him should be made by the sheriff from the national list (8.31)**

## CURRENT LAW

8.3 There are a variety of possible appointments in court cases involving the care of children.

8.4 A court can appoint under their common law powers a solicitor or advocate to protect the interests of children by independently representing them in the court proceedings affecting them. They are required to report to the court and generally act in the children’s interests, the welfare of the children being the paramount concern.

8.5 Curators *ad litem* for adoption, freeing and Parental Responsibilities Orders (PROs) on the other hand are appointed by the court under statutory provisions and the relevant court rules.<sup>1</sup> They must be appointed by the court:

- in every sheriff court freeing and adoption application.
- in Court of Session freeing or adoption applications “where it appears desirable in order to safeguard the interests of the child”.
- in every application for a PRO.

They may also be appointed in applications for revocation of a freeing order or variation or revocation of a PRO.

8.6 “Adoption curators” must investigate and report to the court, again the children’s welfare being their paramount concern. They must, in sheriff court adoption and freeing cases, where the children in question are aged 12 years or over, seek children’s consent. They are also expected to convey to the court the views of the child, although they are not the only medium for doing so. However their overall duty is to safeguard the child’s best interests, and this may differ from the expressed view of the child.<sup>2</sup>

8.7 Reporting Officers for adoption, freeing and PROs are appointed by courts again as a statutory requirement

<sup>1</sup> Adoption (Scotland) Act 1978 (hereafter, 1978 Act), s.58(1)(a); 1995 Act, s.87(4)(a); RCS 1994, rr.67.10, 67.23; AS 1997, rr.2.7, 2.16, 2.25, 2.39, 2.44(3).

<sup>2</sup> RCS 1994, rr.67.11(2), 67.24(2); AS 1997, rr.2.8(2), 2.16(2), 2.26(2), 2.40(2), 2.44(3).

in broadly the same cases as curators *ad litem*.<sup>3</sup> The exceptions – when a reporting officer will not be appointed – are:

- in applications to revoke freeing orders; and
- in applications to vary or revoke PROs.

Reporting officers must be appointed in all Court of Session freeing and adoption applications, except where the child is under 12 years of age and has been freed for adoption. They obtain the consent of the birth parents in uncontested cases and of the child if over 12, whereas in the sheriff court witnessing the consent of a child over 12 years of age is the responsibility of the curator. Otherwise the function of the reporting officer is the same in both courts.

8.8 Reporting officers confirm facts in applications, in particular the agreement of birth parents to the adoption of freeing, and witnessing any agreements.<sup>4</sup> The tasks are more procedural than those of curators, and not focused on the children. The court can, and often does, appoint the same person as curator and reporting officer.<sup>5</sup>

8.9 Safeguarders in children’s hearing cases can be appointed at the discretion of individual hearings or sheriffs.<sup>6</sup> The court or the hearing must consider in any proceedings before it whether a safeguarder should be appointed, and, if so, what the terms of reference should be. If the hearing decides to appoint a safeguarder it must record its reasons for that decision.

8.10 Safeguarders have three roles:

- to ensure that children’s comprehensive rights are protected, beyond simply their legal rights.
- to ensure that the view of the child is established, valued, and communicated to its hearing/court, by whatever means are deemed appropriate.
- to ensure that the proposals being put forward are judged to be in the child’s best interests.

### ISSUES RELATING TO CURATORS, REPORTING OFFICERS AND SAFEGUARDERS

8.11 The Group considered the following issues concerning curators, reporting officers and safeguarders:

- should there continue to be separate roles for curators, reporting officers and safeguarders?
- when should curators, reporting officers and safeguarders be appointed?
- what duties should curators, reporting officers and safeguarders have?
- how should curators, reporting officers and safeguarders be appointed, trained and administered?<sup>7</sup>

8.12 The Group also examined a perception that hearings were likely to appoint safeguarders in permanence cases, even when this did not appear to be necessary, in order to reassure hearing members when considering issues in which they lacked experience and confidence.<sup>8</sup> The Group collected available information on the number of safeguarders recently appointed by hearings in permanence cases. Very few

<sup>3</sup> 1978 Act, s.58(1)(b); Children (Scotland) Act 1995 (hereafter, 1995 Act), s.87(4)(b); RCS 1994, rr.67.10, 67.23; AS 1997, rr.2.7, 2.25, 2.39.

<sup>4</sup> RCS 1994 rr.67.11(1), 67.24(1); AS 1997, rr.2.8(1), 2.26(1), 2.40(1).

<sup>5</sup> 1978 Act, s.58(2); 1995 Act, s.87(4); AS 1997, rr.2.7(1), 2.25(1), 2.39(1).

<sup>6</sup> 1995 Act, s.41.

<sup>7</sup> Alexandra Plumtree, *Choices for Children* (Edinburgh: Scottish Executive, 2003) (hereafter, *Choices for Children*), chapters 4 and 19.

<sup>8</sup> *Choices for Children*, chapter 4.

safeguarders had in fact been appointed, and the appointments made were fully justified by the facts of each case. **The Group is therefore satisfied that there is no reason to believe that safeguarders are being appointed unnecessarily or disproportionately by the hearings system in permanence cases.**

## IEWS FROM CONSULTATION

8.13 Responses from the consultation indicated that an adoption curator should always be appointed in every permanence case unless there are good reasons for not doing so. Some responses favoured a discretionary approach rather than automatic appointment. Others expressed a desire for clarifying regulation regarding roles and boundaries. Opinion was divided as to whether the system of curator appointment should be centralised nationally and also on the subject of curators being paid for out of the legal aid fund. The majority of responses indicated that if the existing system for advice hearings is maintained the role of safeguarder is unnecessary and can cause delay. Some felt that they provide a valuable, objective view of the situation.

## COULD THE ROLES FOR CURATORS, REPORTING OFFICERS AND SAFEGUARDERS BE COMBINED IN ONE APPOINTMENT?

8.14 The Group considered this question. There would be advantages in such an approach: the same individual would follow cases through from children's hearings to the making of any orders about permanence, thus providing continuity; and there would be a reduction in the number of individual professionals who interviewed those involved in cases, particularly the children. However, each of these officers has a distinct role. Their duties are carried out for a different purpose and/or a different tribunal.

8.15 Curators and reporting officers have distinct roles within the court system. The reporting officer's task is to ascertain factual information for the court, in particular to establish the agreement of birth parents to an adoption or freeing. Curators have a more active role in ensuring that the child's welfare is properly considered in the case. Although courts can and do appoint the same individual to carry out both roles, there can be good reasons for separate curators and reporting officers, for example the birth parents may live some distance away from the court in which the adoption application is being made, making it more practical to appoint a reporting officer in the area where the birth parents live. **The Group recommends that the rules should continue to allow the court to appoint a separate individual to the roles of curator and reporting officer if advisable in the circumstances of the particular case.**

8.16 A safeguarder can have a similar role to a curator and reporting officer in permanence cases albeit at a different stage of the process. However, the Group concluded that the hearing and court would want to, and should be able to, appoint its own officers to carry out these tasks. The Group also saw advantages in independent people being appointed by the hearing and the court to consider the case separately in each of these proceedings. This gives birth families, and the wider public, the utmost confidence that the court proceedings are independent of decisions and recommendations made by the local authority and the hearing, and *vice versa*. Given the seriousness of decisions in adoption cases, this was a justifiable level of scrutiny. **The Group recommends that the role of safeguarders should not be merged with that of curators and reporting officers and that separate appointments were justified.**

## WHEN SHOULD CURATORS, REPORTING OFFICERS AND SAFEGUARDERS BE APPOINTED?

8.17 The Group debated whether appointment of curators and reporting officers was necessary in every case. For example:

- is it necessary to appoint a reporting officer when it is known that there will be no agreement to the adoption?
- in disputed cases, is it necessary to have a curator given that the court will be hearing evidence and can form its own view after hearing the evidence?

8.18 Overall, **the Group concluded that the current rules about appointment of curators and reporting officers should continue**, although the duties of the reporting officer should be reworded to cover situations where the parents are not consenting to the adoption or freeing. In relation to curators, the Group believed that there is always a role for an independent person to protect a child's interests, particularly when the outcome can alter the child's status. Curators should therefore continue to be appointed in all applications for both adoption orders and freeing orders, but some discretion could be exercised in applications for other orders relating to permanence.

8.19 **The Group recommends that curators and reporting officers should continue to be appointed in all applications for adoption, freeing and PROs (except post-freeing adoptions). If a Permanence Order is introduced, curators and reporting officers should be appointed in all applications for Permanence Orders, unless a court decides a curator is unnecessary in the particular circumstances of a case** (for example, the child might be represented). However, this exception should not apply in cases involving applications for

authority to place children for adoption as part of the permanence order.

8.20 The Group also considered whether the role of the safeguarder in permanence cases should be changed. One proposal was that the hearing should not be permitted to appoint a safeguarder in permanence cases, thus reducing delay and possible duplication with the role of the curator and reporting officer. Having found that there was no evidence of unnecessary appointment of safeguarders, **the Group recommends that the hearing must always have the option of appointing a safeguarder if it considers it necessary to do so.**

8.21 The Group also considered whether the role of the safeguarder should be extended, so that a safeguarder would be appointed in every case, and the safeguarder would remain involved in the case until the adoption or other order is finally made. This had some attractive features:

- an independent expert voice would speak for the child from an early stage of a process that could radically affect the child's life;
- continuing role for the safeguarder would provide consistency in the lives of these children; and
- extended involvement would provide the opportunity for a number of safeguarders to develop specialist skills in permanence cases.

Such an appointment would be akin to the role of a guardian *ad litem* in England and Wales. It would, however, be a radical extension of the present role of a safeguarder and it would require ample evidence to justify. Given the current number of cases in which safeguarders are thought to be necessary by the hearing, **the Group recommends that the involvement of safeguarders should not be extended either to all permanence cases nor throughout a case.**

## WHAT DUTIES SHOULD CURATORS, REPORTING OFFICERS AND SAFEGUARDERS HAVE?

8.22 There are detailed court rules about the appointment and duties of curators and reporting officers for both the Court of Session and the sheriff court.<sup>9</sup> The Group considered that they would benefit from revision. The Group has made detailed proposals for changes to the rules for curators and reporting officers, along with other proposals for the consideration of the Sheriff Court Rules Council.<sup>10</sup> The proposals aim to clarify these duties and also to harmonise the rules of the Court of Session and the sheriff court.

**8.23 The Group recommends that court rules concerning appointments and duties of curators and reporting officers should be amended in line with its detailed proposals.**

## STRUCTURE AND FUNDING OF THE SYSTEM

8.24 The Group also discussed the administration of curators, reporting officers and safeguards. Under current statutory provisions, local authorities have a panel of curators (not curators *ad litem*) and reporting officers whom they appoint in consultation with the Sheriff Principal.<sup>11</sup> Local authorities have the power to determine the necessary experience or qualifications for appointment to the panel, and no national standard qualifications or experience are prescribed. Courts always make the appointment in individual cases from this panel, although they can appoint someone who is not on the list.

Curators and reporting officers' fees and expenses are paid by local authorities in many cases, but again no standard payment is prescribed. The rate currently fixed by COSLA is considered not to represent a fair return, particularly in complex cases.

8.25 Safeguards are also appointed by local authorities, in consultation with the chairman of the children's panel and the Sheriff Principal, and are paid by local authorities.<sup>12</sup> (It has also been brought to our attention that some safeguards appointed in court related hearings, who happen to be qualified solicitors, can also be paid through the Legal Aid Fund, perhaps in addition to payments claimed from the local authority.) Local authorities again determine the necessary experience and qualifications and the level of fees and expenses, for which no national levels are prescribed. Following legislative changes, local authorities have responsibility for the training of safeguards under arrangements made by the Scottish Executive.<sup>13</sup> Such training is now being undertaken to safeguards in Scotland.

8.26 The Group discussed the following issues about the administration of curators, reporting officers and safeguards:

- qualifications for appointment;
- method of appointment to individual cases
- training and support
- complaints
- delays in submitting reports
- funding and fees.<sup>14</sup>

<sup>9</sup> RCS 1994, rr.67.11, 67.24; AS 1997, rr.2.8, 2.26, 2.40.

<sup>10</sup> Annex F, below.

<sup>11</sup> 1995 Act, s.101; Curators ad Litem and Reporting Officers (Panels) (Scotland) Regulations 2001 (SSI 2001 No. 477).

<sup>12</sup> 1995 Act, ss.41(4) and 101; Panels of Persons to Safeguard the Interests of Children (Scotland) Regulations 2001 (SSI 2001 No. 476).

<sup>13</sup> Regulation of Care (Scotland) Act 2001 (2001 asp 8), s.75(c); 1995 Act, s.101(4) and schedule 1, paragraphs 9 and 10(b).

<sup>14</sup> *Choices for Children*, chapter 19.

8.27 The Group concluded that there should be a national structure for curators, reporting officers and safeguarders which would address these issues. A centralised system would lay down the criteria and standards of qualifications for appointment and provide uniform training. Recruitment and some aspects of management might be better done locally. The appointment and training of children's hearing members, which is run by the Scottish Executive with substantial local input, could provide the model. Training should be properly organised, quality assured and delivered through a national programme, again similar to hearing members.

8.28 The Group considered that appointments to individual cases should stay with the judge or sheriff in each case, but there should be a system of proper rotation, so that every member of the panel is appointed with sufficient regularity to gain and retain experience and expertise. The level of payment should reflect the work done in each case and be funded centrally, either by the Scottish Executive itself or through the Scottish Court Service. There should also be a national system for monitoring reports and for dealing with complaints.

8.29 The Group considered that a separate public body would not need to be created for this purpose, but that the service could be administered from within the Scottish Executive. However, if the provision of reports in all child care cases, including private law cases, were to be included in its remit, there could be a case for a separate body to organise and administer the proposed national structure.

8.30 In making this recommendation, the Group emphasises that this proposal is to merge and rationalise the administration of curators, reporting officers and safeguarders. It does not recommend that the roles are merged, nor would it envisage the same individuals carrying out all of these functions, since different skills and experience would be required for each.

**8.31 The Group recommends that there should be a centralised system to appoint and train sufficient curators, reporting officers, and safeguarders, but that appointments for individual cases should be made by the sheriff/judge dealing with the case. Remuneration should be paid centrally and should take account of the active amount of work undertaken in each case.**

## **RECOMMENDATIONS OF CHAPTER 8 – CURATORS, REPORTING OFFICERS AND SAFEGUARDERS**

54. There is no reason to believe safeguarders are being appointed unnecessarily or disproportionately by the hearings system in permanence cases. (8.12)
55. The rules should continue to allow the court to appoint separate individuals to the roles of curator and reporting officer if this is the most practical approach in particular cases. (8.15)
56. The role of safeguarders should not be merged with that of curators and reporting officers. (8.16)
57. Curators and reporting officers should continue to be appointed in all applications for adoption, freeing and PROs (except post-freeing adoptions). If a Permanence Order is introduced, curators and reporting officers should be appointed in all applications for Permanence Orders, unless a court decides a curator is unnecessary in the particular circumstances of a case. (8.19)
58. The hearing must always have the option of appointing a safeguarder if it considers it necessary to do so. (8.20)
59. The involvement of safeguarders should not be extended either to all permanence cases nor throughout a case. (8.21)
60. Court rules concerning appointments and duties of curators and reporting officers should be amended in line with detailed proposals. (8.23)
61. There should be a centralised national system to appoint and train curators, reporting officers, and safeguarders from which individual case appointments are made locally. Remuneration should be paid centrally and should take account of the varying amounts of work required in individual cases. (8.31)



9. role of the  
children's  
hearing in  
permanence  
cases



## SUMMARY

**9.1 The Group considered problems with the current involvement of the children's hearing<sup>1</sup> system in permanence cases, in particular the relationship with local authority planning and the timing of the hearing's formal involvement.**

**9.2 The Group's major recommendations are:**

- **there should be a formal requirement to inform the hearing system of permanence planning by the local authority at an earlier stage (9.12)**
- **if a child has been looked after away from home for a year the hearing should consider asking local authorities about permanence planning at the next review of the child's case (9.15)**
- **the provisions on providing advice from the hearing to the court are reviewed in regard to who has responsibility for each step, and to allow the court to ask for updated advice from the hearing (9.21)**
- **there should be nationally developed and quality assured joint training and guidance materials for key agencies, the hearing, social work departments, safeguarders and others (9.25)**
- **each hearing should, if possible, contain one member from a previous hearing throughout the progress through the system of a permanence case (9.29)**

## CURRENT LAW

9.3 The hearing has no power to make legal decisions about the legal status of children. Its interventions, through

compulsory measures of supervision, are designed to improve the current and prospective welfare of the child, and the hearing must consider the child's welfare throughout its life in making its decisions. Supervision requirements need to be reviewed at least every year.<sup>2</sup> The hearing does not have a formal role in long-term planning for a child, although good practice is that at an early stage the local authority should provide information about its long-term plans for the child, and that the hearing should inquire about such planning.

9.4 Since the 1995 Act, the hearing does have a formal role after a decision to apply for a freeing order, adoption order, or Parental Responsibilities Order (PRO) for a child on a supervision requirement. The local authority must inform the principal reporter of a decision to apply for one of these orders, or to place the child for adoption. The principal reporter will then arrange for a hearing to meet to review the supervision requirement and prepare advice for the court. The court must consider the advice of the hearing before coming to a decision.<sup>3</sup>

## PROBLEMS WITH THE CURRENT SITUATION

9.5 The Group has heard evidence of dissatisfaction with the current involvement of the hearing in permanence proceedings. The formal need to involve the hearing is late in the process, after a decision has been made to apply for an order. The involvement of the hearing in long-term planning prior to this point relies on good practice, and may be patchy. The system has the

<sup>1</sup> To avoid confusion with local authority Adoption and Fostering Panels this paper avoids the term 'panel' or 'children's panel' when referring to the children's hearing system. The terms 'hearing' or 'children's hearing' are used instead.

<sup>2</sup> Children (Scotland) Act 1995 (hereafter, 1995 Act), s.73(2).

<sup>3</sup> Adoption (Scotland) Act 1978 (hereafter, 1978 Act), s.22A; 1995 Act, s.73(4) and (8) – (14); see also Alexandra Plumtree, *Choices for Children* (Edinburgh: Scottish Executive, 2004) (hereafter, *Choices for Children*), chapter 4.

potential to engender a lack of trust between its various components. For example, there might be a suspicion that some local authorities do not expose to the hearing (and birth parents) their plans to place a child for adoption until the freeing order has actually been applied for and the adoption seems inevitable. Similarly, the hearing can be suspected of being reluctant to make difficult decisions about reducing or terminating contact even after moves have started towards freeing or adoption. Despite the anecdotal nature of many of these criticisms, it is undeniable that the current system could lead to many of these undesirable situations, and it should therefore be improved.

9.6 Other problems identified with the current system include:

- training of hearing members in the issues around permanence;
- continuity of members of individual hearings and consistency of decision making;
- the role of safeguarders in permanence cases; and
- clarity and timeliness of communication between the court and the hearing over advice.

### OPTIONS FOR CHANGE

9.7 The Group considered a number of possible options for changing the current system.<sup>4</sup> The most radical of these was to remove the hearing system's current role in permanence, and leave these matters solely with the Sheriff Court. Other possibilities included:

- increased specialist training on permanence and contact issues for all hearing members.
- developing a core of 'specialist' hearing members so that one of them

would form part of any hearing dealing with a child for whom a local authority had made a decision to seek permanence. There could be peripatetic specialists.

- rules providing for definite continuity of hearing members for any hearing dealing with a child for whom a local authority has made a decision to seek permanence.

### VIEWS FROM CONSULTATION

9.8 The consultation with young people explored their experiences of the hearing system as well as their experiences at court.<sup>5</sup> Of 78 young people who had attended a children's hearing, 51 thought that they had been listened to and their views taken into account. They expressed views about the importance of being put at their ease by hearing members and the difficulty that some young people find in front of hearings, either because of the presence of birth parents and other carers, or because of their experiences with adults.

*They took my opinion into consideration when I expressed my concern about the level of contact with my Mum. She wanted it increased and I did not. The panel [hearing] listened to me and kept the contact the same. (Young woman, 13 years)*

*I did not speak at the hearing because you always get different panel members and I do not like talking about my family to strangers. (Girl, 11 years)*

*...I found it hard with my birth and adoptive parents because no matter what I said it was always going to hurt one of them. (Girl, 12 years)*

*... for most of the folk that go to the children's panels [hearing], a lot of their*

<sup>4</sup> *Choices for Children*, chapter 4.

<sup>5</sup> Annex A, below.

*heads are messed up, and nobody can make them understand... a lot of the time, I did not trust adults, all the trust went away, I thought, 'No, you are messing me about too much...' (Young woman, 17 years)*

One interesting comment was on times when hearings come to conclusions that young people did not want at the time, but later realise were in their best interests:

*... sometimes they did not listen to me, but ... I wanted things that was not best for me. ...Now I realise and think, they did want the best for me ...I was wanting to go and stay with my Mum. But my Mum was really messed up with drugs... (but) I hated them for it. (Young woman, 17 years)*

9.9 Of 22 young people who had attended court, 13 thought that they had been listened to, a lower proportion than those attending a hearing but from a significantly smaller sample. Again the approach and sincerity of the court officials had been vital in their experience of having their voices heard and engendering a security that what they were saying was valued.

## RECOMMENDATIONS FOR CHANGE

### Improving the role of the hearing system in permanence cases

9.10 The Group considered various options for improving the current involvement of children's hearings in permanence cases. The Group did not support the removal of the hearing's formal role in permanence decisions. The position before the 1995 Act was found to be unworkable, as, in the absence of a formal role, difficulties developed with adoption being mentioned in hearings, which constrained unrealistically discussions in hearings that were considering children unlikely to return home. The Group therefore

concluded that removing any formal role would be a retrograde step and lead to a worse system. In addition, the Group considered that the children's hearing system is the specialist forum to consider the best interests of children, and should have a role in permanence decisions. Consultation with young people showed that they generally felt hearings listened to their views. The hearings system should therefore continue to have a role in considering permanence plans for children. However, the criticisms of the current system showed that the *status quo* was not a desirable option either. **The Group recommends that the hearing system should continue to be involved in permanence planning and decision making for children, and this role should be improved.**

9.11 The Group considered that the current requirement to involve the hearing formally in cases was too late in this process. For the hearing to have full confidence in the plan and for the local authority to benefit from the hearing's advice, the permanence plan for a child should be exposed at an earlier stage. To ensure consistency of practice, there should be a formal trigger for this process.

9.12 **The Group recommends there should be a formal requirement to inform the hearing system of permanence planning by the local authority at an earlier stage.** This should ideally be when a looked after child review has decided to proceed towards permanence, and should, at the latest, be immediately after adoption or permanence panel has made its recommendation. The Group recognised that local authorities must be given time to make decisions formally, and that informing a hearing prematurely might not be helpful. However, sharing the local authority's planning with the hearing as early as possible avoids problems later.

9.13 The Group saw a number of advantages to earlier discussion of permanence planning:

- the process could be made more open and transparent for birth parents and also for hearing members.
- twin-tracking or concurrent planning could be encouraged, in line with the recommendation of Phase I of the review.<sup>6</sup>
- the potential consequences of not complying with any work in progress would be clear to birth parents.

The overall effect should be that when the advice to the sheriff is sought, the hearing is better informed about the social work department's plans, and is able to make a better informed recommendation to the court.

9.14 Procedurally, the requirement could be similar to the current requirement for a local authority to inform the principal reporter when a decision is taken to place a child for adoption.<sup>7</sup> The hearing is being informed of the planning and may offer its views but it should be emphasised that the hearing is not being asked to approve or agree the local authority plans, nor does the hearing have a veto on a particular permanence plan within the authority, although the local authority would be expected to take the hearing's views into account.

9.15 The Group also believed that the hearing should actively seek information about permanence planning for children. **The Group recommends that, if a child has been looked after away from home for a year, the hearing should consider asking the local authority about permanence planning at the next review of the child's case.**

9.16 It became clear in the Group's discussions and at the conference held by the Group in November 2004, that these recommendations represented current best practice across Scotland. Implementation would put this best practice on a formal and more consistent basis rather than introduce a new hurdle or barrier to permanence proceedings. The Group believes that this best practice has the potential to reduce the total time taken on permanence cases by increasing the hearing's knowledge of local authority planning and transparency for birth parents, and reducing the risk that there might be a disagreement, requiring time to resolve later in the process. For the children concerned this time could be critical.

#### **Role of the adoption/permanence panel and the court**

9.17 The Group considered whether there was scope for combining the roles of the hearing with that of the local authority permanence or adoption panel. At the moment the same case is considered by the panel, the hearing and the court. **The Group recommends that the roles of both the local authority adoption or permanence panel and the children's hearing in permanence cases should be preserved as they are valuable and distinctive.** The panel was an important part of rigorous local authority decision making and the hearing provided a further level of independent scrutiny of local authority internal decisions through a community based forum for children's issues. In matters as important as removing children permanently from their families, it was vital to have a robust system that examined each decision closely and openly, both to provide justice for birth parents and confidence to the wider public.

<sup>6</sup> *Adoption Policy Review Group – Report on Phase I* (Edinburgh: Scottish Executive, 2003) (hereafter, Phase I report), Chapter 1 and Recommendation 4.

<sup>7</sup> 1995 Act, s.73(4)(c).

### Communication between the adoption/permanence panel and the hearing

9.18 The Group's work indicated that hearings considering advice to a sheriff are not routinely made aware of the preparatory work carried out by the local authority in the looked after children review, and, particularly, the discussion and conclusions of the adoption panel. Indeed, it seemed that at least some hearing members were unaware of the panel and its function.

9.19 The Group recommends that reports from the adoption/permanence panel to the hearing in considering permanence cases should be improved and standardised. It has devised a form to be used in presenting the proceedings of the panel to the hearing.<sup>8</sup> The Group believes that better information about the discussion at the panel will reassure hearings about the consideration that has been given to a decision for permanence.

### Advice from the hearing to the court

9.20 The Group considered a number of issues around the provision of advice from the hearing to the court. These recommendations also apply to advice from hearings in applications for the new Permanence Order.<sup>9</sup>

9.21 Under the current provisions the local authorities inform the principal reporter when a decision is made to pursue adoption or freeing and the reporter then convenes a hearing to provide advice to the court.<sup>10</sup> The court does not call for advice from the hearing nor are there any explicit provisions allowing the court to ask for further or updated advice. **The Group recommends that the provisions on providing advice**

**from the hearing to the court should be reviewed in regard to who has responsibility for each step, and to allow the court to ask for updated advice from the hearing.**

9.22 There have been difficulties over the need under the statute for the hearing both to review the supervision requirement and provide advice to the court.<sup>11</sup> The separate nature of the two tasks could lead to confusion for the birth family and the hearing. This might be resolved by having two separate hearings, or a two part hearing. On the other hand the legislation made clear that the review hearing was one process with two purposes: to review the supervision requirement and provide advice to the sheriff. **The Group recommends that the review and advice hearing should remain one process but that better information for all parties involved would address the concerns that have been expressed.**

9.23 **The Group recommends that there should be a standardised form for the hearing to provide advice to the court.** This should record clearly the hearing's recommendation and the date of that advice.<sup>12</sup>

### National training

9.24 Permanence cases raise particularly difficult and specialised issues for decision makers. There was widespread acknowledgement that the training currently given to hearing members in this field needed to be improved. Hearing members do not need to become experts in the all aspects of permanence – any more than they do in other subjects with which they deal - but the training should aim to equip hearing members to ask the right questions that ensure the process is transparent and key

<sup>8</sup> Annex E, below.

<sup>9</sup> Chapter 5, paragraphs 5.41 – 5.49, below.

<sup>10</sup> 1995 Act, s.73(8) – (14).

<sup>11</sup> 1995 Act, ss.73(8) and 73(13).

<sup>12</sup> Annex E, below.

agencies are scrutinised effectively. Hearing members also need to be clear about their own role in the process.

**9.25 The Group recommends that there should be nationally developed and quality assured joint training and guidance material for key agencies: the hearing, social work departments, safeguarders and others.** Joint training would enable social workers to identify what information hearing members need to make an independent and informed decision on behalf of the child in permanence matters. This reinforces the principle of 'integrated' or 'collaborative' training, not simply joint training. Hearing member attendance at the training should be compulsory and it therefore needs to be nationally implemented every two to three years.

### Specialist hearing members and professional advisers

**9.26** The Group considered whether there should be specialist hearing members or expert advisers to hearings in permanence cases. **The Group did not support either of these suggestions.**

**9.27** The Group concluded that the role of hearing members was not to become specialists in particular fields but to be properly informed and trained to scrutinize the agencies' plans for the child. Specialism could lead to all permanence cases being approached in the same way, rather than the independent, community based scrutiny intended from the hearing system. There would also be practical issues in organising specialist hearing members either locally or across Scotland.

**9.28** Similarly, the Group believed that proper training for hearing members and proper explanation of their plans and reasons by local authorities was preferable to expert advisers. Social workers should be able to explain the

process and the issues to parents and children; they should therefore be able to make appropriate explanations to hearing members.

### Continuity of hearing members

**9.29** Where permanence away from home is the plan for a child, the case is likely to have some history within the hearing system. In these circumstances it is desirable to have some continuity in hearing members. This point also came out of the consultation with young people. **The Group recommends that each hearing should, if possible, contain one member from a previous hearing throughout the progress through the system of a permanence case.** This is consistent with the Scottish Executive's document *Best Practice for Panel Members* agreed by all partners and agencies, which recognises that continuity can be appropriate. However, there are practical issues with providing continuity of hearing members and the Group recognises that it might not always be possible.

### REVIEW OF THE CHILDREN'S HEARING SYSTEM

**9.30** The Group is aware of the review of the hearing system being carried out by the Scottish Executive. The Group's emerging conclusions have also been fed into the consultation process on the hearing review.

**9.31** The Group's recommendations are consistent with the outcome of the consultation on the first phase of the hearings review. The first phase has shown general support for the current children centred system with hearing members recruited from local authorities. The consultation also showed strong support for the current system of general hearing members, and less support for specialist hearings or hearing members.

**9.32 The Group recommends that its recommendations on the role of hearings in permanence cases should be taken into account in the review of the hearing system.**

### **PROHIBITION ON PUBLICATION OF PROCEEDINGS AT CHILDREN'S HEARINGS**

9.33 The Group discussed the current prohibition on publication of proceedings at children's hearings.<sup>13</sup> The section is intended to prevent publicity about children's cases within the hearing system, but it has given rise to long-running discussions as to whether it also prohibits the publication of photographs of children who are subject to supervision requirements and for whom permanent carers or adopters are sought.<sup>13</sup> Adoption agencies in Scotland can be at a disadvantage when trying to seek adopters for children as agencies in England and Wales can use photographs. If websites are introduced to find permanent carers, this problem will increase.

9.34 Consultation responses indicated that clarification would be welcomed, along with some provision allowing the use of photographs, with or without parental consent.

**9.35 The Group recommends that legislation should allow publication of details about children by local authorities and adoption agencies in planning for permanence.** The Group believed that parental consent should not be required to use photographs for such purposes.

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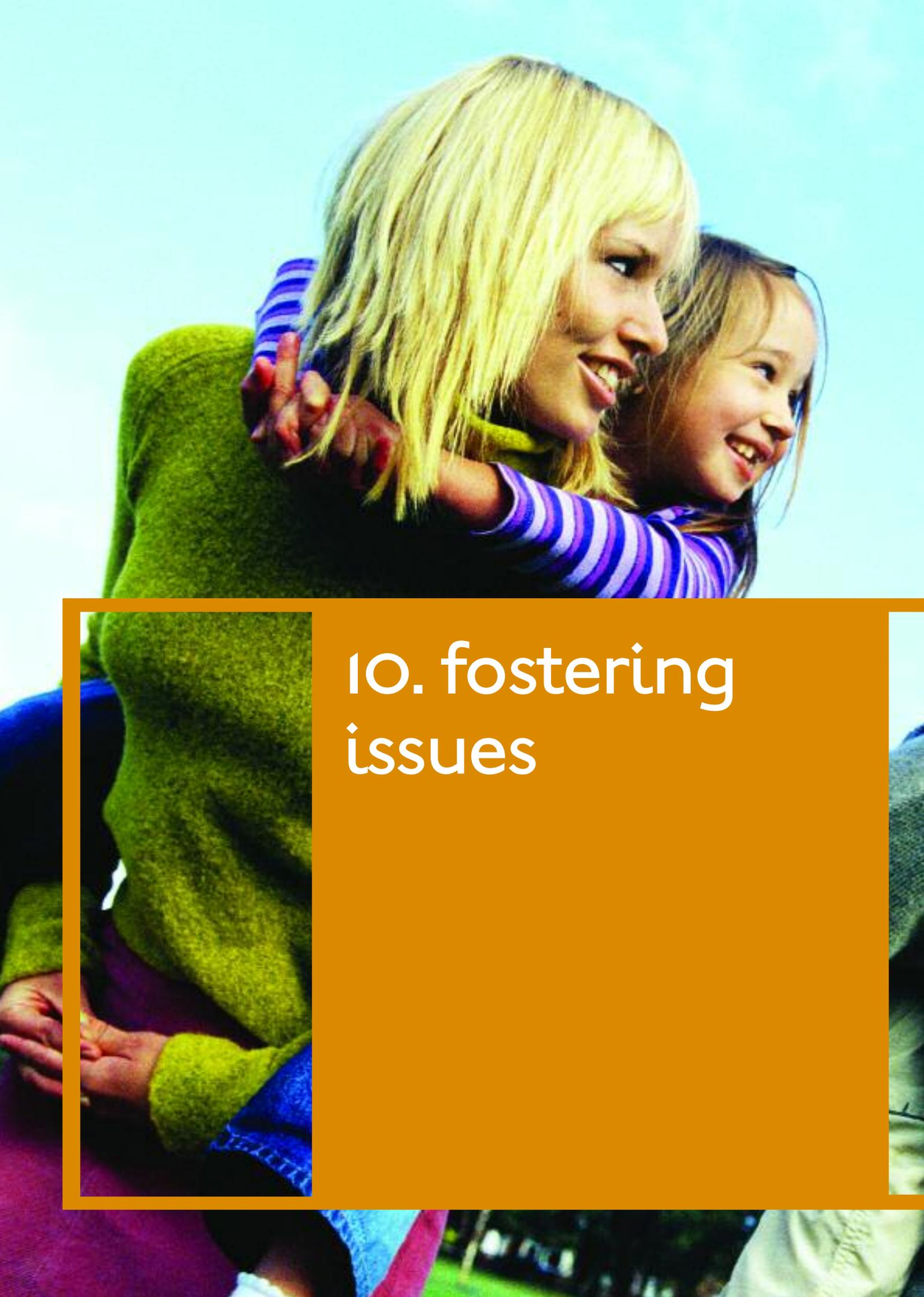
<sup>13</sup> 1995 Act, s.44.

<sup>14</sup> *Choices for Children*, chapter 14.

## **RECOMMENDATIONS OF CHAPTER 9 – ROLE OF THE CHILDREN’S HEARING SYSTEM IN PERMANENCE CASES**

- 62. The hearing system should continue to be involved in permanence planning and decision making for children, and this role should be improved. (9.10)**
- 63. There should be a formal requirement to inform the hearing system of permanence planning by the local authority at an earlier stage. (9.12)**
- 64. If a child has been looked after away from home for a year, the hearing should consider asking the local authority about permanence planning at the next review of the child’s case. (9.15)**
- 65. The roles of both the local authority adoption or permanence panel and the children’s hearing in permanence cases should be preserved as they are valuable and distinctive. (9.17)**
- 66. Reports from the adoption/permanence panel to the hearing in considering permanence cases should be improved and standardised. (9.19)**
- 67. The provisions on providing advice from the hearing to the court should be reviewed in regard to who has responsibility for each step, and to allow the court to ask for updated advice from the hearing. (9.21)**
- 68. The review and advice hearing should remain one process but that better information for all parties involved would address the concerns that have been expressed. (9.22)**
- 69. There should be a standardised form for the hearing to provide advice to the court. (9.23)**
- 70. There should be nationally developed and quality assured joint training and guidance materials for key agencies, the hearing, social work departments, safeguarders and others. (9.25)**
- 71. Each hearing should, if possible, contain one member from a previous hearing throughout the progress through the system of a permanence case. (9.29)**
- 72. These recommendations on the role of hearings in permanence cases should be taken into account in the review of the hearing system. (9.32)**
- 73. Legislation should allow publication of details about children by local authorities and adoption agencies in planning for permanence. (9.35)**





## 10. fostering issues

## SUMMARY

**10.1** The Group considered a range of issues arising from current statutory provisions for fostering, including support, allowances, restrictions on who can foster, assessment of carers for immediate placement, and private fostering.

**10.2** The Group's major recommendations are:

- the support needs of children and carers should be re-assessed following a Permanence Order and support should continue to be available to children and carers if a s.11 order is made in respect of a looked after child (10.7 and 10.11)
- there should be a nationally agreed scheme of adequate allowances for foster carers (10.14)
- adults of the same sex living in the same household should be allowed to foster children (10.19)
- carers looking after children in immediate placements should be fully assessed within four months (10.24)
- kinship care and private fostering should be examined further (10.48 and 10.52)

## ISSUES WITH FOSTERING

10.3 The Permanence Order proposed by the Group is intended *inter alia* to address the legal status of children in long-term fostering.<sup>1</sup> The Group also examined a range of issues arising from the current arrangements for fostering which have either led to practical problems or been the subject of criticism. The issues considered were identified in *Choices for Children* or arose from consultation or the Group's own discussions.<sup>2</sup>

<sup>1</sup> Chapter 5, below.

<sup>2</sup> Alexandra Plumtree, *Choices for Children* (Edinburgh: Scottish Executive, 2004) (hereafter, *Choices for Children*), chapters 8 and 12.

## PUBLIC FOSTERING

### Support for children and carers in long-term placements

10.4 There is extensive statutory provision and guidance on the duties of local authorities to assess and meet the needs of looked after children and support foster carers.<sup>3</sup> For looked after children, local authorities must assess the child's needs and draw up a care plan which details how these needs are to be met.<sup>4</sup> Care plans must be reviewed on a regular basis, generally every six months.<sup>5</sup> For foster carers, local authorities must agree - in writing - the support and training they will provide to the carer.<sup>6</sup> Local authorities may also pay allowances and reward payments to foster carers.<sup>7</sup>

10.5 Children in long term placements, and their carers, should continue to have access to support from the local authority. The Group has therefore recommended that children on a Permanence Order continue to be looked after children.<sup>8</sup> This approach will ensure both the maximum use of Permanence Orders – as carers need not be concerned about losing support – and that children and carers receive the help they need from the local authority.

10.6 The Group recognised that in some cases when a Permanence Order is made the support needs of the child and the carers might change. Reviews of the care plan might need to be less frequent. The making of a Permanence Order

<sup>3</sup> Children (Scotland) Act 1995 (1995 Act), s.17; Arrangements to Look After Children (Scotland) Regulations 1996 (1996 No. 3262 (S.252)) (hereafter, LAC Regs); Fostering of Children (Scotland) Regulations 1996 (1996 No. 3263 (S.253)) (hereafter, Fostering Regs).

<sup>4</sup> LAC Regs, regs. 3 - 6 and Schedule 2.

<sup>5</sup> LAC Regs, regs. 8 - 10.

<sup>6</sup> Fostering Regs, reg. 8 and Schedule 2.

<sup>7</sup> Fostering Regs, reg. 9.

<sup>8</sup> Chapter 5, paragraph 5.24, below.

would therefore be a suitable opportunity to re-assess the support needs of the family and to draw up a new care plan, and agreement with the foster carers, reflecting those needs.

**10.7 The Group recommends that the support needs of the child and the carer should be assessed on the making of a Permanence Order for a child in foster care, and new plans should be put in place to meet those needs.**

#### **Applications for s.11 orders for children who are or were looked after.**

10.8 The Group expects that s.11 of the 1995 Act, which allows the court to make orders governing the residence and contact arrangements for a child, will continue to be used as a means of securing long-term arrangements for some looked after children, even after the introduction of the proposed Permanence Order. This course of action might be attractive to carers and children who do not need the same degree of continuing involvement and support of the local authority, and it can be particularly appropriate when care is being provided by relatives of the child.

10.9 The Group believes that this option should continue to be available in appropriate cases. However, carers can currently be deterred from pursuing this option as they would, generally, lose their support from the local authority and the child would cease to be looked after if the order is granted.

10.10 The Group believes that when a s.11 order is obtained by a carer in respect of a looked after child, the local authority should have a duty to assess the support needs of the child and the carers, and produce a plan for support. This is similar to the Group's recommendation on support after an adoption order.<sup>9</sup> The local authority

should also have a duty to review the plan at the request of the child or carer until the child reaches 18. With these support arrangements, s.11 orders granted for looked after children would resemble the Special Guardianship orders being introduced in England and Wales.<sup>10</sup> Scotland would therefore benefit from two possible arrangements for non-adoptive permanent placements – Permanence Orders and s.11 orders – both of which would offer support to the child and carers.

**10.11 The Group recommends that, when a s.11 order has been granted for the long-term security of a looked after child, the local authority should assess and plan to meet the support needs of the child and the carers.**

#### **Nationally agreed foster care allowances**

10.12 Local authorities and other agencies use a variety of different ways to calculate and pay allowances and fees to foster carers. While this reflects the discretion given to local authorities to pay foster carers according to local circumstances, such variation is seen as unjust to foster carers and may affect the recruitment of foster carers and therefore the service provided to children needing care in the area. The Scottish Office guidance on the 1995 Act says:

Whilst there will be some local variations, the costs of fostering will not differ markedly across Scotland. It will aid recruitment and retention, be more comprehensible and fair to foster carers, and prevent competition emerging between local authorities if ... national agreements on rates of payment are continued and, if possible, extended.<sup>11</sup>

The Fostering Network's minimum recommended allowances, which are used

<sup>9</sup> Chapter 6, paragraphs 6.11 – 6.14, below.

<sup>10</sup> Chapter 5, paragraphs 5.50 – 5.52, below.

by the Inland Revenue for taxation of the foster care work force, are widely accepted to reflect the true costs of looking after children within the looked after system.

10.13 The Group believes that the basic allowances for foster carers should be the same across the country and should reflect the true cost of bringing up a child. This would assist in the recruitment and retention of foster carers as well as being fair. Local authorities should retain some discretion, for example over additional reward payments for carers, to cater for local circumstances.

**10.14 The Group recommends that a nationally agreed scheme of adequate allowances should be introduced for foster carers.**

#### Restrictions on who may foster

10.15 Under current regulations, a same-sex couple living together are not allowed to foster children.<sup>12</sup> The same provision effectively prohibits fostering in households where there are two unrelated adults of the same sex who are not in a same-sex relationship. This has led to problems, for example when a former foster child over 18 years old continues to live in the household of a single foster carer of the same sex.<sup>13</sup>

10.16 To a large extent, the consultation responses agreed that this situation needs to be changed to allow fostering by a single person or by two people, whatever their sex or sexual orientation. The responses also indicated that the current provisions acted as a disincentive for some people who might otherwise apply to become foster carers, and might contravene the ECHR as they discriminate against same-sex couples.

10.17 The Group has considered the available research on same-sex parenting and found that there is no reliable research evidence that suggests that same-sex couples should be excluded from adopting or fostering.<sup>14</sup>

10.18 Changing the provisions to allow same-sex couples to foster would bring the rules into line with current fostering law and practice in England and Wales, where assessment of potential foster carers is based on their ability to offer care on a continuing basis for vulnerable children. There are no definitions of who may and who may not foster. Such a change would also remove the difficulties over households containing two unrelated adults of the same sex who are not in a relationship.

**10.19 The Group recommends that the restriction on fostering by adults of the same sex living in the same household should be removed.** This would ensure that no potential foster carers are deterred from coming forward to be assessed.

#### Emergency and immediate placements

10.20 The Group considered current provisions for emergency and immediate placements into foster care.<sup>15</sup> An emergency placement is when the child needs foster home urgently, for example a placement has broken down at the weekend. The child is placed with an approved foster carer.<sup>16</sup> An immediate placement is when it is in the child's best interests to be placed with a relative or friend, who is not an approved foster carer, and there are good reasons why the child should not wait in another placement while the carers are approved.<sup>17</sup>

<sup>11</sup> *Scotland's Children*, The Scottish Office (1997), volume 2 (hereafter, *Scotland's Children*), paragraph 74.

<sup>12</sup> Fostering Regs, reg. 12(4).

<sup>13</sup> *Choices for Children*, chapter 8.

<sup>14</sup> Chapter 3, paragraph 3.34 and Annex D, below.

<sup>15</sup> *Choices for Children*, chapter 8.

<sup>16</sup> *Scotland's Children*, paragraph 96.

<sup>17</sup> *Scotland's Children*, paragraph 97.

10.21 For emergency placements, local authorities can place the child with the foster carers for up to 72 hours without a foster placement agreement, which is required before placement in all other cases, provided certain other conditions are met.<sup>18</sup> The Group considered that this provision was not as clear as it could be, in particular there was a cross reference to the provisions on immediate placements. Supported by the responses to consultation, the Group recommends that the emergency placement provision should be clarified and should be self-contained, without cross-reference to other regulations.

10.22 For immediate placements, local authorities can place the child with the relative or friend of the child, for a period of up to six weeks, provided certain conditions are met.<sup>19</sup> For the placement to continue the relative or friend should be approved as a foster carer by the local authority. Alternatively, a children's hearing can place a child with a relative or friend with whom a child has been placed under the immediate placement provisions.<sup>20</sup> The latter provision is discussed further below.

10.23 There was agreement in the consultation responses that the time limit of six weeks was not sufficient to carry out a full assessment of the placement and the carers, and should be extended to allow the assessment to be carried out within a prescribed but realistic time period. There was also agreement that, within a six week period, there should be an interim assessment and approval of the relatives or friends which is more rigorous than that required under the current provisions. The initial assessment should determine whether

the child should stay in the placement while the full assessment was being carried out.

**10.24 The Group recommends that immediate placements should last for up to four months, subject to an interim assessment and approval, during which time a full assessment and approval should be carried out.** The provisions on immediate placements should also have minimal cross reference to other regulations.

#### Placement recommendations by local authorities to children's hearings

10.25 Children on supervision requirements can be placed with carers either:

- if the carers are fully approved foster carers; or
- if the local authority has carried out the procedures for emergency or immediate placement with the carers and thinks the placement is the best choice for the children.<sup>21</sup>

The latter provision allows longer term placements with family and friends who have not been approved as foster carers, and who either do not want to apply to be approved or who the local authority does not wish to seek to approve for whatever reason. It also allows placement with prospective adopters who have not been approved as foster carers (such people will have been approved as adopters).<sup>22</sup> These provisions therefore allow flexibility, and they also allow a child to be put in a long-term placement with carers who remain formally unapproved.

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<sup>18</sup> Fostering Regs, reg. 13.

<sup>19</sup> Fostering Regs, reg. 14.

<sup>20</sup> Fostering Regs, reg. 15; Children's Hearings (Scotland) Rules 1996 (1996 No. 3261 (S.251)), r.20(6).

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<sup>21</sup> Fostering Regs, reg. 15; Children's Hearings (Scotland) Rules 1996 (1996 No. 3261 (S.251)), r.20(6).

<sup>22</sup> *Choices for Children*, chapter 8.

10.26 The consultation responses showed concern at the lack of a systematic approach by local authorities to assessing and approving carers in these circumstances, particularly those who are related to the children. Some detected unwillingness amongst local authorities to approve relatives as foster carers, possibly to avoid becoming liable to provide financial support. One response wanted formal assessment processes for relative carers, while another one said that more formality was not necessary if good reports were available, but that “some agreed areas for assessment of family and friends as carers would help”.

10.27 The Group recognised the value of flexibility in the placements available to children’s hearings. However, there was also a need for a systematic approach to ensure placements were suitable. **If the Group’s recommendation on assessment in immediate placements is implemented, no child should be placed long-term by a children’s hearing with carers who have not been properly assessed.**

#### Children looked after under s.25 of the 1995 Act

10.28 Under s.25 of the 1995 Act, local authorities must provide accommodation for children residing in their area who require accommodation because:

- (a) no-one has parental responsibility for them;
- (b) they are lost or abandoned; or
- (c) the person who has been caring for them is prevented from providing suitable accommodation or care.<sup>23</sup>

A local authority may also provide accommodation for any child within their area if they consider that to do so would safeguard or promote the child’s

welfare.<sup>24</sup> A child provided with accommodation for more than 24 hours is a looked after child.<sup>25</sup>

10.29 Questions can arise about whether a child has been accommodated by a local authority under s.25, and should therefore be treated as a looked after child.<sup>26</sup> For example, where a child is living with friends or family, the child may be treated as looked after if the placement was organised directly by the local authority (or a voluntary organisation). However, if the placement was arranged by a birth parent, even with the help and agreement of the local authority, the child might not be treated as looked after. This distinction has important implications for the assessment and services the child will receive.

**10.30 To ensure consistency of approach across Scotland, the Group recommends that clear guidance is issued by the Scottish Executive to local authorities on the circumstances in which children should be regarded as accommodated under s.25.**

#### Respite care provided under s.25 of the 1995 Act

10.31 A related issue concerns children and young people needing respite care.<sup>27</sup> When a local authority provides respite care for more than 24 hours, the legal grounds for providing the care is normally regarded as s.25 of the 1995 Act, and the child is considered to be looked after.

10.32 However, children who need respite care might not have any other needs that would justify the local authority looking after them. For these children, and their families, being looked after can be overly intrusive and burdensome. It can also be wasteful for the local authority.

<sup>23</sup> 1995 Act, s.25(1).

<sup>24</sup> 1995 Act, s.25(2).

<sup>25</sup> 1995 Act, s.17(6)(a).

<sup>26</sup> *Choices for Children*, chapter 8.

<sup>27</sup> *Choices for Children*, chapter 8.

**10.33 The Group recommends that clear guidance is issued by the Scottish Executive to local authorities on the use of s.25 to provide respite care to children for periods of more than 24 hours at a time.**

10.34 The Group considered the monitoring arrangements for children who are in consecutive periods of respite care, amounting to continuous time in care away from home, without this position being regularly reviewed. The Group concluded that no specific system of monitoring was necessary. Whether respite is provided by local authorities or voluntary agencies, they can be expected to monitor use of their resources and become aware if and when these situations arise. However, both local authorities and voluntary agencies need to keep information about the services being provided to specific children and families, to assure themselves, through assessment and ongoing support, that respite care is required in each case and is in children and families' best interests. The quality of all respite care services should be monitored through the approval and review processes for the carers who provide them, such as inspection by the Care Commission.

#### **Arrangements with voluntary organisations**

10.35 Arrangements may be made between local authorities and voluntary organisations in relation to fostering for looked after children.<sup>28</sup> The Group discussed what exactly voluntary organisations could do, including arrangements for their fostering panels.<sup>29</sup>

10.36 Consultation responses indicated that voluntary organisations should be able to carry out all appropriate fostering functions under the regulations, and

particularly to be able to run their own fostering panels. This would allow them to assess carers, approve them and carry out their annual reviews. Fostering agencies are now to be inspected by the Care Commission which should ensure that they meet the necessary standards in their activities. There also needs to be a wider definition of "foster carer" in the regulations, to include those approved by voluntary organisations.

**10.37 The Group recommends that the regulations should allow all fostering providers, whether local authorities or voluntary organisations, to carry out their own assessment, approval, reviewing and de-registration processes.**

#### **Assessment of foster carers' new partners**

10.38 The assessment of foster carers' new partners is largely an issue of good practice, as is the related question of whether (and how many) checks are made on regular overnight visitors to a foster carer's house. One consultation response commented that there should be an assessment of new partners which "should include all statutory checks, a reflection on lifestyle changes, commitment as a couple to the fostering task, and where there might be children of the new relationship, their place in the fostering family."

**10.39 The Group recommends there should be clear guidance from the Scottish Executive to local authorities that:**

- **where a prospective foster carer acquires a partner during the assessment process, the partner should be jointly assessed; and**
- **where a foster carer acquires a partner after approval, that approval is reviewed, including an assessment of the partner, and the matter is taken back to the fostering panel.**

<sup>28</sup> Fostering Regs, regs. 16 and 17.

<sup>29</sup> *Choices for Children*, chapter 8.

In support of this, the fostering regulations should specify that such a review should be considered by the fostering panel.<sup>30</sup>

### Checks on households which looked after children are visiting

10.40 Across Scotland there is a wide variation in practice on checks on households where looked after and accommodated children propose to spend time, whether for overnight stays or other sorts of stays that allow access by adults and others to these children.

10.41 For looked after young people, this issue is a crucial one because the need to have checks on friends and their families before being allowed to stay with them is seen as stigmatising in nature and a barrier to forming normal peer group relations.

10.42 This comes out clearly from the Group's consultation with young people, which found this was a contentious and frequently highlighted issue.<sup>31</sup> Young people described how they found it upsetting, difficult, restrictive and stigmatising. A number of young people identified the impact which it had on their friendships and their childhood experience:

*I would just be going about with my friends and they would ask me stay over. I would go home and ask and it would be like, 'Well, not really, has that person had a police check?'... It is really hard when you are wee. It kind of takes away from your childhood. (Young man, 17 years)*

10.43 A further complication is the practice some local authorities have of carrying out checks on all adults and young people who are in contact with all members of the fostering household,

including the birth children. This is seen as burdensome and mitigates against the normal growth and development of peer group associations for all the children in the foster home. This is resented as intrusive by all the children involved.

10.44 Consultation responses indicated that guidance on this matter would be welcomed and that regulations were unnecessary. In fact, the then Social Work Services Inspectorate of the Scottish Executive undertook consultation across Scotland about this issue, following work with young people in the looked after and accommodated system by the Fostering Network in Scotland. Draft Guidance was issued for consultation in 2004.

**10.45 The Group recommends that the issue of checks on those in contact with looked after children should be dealt with by the current consultation and guidance process being carried out by the Scottish Executive.**

### Kinship care

10.46 This term is used for a wide range of arrangements where children are cared for by relatives for considerable periods, if not permanently. While many of these situations are covered by the looked after system, the majority are thought to be informal family arrangements with little or no involvement with social work departments or other support services. Some of the consultation comments highlighted concerns about the lack of systems for assessing family and friends as carers.

10.47 From these responses, the issues with kinship care include:

- the growth and extent of kinship care across Scotland;
- the support needs of kinship care;
- the underlying assumptions and value base of kinship care;

<sup>30</sup> Chapter 11, paragraphs 11.37 – 11.40, below.

<sup>31</sup> Annex A, below.

- the need for a consistent realistic level of support from social work and other agencies in kinship care arrangements;
- the need for an agreed, consistent level of financial support for kinship carers across Scotland;
- the underlying status of and proposed developments for kinship care.

In 2004, the then Social Work Services Inspectorate of the Scottish Executive commissioned research into the prevalence of kinship care across Scotland and associated issues.

**10.48 The Group recommends that the issues surrounding kinship care should be examined following the current research being carried out by the Scottish Executive.**

### PRIVATE FOSTERING

10.49 It is important to distinguish “private fostering” from “public fostering”. Public fostering is the provision of fostering services to children who are looked after by local authorities. This can be done by the local authorities, or by organisations in the voluntary sector. Public fostering is governed by statute, and detailed guidance and regulation.

10.50 Private fostering, on the other hand, is where parents make arrangements with people who are not close relatives to care for their children.<sup>32</sup> If these arrangements last for more than 28 days both parents and carers have a duty to report the arrangement to the relevant local authority, who must inspect and monitor the accommodation and other aspects of the arrangements, although they do not assess and approve the carers as such.<sup>33</sup> There is very little

public awareness of these legal requirements and local authorities themselves are often unsure of their scope, although they will now be inspected by the Care Commission to see how well they perform this function.<sup>34</sup>

10.51 The consensus of the responses to consultation on private fostering was that the current system needed reform, although the nature of that reform differed between respondents. There was support for some form of registration and/or assessment of arrangements and/or carers, but no consensus on how this would be done, or whether the tasks should be carried out by local authorities or the Care Commission.

10.52 This is a complex issue, and there is limited information about a number of areas, including:

- what is the practice of individual local authorities?
- which private fostering arrangements are notified and which are not?
- what, if any, information is available to the public, either nationally or locally?
- what are the views of the users of private fostering services, children, birth families and/or carers, who are or may be involved in private fostering?

Some of this information will become available as the Care Commission starts its work of inspection and registration, but the Group concluded that private fostering needs more investigation and discussion than is possible within its timeframe. **The Group recommends that a Working Party should be set up to carry forward further consideration and discussion on private fostering.**

<sup>32</sup> *Choices for Children*, chapter 12.

<sup>33</sup> Foster Children (Scotland) Act 1984 (1984 c.56); Foster Children (Private Fostering) (Scotland) Regulations 1985 (SI 1985 No 1798 (S.134)).

<sup>34</sup> Regulation of Care (Scotland) Act 2001, s.2(14)(c).

## **RECOMMENDATIONS OF CHAPTER 10 – FOSTERING ISSUES**

74. The support needs of the child and the carer should be assessed on the making of a Permanence Order for a child in foster care, and new plans should be put in place to meet those needs. (10.7)
75. When a s.11 order has been granted for the long-term security of a looked after child, the local authority should assess and plan to meet the support needs of the child and the carers. (10.11)
76. A nationally agreed scheme of adequate allowances should be introduced for foster carers. (10.14)
77. The restriction on fostering by adults of the same sex living in the same household should be removed. (10.19)
78. The emergency placement provision should be clarified and should be self-contained, without cross-reference to other regulations. (10.21)
79. Immediate placements should last for up to four months, subject to an interim assessment and approval, during which time a full assessment and approval should be carried out. If this recommendation on assessment in immediate placements is implemented, no child should be placed long-term by a children's hearing with carers who have not been properly assessed. (10.24 and 10.27)
80. Clear guidance should be issued by the Scottish Executive to local authorities on the circumstances in which children should be regarded as accommodated under s.25 and the use of s.25 for respite care. (10.30 and 10.33)
81. The regulations should allow all fostering providers, whether local authorities or voluntary organisations, to carry out their own assessment, approval, reviewing and de-registration processes. (10.37)
82. There should be clear guidance from the Scottish Executive to local authorities on the procedures when a prospective foster carer acquires a new partner during or after the assessment process. (10.39)
83. The issue of checks on those in contact with looked after children should be dealt with by the current consultation and guidance process being carried out by the Scottish Executive. (10.45)
84. The issues surrounding kinship care should be examined following the current research being carried out by the Scottish Executive. (10.48)
85. A Working Party should be set up to carry forward further investigation and discussion on private fostering. (10.52)



11. procedures  
within local  
authorities and  
agencies



**SUMMARY**

**11.1 The Group considered the procedures for planning for permanence within local authorities and adoption agencies, including the functions of adoption and permanence panels, and the procedures for assessment and approval of adopters and foster carers.**

**11.2 The Group’s major recommendations are:**

- **all plans for permanence for children, including adoption, should be looked at by a single advisory panel within each local authority (11.19)**
- **there should be an independent review body (external to agencies) to consider appeals against the decisions of agency decision makers on adopters and adoptions (11.36)**
- **there should be an independent system for appeals by prospective and existing foster carers (11.50)**
- **there should not be a list of prescribed offences that prevent a person from adopting or fostering. However, regulations should specify that enhanced criminal record certificates should be sought for all applicants as a matter of regulation (11.57)**

**PERMANENCE PLANNING BY LOCAL AUTHORITIES AND ADOPTION AGENCIES**

**Principles to be applied in permanence cases**

**11.3 The following principles should be applied in planning and decision-making by local authorities, adoption agencies and courts in permanence cases:**

- the paramount consideration in each case is the welfare of children, or, in adoption cases, the welfare of children throughout their lives;
- children’s views must be taken into account in all decisions;

- there must be consideration of race, religion, culture and language in all decisions; and
- no order should be made unless it is better to do so than not to do so – the “minimum necessary intervention” principle.<sup>1</sup>

11.4 A number of areas of the consultation with young people showed the importance of young people being involved in decisions.<sup>2</sup> Most young people would want to attend meetings which are considering their future and be involved in decisions about where they will live, including decisions about adoption:

*...it is important that you have your say in what is going to be happening to you in your future. (Young woman, 17 years)*

*I really think that children should have some sort of say. Even if they are quite young ... Let them have ... some kind of responsibility for the rest of their lives. ...you are... taking away from their lives if they do not want to be adopted and they realise that later in their lives. (Young man, 17 years)*

*I felt that a lot of the stuff was hidden from me. I could see the hesitance when they spoke to me ... Obviously I was only 10 ... but if somebody had taken the time to sit down with me and explain to me, look this is why this decision was made, do you understand. (Young woman, 20 years)*

11.5 The responses also showed the difficulties that can occur if young people do not feel involved in these decisions:

*The majority of my foster placements used to go out with a bang... I got picked up and then taken somewhere else.*

<sup>1</sup> Alexandra Plumtree, *Choices for Children* (Edinburgh: Scottish Executive, 2004) (hereafter, *Choices for Children*), chapter 6.

<sup>2</sup> Annex A, below.

*I was taken from my real Mum's to a foster placement, maybe be told briefly where I was going... It was always like that. (Young woman, 21 years)*

*I would not say I have had a say in it. I feel that if I had not got put into that children's home I would not have spent most of my teenage years in secure units and residential (units). (Young woman, 17 years)*

11.6 The consultation also highlighted the complexity of enabling young people to participate in decisions about their lives. For example, some of the responses indicated that young people would not have chosen at the time the outcome they would choose today.

*... I would not really have known at the time what that (adoption) was ...when I was that age I would have wanted to live with family because they are people you know. (Young woman, 14 years)*

*... sometimes they did not listen to me, but ... I wanted things that was not best for me ...Now I realise and think, they did want the best for me ...I was wanting to go and stay with my Mum. But my Mum was really messed up with drugs... (but) I hated them for it. (Young woman, 17 years)*

11.7 The responses to the consultation largely indicated that these principles should remain as they are, although increased guidance would be welcomed on some issues, for example how to take and use the views of children and young people.<sup>3</sup>

11.8 The Group considered the list of criteria for making decisions contained in the Adoption and Children Act 2002.<sup>4</sup>

The Group concluded that most of these considerations would be covered by the existing wide-ranging duty to treat children's welfare as paramount. However, the Group was attracted to the provision that courts and adoption agencies must include in their considerations "the likely effect on the child (throughout his life) of having ceased to be a member of the original family and become an adopted person".<sup>5</sup>

**11.9 The Group recommends that the principles for permanence planning should remain the same, with the addition of a duty in adoption cases to consider the effect on the child of having ceased to be part of the original family and become an adopted person.**

### Role of local authority adoption agencies

11.10 The Group considered the need for 32 local authority adoption agencies, given the relatively small number of adoptions each year, and the resulting lack of experience for social workers in each local authority.

11.11 The report of Phase I of the review was not in favour of a national adoption service.<sup>6</sup> It did, however, recommend national co-ordination of some services and activities, including:

- a national recruitment strategy;
- standardisation of pre-assessment criteria and materials;
- establishment of an Adoption Support Network for Scotland.<sup>7</sup>

11.12 Views from consultation indicated that there was no clear consensus on these issues. However, there was

3 A summary of the responses can be found on the Scottish Executive website at <http://www.scotland.gov.uk>.

4 Adoption and Children 2002 Act (hereafter 2002 Act), s.1(4).

<sup>5</sup> 2002 Act, s.1(4)(c).

<sup>6</sup> Adoption Policy Review Group – Report on Phase I (Edinburgh: Scottish Executive, 2002) (hereafter, Phase I report), Executive Summary, paragraph 2.

<sup>7</sup> *Choices for Children*, chapter 18.

general support for centralisation and standardisation of some aspects of adoption services, such as adoption information, information about the curator ad litem service and post-adoption support.

**11.13 The Group recommends that there should not be a national adoption service, but, as recommended in Phase I, there should be centralisation of some services.** In addition, guidance from the Scottish Executive should encourage consistency in service delivery throughout Scotland, and encourage authorities and agencies to work together to ensure this. The Care Commission inspection of adoption agencies will have an important role in establishing national standards of service.

## FOSTERING, ADOPTION AND PERMANENCE PANELS

### Functions of and terminology for panels

11.14 Local authority fostering and adoption panels make recommendations to - not decisions for - local authorities on approval of foster carers and adopters, and - in the case of adoption panels – they can recommend whether adoption is in the best interests of an individual child, and the match with prospective adoptive parents.<sup>8</sup>

11.15 Local authority advisory panels can be known as fostering, adoption or sometimes “permanence” panels. The first two are names used in regulation, but the last one has no statutory meaning. Some local authorities combine the two statutory panel functions in one body, and various combinations of names are used, such as “fostering and adoption panel”. The term “permanence panel” is

sometimes used for a combined panel, and sometimes for a panel that deals with all permanence plans for children, including adoption and long-term fostering, although again this is not a statutorily defined function. The Phase I report recommended “that local authorities should have one panel to consider all decisions about permanence away from home, including adoption”.<sup>9</sup>

11.16 The Group considered whether carer panels should be created to deal with all approval recommendations for foster and adoptive carers and whether agencies should continue to use adoption/permanence panels as part of the planning process for children.<sup>10</sup>

11.17 The consultation responses on the first matter gave no clear view. The consensus of the responses about the use of adoption/permanence panels indicated that the current system seems to be well established and working relatively well across Scotland, with panels developing on a local basis to suit the needs of particular authorities and agencies.

11.18 The Group agrees with the Phase I recommendation that one panel within local authorities should deal with all permanence plans for children. However, it considers that there should formally be two different panels, one for fostering and one for adoption, to recognise the different range of functions each has. For example, a recommendation by an adoption panel that a child should be adopted has formal consequences in terms of court applications which might not be the case for other permanence plans. Fostering panels need to deal with the approval of short-term as well as long-term foster carers. However, the Group believes that the regulations should allow both functions to be

<sup>8</sup> Fostering Regs, reg. 6(1); Adoption Agencies (Scotland) Regulations 1996 (SI 1996 No. 3266 (S.254)), regs. 11(1) (hereafter, Adoption Agencies Regs).

<sup>9</sup> Phase I report, chapter 1, paragraph 26.

<sup>10</sup> *Choices for Children*, chapter 15.

exercised at the same meeting. This reflects the practice in many authorities and agencies. The regulations should allow individual local authorities and agencies to organise the membership of panels separately or together, as they wish. This will give maximum flexibility to local authorities and agencies to organise the work of panels in their area.

**11.19 The Group recommends that all plans for permanence for children, including adoption, should be looked at by one advisory panel within each local authority/agency.** There should continue to be separate regulations for fostering and adoption panels, but these should allow individual authorities and agencies to operate these panels together if they wish.

#### **Attendance at adoption/permanence panels**

11.20 The Group considered who should be able to attend adoption panels, including:

- children whose plans are being discussed;
- birth parents whose children's plans are being discussed; and
- prospective adopters whose approval is being discussed.<sup>11</sup>

At present, prospective adopters have a right to be invited to and attend the panel when it is considering whether to approve them.<sup>12</sup> There is no such regulatory right for birth parents with parental responsibilities and rights, although a few agencies do invite them to panels which are considering plans for their children.<sup>13</sup> Questions have been raised whether children should be able to attend panels when discussing plans for them.

11.21 The responses to the consultation indicated that there was considerable support for allowing children to attend panels, if the child was mature enough to understand the process. There was mixed support for allowing birth parents to attend panels, although it was generally considered positive, provided that there was guidance to govern how this would operate in practice.

11.22 As laid out above, the consultation with young people showed clearly that it is important for young people to be involved in decisions about their lives, including plans for adoption.<sup>14</sup>

11.23 The Group concludes that children should be given the right to make representations to any panel which is looking at plans for them, taking into account their maturity and wish to be heard. The Group agreed that the birth parents should have the right to make oral or written representation to the panel, although this should happen at the stage when the plans are discussed at panel, rather than at the matching stage. There should also be the discretion to invite fathers without parental responsibilities and rights. Prospective adopters should continue to have the right to be invited to panels, and clearer, non-ambiguous regulations are needed to avoid confusion on the rights of adopters to attend or make representations to the panel.

**11.24 The Group recommends that:**

- **children and young people should have a right to make representations to adoption panels and/or attend them, taking into account their age and maturity.**

<sup>11</sup> *Choices for Children*, chapter 15.

<sup>12</sup> Adoption Agencies Regs, reg. 11(3).

<sup>13</sup> In *Dundee City Council v M* 2004 S.L.T. 640 the First Division of the Court of Session held that birth parents' rights under Articles 6 or 8 of the ECHR were not breached if they were not invited to attend an adoption panel.

<sup>14</sup> Paragraphs 11.5 – 11.7, below.

- **birth parents should have a right to make oral or written representations to adoption panels considering plans for their children.**
- **fathers without responsibilities and rights may be invited to attend adoption panels at the discretion of the local authority/adoption agency.**
- **adopters should have a right to make oral or written representations to panels considering their approval.**

### Timetables for planning

11.25 Avoiding delays is crucial in plans for all types of permanence for children. The Phase I report identified delays at three stages before the court proceedings:

- between the child becoming looked after away from home and a looked after review decision to seek permanence.
- between such a review and the adoption/permanence panel.
- between the panel recommendation and the lodging of a court application for freeing or adoption.<sup>15</sup>

The Phase I report made recommendations for improved planning for looked after children, including the avoidance of delay.<sup>16</sup>

11.26 At present there are statutory timetables for local authority adoption agencies for the stage between an adoption panel recommendation for the child and an application to the court.<sup>17</sup> The national care standards for adoption agencies also contain timetables for the delivery of services which the Care Commission will use in inspecting these services.<sup>18</sup>

<sup>15</sup> Phase I report, chapter 1, paragraphs 34 – 35, and chart 1.

<sup>16</sup> Phase I report, chapter 1, recommendations 2 – 7.

<sup>17</sup> Adoption Agencies (Scotland) Regulations 1996 (SI 1996 No. 3266 (S.254)), regs. 12-18.

<sup>18</sup> National Care Standards for adoption agencies, Scottish Executive (2002).

11.27 Responses to the consultation<sup>19</sup> indicated that there was support for reducing delays, and it was felt that Sheriff Principal Macphail's practice note was particularly useful.<sup>20</sup> There was support for the development of sheriffs with particular expertise in permanence cases. The consultation also indicated that there was support for guidelines to address delays at various stages of permanence planning.

11.28 The Group concluded that further guidance should be given on the average time each part of the process should take, rather than further timescales being introduced in regulations. Regulatory timetables covering the whole permanence planning process would be too inflexible and could not take account of the wide range of circumstances involved. However, the existing regulatory timetables for the last stage of the process were considered valuable and should be retained.

**11.29 The Group recommends that there should continue to be statutory timetables for the procedures between adoption/permanence panels and court applications and clear guidance from the Scottish Executive (or the Care Commission) about other parts of the process.**

### Role of the adoption agency decision maker and appeals by prospective adopters

11.30 Agency decision makers have a central role in adoption agencies, making decisions on permanence planning for children on the basis of recommendations by adoption panels. They also approve prospective adopters. Decision makers do not have to follow the recommendations of adoption panels but can disagree and make other decisions. However, there is little in regulations and guidance about their role and duties.

<sup>19</sup> *Choices for Children*, chapter 18.

<sup>20</sup> Chapter 7, paragraph 7.9, below.

11.31 The Group considered whether there should be new regulations and/or guidance about the role of agency decision makers in a range of issues:

- should there be the right to make written representations to agency decision makers, and if so, to whom should it be given?
- should decision makers attend all adoption panels as observers?
- should agencies have more than one decision maker?
- what should be the format of adoption panel minutes?
- should there be an automatic internal review if the decision maker disagrees with the adoption panel recommendation?<sup>21</sup>

11.32 The responses to the consultation indicated that the current system is satisfactory. There was strong support for the issuing of guidance, rather than regulations, on the role of the agency decision maker.

11.33 The Group considers that clear accountability within the local authority or adoption agency is very important. Recommendations should be the province of the permanence panel. The agency should make the decision. The decision making role should be exercised by senior managers, and every organisation should have more than one agency decision maker. It is not necessary for agency decision makers to attend adoption panels as observers. This could blur the clear separation between their distinctive roles.

11.34 The Group did not consider that parties should normally have the right to make written or oral representation to agency decision makers following the recommendation of the adoption panel. All relevant information should be before the adoption panel when it makes its recommendation. However, there may

be circumstances where new information comes to light after the recommendation or before the decision maker has decided, which might indicate that the information relied upon by the adoption panel was incorrect. The decision maker should be able to take such information into account.

11.35 The decision maker, as the proper accountable person, is making the decision of the agency. There should therefore be no automatic review if the decision maker disagrees with the adoption panel. However, the disagreement should continue to be recorded and should also be communicated to all parties, including members of the adoption panel. If a party wishes to appeal, there should be an independent review body, external to the agency, to consider all relevant decisions.

11.36 **The Group recommends that:**

- **the authority/agency decision making role should be exercised by senior managers.**
- **every authority/agency should have more than one decision maker.**
- **additional written or oral representations from parties should be invited by the agency decision maker only if new information comes to light after the recommendation of the panel.**
- **interested parties should be informed if the decision maker disagrees with the recommendation of the adoption panel, but there should be no automatic review of the decision.**
- **however, there should be an independent review body (external to the authority/agency) to consider appeals against the decisions of agency decision makers.**

### Issues for fostering panels

11.37 Current regulations about fostering panels are less detailed than those for adoption panels. The Group considered a number of issues about this, including:

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<sup>21</sup> *Choices for Children*, chapter 18.

- whether fostering panels should have legal advisers;
- whether fostering applicants should be invited to panels; and
- whether local authorities should be obliged to involve their panels in the annual reviews of foster carers.<sup>22</sup>

The fostering standards deal with what prospective foster carers can expect during the assessment process, access to assessment reports and to the fostering panel on approval and review.<sup>23</sup> However, these matters are not governed by regulation.

11.38 Responses to the consultation indicated that there was general satisfaction with the existing arrangements. However, it was felt that regulations could be useful to provide consistency.

11.39 The Group agreed that there is no need for a regulation obliging fostering panels to have legal advisers. This can be left to the discretion of the organisation. The Group considered that, in the interests of openness, both prospective foster carers and foster carers being reviewed should be able to attend panels. The Group did not believe that it was necessary for a routine annual review of foster carers by a fostering panel, but approvals of foster carers should be considered by a fostering panel every three to five years and when the Care Commission recommends it following an inspection of a foster care service.

11.40 **The Group recommends that:**

- **regulations should give those applying to foster and existing carers being reviewed the right to make oral or written representations to fostering panels, including the right to attend the panel.**

- **fostering panels should be involved in reviews every three to five years and when the Care Commission recommend such involvement in light of its individual inspections of fostering services.**

#### Access to assessment information by foster carers

11.41 Adoption applicants currently receive a copy of their assessment report, excluding confidential third party information.<sup>24</sup> There is no equivalent regulatory right for fostering applicants, although the Fostering Standards services say:

You [the prospective foster carer] know that you have access to the assessment report before a decision on approval is made. You can add to the report and go to the fostering panel.<sup>25</sup>

11.42 **The Group recommends that fostering applicants should be given a right to receive a copy of their assessment report, excluding confidential third party information.**

#### Appeals by prospective and existing foster carers

11.43 There are three situations where prospective or existing foster carers may wish to appeal or seek a reconsideration of a decision:

- where prospective carers are not approved following assessment;
- where existing carers are de-registered at their annual review, whether they have attended a panel or not; and
- where existing carers are de-registered after allegations are made, whether they have attended a panel or not.

<sup>22</sup> *Choices for Children*, chapter 15.

<sup>23</sup> National Care Standards for foster care and family placement services, standards 5 – 12.

<sup>24</sup> Adoption Agencies Regs, reg. 10(5)(b).

<sup>25</sup> National Care Standards for foster care and family placement services, Scottish Executive (2002), standard 6.1.

The Fostering Standards state that carers and prospective carers should be “given information about the appeals procedure and how, and in what circumstances” they can be accessed.<sup>26</sup> They also state that “a review will be held as soon as possible after any significant incident, complaint or allegation of abuse or neglect” against an existing carer.<sup>27</sup> Foster carer approval must be reviewed at least annually, and the review may or may not involve the fostering panel.<sup>28</sup>

11.44 However, there is no statutory provision for an appeal process, either for prospective or existing carers. Existing carers are not employees and are therefore not eligible for the support available to the employed, despite the fact that de-registration may deprive them of their income.

11.45 The Group considered whether there should be a statutory appeals system for applicants who fail to be approved or are de-registered, and if so, whether it should be a national one.<sup>29</sup>

11.46 The consensus of opinion from the consultation was that there should be an independent appeals mechanism for prospective and existing carers. It was considered that appeal procedures should be available, widely advertised, and that they should be transparent, accessible, and in place across Scotland.

11.47 In England and Wales, the recent fostering regulations require agencies to give written notice to carers of an intention not to approve or to de-register or to change the terms of registration; 28 days are allowed for them to make written representations.<sup>30</sup> If written

representations are made, the case must be referred to a panel and agencies must take account of the panels’ recommendations before reviewing their decision anew.

11.48 Under the Standards for Fostering Services in England and Wales, information about procedures for dealing with complaints and representations should be widely available. Agencies must also provide information about their procedures to deal with investigations into allegations to a range of people, including carers, and provide independent support to foster carers during investigations. Where there are allegations of abuse, agencies must keep records of these and have clear policies about when carers should be de-registered.<sup>31</sup>

11.49 The Group believes that there should be a statutory process for appeals by carers, giving access to an independent review of decisions on approval and re-approvals of foster carers. This independent process should review rather than overturn decisions of the local authority or voluntary agency decision makers. The system could be supported by an independent agency, or by the Care Commission, or through local arrangements of independent advisors. The Group also believed there should be a system to provide independent support to foster carers during the investigation process. This could again be delivered by either national – possibly a central agency – or local arrangements. To underpin the system of investigation, the Group believed that agencies should have clear and consistent approaches to handling allegations against foster carers. A

<sup>26</sup> National Care Standards for foster care and family placement services, standard 12.10.

<sup>27</sup> National Care Standards for foster care and family placement services, standard 11.10.

<sup>28</sup> Fostering Regs, reg. 10(1.)

<sup>29</sup> *Choices for Children*, chapter 17.

<sup>30</sup> Fostering Regulations 2002 (S.I. 2002/57) and the Fostering Regulations (Wales) 2003 (S.I. 2003/237 (W.35)).

<sup>31</sup> National Minimum Standards for Fostering Services, Department of Health (2002), standards 22.8 - 22.10.

national code of practice on handling investigations would provide agencies with a basis for these policies.

**11.50 The Group recommends that there should be an independent system to review decisions about prospective foster carers and existing foster carers whose approval has been terminated or whose conditions of approval varied. There should also be an independent system, similar to that already in place in England, to provide support to foster carers during investigations and appeals. There should be clear and consistent policies from agencies on the handling of allegations against foster carers based on a national code of practice.**

### Other panel issues

11.51 The Group considered some general issues about panels:

- the meaning of “panel”: is it a particular meeting or is it the wider group of people from which the attendees of a particular meeting can be drawn?
- qualifications of panel members.
- whether it is necessary to have a man and a woman at each panel meeting.
- the form and style of panel minutes.<sup>32</sup>

11.52 Responses to the consultation indicated that there was general satisfaction with the existing system, but that some changes would be valuable. It was felt that there is scope to achieve a better representation of gender, age, qualifications and background with panel members, but that this should not be too prescriptive, otherwise it could be difficult to recruit panel members.

11.53 The Group agreed that there should be greater clarity about the meaning of “panel” in different situations to distinguish a meeting of a panel from the

wider pool of people from which the local authority or agency can draw to consider individual cases. More detailed guidance is required about appropriate qualifications for members of fostering and adoption panels, and the composition of meetings of the panel. The composition of a panel meeting should be appropriate given the child’s ethnicity and related matters. Guidance should also make it clear that each panel meeting should include a man and a woman wherever practicable. As far as panel minutes are concerned, the Group agreed that more clarity is required and this should be covered in guidance.

11.54 The Group recommends that:

- **the terms “panel” and “panel meeting” should be used in regulations and guidance to distinguish between the pool of people as a whole and who may serve out the composition of an individual meeting.**
- **there should be detailed guidance from the Scottish Executive about qualifications of panel members and the composition of panel meetings, including the child’s ethnicity and related matters.**
- **guidance from the Scottish Executive should make it clear that there should be a man and a woman at each panel meeting wherever reasonably practicable.**
- **guidance from the Scottish Executive should be provided on the format of panel minutes.**

### Criminal record checks on prospective carers and adopters

11.55 In Scotland there is no prescribed list of previous convictions which would automatically bar applicants from approval as foster carers or adopters. The only exception is where applicants seek to adopt from a Hague Convention country. The Group considered whether a prescribed list should be introduced for

<sup>32</sup> *Choices for Children*, chapter 15.

all applicants, as exists in England and Wales. A related issue is whether regulations should specifically instruct that enhanced criminal records certificates must be sought for prospective carers and adopters.

11.56 Consultation responses showed a clear division of opinion about whether a prescribed list would be a positive move. The majority view supported a prescribed list. However, other responses suggested a prescribed list could be burdensome because it would remove discretion from local authorities and agencies. Should convictions for this purpose “expire” after a given number of years enabling the agency to consider all the circumstances?

**11.57 The Group recommends that there should not be a list of prescribed offences.** It was better to allow local authorities and agencies to make judgments in individual cases based on all the facts before them. **However, the Group recommended that regulations should state that enhanced criminal record certificates should be sought for all applicants.** This would ensure that the best information was available to the local authority or agency in reaching its decision. In addition, under the 2003 Act no person can be approved as a carer or adopter if they are disqualified from working with children. This legislation has been in force since January 2005.

## **RECOMMENDATIONS OF CHAPTER 11 – PROCEDURES WITHIN LOCAL AUTHORITIES AND AGENCIES**

86. The principles for permanence planning should remain the same, with the addition of a duty to consider the effect on the child of having ceased to be part of the original family and become an adopted person. (11.9)
87. There should not be a national adoption service, but, as recommended in Phase I, there should be centralisation of some services. (11.13)
88. All plans for permanence for children, including adoption, should be looked at by one advisory panel within each local authority. (11.19)
89. Adoption/permanence panels should be attended and/or hear representations from:
- children and young people taking into account their age and maturity
  - birth parents (unmarried fathers at the discretion of the local authority/adoption agency)
  - adopters. (11.24)
90. There should be statutory timetables for the procedures between adoption/permanence panels and court applications and clear guidance from the Scottish Executive (or the Care Commission) about other parts of the process. (11.29)
91. Authority/agency decision making role on permanence and adoption cases should be exercised by senior managers and every organisation should have more than one agency decision maker. (11.36)
92. Additional written or oral representations should be made to agency decision makers after an adoption panel's recommendations only if new information comes to light. (11.36)
93. There should be an independent review body (external to agencies) to consider appeals against the decisions of agency decision makers on adopters and adoptions but there should be no automatic review of cases where the decision maker disagrees with the adoption panel. (11.36).
94. Fostering applicants and existing carers on review should have the right to make oral or written representations to fostering panels, including the right to attend the panel. (11.40)
95. Fostering panels should be involved in reviews of foster carers every three to five years. (11.40)
96. Fostering applicants should be given a right to receive a copy of their assessment report, excluding confidential third party information. (11.42)
97. There should be an independent system for appeals by prospective foster carers and existing foster carers. (11.50)
98. There should be general guidance from the Scottish Executive on fostering and adoption/permanence panels covering:
- the composition of panel meetings (man and woman wherever practicable; reflect child's ethnicity and related matters)
  - qualifications of panel members
  - the format of panel minutes; and
  - the meaning of "panel" and "panel meeting". (11.54)
99. There should not be a list of prescribed offences that prevent a person from adopting or fostering. However, enhanced criminal record certificates should be sought for all applicants. (11.57)



## 12. access to information



## SUMMARY

**12.1 The Group considered access to information in relation to adoptions. The Group examined access to medical information, in particular access by adopted children to medical information about their birth parents without their consent. The Group also considered who should have access to adoption records and what information should be provided to adoptive parents about children at placement.**

**12.2 The Group's major recommendations are:**

- **only adopted people aged 16 or over should have an automatic right to information about their adoption (12.9)**
- **adopted people under 16 should have clear though limited rights to have access to appropriate information from their adoption agency records (12.9)**
- **regulations should lay out a support service for tracing and accessing information as a distinct part of the overall adoption support system (12.10)**
- **there should be primary legislation to allow the release of medical information, with or without consent, where this is necessary to plan properly for children who cannot live with their birth families (12.17)**
- **there should be further guidance to agencies to ensure that all relevant information about children is passed on to prospective adopters, in written form as well as orally (12.30)**

## ACCESS TO ADOPTION RECORDS

12.3 The Group considered the interests of three groups of people in tracing and/or accessing records:

- adults and children who have been adopted;
- birth parents and other birth relatives of adopted people;

- other relatives of adopted people, such as their spouses, children or adoptive parents, particularly when the adopted person has died or otherwise cannot or will not exercise rights to access information.<sup>1</sup>

12.4 Currently only adopted people who are 16 or over have automatic rights to information about their own adoption. They can obtain a copy of their original birth certificate, which will provide details of their birth parents.<sup>2</sup> They can have full sight of the court papers relating to their adoption.<sup>3</sup> They can also ask to see their adoption agency records, although the agency has discretion not to release the papers.<sup>4</sup> Adopted people under 16 have no automatic rights to information about their adoption, although adoption agencies have discretion to provide them with information, and they have a right to counselling and assistance from the agency.<sup>5</sup>

12.5 The other groups of people identified above have no right to information about an adoption. However, adoption agencies have a duty to provide a service to birth parents and counselling to others with problems related to adoption.<sup>6</sup>

12.6 Birth parents, birth families and others can also use the non-statutory adoption contact register run by Birthlink. The contact register allows people affected by adoption, either adopted people or relatives, to register an interest

<sup>1</sup> Alexandra Plumtree, *Choices for Children* (Edinburgh: Scottish Executive, 2004) (hereafter, *Choices for Children*), chapter 11.

<sup>2</sup> Adoption (Scotland) Act 1978 (hereafter, 1978 Act), s.45(5).

<sup>3</sup> RCS 1994, r.67.32(2)(a); AS 1997, rr.2(14)(2)(a) and 2.33(2)(a).

<sup>4</sup> Adoption Agencies Regs, reg. 25.

<sup>5</sup> Adoption Agencies Regs, reg. 24(2); 1978 Act, s.1(2)(bb).

<sup>6</sup> 1978 Act, ss.1(1)(b) and 1(2)(c).

in establishing contact with each other. This is done on a purely voluntary and consensual basis. If the agency running the register matches two approaches it can facilitate contact between the parties, with a high degree of professional counselling and support.

12.7 The Adoption and Children Act 2002 has made new provision for the access to information about adoption in England and Wales. The Act and associated regulations provide a system for birth families and others to apply for information about an adopted person, and to be counselled about tracing adopted relatives. However, the Act only gives a right to information to the adopted person.<sup>7</sup>

12.8 Consultation responses indicated that there is a lack of knowledge about the rules governing the release of information. A clearer explanation of who is entitled to what information would be welcome. The respondents also called for a consistent system across Scotland, with the same level of service provision.

12.9 **The Group recommends that only adopted people aged 16 or over should have an automatic right to information about their adoption.** The Group recommends that adopted people under 16 should also have clear though limited rights to access appropriate information from their adoption agency records. The Group does not recommend that other people affected by adoption should have a right to information, but the Group recognised that there was uncertainty about the rights and services available to the three groups of people identified above. The Group advocates a clear and full statement in this regard of the rights of and the services available to those

affected by adoption, including who can access particular information and in what circumstances. Such a statement, which would also be valuable to care professionals, should be in guidance rather than primary legislation.

12.10 **The Group recommends that there should be a support service for tracing and accessing information as a distinct part of the overall adoption support system.** This service should include the provision of intermediary services for birth parents and other birth family members and assistance to other relatives of adopted people, such as their spouses, children or adoptive parents, particularly when the adopted person has died or otherwise cannot exercise rights to information. At present, there is disparity in the information and services provided around Scotland and a system prescribed by regulation would provide greater consistency.

12.11 **The Group recommends that voluntary agencies should be allowed to provide those adoption support services that involve tracing and access to records.** The work of Birthlink on the adoption contact register has shown the value of involving the voluntary sector in this area.

## ACCESS TO MEDICAL INFORMATION

12.12 The Group considered various concerns about the current law in relation to information about medical matters.<sup>8</sup> These included:

- access to medical information about children, birth parents and birth families.
- the content of medical reports on prospective adopters.
- disclosure of medical information about prospective adopters to birth parents.
- 'registered medical practitioner' to include a registered nurse.

<sup>7</sup> Adoption and Children Act 2002 (hereafter 2002 Act), ss.56 – 65; Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005 (2005 No. 888).

<sup>8</sup> *Choices for Children*, Chapter 5.

### Access to medical information about children and birth parents

12.13 A full health assessment is part of the process of planning permanence for a child. This requires extensive medical information, including indicators of possible future health problems. Medical advisers to local authorities and adoption agencies try to get as much medical information about children and their birth parents as possible. This can be difficult to obtain. A proper assessment of the potential risks to a child's health requires access to the medical history of the pregnancy – the level of ante-natal care, any indications of substance or alcohol abuse, any obstetric complications – as well as the wider family medical history, for example, genetic issues. There is therefore a need for access to medical information about birth parents, as well as information about the child.

12.14 The issues about the release of medical information are complex, but generally, disclosure of medical information requires the consent of the person to whom the information relates, or, for children too young to consent, the consent of a person with parental responsibilities and rights for the child.

12.15 In practice, there are difficulties for local authorities and adoption agencies in obtaining medical information about children and birth parents in three situations:

- there is no consent because birth parents have never been asked;
- there is no consent because birth parents have disappeared or are otherwise absent and therefore cannot be asked;
- there is no consent because birth parents have been asked but have refused to agree.

Information about a child may in some circumstances be disclosed without parental consent if the child's welfare requires it. However, there are greater difficulties in obtaining medical information about the parent without explicit consent.

12.16 The consultation responses indicated that agencies and their medical advisers had difficulties in obtaining medical information about children and their families, which hindered good planning. The respondents would welcome greater sharing of information, but recognised the need to respect parents' rights.

12.17 The Group concluded that the local authority or agency had a right to obtain all relevant information which might affect the development of a child in public care, including a child that is being adopted. **The Group recommends that there should be primary legislation to allow the release of medical information, with or without consent, where this is necessary to plan properly for children who cannot live with their birth parents.** This would be consistent with the General Medical Council Guidelines on Consent, which allow information to be released without consent when there is a specific statutory requirement.

12.18 In addition to legislation, guidance from the Scottish Executive, professional bodies and others should encourage all professionals to take active steps to share with each other appropriate information to ensure the best long-term outcome for a child requiring a permanent placement. Local authority and agency procedures should make clear that all possible steps should be taken to obtain the necessary consent to disclose information from birth parents, ensuring that birth parents are asked to consent and that the reasons for consent are explained to them.

## Access to medical information about birth families

12.19 There can be circumstances where an adult adopted person, or the adopters of a younger adopted person, need access to medical information about the birth family, for example if an inherited condition comes to light some years after the adoption. In most families, this information is available informally and easily accessed, but this is rarely possible after an adoption which tend to sever all social bonds with the birth family. The Group considered whether a system could be developed to gain access to this information after adoption, without unnecessarily compromising the confidentiality of either the adoption or the medical information about the birth family.

12.20 Consultation responses recognised this as an issue and were in principle in favour of a system of sharing such information. The increasing importance of genetic information was highlighted. The Group was in no doubt that this is a very important issue for adopted people, particularly adult adopted people who face difficulties in obtaining medical information about their birth families which might be crucial to their own health.

12.21 A full assessment of the future risks to a child's health is required at the time of adoption, and this may involve access to information to the birth family's medical history. However, there will still be circumstances in which adopters or adult adopted people would benefit from access to medical information about the wider birth family. **The Group does not recommend an automatic right of access to information about the wider family. The Group recommends that professionals should consider carefully the need to disclose medical information about wider birth families to adopted people and adopters taking into account all the circumstances.**

## Content of medical reports on prospective adopters

12.22 Medical reports are an essential part of the assessment process for prospective adopters, and prospective adopters consent to the disclosure of medical information to the local authority or agency. However, there is no clear guidance to general practitioners about how much information to include in their reports on prospective adopters. In practice it appears that on occasion information can be omitted from the written report and then disclosed orally if the doctor is contacted directly by a colleague. Consultation responses indicated that additional guidance on this area of practice would be welcome.

**12.23 The Group recommends that there should be clearer interagency guidance for general practitioners and consultants dealing with prospective adopters, possibly requiring doctors to disclose all information to adoption agencies.** Consent forms for signing by prospective adopters should provide for this.

## Disclosure of medical information about prospective adopters to birth parents

12.24 There is an increasing tendency in disputed proceedings for agents for birth parents to seek production of medical and other information about prospective adopters. Consultation responses indicated unease at this development, and some respondents believed that this information should not be released without the consent of the prospective adopters and certainly not if part of a "fishing" exercise on the part of those acting for the birth family.

12.25 The Group shares these concerns but accepted that the courts must allow access to this information when it is clearly shown to be relevant to the best interests of the child. **The Group recommends that those representing**

**birth parents should only make requests to see medical information about adopters where the information can be shown to be relevant.**

### **Meaning of “registered medical practitioner”**

12.26 There is an issue about the meaning of the phrase “registered medical practitioner” in current regulations.<sup>9</sup> Some local authorities and agencies are reluctant to use nurse practitioners because their understanding is that the phrase only refers to doctors.

**12.27 The Group recommends that regulations should make it clear that the term “registered medical practitioner” includes nurse practitioners as well as doctors.**

### **INFORMATION PROVIDED TO ADOPTERS AT PLACEMENT**

12.28 At present, prospective adopters must be provided with written information about the child with whom they are matched.<sup>10</sup> Medical information must be passed to the prospective adopters’ health board and family doctor.<sup>11</sup> While these provisions and the supporting guidance are wide-ranging, adopters have complained that they have not been given full information about a child, and the child’s medical prognosis and future needs. There have been examples of agencies failing to give all the information they had to adopters, so that they were not prepared for foreseeable deterioration in the child’s health. Prospective adopters have told us that they would not have accepted the placement if the full facts had been disclosed.

12.29 Consultees were asked if the regulations should be strengthened. Consultation responses indicated that there was strong support for the release of medical information where it was in the best interests of the child. However, there is a need for clearer guidance on this, so that it is clear who has responsibility for the release of such information.

**12.30 The Group agreed the existing regulations on disclosure of information to adopters were satisfactory, but recommends there should be further guidance to agencies to ensure that all relevant information about children whether received by them orally as well as in writing should be made known to prospective adopters.**

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<sup>9</sup> Adoption Agencies Regs, regs. 6(1), 8(b) and 9; LAC Regs, reg. 13(1).

<sup>10</sup> Adoption Agencies Regs, reg. 19(1).

<sup>11</sup> Adoption Agencies Regs, reg. 19(2)(c) and (d).

## **RECOMMENDATIONS OF CHAPTER 12 – ACCESS TO INFORMATION**

- 100. Only adopted people aged 16 or over should have an automatic right to information about their adoption. Adopted people under 16 should also have clear though limited rights to access to appropriate information from their adoption agency records. (12.9)**
- 101. There should be a support service for tracing and accessing information as a distinct part of the overall adoption support system. (12.10)**
- 102. Voluntary agencies should be allowed to provide those adoption support services that involve tracing and access to records. (12.11)**
- 103. There should be primary legislation to allow the release of medical information about birth parents, with or without consent, where this is necessary to plan properly for children who cannot live with their birth parents. However, there should not be a right of access to medical information about the wider family. Professionals should consider carefully the need to disclose such medical information to adopted people and adopters. (12.17 and 12.21)**
- 104. There should be clearer interagency guidance for general practitioners and consultants dealing with prospective adopters, possibly requiring doctors to disclose all information to adoption agencies. (12.23)**
- 105. Those representing birth parents should only make requests to see medical information about adopters where the information can be shown to be relevant. (12.25)**
- 106. Regulations should make it clear that the term “registered medical practitioner” includes nurse practitioners as well as doctors. (12.27)**
- 107. Existing regulations on disclosure of information about children to adopters are satisfactory, but there should be further guidance to agencies to ensure that all relevant information about children is passed on to prospective adopters, in written form as well as orally. (12.30)**





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# Annex A: Consultation with children and young people:

Having your say about  
adoption and fostering  
Final Report  
October 2004

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## Acknowledgements

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The development of the questionnaire was supported by a sub-group of people from the Adoption Policy Review Group. The Scottish Executive distributed the questionnaire. Thank you to all those who contributed.

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## EXECUTIVE SUMMARY CONSULTATION WITH CHILDREN AND YOUNG PEOPLE: HAVING YOUR SAY ABOUT ADOPTION AND FOSTERING

The Scottish Executive convened the Adoption Policy Review Group in 2001 to look at the role of adoption as a means of securing permanence for looked after children in Scotland. The Review has been carried out in two phases. Phase 1 concluded in June 2002 and considered practice issues relating to adoption. The focus of phase 2 has been to review the law in Scotland on fostering and adoption. As part of the second phase of the Review, Save the Children was commissioned by the Scottish Executive to consult with children and young people on their experiences of fostering and adoption.

### The consultation

One hundred and four young people took part in the consultation. All the young people completed a questionnaire about their experiences of foster care and adoption and 14 young people took part in follow-up interviews.

Sixty-five were female and 39 were male. The age range was from 7 years to 21 years. Sixty-six young people were under 16 years, 31 were over 16 and 7 young people did not give their age. Ten young people identified that they had a health condition or disability.

At the time of the consultation, 56 young people were living in foster care, 29 with adoptive parents, 9 in a residential school or unit, 6 in their own tenancy or supported lodgings, 3 with birth parents, one with friends and one with other family members.

One hundred of the young people who were consulted had lived in foster care. Thirty-five of the young people were adopted. Some young people had

experience of other arrangements such as living in residential care or independent living.

### Findings

**Living with a family:** All of the young people who were adopted and 76 of young people who had lived in foster care indicated that they liked living in a family situation and felt part of the family. The relationships between young people and their adoptive parents or foster carers were important. This provided a basis for dealing with everyday situations as well as long-term security.

**Living with other children / siblings:** Twenty-nine young people who were adopted and 66 young people who had lived in foster care said that they liked living with other children. Being involved in decisions about their siblings and about other children who they live with was important.

**Feeling safe:** All of the young people who were adopted and 82 of the young people who had lived in foster care identified that they felt safe. Living in a safe environment and the relationships they have with their adoptive or foster families enabled young people to feel safe.

**School and leisure time:** Thirty-three of the young people who were adopted and 71 who had lived in foster care identified that they could go to a school which they liked, and the majority said that they could do hobbies that they enjoyed. A number of young people who had lived in foster care identified the difficulty of having to move school or interruptions to the school day from having to attend meetings, for example, the children's panel.

**Having people to talk to:** Almost all young people who were adopted and 80 young people who had lived in foster

care identified that they had people who they can talk to. Having someone to speak to was important for many young people. This was often their main carer(s). Having a person who they felt they could trust and speak to outside of their adoptive or foster family was also important.

***Making decisions:*** Thirty-two young people who were adopted and 76 who had lived in foster care identified that they are involved in decisions about themselves. The majority of young people felt it was important to be involved in decisions about their lives.

***Keeping in touch with friends:*** All the young people who were adopted and 75 of the young people who had lived in foster care felt that they could keep in touch with their friends. Friendship was identified by a number of young people as important. For young people who had lived in foster care regular moves, having to attend meetings in school time, and having to get police checks to stay overnight with a friend were identified as problematic.

***Religion:*** Twenty-three young people who were adopted and 37 who had lived in foster care felt that they could practise their religion. Nine young people had had difficulties in going to their usual place of worship when living in foster care.

***Contact with birth families:*** Twenty-one young people who were adopted and 62 young people who had lived in foster care identified that they feel happy with the contact they had with their birth families. Contact with birth families was an important issue for young people throughout the consultation. The complex nature of this was evident in young people's accounts. The process of agreeing contact arrangements and their involvement in this was important to young people.

***The future:*** Thirty young people who were adopted and 72 young people who had lived in foster care felt positive about their future. Young people spoke about the importance of their relationships with their adoptive parents or their foster carers in providing this security. For young people in foster care this became more precarious as their placement came to an end. A number of young people identified continuing relationships with their carers after they had moved to live independently and the importance of this to them.

***Possessions that matter:*** Twenty-three young people who had lived in foster care had lost things that matter to them. Young people found this particularly difficult when they were from people who were important to them. They felt that there should be more support to hold on to family belongings, for example, birth certificates. A number of young people spoke of the importance of their pets to them and how difficult they had found it when they had been placed away from them.

***Restrictions because of bad behaviour:*** Several young people highlighted the importance of carers understanding the circumstances they had experienced and the implications that this had for their behaviour. They highlighted how important it is to be treated and understood as individuals.

***Relationships with social work:*** From young people's accounts it was clear that social work and relationships with social workers play an important part in shaping young people's experiences. Having to get permission from people other than their current carers for certain activities was highlighted by young people who had lived in foster care throughout the consultation. This was particularly the case for staying over with friends but also included permission to get hair cut and do certain sports. Delays

in getting this permission made this even more problematic. A number of young people felt that their foster carers were best placed to make these decisions. Relationships with social workers were of importance to young people and vital in ensuring that they were involved in decisions about their lives.

### On adoption

**Matching:** The importance of providing young people with a supportive and stable environment within which they can explore their identity was evident in young people's accounts.

**Consent for adoption:** Young people were in agreement about the importance of being involved in any decisions about their adoption.

**Being adopted:** Many young people had been adopted in their early years and could not recall the processes which had taken place.

**Birth families:** Young people who were adopted were asked what information they thought was important to know about their birth families. Knowledge relating to their birth families was important to the majority of young people. A number of young people identified the importance of others in providing this information and in helping them to make sense of it.

Young people were asked about contact with their birth families. Twenty-four young people thought that they should be able to contact their birth family. Eighteen thought their birth family should be able to contact them. Young people were asked who should make the first contact approach. Nineteen said the birth family members, but only if the young person has said yes. Fourteen said the young person should make first contact and 11 young people said the birth family member. Seventeen young

people, around half of the young people who were adopted, knew how to make contact with their birth family if they wanted to or when they were able to.

**Support:** Young people highlighted the importance of effective support. For many young people their adoptive parents were an important source of support. Other people known to the young person were also identified as important. Support needs identified by young people were often very individual and required specific knowledge about their circumstances. As such, information sources such as magazines and the internet were seen as less helpful.

**On foster care and adoption:** The majority of young people were clear that there were differences between foster care and adoption. A number had clearly reflected on their own experiences of this in their responses. The key factors which young people highlighted were relationships with adoptive or foster families, with birth families and with outside agencies and how these relate to each other.

**Decisions about where to live:** The majority of young people felt that it is important that they are involved in decisions about where they will live. They had experienced this to greater and lesser degrees. Young people identified a number of people who they had discussed options with, and often when they had been living in foster care. As such, foster carers had an important role, as did social workers.

**Children's panel and court:** Seventy-eight of the young people had attended children's panels and 22 had attended court. The reasons for their attendance were not explored in the consultation. Young people did however provide accounts of their experiences and whether they had felt that they had been

listened to. The importance of being involved in decisions was highlighted in a number of areas of the consultation. The complexity of enabling young people to participate in decisions about their lives was also highlighted in young people's accounts.

**What young people thought about the consultation:** Eleven young people provided comments about the consultation process. Five young people commented about how it is important to seek the views and experiences of young people with direct experience of foster care and adoption and thought that the tools had been effective in doing this.

## SECTION 1: INTRODUCTION

The Scottish Executive convened the Adoption Policy Review Group in 2001 to look at the role of adoption as a means of securing permanence for looked after children in Scotland. The Review has been carried out in two phases. Phase 1 concluded in June 2002 and considered practice issues relating to adoption. The focus of phase 2 has been to review the law in Scotland on fostering and adoption. As part of the second phase of the Review, Save the Children was commissioned by the Scottish Executive to consult with children and young people on their experiences of fostering and adoption.

**Who Cares?** Scotland has also carried out work to consult young people. A report of this is included in the Adoption Policy Review Phase 1 Report. A face to face survey was carried out to explore whether young people's views had been sought, when being looked after, about the possibility of adoption. It also provides anecdotal information about young children's experiences of adoption.

## SECTION 2: CONSULTATION APPROACH

Save the Children, together with a sub-group of the Adoption Policy Review Group, developed a questionnaire to consult with young people on their experiences of adoption and fostering. The sub-group identified issues relevant to the current Adoption Policy Review to be included in the questionnaire.

The aim of the questionnaire was to include these issues and to ensure that young people were given the opportunity to express their opinion about the different aspects of their experiences as young people who were adopted or who had lived in foster care. Eight young people were involved in the development of the questionnaire. They were asked about the appropriateness and clarity of the questions. Young people also gave their opinions on the design of the questionnaire.

It was recognised that a questionnaire would limit the opportunities to explore the complexities of young people's experiences and the context of their responses. To address this, the questionnaire was supplemented with follow-up interviews.

### 2.1 Getting in touch with young people

The questionnaire was distributed by the Scottish Executive to contacts in each local authority area and to a range of fostering and adoption agencies. A covering letter was sent to provide further information about the consultation and to ask the contacts for their support. They were asked to arrange to meet with young people in their area to discuss the consultation and the opportunities to contribute. Young people could choose to complete the questionnaire independently, to complete it with support from a relevant person, or to meet with a worker from Save the Children.

## 2.2 The young people who were consulted

One hundred and four questionnaires were completed and returned to Save the Children.<sup>1</sup> Fifty of the questionnaires were completed with the support of a worker or other person. Fourteen young people took part in follow up interviews as well as completing a questionnaire.

More young women took part than young men. Of the total participants, 65 were female and 39 were male. The age range was from 7 years to 21 years. Sixty-six young people were under 16 years, 31 were over 16. Ten young people identified that they had a health condition or disability. Of those who took part in the follow-up interviews, 10 were female and 4 were male. The youngest was 7 and the oldest was 21.

Fifty-six young people were living in foster care, 29 with adoptive parents, 9 in a residential school or unit, 6 in their own tenancy or supported lodgings, 3 with birth parents, one with friends and one with other family members.

One hundred of the young people stated that they had experience of foster care. This was all but 4 of the young people who were consulted. All the young people who took part in follow up interviews had lived in foster care. Four were currently living in foster care and 3 had been living in foster care and were now living independently. Young people had been in one or more than one placement and for varying lengths of time from a few days to a number of years. Information was not routinely collected on this in the questionnaire. A number of young people did however indicate in their responses that they had been in a number of placements.

Thirty-five young people stated that they were adopted. Seven young people who took part in follow-up interviews were adopted and currently living with their adoptive parents. One young person was adopted and currently living in foster care.

## SECTION 3: FINDINGS

This report provides an overview of young people's experiences and opinions based on their responses to structured questions and the issues which young people independently highlighted. It is probable that, amongst other factors, the age at which young people were adopted or lived in foster care was influential in their subsequent experiences. As such, further useful insights could be gained from an analysis of young people's individual experiences.

### 3.1 On adoption and foster care

This section explores young people's experience of adoption and foster care as it impacts on their relationships and the different settings in which they live.

#### ***Living with a family***

All of the young people who were adopted and 76 of young people who had lived in foster care indicated that they liked living in a family situation. Young people spoke about the experiences, which had enabled them to feel part of their adoptive or foster families. Support was an important factor for a number of young people. As one boy describes:

*... they are a good support to me ...and we have a lot of fun... when I have homework and stuff my Mum and Dad are just so helpful. (Boy, 10 years)*

A number of young people commented on feeling loved and how this gave them a sense of security with their family. One young man in long-term foster care

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<sup>1</sup> Every young person did not complete all the questions in each section relevant to their circumstances.

described how his carers had stuck by him despite his behaviour being difficult. This had shaped his positive relationship with his carers.

A number of young people highlighted that, although in some placements they had felt cared for, this differed from the experience of really bonding with a carer or carers. As one young woman describes:

*I found something special with (my carer) compared to the other foster carers ...*  
(Young woman, 21 years)

This had been a short-term placement, which the young woman had left when she was 12 years old. She had then gone on to several other placements where she had always found it difficult to settle. She is still in contact with the foster carer whom she described as having bonded with the most and spoke about their relationship:

*...we still have our fall outs. But we will still speak to each other again ... We have our ups and downs, but she is still there for me ...I love her to bits.* (Young woman, 21 years)

Being able to do activities with their families was important. One boy spoke about how he got support from his carers when he needed it, had great fun with them and was able to do a range of activities which he enjoyed such as camping and going to McDonalds.

One young person who was adopted had recently spent some time in short-term foster care. She had found this a positive experience. Her relationships with her adoptive family however had been the defining factor in her decision to return home:

*I missed people, my Mum and my family.*  
(Young woman, 14 years)

A number of young people spoke of foster placements where they had not felt part of the family or where the experience had not been so positive:

*One night I was breaking my heart and I wanted my Mum. (The foster carer) came in and turned the bedroom light off and told me to shut up, I was not getting my Mum... I was just excluded from everything.* (Young woman, 17 years)

A number of young people who had lived in foster care felt it was difficult to truly feel part of the family:

*When you are fostered you never feel 100% part of that family, there are always things that make you different, that set you apart from them* (Young woman, 17 years)

One young person had been adopted but the adoption broke down after 3 years. As a result of his experience he felt that foster care was better for him:

*...I lived with adoptive parents for 3 years then they changed their mind. Thank goodness for my foster carers, they love me.* (Boy, 11 years)

Two young people highlighted their desire to be at home with their birth family and as a consequence disliking being in foster care.

Three young people referred to people's motives to provide foster care and thought it imperative that this is guided by concern for the young person:

*My first placement was terrible ... my foster parents fostered because it made them look good in the eyes of the community. My second placement was great as those foster parents fostered out of love.* (Young woman, 21 years)

For the majority of young people living with a family was seen as a positive

experience. The relationships between young people and their adoptive parents or foster carers were important. This provided a basis for dealing with everyday situations as well as long-term security.

### ***Living with other children / siblings***

Twenty-nine young people who were adopted and 66 young people who had lived in foster care said that they like living with other children. One girl, who is adopted, spoke about why it was important to her to live with other children:

*... then you learn to be friendly, because otherwise, life would be quiet. Mum and Dad would be like, 'Hi', and you would go off and watch TV* (Girl, 11 years)

Four of the young people who were interviewed had been adopted with birth siblings and thought this was important. Two of the young people had other siblings who lived with their birth mother. They felt it was important to have knowledge of this and had recently made moves to find out more about them.

Two young people had been adopted separately from their siblings. One young woman described how she found this difficult:

*(my) brother and sister are together ... they should have taken me as well ...they should have thought about how I would feel when I was older* (Young woman, 14 years)

One young person in foster care spoke about the lonely experience she felt it could be if a child is not with his or her siblings:

*... in foster care, if you are not with your brothers and sisters you are on your own. Unless you are lucky, like I was with (one particular carer), they do not*

*really know you and you do not know them. They are just giving you a roof over your head and feeding you.* (Young woman, 21 years)

Living with other children became problematic however when it meant that space and privacy within the home was limited:

*Children should not be crammed into the house. There were 8 of us living in a 4 bedroom house. It was too small. No privacy, or time to think.* (Young woman, 15 years)

This was particularly the case for children living in foster care. Two young people referred to the importance of being involved in decisions about other young people coming to the same foster family:

*I think we should have a say in whether other young people come to stay in your foster placement.* (Girl, 11 years)

Two young people identified that because of their personal circumstances living without other children was better.

The majority of young people identified that they like living with other children. Being involved in decisions about their siblings and about other children who they live with was important.

### ***Feeling safe***

All of the young people who were adopted and 82 of the young people who had lived in foster care identified that they felt safe.

Two young girls highlighted the measures their adoptive parents took to ensure an environment where they felt safe. This related to every day things such as providing healthy foods, ensuring that they have their seatbelts on in the car and making sure that their bath water is not too deep.

Other young people also spoke about safety as an important feature of their family life. This was often referred to in relation to having people around them who they knew would keep them safe:

*Being here, and my Mum and Dad and stuff and friends and people like that (helps me feel safe) (Young woman, 14 years)*

Similarly, for one young woman safety was ensured by having people around her whom she knew would be there for her. She differentiated these people from others who had not:

*I feel more safe when I am with my (adoptive) Mum (than when in foster care)  
Right - and why do you think that is?  
Well, because she is my Mum, she is the only person who has been there for me. (Young woman, aged 14 years)*

One young woman living in foster care identified that living with other children who are also in foster care made her feel unsafe.

Safety was an important feature for young people. This was enabled through the environment where they live and the relationships they have with their adoptive or foster families.

### **School and leisure time**

Thirty-three of the young people who were adopted and 71 who had lived in foster care identified that they could go to a school, which they liked, and the majority said that they could do hobbies that they enjoyed.

Young people who had lived in foster care were asked an additional question about if they had ever had difficulties in relation to a number of areas of their lives, for example, going to school.

Fifteen young people identified that they had had difficulty with going to their school. A number of young people spoke about how they did not like their school day to be interrupted with meetings as they enjoyed school. One young woman spoke about the negative impact that interruptions had had for her schooling. This had resulted through having to move placements and time lost from attending meetings such as the children's panel. For this young woman she felt that there had been an impact on her learning and on her friendships. For another young woman going to a residential unit rather than foster care would have meant moving school. It was important to her that this did not happen. This was an important factor in her decision to stay in foster care.

Fourteen young people identified difficulties in taking part in their usual groups and hobbies. One young woman had had to move away from her home area when she moved into foster care. This meant that she had left a number of groups that she attended. She spoke about how she had been in a position to take up the same hobbies again later when she moved back to her home area. By this time her peers had progressed through the different stages of the organisation. She returned briefly but felt out of place and decided against returning full time.

Twelve young people identified difficulties in doing their usual pastimes, like watching television, using computers and listening to music.

The majority of young people identified that they could go to a school which they liked and do hobbies which they enjoyed. Young people did however identify times when this had been problematic. This was particularly the case when they had had to move foster placements or attend meetings in the school day.

### **Having people to talk to**

Almost all young people who were adopted and 80 young people who had lived in foster care identified that they had people who they can talk to.

Young people identified why this is important and the factors which contribute to someone being a good person to speak to. One young woman, who is adopted, highlighted the importance of trust and having someone to help to understand about being adopted:

*... it is really important to have people to talk to. (it is important) to have someone to break it up (information about her birth family) and to help you understand. (Young woman, 14 years)*

For one young person, being in a short term foster care had given her the opportunity to talk to other people which she had found valuable:

*... just somebody else rather than your Mum to talk about stuff. I dinnae find it hard to talk to my Mum about stuff, I just like talking to other people. (Young woman, 14 years)*

One young woman spoke about the importance of having a person other than her foster carer:

*(Children's Rights Officer) has been really, really supportive, she has worked with me since 16 ... I have got my foster Mum, but we are really close and sometimes you need someone else to talk to. (Young woman, 21 years)*

A number of young people also expressed the importance of carers understanding the often difficult circumstances which they had experienced.

Having someone to speak to was important to young people. For a

number of young people this was often their main carer. Having a person who they felt they could trust and speak to outside of their adoptive or foster family was also important.

### **Making decisions**

Thirty-two young people who were adopted and 76 young people who had lived in foster care identified that they are involved in decisions about themselves.

One young man who lived in long-term foster care felt strongly that young people should be involved in deciding whether they should be adopted. He highlighted that it is a complex decision and that it has implications for later life if they are not involved or fully understanding of the situation:

*I really think that children should have some sort of say. Even if they are quite young ... Let them have ... some kind of responsibility for the rest of their lives... you are... taking away from their lives if they do not want to be adopted and they realise that later in their lives. (Young man, 17 years)*

Young people also provided information about their involvement in decisions about where they live. Further information is provided in section 3.4.

### **Keeping in touch with friends**

Keeping in touch with friends was important to young people. A number of young people identified the importance of friendships. All of the young people who were adopted and many of the young people who had lived in foster care felt that they could keep in touch with their friends. In an additional question asked about foster care, 34 young people identified that they had had difficulties at times in keeping in touch with friends.

For one young woman living in long-term foster care being able to do similar activities as her friends was important:

*I like living here because I can do all the things that I really want to do like go out with my friends, do most of the things that my friends do. (Young woman, 17 years)*

Maintaining friendships was often difficult, particularly for those living in foster care. One young person highlighted the difficulty of not having telephone numbers to keep in touch with friends. This situation is more problematic when not living locally to friends or seeing them on a daily basis at school:

*I do not have some of my friends' numbers and so can not keep in touch. (Female, 9 years)*

A number of young people spoke about the importance of having friends who could empathise with their own situation.

A contentious and frequently highlighted issue throughout the consultation was getting permission to stay overnight with friends whilst in foster care. Fifty-three young people highlighted this in their questionnaire responses. Young people described about how they found it upsetting, difficult, restrictive and stigmatising. A number of young people identified the impact which it had on their friendships and their childhood experience:

*I would just be going about with my friends and they would ask me stay over. I would go home and ask and it would be like, 'Well, not really, has that person had a police check?' ...It is really hard when you are wee. It kind of takes away from your childhood. (Young man, 17 years)*

One young woman talked about how she would often avoid the situation rather than have to ask that police checks be

undertaken. She described how she found it embarrassing to have to ask friends to do this. Another young woman highlighted a time when police checks had been carried out for the family of a friend. In the time this had taken her friendships had changed and she no longer wanted to stay over with this same friend.

Three young people highlighted how they thought that foster carers should be able to decide if young people are able to stay at a friend's house overnight:

*If the carers know and trust them ... then I think they should be allowed to let them (the young person in their care) stay (overnight at a friend's house) ... (Young woman, 17 years)*

Friendship was identified by a number of young people as important. The majority of young people were able to keep in touch with their friends. Feeling different from friends was difficult for young people. Having to get police checks to stay overnight with a friend was identified as problematic.

### **Religion**

Twenty-three young people who were adopted and 37 who had lived in foster care felt that they could practise their religion. Sixty young people did not answer this question, with some making later comments that this was because they did not have a religion or it was not important to them. Nine young people had had difficulties in going to their usual place of worship when living in foster care.

### **Contact with birth families**

Twenty-one young people who were adopted and 62 young people who had lived in foster care identified that they feel happy with the contact they had with their birth families. Responding to an

additional question, 22 young people identified that they were not happy with the contact they had with their birth families when living in foster care. The complex nature of contact was highlighted in young people's responses.

Thirty-one young people later identified issues about contact in their questionnaire responses. They spoke about disliking going on visits to see birth parents, wanting more or not wanting contact with birth parents. This young person who was very positive about her experience of adoption commented:

*I am very happy with my family and I have good contact with all of my birth family 4 times a year. (Young woman, 14 years)*

Another however had stopped contact with her birth parents because she felt unsafe and felt that it complicated her circumstances:

*I do not go to see my birth parents I stopped it because I was scared and I thought it complicated things because I only want to be with my adoptive parents now. (Young woman, 12 years)*

A number of young people spoke about the difficulty of not having contact with adopted siblings. One young woman felt that her foster care arrangements had allowed her to maintain good contact with her birth family including two siblings in foster care. She found her contact with a brother who is adopted more problematic:

*... when my brother was adopted it was agreed that we were to see him twice a year. (Now)... we are only getting to see him once a year and this year we have not seen him at all. (Young woman, 17 years)*

A number of young people felt that they should be involved in decisions about

their brothers and sisters and that, when appropriate, more efforts should be made to place larger families of children together.

They spoke about some of the difficulties of contact such as making an effort to maintain it but continually being put down by a birth parent, feeling pressure to see birth parents, and about birth parents changing or cancelling contact. This young woman spoke of the pressure young people can feel to have contact with their birth families:

*Please accept that if young people do not want contact with their birth parents then they do not have to! We should not be put under pressure to do this. (Young woman, 13 years)*

Two young people commented about issues relating to growing up as a young person who has been adopted. They expressed feeling frustrated and confused and wondering what it would have been like to live with their birth families.

One young man, in long term foster care, described how his arrangements had worked well:

*I have been really lucky. The family who I have gone to live with have been excellent ... There has not really been any issue about not being adopted. I mean I have got two families now. It has really worked in my advantage in that I have two sets of parents and things, I really feel that it has worked well for me. (Young man, 17 years)*

For him, being able to negotiate his contact on his terms had been important. He felt positive about the contact he has with his birth family and the process to achieve this.

Another young woman who is adopted spoke about how she had had a sense of enquiry about her birth family when she

was younger. As she has grown older though this had lessened as she has related increasingly to her life with her adoptive family:

*When I was younger I had issues with where I came from and where I belonged. I am completely happy with my situation now though. My adoptive parents are my parents: they are the ones who have been with me through the ups and downs. (Young woman, 17 years)*

Another young woman, who is adopted, found it difficult that she had so little knowledge of her birth family. Her siblings, who were also adopted, all had life story books and she found it difficult that she was the only one of her siblings who did not. Three other young people also referred to the importance of their life story books. One young person who had been in a high number of foster placements had three books of information which one of her foster carers, while in her early teens, had put together for her and which she treasured.

Contact with birth families was an important issue for young people throughout the consultation. The complex nature of this was evident in young people's accounts. How contact arrangements were come by and their involvement in this was important to young people.

### **The future**

Thirty young people who were adopted and 72 of the young people who had lived in foster care felt positive about their future. A number of young people did not answer this question. A number of the young people who took part in the follow-up interviews often found this a difficult question to answer.

For many young people, feeling happy about their future was dependent on

having a secure relationship with their adoptive parents or current carers. A number of young people spoke about the continuing importance of these relationships once they were living independently.

A number highlighted the difficulty of moving from foster placements before they felt ready to and the implications that this may have for them:

*I am just going into college ... I am thinking, 'Oh no', I am wanting them (the funders) to see me through until I am finished college and I can make myself money ... rather than kick me out just now and I am struggling with college and then it will be a total mess (Young woman, 17 years)*

One young man who is 15 years old and currently living in foster care spoke about his concerns about planning for independent living in the near future:

*I do not know much about my future ... I am quite scared about all this talk of independent living as I am only 15 (Young man, 15 years)*

A number of young people spoke about having to move foster placements regularly and the implications that this had had on their security for the future.

Many young people felt happy about their future. This was often based on having secure relationships with their adoptive parents or their foster carers. For young people in foster care this became more precarious as their placement came to an end. A number of young people identified the importance of continuing relationships with their adoptive parents or foster carers once they were living independently.

### **Possessions that matter**

Twenty-three young people who had lived in foster care identified that they had lost things that matter to them. Twenty-two had had problems with not having things with them whilst in foster care, like toys or pets. Twenty-one also commented on having difficulty with getting pocket money.

One young woman living in foster care spoke about how she had constantly lost possessions due to moving so regularly:

*I lost a lot of stuff in foster care, which was not great ... That is why everything that I have got in my own house has so much value and means something to me, because I had nothing when I was little...* (Young woman, 21 years)

Young people commented on losing possessions, which had been bought by people important to them. They also felt that there should be more support to hold on to family belongings, for example, birth certificates. A number of young people spoke of the importance of their pets to them and how difficult they had found it when they had been placed away from them.

### **Restrictions because of bad behaviour**

Five young people commented in questionnaire responses about restrictions which had been placed on them because of their behaviour. They identified getting grounded, not getting pocket money when grounded, and not getting things when they misbehaved. One young person commented on getting smacked.

One young man spoke about his behaviour when he first went into foster care:

*... I was just an angry wee boy and I would take it out on people ... Like in school the slightest thing would set me*

*off ... I would just kick off at a teacher or something ... I do not know where all that rage came from.* (Young man, 17 years)

This had resulted in him not going in to foster care placements or in them being shorter than planned. He spoke about opportunities he was given to improve his behaviour but how for a young person in his circumstances this had meant very little:

*I was given various chances to try and improve things, but I did not really take that seriously. These were people that were (just) coming into my life.* (Young man, 17 years)

Several young people highlighted the importance of carers understanding the circumstances they had experienced and the implications that this had for their behaviour. They highlighted how important it is to be treated and understood as individuals.

### **Relationships with social work**

Five young people living in foster care commented on their relationships with social workers. This included not having seen their social worker for a number of months, feeling that they had not got help and that they had not been listened to, and concerns about contact with their birth families. Two young girls who were adopted highlighted the importance of their social worker and saw her as an important person in their lives.

One young person felt that often he had contact with social workers on a routine basis, but it was not as supportive as it could be as it was not always when he really felt he needed it. Another young person referred to the need for training on issues faced by young people in care and of the importance of treating them as individuals.

A number of young people felt that input from social workers was often driven by fulfilling obligations for statutory meetings rather than by their individual needs:

*I do not particularly like having reviews ... I just feel that the social work must have better things to do. I do not know if they have to do them by law until I'm 18 or something... I do not feel like I am in a placement, I feel like I am in a family and have done for many years... I do not really feel there is any need for social work involvement, especially when it is not needed for anything.* (Young man, 17 years)

The same young man, in long-term foster care, spoke about his relationship with his social worker. He felt that issues he raised were often made into bigger issues than they were to him. He identified a number of alternative people in his social network who played an important part in dealing with any difficulties:

*My social worker ...I feel that if I say anything he will blow it out of proportion. That is okay though, I have got other people I can speak to, I have got the family and stuff.* (Young man, 17 years)

From young people's accounts it was clear that social work and relationships with social workers play an important part in shaping young people's experiences. Having to get permission from people other than their current carers for certain activities was highlighted by young people who had lived in foster care throughout the consultation and was seen as problematic. This was particularly the case for staying over with friends, as previously discussed, but also included permission to get hair cut and do certain sports. Delays in getting this permission made this even more difficult. A number of young people felt that their foster carers were best placed to make these decisions. Relationships were of

importance to young people and vital in ensuring that they were involved in decisions about their lives.

### 3.2 On adoption

This section reports on issues relating to adoption and the adoption process on which the Adoption Policy Review sub-group were keen to seek young people's opinions. Young people who have been adopted were asked to complete questions in this section of the questionnaire. A number of young people living in foster care also shared their opinions.

#### **Matching**

Young people were asked what they thought was important when matching children with adoptive parents. Twenty-nine young people said that they think it is important to make sure that brothers and sisters are kept together. Young people's involvement in decisions relating to their siblings was a recurrent issue throughout the consultation.

Twenty-nine said that they think it is important adoptive parents speak the same first language. One young woman identified this as a pre-requisite to feeling part of the family.

Fifteen young people said that they think it is important that adoptive parents are married, whilst 28 said that they think it is okay for unmarried couples to adopt children. This was reflected in one young woman's response:

*Any couples would be good adoptive parents as long as they can give the child a secure home and ...surroundings.* (Young woman, 13 years)

For one young person who is adopted having parents in a stable relationship was important. She felt that this was more likely if they were married:

*... I would not want to go to an unmarried couple ... it is going to be harder if they split up than if you have always been with the one person. (Young woman, 14 years)*

Twenty-four young people said that they think it is okay for single people to adopt children. One young woman felt that having access to sufficient support was the most important pre-requisite for people who adopt:

*... single people should be allowed to adopt as long as they have got enough ... support ... (Young woman, 17 years)*

Fifteen said that they think it is okay for same-sex couples to adopt children, 13 thought it was not okay, and 7 young people chose the response 'do not know'. A number of young people reflected on the possibility of young people experiencing discrimination and the impact of this:

*For same sex, it would be wrong to place a child who ... is self conscious. Bullying would also have to be thought of. (Young woman, 17 years)*

Nine young people said that they think it is important that adoptive parents have other children. In relation to this, one young woman highlighted:

*The adoptive parents' children need to be able to accept the adopted child. (Young woman, 17 years)*

Thirteen young people said it was important that they have the same religion. Nine said that they think it is important that adoptive parents are from the same ethnic group. For one young woman who was adopted taking care to think about issues which have implications for understanding her identity was important:

*I do not think it should make a difference (being from a different ethnic group), but*

*I think it would ... I think I would be thinking more about my identity if I was than I am now. (Young woman, 14 years)*

Two young girls highlighted that for them it is important to be able to learn about their backgrounds. They thought that this would be difficult if you were adopted into a family with a different religion from their birth family.

One young man highlighted:

*It should not be too restricted. It does not have to be the archetypal family. The important things are consistency and them sticking by you ... (Young man, 17 years)*

The importance of providing young people with a supportive and stable environment within which they can explore their identity was evident in young people's accounts. When young people verbalised their responses it appeared that they had identified with options that they felt were more likely to secure this.

### **Consent for adoption**

The Adoption Policy Review Group sub-group, was keen to gauge young people's opinions on the current age of consent for adoption. Young people were asked how old young people should be to give consent to be adopted. Thirteen thought it should be younger than the current age of consent which is 12 or over, 11 young people thought it should stay as it is, and 2 thought it should be older than 12.

In responding to this question a number of young people reflected on their own experience of developing an understanding of adoption. They highlighted the dissonance between being told that they were adopted and actually understanding what this meant in the context of their own lives:

*I did not actually know what adopted was. That sounds really stupid, but I had*

*just been told that my Mum and Dad could not look after me, and so I had had to come and live with these people.*  
(Young woman, age 14 years)

A number of young people felt that 12 is a reasonable age to give consent, but this did not deflect from the importance of ensuring that younger people fully understood the implications of adoption and this was taken into consideration in the decision.

One young man spoke about when he had found out that he had been freed for adoption:

*I only found out a few years ago ... I was put up for adoption. That was my legal status. I was not really too pleased ... I did not really get any choice ...* (Young man, 17 years)

Young people were in agreement about the importance of being involved in any decisions about their adoption. Young people who were adopted outlined the difficulties of understanding about this.

### ***Being adopted***

Young people were asked what they thought about the amount of time which was taken for their adoption to take place. Twelve young people thought the time taken had been too long. Ten young people thought it was just right. No young people thought it was not long enough. A number of young people were unable to comment on this because it had happened when they were very young.

Young people were asked about the amount of information they were given about their adoption. Seventeen thought they had been given enough information, 12 did not remember and 4 thought that they had not been given enough. No young people thought they were given more information than they had wanted. Six young people commented that they

would have liked more information. This related mainly to more information about their birth families such as their age, appearance, personality, career, and about their extended families.

One young person commented that because he had been young at the time of his adoption he felt he had not been provided with information. One young person who had experienced an adoption breaking down posed the question:

*What happens if they do not want me just like my birth family?* (Boy, 11 years)

Many young people could not remember the time that had been taken for their adoption or the implications that this might have had. A small number however did reflect on information that they would have found useful since their adoption.

### ***Information about birth families***

Young people who were adopted were asked what information they thought was important to know about their birth families. Thirty thought it was important to know the medical history of their birth family. Young people identified the importance of this for prevention and understanding about conditions that affected them:

*...my eyesight is not very good and my Mum and Dad did not know but then I got a medical ... from my doctor's file and it said that most of my family had eye problems ... stuff like that, that is useful.* (Young woman, 14 years)

Twenty-nine young people thought it was important to know who other family members are, and 23 what other family members look like.

Six young people made further comments about information they would find useful. For example, why their birth family could not look after them, how

their birth family are getting on, if they are nice, where their siblings live, where other family live, and about where they had lived, where they were born, their weight and the time they were born.

Young people were asked about contact with their birth families. Twenty-four young people thought that they should be able to contact their birth family. Eighteen thought their birth family should be able to contact them.

Young people were asked who should make the first contact approach. Nineteen said the birth family members, but only if the young person has said yes. Fourteen said the young person should make first contact. Eleven young people said the birth family member.

Several young people identified that it was important that their birth families made the first contact as they would want to know that their birth families wanted to have contact:

*I think they should do it, it should not be the younger one that has to. I would like to, but I would like to think that my Mum would like to.* (Young woman, 14 years)

One young woman felt it was important to have a mechanism where it could be identified that each party had given their consent to contact being made:

*... it would be weird making the first approach ... it would also be strange someone from my birth family making contact with me. I think the last one (a question about who should make the first contact) is both ways round, birth family or the young person, but only if the birth family and the young person have said it is okay.* (Young woman, 14 years)

Two girls identified that they like to find out what is happening with their birth family. They were keen to know about their siblings and emphasised the fact

that they were their family and this was why it was important to them. They felt strongly that should they want to make contact with birth family members, they would want to do it with the support of their adoptive parents and with the knowledge that their birth family also wanted to be in contact.

One young person identified the importance for young people to know about their adoption from a young age. Being able to find out about their birth families was very important for a number of young people:

*... I only started being interested in who I was 4 years ago when I got this letter from social work about all the reasons why and everything like that and then I started getting interested in my identity...* (Young woman, 14 years)

One boy spoke about the importance of being provided with information about who is in his birth family as he himself has no memory of them apart from his birth parents.

Seventeen young people, around half of the young people who were adopted, knew how to make contact with their birth family if they wanted to or when they were able to.

Knowledge relating to their birth families was important to the majority of young people. A number of young people identified the importance of others in providing this information and in helping them to make sense of it. In line with previous discussion on contact it was important to young people that there is an informed approach to first contact with birth family members.

### **Support**

The majority of young people saw support when being adopted as important. For many their responses

were based on their reflections on this since being adopted. Being able to speak to someone they trust and knowing that their views are being listened to were identified as the two most important supports by young people when being adopted. Twenty-seven young people thought it was useful to be able to speak to someone you trust and 26 young people identified knowing that their views are being listened to as important.

Twenty-five young people identified being kept up to date with what is happening as important, 23 identified getting support afterwards, 17 young people thought knowing that their families were okay was important. Only 13 young people thought it was useful to have regular meetings. Three young people provided further comments. These were: knowing that they would stay clean, emphasising that support is important, knowing what will happen about visiting other family members.

Young people were asked where they would go to for help or information about being adopted. The majority of young people opted for people who they knew. Thirty-two said that they would go to their adoptive parents, 29 to their social worker, 12 to other family, 8 to friends and 5 to another person. Young people were less likely to use media sources or phone lines. Nine however did say they might use the internet, 6 saw magazines as a source of information, 4 television, 4 phone lines and 3 radio.

One young woman noted that for many years her parents had had a support worker. She highlighted that young people themselves need support independent of this as they grow older. She had since had regular meetings with an adoption counsellor which she had found useful in helping her to make sense of information about her birth family and her current circumstances

which she had previously found difficult to understand.

For two girls, their social worker was a good person to speak to as were their adoptive parents and their adoptive grandparents. They had seen information about adoption on television and taken note of it but did not see this as a direct source of support. They had found attending a summer support group useful. They outlined it as having provided a range of opportunities to use arts and crafts, an opportunity to meet other young people who were adopted and a chance to discuss issues of concern to them. The same young girls commented that they did not generally speak about being adopted at school and hence would not see this as a good place to discuss issues relating to being adopted.

One young woman who was adopted, but was currently living in foster care, highlighted that she had a number of workers but at this point in time found none of them helpful. For her the most helpful form of support was other young people who had been through similar experiences. She had found being in a residential home had let her share her experiences with other young people.

One young woman identified that young people being able to spend time with their parents when first adopted is vital:

*... the first day I came to stay here my Mum was not here for the first two days, because she had to work ... there was just really my Dad, and he has to work at home ... And so for the first couple of days, I was just kind of on my own. It felt scary and I felt really lonely. (Young woman, 14 years)*

Young people highlighted the importance of effective support for young people who are adopted. For many young people their adoptive parents were an

important source of support. Other people known to the young person were also identified as important. Support needs identified by young people were often very individual and required specific knowledge about their circumstances. As such, information sources such as magazines and the internet were seen as less helpful.

### 3.3 On foster care and adoption

Young people were asked if they thought there was a difference between foster care and adoption. Responses to this question highlighted the differences between the two arrangements and their impact on the different spheres of young people's lives.

Seventy-one young people thought that there was a difference between foster care and adoption, and 19 young people did not. Many young people thought that adoption provided more stability, security and was permanent. Young people felt that these factors were important in enabling close family relationships:

*When adopted part of a family - somebody loves you, foster care involves moving about a lot.* (Girl, 11 years, adopted)

Relationships with birth families were viewed to be crucially different between foster care and adoption:

*When you're adopted you have to stay with the family ... in foster care you sometimes get to go home.* (Boy, 10 years, foster care)

The involvement of social work was also seen to be greater when in foster care than when adopted. This was viewed to have implications for the relationships which young people could develop with their adoptive or foster family:

*Meetings (panels, reviews) in adoption there would not be any. Be able to become a closer family without the hassle and interference of meetings and social work.* (Young woman, 15 years, foster care)

For one young person adoption was seen as a choice, being in care was not:

*... being adopted is part of your choice, being put in care is not.* (Young woman, 16 years, foster care)

Two young women had recently had a lot of difficulties and had spent time away from their adoptive families in alternative care placements. For both however, their adoptive families were very important and they saw a number of benefits to adoption:

*... obviously adoption is permanent, but it is kind of in a way, you know that it is going to be permanent. But in foster care ... you do not really fit in as much ... you know that you are not going to stay there forever, there could be other people there, there could be people coming in and out. It's not so stable.* (Young woman, 14 years)

One young woman living in long-term foster care saw it as more restrictive than being adopted. She was clear however that long-term foster care had been the best choice for her. This was related to her good relationships with her foster family and her birth family.

The majority of young people were clear that there were differences between foster care and adoption. The key factors which young people highlighted were their relationships with adoptive or foster families, with birth families and with outside agencies and how these relate to each other.

### 3.4 Decisions about where to live

All the young people who were consulted had had to live away from their birth families for shorter or longer periods or permanently. The Adoption Policy Review Group sub-group was keen to find out about young people's experience of their involvement in this. Young people were asked about where they would have chosen to live when they first had to live away from their birth parents. Forty-seven young people said that they would have chosen to live with other family members when they first had to live away from their birth parents, 24 said with foster carers, 20 with adoptive parents and 9 with friends.

One young woman, who is adopted, commented that if asked now she would have chosen adoption. The decision however had been made when she was very young and at that time she thought that she would have been most likely to choose family members or friends. The reason she gave for this was that it had been a difficult time and family members or friends were familiar:

*... I would not really have known at the time what that (adoption) was ... when I was that age I would have wanted to live with family because they are people you know. (Young woman, 14 years)*

Another young man highlighted that he would similarly have chosen other family members as he would have been more assured about the contact that he would have with his birth family. He also felt that foster care and adoption were much more difficult for young people to assess in terms of what it would be like and the implications for their future.

A further two young girls said that although they had been very young when they had had to live away from their birth parents and could not remember being involved in the decision, living with their adoptive parents was their preferred choice.

Young people were asked whether they had ever talked to someone about where they would like to live and if they had, who it was, where they were living at the time, and which places were discussed. Fifty-one young people said that they had talked to someone about where they would like to live, 45 had not.

Most frequently this was with a social worker, with 31 young people identifying this. Foster carers also played an important role, with 13 young people having spoken with their carers. Other key people included children's rights officers, other family members, either birth parents, grandparents, aunts or uncles and adoptive parents. Young people also identified link workers, the children's panel, counsellors, and safeguarders.

One young man identified trust as being important in deciding who he would discuss this with. Another said that he had wanted to speak to a teacher, but did not feel comfortable in doing so. One girl who had spoken to her carers and counsellor, identified that she did not however feel able to speak to her social worker.

One young woman spoke about how it was rare for decision making about where she would live to be an involved process:

*The majority of my foster placements used to go out with a bang ... I got picked up and then taken somewhere else. I was taken from my real Mum's to a foster placement, maybe be told briefly where I was going ... It was always like that. (Young woman, 21 years)*

Thirty-three young people were living with foster carers at the time when they had discussed where they would like to live. A number of young people identified other times when they had discussed where they would like to live. This included when living with their birth parents, with other family members, in

residential units or school, with adoptive parents and when living independently.

A number of young people felt that no options were discussed, 3 of these young people felt strongly that they had always been told where they were going to live and options had not been discussed. One young woman in foster care felt very frustrated about her situation. She felt that she had spoken to a number of people about wanting to be moved but was being deemed as awkward.

Two young people identified that they had discussed long term foster care. Seventeen identified that they had discussed foster care options, but did not specify long term foster care. Eight young people had discussed residential school or units, and 18 young people had discussed the options of living with their birth parents, with other family, or with friends. Only 2 young people had discussed adoption and 2 young people who were adopted had discussed other options. One young person had discussed the option of supported accommodation and one of living independently.

A number of young people spoke about how a permanent arrangement had never been achieved for them and the difficulties this had caused. A number described their experiences of being moved between foster care, their birth families, and other family members:

*I did hear once that I was up for adoption at 4 ... It would have been nice instead of having been brought back and forward between care and my Mum ... Because of my Mum and Dad's problems, nothing was ever perfect at my Mum's house ... we were not looked after properly ... It was like a relief when I went into care, it was like, I knew that I would be looked after, that I would be fed properly. But then I would be put back home ... I think my Dad ... would make them believe that he loved his kids and could look after*

*them, and that would be it, back and forth. Until (year) and then it came to a halt. (Young woman, 21 years)*

One young woman spoke about the difficulties she had faced since moving to a residential unit:

*I would not say I have had a say in it. I feel that if I had not got put into that children's home I would not have spent most of my teenage years in secure units and residential (units). (Young woman, 17 years)*

Young people were asked if they felt that they were involved in deciding about where they live just now. Forty-two young people said that they had been involved a lot in the decision about where they live just now, 16 a bit, 11 very little and 30 not at all.

One young woman reflected on the time when the decision was made that she would have to live away from her birth family:

*I felt that a lot of the stuff was hidden from me . I could see the hesitance when they spoke to me ... Obviously I was only 10 ... but if somebody had taken the time to sit down with me and explain to me, look this is why this decision was made, do you understand. (Young woman, 20 years)*

She went on to reflect that measures were taken to protect her and to guard against her being upset. She was aware that information had been taken from her file so that she would not see it and found this difficult. She went on to say that she had learning difficulties and felt that this had unjustified implications for how people treated her.

The majority of young people felt that it is important that they are involved in decisions about where they will live. They had experienced this to greater

and lesser degrees. At times young people felt that they were not involved in this and that decisions were made for them. Young people identified a number of people who they had discussed options with, and often when they had been living in foster care. As such foster carers had an important role, as did social workers.

### 3.5 Children's panels and court

The Adoption Policy Review Group sub-group was keen to seek views from young people on whether they had attended children's panels and court, why this had been, and whether young people felt that they had had a voice in these processes. Information was not collected on the reasons for the young person's attendance. Young people were asked if they had attended the children's panel or court and if they felt that they were listened to.

Seventy-eight young people had attended a children's panel and 51 of those young people thought that they had been listened to. A number of young people related being listened to when action had been taken which they wanted. As one young person said:

*They took my opinion into consideration when I expressed my concern about the level of contact with my Mum. She wanted it increased and I did not. The panel listened to me and kept the contact the same.* (Young woman, 13 years)

Also of importance were measures taken by panel members to put young people at ease and to ensure that they were given opportunities to express their opinions.

One young person identified that she had not spoken because she did not feel comfortable talking about personal issues in front of strangers:

*I did not speak at the hearing because you always get different panel members*

*and I do not like talking about my family to strangers.* (Girl, 11 years)

Young people also identified a range of experiences such as feeling upset, feeling safer as a result of the outcomes, feeling that their needs had not been central to the decision made, and feeling the pressure of not wanting to hurt those close to them. As one girl describes:

*... I found it hard with my birth and adoptive parents because no matter what I said it was always going to hurt one of them.* (Girl, 12 years)

Young people also spoke about wanting outcomes which they later reflected on not necessarily having been in their best interests. As one young woman says:

*... sometimes they did not listen to me, but ... I wanted things that was not best for me ... Now I realise and think, they did want the best for me ... I was wanting to go and stay with my Mum. But my Mum was really messed up with drugs ... (but) I hated them for it.* (Young woman, 17 years)

The same young woman highlighted that many of the young people attending children's panels are feeling disenfranchised about their relationships with adults and that this has implications for how they engage with them:

*... for most of the folk that go to the children's panels, a lot of their heads are messed up, and nobody can make them understand ... a lot of the time, I did not trust adults, all the trust went away, I thought, 'No, you are messing me about too much ...* (Young woman, 17 years)

Young people were asked if they had attended court. Twenty-two young people had attended court. Thirteen thought that they had been listened to when they attended court. Young people identified a range of experiences. Again

the approach and sincerity of the court officials had been vital in their experience of having their voices heard and a security that what they were saying was valued.

Young people were asked if they would like to attend meetings where their future is being discussed. Sixty-six said they would. As one young woman said:

*... it is important that you have your say in what is going to be happening to you in your future. (Young woman, 17 years)*

The importance of being involved in decisions for young people was highlighted in a number of areas of the consultation. The complexity of enabling young people to participate in decisions about their lives was also highlighted in young people's accounts.

### **3.6 What young people thought about the consultation**

Eleven young people provided comments about the consultation process. Five young people commented about how it is important to seek the views and experiences of young people with direct experience of foster care and adoption and thought that the tools had been effective in doing this:

*I think it is good to get feedback by people who are in foster care or were adopted ... (Young woman, 20 years)*

*I think the questions are quite good. I think it covers the major areas that are important. (Young woman, 16 years)*

One young man highlighted the importance of making sure that the consultation findings were used effectively to benefit young people. Two young people felt that the tools had limited their responses.

A number of parents also provided comments on the process through the

questionnaire, via email or in face to face discussions with the Save the Children worker. One parent commented that they had found the questionnaire was limited in allowing the dynamic to be explored between the young person, their adoptive family and their birth family. Another commented that their children had been too young to remember about the actual process of adoption. She highlighted that delays in the transition for her son from his birth parents, to foster carers, to adoptive parents had caused difficulties for him. One parent commented on how she thought it was a positive exercise for young people to be consulted, although it could be difficult for their children to discuss issues which were so close to them. A number of parents commented on issues from their perspective and hoped that there would be an opportunity for these to be taken into consideration in the Adoption Policy Review.

### **4.0 CONCLUSIONS**

This report provides an overview of young people's experiences of adoption and foster care based on their responses to structured questions and issues which young people independently highlighted in a questionnaire and in follow-up interviews. Many young people highlighted positive experiences of being adopted and living in foster care. They spoke about their relationships with adoptive parents and foster carers, birth families and outside agencies. Young people spoke about the role of relationships in enabling them to be involved in decisions and to access support when needed. A number of young people spoke about situations which they found difficult and which had a negative impact on their lives. In their accounts, young people suggest a number of policy changes which would improve their experience. A number of young people highlighted the importance of having the opportunity to participate in the Adoption Policy Review. The

consultation provides a rich source of evidence about young people's experiences of adoption and foster care for consideration by the Adoption Policy Review Group in relation to the proposed policy changes.

# Annex B:

## Research on Same-Sex Parenting.

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## ADOPTION POLICY REVIEW IN SCOTLAND

### Review of research into Same-Sex Parenting

Peter Selman and Kathy Mason  
University of Newcastle

#### 1: INTRODUCTION

In our initial report (Selman & Mason 2003) we noted that "... a key question was *who may adopt?* The legalisation of adoption by unmarried couples was a big issue in debates in England - the question to be asked is whether the debate is evidence-based? Or was the issue really about gay/lesbian adoptions where there is mixed research evidence... Such issues are likely to need resolution in the Scottish debate and we can look beyond England to issues raised in other countries (including states of origin in intercountry adoption)"

We were subsequently asked to present this report on research into same-sex parenting for the meeting on Monday 24th May 2004. Due to the large number of studies it has been impossible to produce a detailed review of all of these. We have chosen rather to look at some of the earlier reviews and then concentrate on one or two studies for a more detailed analysis - with brief descriptions of others which seem to merit attention. We have included a section in the Bibliography which lists the web-sites of those reviews which can be accessed through the internet. The focus throughout has been on the research on lesbian and gay parenting, as there are no reliable studies of same-sex adoption. The research discussed has largely concerned a) gay and lesbian parents whose children were born in a heterosexual relationship which has broken down and b) lesbian mothers who have deliberately conceived using donor insemination.

The debates in Scotland - as in the England - have also been about unmarried heterosexual couples adopting and we have not at present included any research in this area - e.g. on the relative stability of married and cohabiting couples - although this could be done at a later stage if required.

#### 2: THE CURRENT POSITION IN SCOTLAND

The position in Scotland is clearly presented in Plumtree A (2003) *Choices for Children in Adoption and Fostering: a discussion paper on legal issues*, Adoption Policy Review Group:

*"At present - under the Adoption (Scotland) Act 1978, sections 14-15 - only married couples or single individuals can adopt in Scotland. In practice, unmarried couples do apply and are assessed, although only one of them goes ahead and adopts, while the other one can seek a residence order under s.11 of the 1995 Act..*

*Consideration needs to be given to as to whether the law in Scotland should be changed or not"*

As we understand the situation, a single gay man or lesbian woman can already adopt a child and such adoptions have been approved by the courts in cases where the individual concerned was living with a partner of the same sex.

In contrast, *The Fostering of Children (Scotland) Regulations 1996* seem to preclude the possibility of a child being placed in a household where there are two unrelated adults of the same sex. Part III section 12 (4) states that:

*"In making arrangements under this Part of the Regulations the local authority shall not foster a child with a person except where the household of the person comprises -  
a man and a woman living and acting*

*jointly together; or  
a man or a woman living and acting  
alone,  
provided that a person shall not be  
disqualified by virtue of this regulation  
where the household also comprises  
other relatives of the person who are not  
themselves concerned in the undertaking  
to care for the child."*

This seems to allow an unmarried heterosexual couple to jointly undertake responsibility for fostering but not a gay or lesbian couple - nor a single man and woman who is living with an unrelated person of the same sex.

The BAAF Practice Note 44 (2004) notes that *"... in Scotland regulations prohibit unrelated, unmarried adults of the same sex in a household from being foster carers ... and therefore exclude those living together in a gay or lesbian partnership."*

This will need to be brought in line with any changes in Adoption legislation

### ***Defining an "unmarried couple" for the purposes of adoption***

Plumtree (2003) notes that *"If it is proposed to allow unmarried couples to adopt, there needs to be consideration of what statutory definition should be used"*.

In England and Wales, unmarried couples, including same-sex ones, will be able to adopt jointly when the 2002 Act is implemented as expected in 2004.

The 2002 Act defines 'a couple' as:

- (a) a married couple, or
- (b) two people (whether of different sexes or the same sex) living as partners in an enduring family relationship - s.144(4).

Another way of defining a couple could be to refer to the length of time they have lived in a partnership.

## **2.1 Responses to Discussion Paper in Scotland**

The initial synopsis of the responses to the paper on *Choices for Children in Adoption and Fostering* by Lexy Plumtree showed clearly that this was a major area of concern. There was an organised campaign of letter-writing in response to the issue, arguing that the law should not be changed and that unmarried couples should not be allowed to adopt. Over 300 letters and e-mails were received solely on this issue. The letters nearly all used very similar wording and examples and it was apparent that most respondents were using a prepared text to draw up their responses. These respondents appeared particularly opposed to the idea of same-sex couples adopting. Judging from the language used (and indeed the organisations named) this campaign has strong connections with some churches and religious organisations:

*"It would be far better to leave the law as it is. It would greatly increase the vulnerability of children to have co-habiting couples as parents. Such couples make it plain by their conduct that they wish to evade the responsibilities of marriage. They therefore could not be trusted to provide security and stability for children whom they would adopt ... Research proves that children of secure married couples have much the better outcomes in life on a broad scale of social markers.*

*The very opposite is true of children adopted by homosexual parents. One such study - and there are others - of children of lesbian couples showed 60% suffering relationship problems. According to the author this was caused by deep anxiety and confusion in children."*

Many responses followed a template which included reference to three studies: - Golombok & Tasker (1996); Stacey & Biblarz (2001) and Wyers (1987).

In contrast those responses which covered a wider range of issues were generally supportive of change:

*“We would therefore strongly support changes to the law in Scotland similar to those introduced in the Adoption and Children Act 2002 for England and Wales [allowing unmarried couples to adopt].”*

And this was seen as needed even by those feeling that adoption by a mother and father was best:

*“It is surely better for a child to be brought up by a mother and a father than by a single person or a same-sex partnership. But better one of these latter relationships than for the child to be left in institutional care or a series of foster homes.”*

### 3: MAIN ISSUES FOR CONSIDERATION

In order to make this review manageable and relevant for readers we have tried to keep in mind throughout the key questions which we would all hope the research to resolve.

At the root of the discussion should be the question - ***What is in the best interests of the child?***

- Are children raised by same-sex couples predisposed to homosexuality?
- Are such children more prone to develop psychiatric problems?
- Will there be a lack of appropriate role models?
- Are the children of same-sex couples subject to stigma and harassment by peers?

Other concerns raised by opponents (e.g. Morgan 2002) include:

- Does a homosexual lifestyle lead to neglect or conflict?
- Is the gender identity of children raised by same-sex couples problematic?
- Are same-sex relationships less stable than heterosexual relationships?
- Is the life expectancy of gay and/or lesbian parents shorter?

**NB:** In England & Wales the wider debate on allowing adoption by unmarried couples, whatever their sexual orientation, was dominated by assertion of the advantages of such adoptions in increasing the number of children who could be offered social, emotional, financial and legal security in the future; i.e. that such parents if carefully selected would be able to afford the child a greater level of permanency. The potential for finding additional adoptive families for special needs children has been demonstrated in the United States (Brodzinsky 2003).

#### 3.1 Related Issues

A further question arising is whether birth parents should be informed that their children have been placed with homosexual parents? - and whether a final decision on adoption should take into account the views of the birth parents.

In the case of inter-country adoption, the decision would be made by the State of origin and it is clear that in most countries there would be a strong objection to placement with a gay or lesbian parent (whether single or partnered) - as indeed there would be to a single person or an unmarried couple by some countries (e.g. Korea), although for many (e.g. China, Guatemala) the former has been unproblematic.

The growing practice of assisted reproduction has increased the number of gay women who can bear a child with the aid of sperm donation. Should the

female partner be allowed to adopt this child? In the case of married couples, the 1987 Act deems the parents of assisted donor children to be the legal parents of the children, even if one is not the genetic parent. Steps could be taken to extend this to include lesbian couples who conceive a child through assisted reproductive technology.

Should a same-sex partner be able to adopt the child as part of a couple as in step-parent adoptions or as a single adopter? This has become a major issue in the United States in debates about "co-parenting".

#### **4: THE LEGAL POSITION IN OTHER INDUSTRIALISED COUNTRIES:**

##### **EU Countries:**

Other European countries have debated both same sex marriages and the rights of gay and lesbian couples to adopt. In some (e.g. Sweden and the Netherlands) there have been reviews of research which have concluded that there is no reason to exclude such couples. But in most there are indications that public opinion is opposed to adoption by homosexuals. To date only two countries have allowed same-sex marriage and only one of these permits those entering such marriages to adopt.

##### ***The Netherlands***

It has been possible since 1st January 1998 for one of the parents to share the authority with his or her partner, or with the person with whom he or she has signed a registered partnership, even if the partners are the same sex. However, on 1st April 2001, The Netherlands became the first country in the world to legalize marriage for gays and lesbians and this Act also extended the rights of gay couples to adopt a child. This law only applies to children who are citizens

of the Netherlands i.e. cannot adopt from overseas. The law also allows for one of the partners to adopt his or hers partner's child(ren), even if the child(ren) has been previously adopted.

In 2001 there were 1,075 Lesbian marriages; 1,339 Gay marriages; and 80,432 heterosexual marriages. (over 9 months from April)

##### ***In 2002:***

903 Lesbian marriages; 935 Gay marriages; and 83,970 Heterosexual marriages

##### ***In 2003:***

759 Lesbian marriages; 727 Gay marriages; and 81,135 Heterosexual marriages

##### ***Belgium***

On 30th January 2003, Belgium opened up marriage to same-sex couples. The new law gives gay couples almost the same marital rights as heterosexuals - e.g. inheritance rights over goods and property and the same fiscal breaks - e.g. can have joint tax forms, will benefit from unemployment payouts and will have the same financial obligations in the case of divorce - but CANNOT adopt.

From February 6th 2004, the right to marry was extended to non-Belgian gay and lesbian couples if at least one partner was living in - or regularly visited - Belgium

##### ***Denmark***

Denmark was the first country in 1989 to allow same-sex couples to form 'registered partnerships,' giving them a status and benefits similar to marriage. This allows the homosexual partner to adopt the child of their homosexual partner, but does not allow homosexual couples to adopt. Their law also limits access to reproductive technologies to women in heterosexual relationships.

## **Sweden**

The **1994 Registered Partnership (Family Law) Act** allowed the registration of same-sex partnerships, but did not allow such couples to adopt jointly.

Public opinion has been consistently against same-sex adoption, but this was endorsed in principle by an academic review of research commissioned by the government. However, a review of States of origin in inter-country adoption indicated that many would accept only married couples and that none would accept gay partners.

More recently the **Partnership and Adoption Act**, which came into force on 1st February 2003, gave homosexual couples living in a registered partnership the same chance as married couples to become adoptive parents. It provides for what is termed 'second parent adoptions', which means that one partner has the right to adopt the other's child. The Act also permits gay and lesbian couples to adopt from abroad. This latter provision caused much controversy but the law was passed by a parliamentary majority in defiance of a majority of bodies consulted (46 out of 570 including the *Swedish National Board for Intercountry Adoption* (NIA) and the *Association of Adopted Koreans*. As a result Sweden has withdrawn from the 1967 EU Convention on Adoption, which stipulates that only married couples or a single person have the right to adopt. (Froman 2003).

The government had contacted 25 States of origin about the proposals and none of the 17 countries replying were prepared to accept gay or lesbian couples as adoptive parents, so that in practice it is unlikely that such couples will be able to adopt from countries such as China or Peru.

## **Other countries:**

In France and Germany same-sex couples have extensive civil union rights but these do not extend a right to adopt. However, recently Germany has announced plans to introduce legislation to allow same-sex marriages.

Iceland allows same-sex couples to adopt and Norway and Finland allows gay and lesbian partners to adopt their partner's birth child.

## **United States**

Adoption law is determined at the state level and there is a wide variation in law and practice. According to Appell (2001), Utah has the only statute that explicitly bans non-marital co-parent adoption - in other words for the vast majority of states adoption by unmarried heterosexual couples is permitted - as will be the case in England when the 2002 Act is implemented.

However, some states (e.g. Florida) prohibit adoption by gay and lesbian couples and individuals - "No person eligible to adopt under this statute may adopt if that person is a homosexual". A similar ban in New Hampshire was revoked in 1999. The Utah ban referred to above proscribes adoption (and foster care placements) by persons "cohabiting in a [sexual] relationship that is not a legally valid and binding marriage under the laws of the state".

Connecticut specifically permits non-marital co-parent adoption - "any parent of a minor child may agree [to the adoption of that child by] one other person who **shares parental responsibility for the child with such parent**" - (my italics). Other states (e.g. Massachusetts, New York and Vermont) also permit gays and lesbians to adopt their partner's (birth) child without termination of existing parental rights.

Same-sex couples can marry in San Francisco since February 2004, because of an action by their mayor, but the state of California refuses to register the marriages. Similar actions have been taken in New Mexico and New York. Massachusetts legalised gay and lesbian marriage from May 18th 2004. At the end of 2003, 37 states had enacted "Defence of Marriage Acts" (DOMAs) that ban same-sex marriage. Other states have similar legislation pending. In some states adoption by lesbians and gay men is denied on the basis of the "best interests of the child", even if the only evidence cited is the sexual orientation of the applicants. In others the same standard is used to permit co-parent adoption where there is no explicit legislation against this and this has been extended to include the partners of lesbians (Appell 2001).

However a recent survey of adoption practice in the United States by David Brodzinsky (2003) for the Evan B. Donaldson Institute, suggests that "reality on the ground is outstripping the pace of the debate" and that "more and more lesbians and gay men are becoming parents via insemination, surrogacy and adoption".

### **Canada**

The federal government's position, which bans same-sex couples from marrying, is currently being challenged in court where cases have stated that gay and lesbian couples can equally offer homes to children in need. However, leaving decisions up to the court has meant that there is wide variation from state to state. To give one or two examples: in Newfoundland and Labrador, gays and lesbians can adopt - as a couple; in Ontario, British Columbia and Quebec same-sex couples are permitted to both marry and then adopt as a married couple. National legislation is expected in 2005, but in the mean time courts

continue to confirm that gay and lesbian couples can offer homes to children in need.

### **New Zealand**

New Zealand has laws which forbid discrimination based on sexual orientation in matters of employment, education, housing etc but do not legally sanction gay marriages.

The current law does not permit adoption applications by de facto couples, although some judges have adopted a more flexible approach to this issue - e.g. where a couple may be living in a Maori customary marriage. Nor does it permit adoption by same-sex couples (or a male in respect of a female child, unless he is the father of the child).

However two major papers on reforming adoption law have supported same-sex couples being permitted to adopt a child.

**Adoption: Options for Reform: A discussion paper** (New Zealand Law Commission, October 1999) states (para 197) that "our preliminary view (based in the research discussed above in paragraphs 191-196) as to whether same-sex couples should be permitted to adopt a child is that, rather than create a blanket prohibition, such applicants should be assessed on their merits, alongside other potential options for the child. The way in which gay or lesbian people plan to take account of their sexual orientation when raising the child - for example, whether they plan to provide appropriate models - would be an extra element for a social worker to consider

**Adoption and Its Alternatives: A Different Approach and a New Framework** (New Zealand Law Commission, September 2000) concludes (para 358) that "there is not sufficient evidence to establish that adoption by same-sex adopters cannot

*be in the best interests of the child so as to justify disqualifying same-sex couples from being eligible to apply"*

A recently published *Care of Children Bill 2004* would allow gay and lesbian couples to adopt and foster children

### **Australia**

On 8th March 2004 Prime Minister John Howard condemned the ruling by the government of Australia Capital territory in support of a bill to offer same-sex couples the right to adopt. The state of Western Australia, where Perth is located, and the island state of Tasmania also allow gay couples to adopt. He subsequently introduced legislation banning same-sex marriage as well as preventing same-sex couples from adopting children abroad, but this would not impact on their ability to adopt within Australia, however, as adoption falls under state jurisdiction.

**NB:** In many countries which are predominantly States of origin for the purpose of intercountry adoption there are strong sanctions against homosexuality and same-sex parenting. We have not reviewed these, but they must clearly be a major factor in any decisions about approval of parents for overseas adoption - see earlier comments on new Swedish law.

### **5: REVIEWS OF AMERICAN AND BRITISH RESEARCH INTO SAME-SEX PARENTING**

There are already a number of research reviews on the topic of same-sex parenting. Unfortunately these do not point to any consensus as they seem to divide into reviews which indicate a fairly positive message from the research and those which attack these reviews as misleading because they do not acknowledge the flawed nature of the individual research studies.

### **5.1 Positive Reviews**

#### **1) Issues in Gay and Lesbian Adoption: Proceedings of the Fourth Peirce-Warwick Adoption Symposium (1995)**

The 1994 Peirce-Warwick Adoption Symposium provided an opportunity for issues and concerns to be identified and for a framework for policy development to be discussed. Presenters and participants addressed policy, legal, and research issues. The book includes papers that cover the major points of the presentations and provide an overview of the entire symposium and may be purchased from the **Child Welfare League of America**: <http://www.cwla.org/pubs>.

Conclusions on research issues include:

#### **Limitations:**

Most research examines lesbian-mother rather than gay-father families - and many have been about parents who had children in heterosexual relationships and then "came out" after divorce. Others have looked at "planned families" using donor insemination. Most samples are small, Caucasian and well-educated.

#### **Findings:**

A review of research concludes that "overall, the research on planned lesbian families, like the research on divorced lesbian mothers, has consistently failed to find any special difficulties among the children ... the research strongly suggests that homosexuality is not incompatible with effective parenting" (p20).

"Research using the *Parent Awareness Skills Survey* shows that lesbian couples are more aware of skills than heterosexual (p26) - but this seems to be related to gender rather than sexual orientation."

The review concludes that there is no evidence of confused gender identity amongst children but that more research is needed especially on adoptive families (p26).

Gay and Lesbian applicants applying to adopt should be considered alongside other applicants: no-one has a "right" to adopt.

2) A review of recent studies available from the web-site of the **Ontario Consultants on Religious Tolerance** - [http://www.religioustolerance.org/hom\\_pare2.htm](http://www.religioustolerance.org/hom_pare2.htm) concludes that:

"with the exception of studies at a few universities with very close connections with conservative Christian denominations (like the Brigham Young University in Salt Lake City, UT), essentially all research studies into same-sex parenting reveal that children of these families develop normally. There is some indication that boys are less sexually adventuresome, and that girls are more sexually daring. There are also anecdotal accounts of children having to endure ridicule, taunting and harassment from other youth because of their parents' sexual orientation."

3) **Patterson, C.** *Lesbian & Gay Parenting: - a summary of research findings*, - <http://www.france.qrd.org/assocs/apgl/documents/doc9.htm>

Published by the French organisation APGL - (**Association des Parents et futurs parents Gays et Lesbians: - Association of Gay and Lesbian Parents and future parents**), this review concludes that:

"Overall ... results of research to date suggest that children of lesbian and gay parents have normal relationships with peers and that their relationships with adults of both sexes are also satisfactory.

...Not a single study has found children of gay or lesbian parents to be disadvantaged in any significant respect relative to children of heterosexual parents. Indeed, the evidence to date suggests that home environments provided by gay and lesbian parents are

as likely as those provided by heterosexual parents to support and enable children's psychosocial growth."

The review further argues that research suggests that children of lesbian mothers develop patterns of gender-role behaviour that are much like those of other children.

See also Patterson and Redding (1996)

4) **Perrin, C. et al (2002)** "Technical Report; Co-parent or second-parent adoption by same-sex parents", *Pediatrics*, Vol 109 no 2.

Available at <http://aappolicy.aappublications.org/>

This report from the **American Academy of Pediatrics** notes that "A growing body of scientific literature demonstrates that children who grow up with 1 or 2 gay and/or lesbian parents fare as well in emotional, cognitive, social, and sexual functioning as do children whose parents are heterosexual. Children's optimal development seems to be influenced more by the nature of the relationships and interactions within the family unit than by the particular structural form it takes."

5) There are also many books which give accounts of gay and lesbian parenting from the perspective of such parents. Two recent examples are: Hicks, S. and McDermott, J. (Eds.) (1999) *Lesbian and Gay Fostering and Adoption: Extraordinary Yet Ordinary*, Jessica Kingsley Publishers, London.

Strah D (2003) *Gay Dads*, New York: Putnam

## 5.2 Negative Reviews

1) **Lerner, R. & Nagai, A. (2001)** *No Basis: What the Studies Don't Tell us About Same-Sex Parenting*, Marriage Law Project, Washington D.C.

Analyses 49 empirical studies and conclude that they have numerous flaws and provide no basis for good science or good public policy. The main problems include:

- Unclear hypotheses and research designs
- Missing or inadequate comparison groups
- Self-constructed, unreliable and invalid measurements
- Non-random samples, including participants who recruit other participants
- Samples too small to yield meaningful results
- Missing or inadequate statistical analysis

As a result they conclude that no generalisations can reliably be based on any of the studies and “are no basis for good science or good public policy”.

Appendix 2 lists quantitative studies in terms of three factors: - heterosexual control group: control for extraneous variables and reliability of measures. Ten studies are noted as fulfilling all 3 criteria and these are noted in our individual outlines below.

Many of these studies are ones used by Patterson (5.1.3. above) as evidence for positive outcomes of same-sex parenting. Criticisms about methodology by Lerner and Nagai could also be applied to many small scale social research projects that are not trying to test a hypothesis, know their sample is small, have no statistical analysis because this is not the nature of this type of small-scale, investigative and qualitative research.

**N.B.** This report - and the affidavit below (5.2.2.) by Nock - is available at <http://www.marriagewatch.org/issues/parenting.htm>, the web-site of MarriageWatch, an American organisation which aims to “inform attorneys, policymakers, and the general public about marriage in law and

society” and sees their purpose as being “to strengthen the institution of marriage and to affirm the definition of marriage as the union of one man and one woman.”

**2) Nock, S. L. (2001)** in an *Affidavit filed with the Ontario Supreme court in Halpern v Attorney General*, Court File no 684/00, makes a response to evidence cited by **Professor Jerry Bigner** on Nov 11 2000 and previously cited in the case of *Baker v Vermont*. The review includes summaries of many of the key studies in a series of appendices.

In a review of over 50 studies Professor Nock critiques a series of studies and concludes (p 39) that “*All of the articles I reviewed contained at least one fatal flaw of design or execution. Not a single one of these studies was conducted according to generally accepted standards of scientific research*”.

While accepting that the “weight of published evidence” suggests that there no differences between the children of gay parents and the children of heterosexual parents in terms of gender identity or sexual orientation, Nock argues that the methodological deficiencies indicate that further research is needed and that “the only acceptable conclusion at this points is that the literature does not constitute a solid body of scientific evidence”

**3) Morgan, P. (2002) *Children as Trophies? Examining the Evidence on Same-sex Parenting*, The Christian Institute, Newcastle upon Tyne.**

One of the most publicised critical reviews - and one that claims to be the “most comprehensive” - is that of Patricia Morgan (2002), published by the Christian Institute and available from 26 Jesmond Road, Newcastle upon Tyne (0191 281 5664). Credit card orders taken.

Morgan cites three review papers supporting her position: Lerner & Nagai

(2001) cited above and two articles in academic journals: Belcastro et al (1993) and Stacey & Biblarz (2001) which is discussed below.

Her book is largely based on the earlier reviews cited and sets opposition in the context of a wider opposition to adoption by single parents and unmarried (heterosexual) couples.

The foreword (by Colin Hart, Director of the Institute) is available at <http://www.facingthechallenge.org/trophies.htm>

Morgan's review is also hostile towards single parents and heterosexual cohabitantes as adopters, although much of her earlier work on adoption (e.g. Morgan 1998 and 1999) is concerned to argue the importance of adoption, arguing that this should be given priority as a response to the needs of children who cannot live with their birth parents - the first not the last option - with strong support for transracial adoptions and the curtailment of parental rights.

#### **4) Dailey, T. J. (2002) *Homosexual Parenting; Placing Children at Risk*, Family Research Council**

- available at <http://www.orthodoxytoday.org/articles/DaileyGayAdopt.htm>

Dailey reviews critically a number of studies and argues that they are compromised by methodological flaws and driven by political agendas" (Dailey 2002 p1). He argues that there is no evidence to support the promotion of such adoptions and that "to entrust children to such arrangements is wholly beyond the pale" (ibid p14).

In addition to his methodological critique, he argues that there are many harmful aspects of the homosexual (gay) lifestyle - e.g. gay promiscuity; unsafe

sexual practices - and that violence and substance abuse are common in lesbian relationships. He also notes a reduced life span and increased suicide risk for male homosexuals. Risks for children include confusion over sexual identity; a greater likelihood of sexual experimentation; and increased risk of sexual molestation or incest.

#### **5) Wardle L (1997) *The Potential Impact of Homosexual Parenting on Children*, University of Illinois Law Review 833**

This article was cited by opponents of same-sex adoption in New Zealand as challenging the research quoted by the Law Commission (see 5.3.2 below). The paper impugns the motives, methods and merits of social science research in the field, arguing that most studies show an ideological bias favouring "lesbians". The Commission Report of September 2001 comments that "upon further examination, the article proved to be based upon a flawed analysis and misinterpretation of the relevant literature and an obvious bias against homosexuality (see e.g. Ball & Pea 1998).

### **5.3. Other Reviews**

Three recent reviews which we have found particularly useful are written from a perspective that it is supportive of allowing Gay and Lesbian individuals to adopt but have a more balanced approach to the literature and have selected for discussion only the more robust studies.

#### **1) Stacey, J. & Biblarz, T. J. (2001) "(How) does the Sexual Orientation of Parents Matter", *American Sociological Review*, 66, pp 159-183**

**Stacey, J. & Biblarz, T. J. (2001)** review 21 studies, carried out between 1981 and 1988, and demonstrate - using a meta-analysis - that researchers frequently downplay findings indicating difference regarding children's gender and sexual

preferences. The authors identify a number of “conceptual, methodological, and theoretical limitations in the psychological research on the effects of parental sexual orientation” and challenge the predominant claim “that the sexual orientation of parents does not matter at all”. They suggest rather that there is “*good reason to believe that contemporary children and young adults with lesbian or gay parents do differ in modest and interesting ways from children with heterosexual parents*” (p159), but suggest that these differences are not causal but rather “*the indirect effects of parental gender or selection effects associated with heterosexist social conditions under which lesbian-gay-parent families currently live*” (p176).

**However, they differ from Lerner & Nagai in concluding that** “... *social science research provides no grounds for taking sexual orientation into account in the political distribution of family rights and responsibilities.*” (p179)

2) New Zealand Law Commission, (1999) Adoption: Options for Reform: A discussion paper

Earlier in this paper we noted the New Zealand Law Commission (1999) had produced a discussion paper which included a useful summary of recent research. Key conclusions include:

- ... research on children raised by lesbian mothers suggests that these children are no more inclined to become homosexual than children raised by heterosexual parents (para 191)
- a parent’s homosexuality alone does not predispose the child to psychosocial disorder (para 192)
- ... children raised in such families generally have greater access to a male model than do children raised in single-mother families (para 193)

- ... children raised by lesbian mothers ... on the whole experienced no more “teasing” (para 194)
- ... the homosexuality of the parents makes little difference to the ultimate welfare of the child as long as parents exercise quality parenting skills (para 196)

### 3) BAAF (2004) *Assessing Lesbian and Gay Foster Carers and Adopters*, practice note 44

Following the passing of the 2002 Children Act BAAF published a practice note (no 44) on gay and lesbian adopters, which includes brief summaries of a number of studies and, while noting their limitations, conclude that there is no evidence supporting the use of a person’s sexuality as precluding effective parenting and that “all available evidence confirms that lesbians and gay men can provide parenting and warm nurturing family environments, together with the security and safeguards that children need”.

The report argues that “all studies of comparative parenting by lesbian or gay parents and heterosexual parents strongly endorse a ‘no difference’ message”; that heterosexual, homosexual and bisexual adults are just as likely to be good, poor or indifferent parents; and that sexuality is not a determining factor in the capacity to offer a good home to a child.

## 6: REVIEWS OF LAW AND POLICY

### 1) David Brodzinsky (2003) *Adoption by Lesbians and Gays: A National Survey of Adoption Agency Policies, Practices, and Attitudes*.

In this survey, carried out for the Evan B Donaldson Institute, Brodzinsky notes that more and more lesbians and gay men are becoming parents via insemination, surrogacy and adoption.

The survey (of over 300 agencies) did not attempt to evaluate same-sex parenting but rather to answer two related questions:

- What are adoption agency policies and practices toward prospective adoptive parents who are gay or lesbian?
- And to what extent are agencies placing children with homosexuals?

The main conclusion that comes out of the research is simply that adoption agencies are increasingly willing to place children with gay and lesbian adults and, consequently, a steadily escalating number of homosexuals are becoming adoptive parents.

Brodzinsky further argues that from a child-centered perspective, the willingness of adoption agencies to accept gay and lesbian adults as parents means more and more waiting children are moving into permanent, loving families.

The full report and the executive summary can be accessed on the internet at <http://www.adoptioninstitute.org/whowe/Gay%20and%20Lesbian%20Adoption1.html>

It can also be requested by e-mail from [info@adoptioninstitute.org](mailto:info@adoptioninstitute.org)

## 2) Appell, A. R. (2001) "Lesbian and Gay Adoption" *Adoption Quarterly* , 4-3 pp 73-86

The journal *Adoption Quarterly* has a section entitled *Legal Intersections*, which contains useful reviews of US legislation. Volume 6 number 1 focuses on lesbian and gay adoption and Appell (2002) reviews state legislation as it applies to lesbians and gays who adopt either as individuals or as co-parents and a number of recent court cases.

Appell points out that "although all states permit single persons or married

couples to adopt children, out lesbians and gay men seeking to adopt may face explicit bans on homosexual adoption"

The author argues that such bans are largely motivated by ideology and preclude judgements relating to the needs of individual children.

*"Judgements that arbitrarily limit legal protections and privileges for children or that erect needless barriers to the adoption of children who do not have fit or willing parents have no place in a society that purports to value children and families"* (Appell 2002 p 84)

## 7: INDIVIDUAL RESEARCH PROJECTS

In this section we look at some of the studies which are quoted in more than one review and which seem to have particular merits - e.g. longitudinal structure; or sound comparison groups; published in a respectable outlet etc.

### 7.1 Studies by Golombok and associates 1980 to date

This series of studies, initiated at the Department of Psychiatry, University of London is widely acknowledged to be one of the soundest in methodology terms and is frequently cited by those supporting adoption by gay and lesbian parents, but is criticised by Lerner & Nagai and Morgan. However, Stacey & Biblarz (2001) use them as one of their six "best designed" studies. In their meta-analysis. It is also one of the few studies carried out in the UK .

**Golombok, S. & Spencer, A. et al. (1983). "Children in Lesbian and Single-Parent Households: Psychosexual and Psychiatric Appraisal." *Journal of Child Psychology and Psychiatry* 24(4): 551-572.**

This important study compared 38 children aged 5-17 yrs raised by 27 single mothers and 37 children of similar age

raised by lesbian mothers. Of the 27 lesbian mothers, 9 were single parents; 12 were cohabiting with a lesbian partner; 4 lived in shared households and 4 shared a home with their husband and a lesbian partner. All the children had been conceived in heterosexual relationship.

The study found no significant differences between children raised by lesbian mothers and children raised by single heterosexual mothers on measures of emotional behaviour, and relationships with peers. Also, no differences were found in terms of their gender identity or gender behaviour. However the lesbian mothers were more likely to have sought psychiatric help. The findings are cited by the New Zealand Law Commission and BAAF.

**Tasker, F. & Golombok, S. (1995). "Adults Raised as Children in Lesbian Families." *American Journal of Orthopsychiatry* 65(2): 203-215.**

This study followed up the authors' 1976-1977 study group (see 1993 publication above) and was able to do interviews with 25 lesbian mothers and 21 single mothers. The study found no significant difference between children raised by lesbian parents and those raised by heterosexual parents in the quality of the young adults' relationships with their mothers, in incidences of teasing or bullying in high school, or in their emotional well-being. No differences were found in proportion of each group that reported experiencing sexual attraction to someone of the same sex, though the children of lesbians were more likely to act or consider acting, on those attractions.

Stacey & Biblarz (2001) note that although the authors' conclusion is that overall there is no significant difference between the two groups, it deflects from some of the differences in sexual attitudes: - e.g. the finding not fully discussed that children (especially girls)

raised by lesbians appear to depart from traditional gender-based norms - e.g. in being more sexually adventurous.

**Golombok, S. Tasker, F. & Murray, C. (1997) "Children raised in fatherless families from infancy: family relationships and the socioemotional development of children of lesbian and single heterosexual mothers". *J Child Psychol Psychiatry*; 38-7: 783-791, 1997**

This study looked at three groups: 30 lesbian mother families and 42 families headed by a single heterosexual mother were compared with 41 two-parent heterosexual families using standardised interview and questionnaire measures of the quality of parenting and the socio-emotional development of the children. The results show that children raised in fatherless families from infancy experienced greater warmth and interaction with their mother and were more securely attached to her, although they saw themselves as less cognitively and physically competent than their peers from father-present families.

No differences were identified between families headed by lesbian and single heterosexual mothers, except for greater mother-child interaction in lesbian mother families.

#### **See also**

**Golombok, S. & Tasker, F. (1996) "Do Parents Influence the sexual Orientation of their Children: findings from a longitudinal study of lesbian families", *Developmental Psychology* 32 (1)**

**Tasker, F. & Golombok, S. (1997) *Growing up in a Lesbian family*, New York: Guildford**

**Golombok, S. (2002), 'Adoption by Lesbian Couples: Is it in the Best Interests of the Child?', *British Medical Journal*, 324, 1407-1408.**

## 7.2 Brief outlines of other cited studies

The following studies are widely cited and seem to have clear merits. Unless otherwise stated, the publications were cited in the critical study by Lerner & Nagai (appendix 2) as among the more sound methodological studies in that they were quantitative studies which were rated positively as having i) a heterosexual control group: ii) some control for extraneous variables and iii) reliability of measures.

**Bigner, J. J. and Jacobsen, R. B. (1989), 'Parenting Behaviors of Homosexual and Heterosexual Fathers', *Journal of Homosexuality*, 18, 173-186.**

**Bigner, J. J. and Jacobsen, R. B. (1992), 'Adult Responses to Child Behavior and Attitudes Toward Fathering: Gay and Non-Gay Fathers', *Journal of Homosexuality*, 23, 99-112.**

In both of these studies the researchers found that gay fathers did not differ significantly from heterosexual fathers in terms of overall parental involvement, intimacy, parenting skills and attitudes to parenthood. However, there were some differences between the two groups in approaches to parenting; for example, gay fathers tended to be more communicative with their children and to enforce rules more strictly. Limitations of research include - small, non-random sample; participants were studied based only on their self-reported answers to questions about parenting.

**Brewaeys, A., Ponjaert, I. et al. (1997). "Donor Insemination: Child Development and Family Functioning in Lesbian Mother Families." *Human Reproduction* 12(6): 1349-1359.**

Found children in lesbian mother homes were as positive and healthy as children in homes headed by a mother and a father. The research compared children of lesbian

couples conceived via donor insemination, children of heterosexual couples conceived via donor inseminations, and children of heterosexual couples who conceived conventionally. Overall, less non-biological mothers were found to have better relationships with their children than the heterosexual fathers. No differences were found between the three groups of children. Sample: 30 lesbian two-mother families; 38 heterosexual families conceiving via IVF; and 30 heterosexual conceiving naturally.

**Chan, R. W., Raboy, B. et al. (1998). "Psychosocial Adjustment among Children Conceived by Donor Insemination by Lesbian and Heterosexual Mothers." *Child Development* 69(2): 443-457.**

Found that the sexual orientation and relationships status of parents had no significant impact on the psychological well-being of their children. Rather, children were impacted by other factors, such as parents' psychological well-being and parenting stress - neither of which had anything to do with sexual orientation.

**Flaks, D. K., Fischer, I. et al. (1995). "Lesbian Choosing Motherhood: A Comparative Study of Lesbian and Heterosexual Parents and Their Children." *Developmental Psychology* 31(1): 105-114.**

This study found that children of lesbians and children of heterosexuals were equally healthy in terms of psychological well-being and social adjustment. Lesbian mothers were found to have more developed parenting awareness than the heterosexual parents. Limitations of the study include the small, non-random sample of 15 lesbian and 15 heterosexual couples and their children.

**Hoeffler, B. (1981). "Children's Acquisition of Sex-role Behavior in Lesbian Mother Families." *American Journal of Orthopsychiatry* 51(3): 536-544.**

Found no significant differences between the gender behaviour of children of lesbian and heterosexual mothers. It also found that lesbian mothers were significantly more likely to prefer a more equal mix of masculine and feminine toys, while heterosexual mothers tended to prefer that girls played with stereotypically feminine toys etc.

**Huggins, S. L. (1989). "A Comparative Study of Self-esteem of Adolescent Children of Divorced Lesbian Mothers and Divorced Heterosexual Mothers." *Journal of Homosexuality* 18(1/2): 123-135.**

Examines the psychological construct of self-esteem using a comparative survey design with adolescent children. There were 18 children in both groups, also divided equally by sex and aged 12-19yrs. There was no significant difference in self-esteem scores. Findings consistent with other studies i.e. children not at greater risk for problems with '.....sexual identity confusion, inappropriate gender role behaviour, psychopathology, or homosexual orientation in children' (p124). Stresses the need for further comparative research.

**Kirkpatrick, M., Smith, C. et al. (1981). "Lesbian Mothers and Their Children: A Comparative Survey." *American Journal of Orthopsychiatry* 51: 545-551.**

The study found no differences between the regularity of father's visits, involvement with the children, or financial support but did find that lesbian mothers were more likely to have only children. There were no differences between children on Human Figure Drawing Test, the Rutter Scale of emotional disturbance, and developmental history. However, an unexpectedly high number of children in both groups showed emotional symptoms which was attributed to the fact that the authors offered free psychological evaluations and thus this may have appealed to mothers who had some

concern about their children. Sample: 10 girls and 10 boys between the ages of 5-12 who were living full time with self-identified lesbian mothers compared with 10 girls and 10 boys living full time with single, heterosexual mothers.

**McNeill, K. F., Rienzi, B. M. et al. (1998). "Families and Parenting: A Comparison of Lesbian and Heterosexual Mothers." *Psychological Reports*, 82: 59-62.**

Found that lesbian and heterosexual mothers groups did not differ significantly in relationship with their children, parenting practices, and overt family stress. The authors reviewed 21 studies and demonstrated that researchers frequently downplay findings that indicate differences regarding children's gender and sexual preferences and behaviour that could stimulate important theoretical questions and propose a "less defensive, more sociologically informed analytic framework" for investigating these issues.

**Wyers, N. (1997) "Homosexuality in the family; lesbian and gay spouses" *Social Work March/April* pp 143-148.**

The study receives a low rating from Lerner and Nagai but is widely quoted by both sides of the debate. It notes that same-sex couples share the same problems as heterosexual couples, but also have to face many additional problems; the lack of social approval and legal protection; isolation; fear of losing custody of their children; need for secrecy etc.

## CONCLUSION:

We have presented above a review of the main reviews of research in this area. Some of these are clearly driven by an agenda reflecting the authors' position with regard to marriage and/or homosexuality; others start from a position committed to rights for gays and lesbians. We have indicated those which seem to us to have achieved greatest objectivity and agree with these that there is no strong evidence which suggests that gays and lesbians should be excluded from consideration for adoption if a decision is taken to extend the right to apply to adopt to non-married partners.

However, the studies do seem to indicate some differences in the behaviour and attitudes of children raised in families headed by gays and lesbians - as would be expected. The interpretation of the importance of these will depend on views about a more accepting approach to same-sex relationships. We would however stress that much of the research is very limited and that there is a need for more studies; and especially studies which look at same-sex partners adopting and fostering. Most of the evidence presented is about two groups; women who gave birth in a heterosexual relationship or as a single parent and who subsequently entered a lesbian relationship; and women who conceived by donor insemination while in a same-sex relationship.

## BIBLIOGRAPHY

### Introduction;

We have divided the bibliography into three sections which bring together much of the available literature on same-sex parenting.

- **References:** in this section we list any published books or articles mentioned in the main text of this report: - some reports available only on the internet are identified in the web references section, but also have the web-site listed in the text.
- **Further Reading:** this section lists a number of other publications cited widely in reviews but not mentioned in the text and not consulted by the authors of this report.
- **Web References:** Here we have listed some of the key **web-sites** where reviews and studies cited above may be found and also some more general adoption-related web-sites.

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### 3. Useful web-sites for information on gay and lesbian adoption:

#### **Child Welfare League of America:**

<http://www.cwla.org>

*Issues in Gay and Lesbian Adoption; Proceedings of the Fourth Annual Peirce-Warwick Adoption Symposium February 1994*, published by the Child Welfare League of America

#### **Evan B. Donaldson Institute:**

<http://www.adoptioninstitute.org>

David M Brodzinsky: *Adoption by Lesbians and Gays: A National Survey of Adoption Agency Policies, Practices, and Attitudes* - available from the above web-site by clicking on relevant bullet point on the home page.

The full report and the executive summary can be accessed on the internet at <http://www.adoptioninstitute.org/whowe/Gay%20and%20Lesbian%20Adoption1.html>

#### **National Adoption Information Clearinghouse (NAIC):**

<http://naic.acf.hhs.gov/>

*Gay and Lesbian Adoptive Parents: Resources for Professionals and Parents - AB-0030A*

Explores the status of gay and lesbian parenting, issues, laws, and more.

*Gay and Lesbian Adoptive Parents: Sources of Support and Information* (Available online only)

Includes organizations and publications supporting gay and lesbian parenting

#### **New Zealand Law Commission:**

<http://www.lawcom.govt.nz>

*Adoption: Options for Reform: a discussion paper*, NZLC PP38, October 1999

*Adoption and Its Alternatives: A Different Approach and a New Framework*, Report NZLC R65, September 2000

**The sites below represent particular stances for and against gay and lesbian marriage and parenting**

**American Civil Liberties Union** has a site dealing with gay and lesbian issues; <http://www.aclu.org/LesbianGayRights/LesbianGayRightsMain.cfm>

**Association des Parents et futurs parents Gays et Lesbians:** - Association of Gay and Lesbian Parents and future parents) <http://www.france.qrd.org/assocs/apgl/documents/doc9.htm>

Patterson, C. *Lesbian & Gay Parenting: - a summary of research findings.*

**Equal Marriage for Same Sex Couples;** Canadian web-site;

<http://www.samesexmarriage.ca/equality/world.html>

Has mass of information and useful links on same-sex marriage around the world, including details of where this extends to a right to adopt.

**Let him stay:** produced by the American Civil Liberties Union Lesbian & Gay Rights Project;  
<http://www.lethimstay.com/index.html>

Web-site focussed on opposition to Florida's ban on gay and lesbian adoption.

**Marriage Watch:** describes its purpose as being to strengthen the institution of marriage and to affirm the definition of marriage as the union of one man and one woman.  
<http://www.marriagewatch.org/>

Has access to Lerner, R. & Nagai, A. K. (2001) *No Basis; What the Studies Don't Tell us About Same-Sex Parenting*, and the affidavit by Professor Stephen Nock cited in this report.

Ontario Consultants on Religious Tolerance  
<http://www.religioustolerance.org>

A "multi-faith" web-site discussing issues such as abortion and homosexuality - same-sex marriage is described as "our most popular topic".

**Orthodoxy Today:**  
<http://www.orthodoxytoday.org/> - describes itself as an "online journal that examines social and moral problems that affect American society." featuring authors "who write on cultural issues within a Judeo/Christian moral framework and analyze social and moral issues with clarity and depth". The site is maintained by Fr. Johannes Jacobse, a priest in the Greek Orthodox Archdiocese of America. A key theme is that "**American society needs moral renewal**".

We have cited one article specific to the theme of this paper:

**Timothy Dailey**  
*Homosexual Parenting; Placing Children at Risk*

Other related publications include:

**Samuel Silver**  
*Can America Survive Same Sex Marriage*  
**Johannes L Jacobse**  
*Gay Marriage far removed from Civil Rights Movement*

# Annex C: Alternatives to Adoption for Looked After Children

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## ALTERNATIVES TO ADOPTION FOR LOOKED AFTER CHILDREN

### Report to Adoption Law Review Group of the Scottish Executive

**Peter Selman and Kathy Mason**  
**University of Newcastle**

#### 1: INTRODUCTION

In this report we are responding to a request from the Adoption Law Review Group to look at policy and practice in relation to “looked-after children” in other countries. The report outlines some of the key issues and policies in other countries, whose policies we consider to be of interest as providing some alternative approaches to those currently pursued in Britain and the United States.

The main body of the report is based on three key sources (Selwyn, J. and Sturgess, W. 2001, Thoburn, J. 2000 and Warman, A. and Roberts, C. 2001; 2003), supplemented by a reading of the New Zealand Law Commission reports and personal communications from colleagues working in some of these countries. Professor Pat Petrie at the Thomas Coram Institute is currently researching foster care in Denmark, Sweden, Germany and France, but no findings are yet published. Her research builds on earlier work on residential care (Petrie 2002).

#### 2: COMPARATIVE RESEARCH AND POLICY ISSUES

Comparative policy analysis can be an important stimulus to new thinking about adoption policy and practice but should be used with caution. Many believe there has been an over-reliance on American research studies - and too great a readiness to follow American law, policy and practice - without adequate recognition of the particular problems of the American public care system and the issues of race associated with this.

European adoption research is largely focused on intercountry adoption and there is a tendency to see it as irrelevant to UK issues but the wider childcare system is worth studying and especially the role of prevention and the greater support available to birth families. There is also emerging research on outcomes for foster children.

Finally a wider context should remind us that the UK and USA have had the worst record on child poverty of all developed countries and that policy on tax credits and child care may be of greater relevance to children’s well-being in the long run.

The UK is not alone in reviewing its adoption law and practice and we shall make reference to similar concerns in other countries which may help to focus on key issues. In particular we shall look at proposals from the New Zealand Law Commission which have fundamentally questioned the use of adoption as a major resolution of the needs of looked after children. Scotland has the advantage of being able to examine these ideas and also the debates in England leading to the *Adoption and Children Act 2002* and subsequent discussion concerning associated guidance and regulations, although any evaluation of the impact of changes is for the future.

With these issues in mind we have looked at child care and adoption policy in nine other countries:

- **New Zealand and Australia (section 3)**
- **Scandinavia: Norway, Denmark and Sweden (section 4)**
- **Netherlands, France and Spain (section 5)**
- **Canada (section 6)**

As agreed, we have not reviewed policy in the United States, where there is a similar emphasis on adoption as the preferred solution for children in public

care, but we have referred briefly to US experience in the sections on *Kinship Care, Overriding Parental Rights* and *Outcomes* (sections 7, 8 and 9)

## 2.1 A profile of the countries compared

All of the countries reviewed are industrialised societies, but there are some important differences in the overall policy directions and also in some of the social and demographic indicators and these are presented (with the US as a comparator) in the following pages.

### 2.1.1. Welfare Regimes

In recent years there have been several attempts to classify industrialised states in terms of their overall welfare provision. The most well-known is probably that of Gustav Esping-Andersen (1990) who identified three types of welfare state regime:

**Liberal:** in which “means-tested assistance, modest transfers or modest social insurance plans predominate” and benefits are directed mainly at low-income, usually working-class dependents and “progressive social reform has been severely circumscribed by traditional work-ethic norms”

**Social Democratic:** under which “the principles of universalism and decommodification” are extended to the new middle classes and there is a pursuit of equality with “all strata incorporated under one universal insurance scheme, with benefits graduated according to earnings”

**Conservative-corporatist:** committed to the “preservation of status differentials” and usually relying heavily on social insurance, with private insurance and occupational fringe benefits playing a marginal role

States are categorised as one of these regimes according to their public-private mix and the degree of decommodification - i.e. the extent to which “a service is rendered as a matter of right” and a person can “maintain a livelihood without reliance on the market” (1990; 27-28).

The UK is seen as belonging to the first group, which also includes the US, Canada and Australia. Leibfried (1991) suggested a specific **Anglo-Saxon** welfare regime, embracing the UK, United States, Australia, New Zealand and Canada. The location of Britain alongside the USA makes sense only if we consider the effects of Thatcherism - earlier models (eg Titmuss 1974 or Furniss & Tilton 1977) would have stressed differences - especially in the Beveridge model of social security and the NHS in postwar Britain. This may in turn need revision after two periods of “New Labour” government, which have seen a commitment to reducing child poverty.

The Social Democratic group comprised Sweden, Denmark and Norway, which were classified as **Scandinavian Welfare States** by Leibfried, who chose the term “**Bismarck**” countries to describe France and Germany, which Esping-Andersen classifies as **Conservative**. Leibfried also suggests that Italy, Spain, Greece and Portugal form a distinct type of regime, which he characterises as “**Latin Rim**” and we have taken Spain as an example, but the cluster has been criticised as essentially a geographical analysis which wrongly implies a less developed system. There has been difficulty in categorising the Netherlands, which is usually seen as “corporate-conservative” but has recently experienced neo-Liberal reforms. Esping-Andersen has described the Dutch welfare regime as “... Janus-headed because the income transfers are large (as in social democratic types) but social services and the sponsoring of women’s careers are low (as in Conservative types of welfare state”.

Lewis (1997) has looked in particular at the issue of one-parent families and has developed a typology based on the concept of the dominance of a “male breadwinner model family, in which men are assumed to provide income for women and children and women to provide care” (Lewis 1997 p 3). Britain, Ireland, Germany and the Netherlands are seen as examples of a strong male breadwinner model - although in the latter this has not resulted in a backlash against lone parents and support is

generous despite the low number of working mothers (Millar & Rowlingson 2001). In contrast, the Scandinavian countries are seen as examples of a “weak” or “dual” breadwinner model.

### 2.1.2 Background Data

The tables below gives some background data on the countries reviewed, including any available material on looked after children.

**Table 1:** Looked After Children in Selected Industrialised Countries.

Country	GN1 per capita (2002) <sup>1</sup>	Under 5 Mortality (2002) <sup>1</sup>	% of children in poverty <sup>2</sup>	children in public care <sup>3</sup> 1998/9	% adopted from care <sup>4</sup> 1998/9
Australia	\$19,740	6	12.6%	30	0.8
New Zealand	\$13,710	6	—	30	0.8
Sweden	\$24,820	3	2.6%	50	0.2
Norway	\$37,850	4	3.9%	30	0.7
Denmark	\$30,290	4	5.1%	100	0.5
Netherlands	\$23,960	5	7.7%	24	N/A
France	\$22,010	6	7.9%	80	1.5
Spain	\$14,430	6	12.3%	40	—
Canada	\$22,300	7	15.5%	90	N/A
UK	\$24,250	7	19.8% <sup>5</sup>	47 (55)	4.0
USA	\$35,060	8	22.4%	75	6.7

<sup>1</sup> UNICEF (2004) *State of the World's Children 2004* Table 1, New York: UNICEF

<sup>2</sup> UNICEF (2000) *A League Table of Child Poverty in Rich Nations*, Innocenti Report Card no 1 June 2000; Florence: UNICEF Innocenti Research Centre

<sup>3</sup> Figures - per 10,000 aged 0-18: Selwyn, J. & Sturgess, W. *International Overview of Adoption: Policy and Practice*: University of Bristol, April 2000; Thoburn, J. (2000) *A Comparative Study of Adoption*, University of East Anglia

<sup>4</sup> PIU (2000) *Prime Minister's Review of Adoption*, London: HMSO

<sup>5</sup> For further comments on UK figures see also Bradshaw (2005)

**Table 2: Additional Data on Selected Countries.**

Country	Teen births 1998 <sup>1</sup>	Child Maltreatment <sup>2</sup>	Government Expenditure: % of GDP - 2000 <sup>3</sup>	Inequalities 2001-2 <sup>4</sup>
Australia	18.4	0.8	36.0	0.305
New Zealand	29.8	1.3	37.2	—
Sweden	6.5	0.8	57.4	0.230
Norway	—	0.3	43.5	—
Denmark	8.1	0.8	54.8	0.217
Netherlands	6.3	0.6	45.3	0.255
France	9.3	1.4	52.7	0.278
Spain	7.9	0.1	—	—
Canada	20.2	1.0	41.2	0.285
UK	30.8	0.9	37.0	0.324
USA	52.1	2.4	33.6	0.344

**SOURCES**<sup>1</sup> UNICEF Innocenti Report Card 3 2001<sup>2</sup> UNICEF Innocenti Report Card 5 2003<sup>3</sup> OECD<sup>4</sup> The **Gini coefficient** is a measure of income inequality developed as a number between 0 and 1, where 0 corresponds with perfect equality (where everyone has the same income) and 1 corresponds with perfect inequality (where one person has all the income, and everyone else has zero income). Source = Institute for Fiscal Studies 2001

### 2.1.3 Increases in adoption from care in England and the United States

The number of children placed for adoption in England has risen from 1,900 in 1997 to 3,500 in 2003 (an increase of over 80%), but the impact has been lessened by a rise in the total number of looked after children, so that the proportion adopted has risen by only 57% from 3.7 to 5.8 (see Table 3 below).

Despite over 16,000 children leaving care to join adopted families between 1999 and 2003 the total number of looked after children has risen by over 5,000. The impact of adoption in terms of securing a permanent future for children is limited without a parallel drive to reduce the numbers entering care.

In the United States adoption has been the preferred alternative for children in public care since the late 1990s and especially following the 1997 Adoption

& Safe Families Act, following which President Clinton called for a doubling of the number of children placed for adoption from public care. Table 4 shows the rise in adoptions for fiscal years 1998 to 2002. In contrast to England the number of children in care has started to decline, partly as a result of the rising number of adoptions: new admissions are static at about 300,000 per annum.

### 3: ADOPTION DEBATES IN OCEANIA

New Zealand and Australia both emphasise early intervention and working with families. The number of children adopted in both countries is lower than in Britain and 'kinship care' is viewed as the preferred option. These countries (and Canada which is discussed later) have been classed with the UK and the US as "Anglo-Saxon" welfare states in the typology developed by Liebfried (1991); as "liberal" welfare states by Esping-Andersen (1990). Neither country

**Table 3:** Looked After Children in England 1997 - 2003.

Year	Total in Care	Rate per 10,000 aged 0-18	Number fostered	Number placed for adoption	% of Looked After Children
1997	51,200	47	33,500	1,900	3.7
1998	53,300	49	35,000	2,100	4.0
1999	55,500	50	36,200	2,200	4.0
2000	58,100	52	37,900	2,700	4.7
2001	58,900	53	38,300	3,100	5.3
2002	59,700	54	39,200	3,400	5.7
2003	60,800	55	41,000	3,500	5.8
2004	61,100	55	41,600	3,700	6.1

Source: DfES/DH Statistics for *Children Looked After in England* for year ending 31st March

**Table 4: US Statistics on Looked After Children**

Fiscal Year Ending September	Total in Care	Rate per 100,000 aged 0 - 18	Number placed for adoption	% of Looked After Children
1998	559,000	75	37,000	6.7%
1999	567,000	76	47,000	8.2%
2000	552,000	75	51,000	9.2%
2001	545,000	72	50,000	9.2%
2002	532,000	71	53,000	10%
2003	523,000	70	49,000	9.4%

Source: *Adoption and Foster Care Analysis and Reporting System (AFCARS) statistics*

currently regards adoption as an option for special needs children, but there has been much discussion about possible alternatives which can offer more permanence for looked after children

### 3.1 New Zealand

Legal adoption was introduced in New Zealand in 1881, the first country in the British Empire to do so. Adoptive parents and birth parents has access to each others identity and the adoptee’s birth surname was retained and hyphenated to the adoptive surname (Griffith 1998). In 1955 a new **Adoption Act** changed all this, introducing the “complete break” ideology, alongside more positive reforms which increased State supervision and protection of the welfare of the child. This ideology prevailed until the 1970s when members of the adoption triangle began to speak out against secrecy, citing the changes in England & Wales under the 1975 Children Act. A ten-year campaign culminated in the passing of the 1985 Adult Information Act, which gave substantial rights to both adoptees and birth parents, albeit limited by powers to both parties to impose a veto. Since then

open adoption has become normal practice. Recently there has been widespread pressure for a further review to explore issues such as intercountry and transracial adoption; assisted reproductive technologies; and the role of alternatives such as guardianship, which is already “frequently promoted as more appropriate than step-parent or kin adoption in accordance with Maori culture” (Selwyn & Sturgess 2001 p92).

The primary legislation regarding looked after children is the **Children, Young Persons & Their Families Act 1989** and the **Guardianship Act 1968**. In the late 1990s there were 3,500 children in care and 80% were placed in home-based arrangements. Of the small number of adoptions from care in New Zealand around 80% are of children younger than 2 years old, reflecting that adoption is still primarily a means of supplying babies to childless couples.

Family group conferences were introduced in New Zealand in 1989, initially in relation to young offenders but there is now a much wider and extensive use as they are seen to help to reach

decisions earlier and reduce delay in relation to children with problems. Where there have been reports of child abuse, neglect or care problems and an investigation has suggested the child is not safe, he or she will be taken into temporary care (with family members if possible) and the case referred to a *Care and Protection Resource Panel* which arranges the *Family Group Conference*, which seeks an agreed plan with consent of all. If agreement is not reached or it is felt that a Court Order is needed the matter will then be referred to the family Court. The model has subsequently been followed in many other countries including Britain and Sweden. The use of family group conferences in Scotland has been discussed by Gill et al (2003).

Two recent publication papers on reforming adoption law have considered the position of looked after children and considered alternatives to adoption.

***Adoption: Options for Reform: A discussion paper*** (New Zealand Law Commission, October 1999)

The Law Commission was asked to review the legal framework of adoption taking into consideration the changing nature of society since the 1955 Adoption Act and the 1985 Adult Adoption Information Act. A wide range of issues were considered including the competing interests of all parties to adoption; openness and contact; who may adopt including single and same-sex parents; access to birth records; the need or not for birth parents to consent to the adoption and cultural sensitivity to Maori traditions. This review was not looking for answers but raising questions to stimulate discussion and opinion. Also, they were not looking at alternatives to adoption but rather, a wide range of current issues relating to adoption.

***Adoption and Its Alternatives: A Different Approach and a New Framework*** (New Zealand Law Commission, September 2000)

This later work from the Law Commission was looking at alternatives to adoption.

When asked whether adoption should be retained, or whether a more flexible approach should be introduced 38 of the 80 submissions said adoption should be abolished; 42 of the supporters of adoption were concerned that alternative would not provide sufficient permanency for the children.

The main recommendation was for the introduction of 'A Care of Children Act', which would include a range of care options, from temporary care arrangements to adoption. It was argued that a major benefit of such a system was that a range of options could be considered and there could be 'an ease of movement between the options' (p42). The majority of submissions to the review felt that adoption was in need of change and one of the first would be to change the 'legal fiction' that the adopted child had been born to the adopting parents. The review proposed adoption be replaced by a transfer of 'legal parenthood' to adopters as a means of giving full parental responsibility.

There was also a recommendation for the introduction of *Enduring Guardianship* to be used in situations where responsibility for a child had been partially or totally taken by a step-parent or family member (p52). Parental responsibility would pass to a new set of parents without removing the birth parents from the child's life. Parental responsibility would thus be shared and this might be a more appropriate way of meeting the need for permanency in such situations. Unlike current Guardianship, which expires when the

child reaches the age of 20 years, an Enduring Guardianship would continue for a lifetime.

In November 2004 New Zealand passed a new **Care of Children Act**, which will take effect from July 2005, but this was in fact a replacement act for the Guardianship Act rather than the comprehensive statute recommended by the Commission. The proposals on adoption and a continuum of care, including enduring guardianship, are likely to be introduced in a later bill, which would replace the present Adoption Act, but not until 2006 after the next election (Gurney 2004). The new legislation is seen as urgently needed as open adoption has been practised in New Zealand for 20 years without clear legislative backing.

### 3.2. Australia

There is no national child welfare legislation in Australia, child protection being the responsibility of the community services department of each State or Territory. The role of adoption as an option has declined in recent years with only 543 adoptions in 1998/9 of which 244 were intercountry adoptions, 127 were traditional 'stranger adoptions, 48 carer adoptions and 124 step-parent adoptions. By 2002-03 the number of adoptions had fallen to 472, of which 278 (59%) were intercountry adoptions and 116 (25%) were 'known' (step-parent; carer or other relatives) adoptions. In Australia, in 1999 there were 14,667 children in out-of-home care (30 per 10,000 children under the age of 18) of whom 87% were in home-based arrangements. Almost half of the small number of adoptions from care were infants aged under 1.

Emphasis is placed on identity and openness. Many agencies will not approve adopters who are unwilling to facilitate continuing birth family contact after adoption. Forms of guardianship are available where parental consent is not given. There are special provisions to

ensure that whenever possible children of indigenous ethnic origin remain within their kinship groups. Australia has a range of child-care options for children and young people, including out-of-home care, but such options are not seen as culturally appropriate for Aboriginal or Torres Strait Islander families in New South Wales.

In 1992 the Australian state of Victoria introduced a 'Permanent Care Order' under which the new permanent parents have both custody and guardianship of the children and are given caregiver payments until the child reaches the age of eighteen years. It is an option for children only when their parents are unable to fulfil their parenting role and the courts have determined that family reunification is not a desired outcome. The main objective for granting a Permanent Care Order is to provide the child with the opportunity to develop a stable caring relationship with their caregivers without severing ties with the birth family. The order does not affect the child's name, birth certificate or inheritance rights and in most cases contact with birth parents continues. In 2000/2001 91 permanent placement orders were made in Victoria, an increase of 15 over the previous year.

Thoburn (2000) suggests that the numbers of children adopted or in permanent care are low in Australia because formalised kinship care is the preferred option for their children in need of out-of-home placements. However, new legislation in New South Wales in 2001 may lead to a greater emphasis on permanency planning and an increase in the adoption of looked after children (Barber and Delfabbro 2004).

### 3.3. Conclusion

There has been widespread interest in the idea of a continuum of care options as suggested by the New Zealand Law Commission and the proposals for

enduring guardianship were influential on the development of special guardianship in England. Family Group Conferences have already been taken up in many countries including Scotland (Gill et al 2003).

#### 4: CARE OPTIONS IN THE NORDIC COUNTRIES

In her analysis of welfare regimes around Europe, Pringle (1998) found that there was reluctance in Nordic countries to remove children from their families of origin. In each of the countries family preservation was the key via a strengthening of families and via preventative measures. However, open adoption is now being considered by some of the countries as a possible way to meet the need of children away from home but allowing the maintenance of links with the birth family. There is an underlying principle in each of the countries that the State and the family each have equal responsibility for raising children (Selwyn and Sturgess 2001).

In all Nordic countries child poverty is far less prevalent than in the US or UK and preventive and support services more advanced. Welfare policy concentrates on strengthening families and on preventative services and this is reflected in child care practice. Consequently the rate of children entering care is lower in some countries.

In Sweden, Finland and Denmark adoption is not currently viewed as an option in child welfare policy. However, open adoption is now being considered by some countries as a possible way to meet the needs of children within the welfare system and at the same time maintain some links with the birth family. We have looked in detail at the situation in Sweden, but have also included brief comments on Norway, where the number of looked after children is particularly low but there has been a

growing interest in a role for adoption, and Denmark where there has been resistance to the trend towards kinship care found in other Nordic countries.

#### 4.1 Sweden

*"The Swedish child welfare system has no permanency planning as we know it from, for example, the United States and Great Britain"* (Andersson 1999)

The 1980 Social Services Act allows for children to be placed away from home with parental consent, but children can also be removed from parents under the Care of Young Person Act. However the Swedish Board of Social Welfare has stated that "as far as possible, (placements) should be for limited periods of time and focused on treatment, with reunion as the objective" (SoS report 1990). There is no legislation to terminate parental rights so that adoption against the wishes of parents is not possible and there is no provision for a permanent care order or guardianship without consent.

In 2001 there were around 18,500 children and young people in care at some time during the year - around 3000 returned home. The proportion in care is similar to the UK, reflecting the higher level of state intervention in Sweden compared to Norway and Denmark. Statistics show that only 30 children were adopted in 2001 with fourteen of these children being under the age of three. The majority of adoptions in Sweden are overseas adoptions (1,019 in 2003). Adoption is not an option for the majority of children in care because there is no legislation for the termination of parental rights.

Some children are cared for in small residential units that are run by the private sector, but foster care is the preferred option for the child, especially those in long-term care: more than 80% of children in care are placed in foster care with the ultimate aim of family

reunion. Placement with kin is usually explored first. Foster parents are generously remunerated - receiving between £500 and £1,000 per month, in large part tax-free and there has been much criticism of recent increases in the number of children removed against parental wishes. There is nothing stated in law about what should happen to children if it is not possible for them to return home and there are no time limits or guidelines about permanency. This can mean that some children “remain in foster homes for the whole of their childhood, on terms similar to adoption” (Andersson 1999, p 175) and concerns have been raised about the outcomes for the children in this type of placement.

The problems surrounding children in long-term foster care have been highlighted in a number of recent studies. Sallnas et al (2004) have reviewed nearly 1000 placements made during 1991 and found that between 30 and 37% were prematurely terminated. The lowest rates of breakdown were found in kinship care and secure units; the highest in non-kin foster homes, where teenagers displaying anti-social behaviour were particularly at risk. Such failure rates are not out of line with other countries, but indicated a particular need for older children. However, the most striking indictment of the failure of foster care in Sweden comes in a study by Hjern et al (2004) of “avoidable mortality in young adults,” which showed a much increased risk of suicide in intercountry adoptees and child welfare recipients. The latter - and especially a sub-group defined as in long-term foster care - were found to be also at risk of other “avoidable deaths” (e.g. homicide; deaths related to substance and alcohol misuse). One factor is likely to be the foster children’s background - 41% had parents who had been admitted to hospital for alcohol or substance misuse or psychiatric disorder. However, a key aspect of the findings was that such

deaths were most likely to occur over the age of 18 (when the international adoptees showed no increased risk) “highlighting the difference of being a permanent and transitory members of a substitute family” ( ibid 415 ). American studies have also identified deaths in “looked after” children as restricted to time after care (Barth 1998; Thomson 1995).

This has raised again the absence of “permanence” as a concept in Swedish child care policy. In 1995 there was discussion about parental responsibility being passed to foster parents with children in long term placements but the Swedish Government turned this down (Andersson 1999) and the possibility of adoption from care remains remote. Since 1995 Family Group Conferences have been introduced in Sweden and other Nordic countries - following the model introduced in New Zealand - and the results have been seen as very promising.

#### 4.2 Norway

In Norway 30 per 10,000 of all 0-18 year olds are in care, one of the lowest rates in Europe. Despite increasing interest in adoption as a permanency option for children who cannot be returned to their family there is no legal provision for open adoption, nor are there any post-adoption services for children adopted from care (Selwyn and Sturgess 2001, p45). Children tend to stay in foster care longer in Norway than in either Denmark or Sweden but this could be because every other avenue has been explored and the care system is the very last option for the most difficult cases (Blacke-Hansen 1992). As in Sweden, most adoptions are inter-country and a majority of the domestic placements are with step-parents. Only 80-100 children are adopted from care each year, most of these being infants born to “drug-abusing” mothers.

### 4.3. Denmark

The nuclear family is seen as the most important and therefore the extended family is not considered as alternative carers. Care plans have to be drawn up and reviewed on a regular basis - the first time after only 2 months and then every six months. Most children entering the care system are older (teenagers). Special needs children are placed with specially trained foster carers, for whom this is typically a professional full time job undertaken by psychologists or psychiatrists. Continuing contact with birth families is encouraged and there is concern over the poor outcomes for children without families in all types of foster care.

Research by Christoffensen (1996) into the long-term outcomes of children who had been looked after by the care system, found that a quarter had experienced five or more changes of school with many not completing compulsory schooling. Additionally many were found, at the time of the study, to be unemployed and suffering from low esteem and a lack of confidence. There is a growing use of small residential homes, staffed by social educators and psychologists, and this is a reminder of the value of good quality residential care as part of the overall provision for looked after children.

Denmark is one of the few countries that is not turning to members of the extended family for support during times of crisis. It is considered important to preserve the concept of the 'integrity of the nuclear family'. As a consequence, family group conferences are not used in Denmark. The state takes on an active role in supporting families, continuing support after the removal of a child and provides an intense service provision for rehabilitation at home.

### 4.4. Conclusion

The countries reviewed above all rely on foster care as the main provision for looked after children, although there is evidence of a growing interest in adoption in some. None provide a model which is clearly superior to the appropriate use of adoption in providing permanence, but there is much to learn from the successful use of kinship care and specialist fostering and in the stronger commitment to preventive policies compared to Britain and the USA.

## 5: ADOPTION IN OTHER COUNTRIES OF MAINLAND EUROPE

Although today adoption in mainland Europe - as in the Nordic states - is primarily about intercountry and step-parent adoption rather than domestic adoption (including special needs), there may be much to learn from their very different context and we have listed below some examples.

### 5.1 The Netherlands

The Dutch Ministry of Justice has commissioned an evaluation of the Dutch Adoption Law. One part of that, which is also relevant to domestic adoption, is to look into the age issues. Dutch adoptions are mainly intercountry adoptions (1100 a year compared to 40 domestic adoptions a year) - all adoptions take place under the Dutch adoption law that came into effect in 1998 in order to ratify the Hague Convention on Intercountry Adoption which the Dutch government signed in 1993. Dutch Law sets limits on the age of the prospective adopters, the child and the family formation. The maximum age for adoptive parents is 46 and the maximum age difference 40 years. A child can be no older than 6 years when entering the Netherlands and any child that is placed in a family should be no less than 1 year younger than the youngest child in the family. This

legislation was influenced by research by Verhulst (2000) and Hoksbergen (1997), which identified age at adoption as a major negative factor in outcomes.

The Netherlands has one of the lowest levels of looked-after children at a rate of 24 per 10,000 of the child population. Dutch local authorities can take children into care and place them away from home but they must have the full consent of their birth parents and the parents retain full parental responsibility during their children's stay in the care system. When children come in to the care of the state rehabilitation is always the main aim and professionals have to work closely with the birth parents. They also actively encourage the parents to be in regular contact with their children - even when the child has been compulsorily removed. As a consequence of the high levels of intervention and support for families, children in care tend to be older than those in other European countries; they are also likely to have more severe emotional and behavioural difficulties.

Adoption is not considered for children with special needs. Even in situations where there has been a compulsory order made and the children are brought in to care against the wishes of their parents the courts are obliged to review the cases each year, to seriously consider whether the child can be safely returned home (Warman and Roberts 2003). There is no provision at present for "open" adoption. At the current time there is a national shortage of foster carers leading to moves to improve payments, training and 'attachment leave'.

There may, however, be lessons to learn from the Dutch policies in respect of children adopted from abroad. Concern over the outcome of these adoptions has led to a determined effort to provide parents with post adoption support and in 1999 the Dutch government introduced a scheme offering new adoptive parents

support sessions with a possibility of follow-up when the child begins school or reaches adolescence (Juffer 2001). The problems facing British parents adopting special needs children are similar but may be even greater where the children have experienced abuse or unsettled early lives (Warman & Roberts 2001).

## 5.2 France

The French child welfare system was decentralised in 1983, giving local authorities the power to make administrative and financial decisions. There were 80 per 10,000 children in care in the late 1990s (Selwyn & Sturgess 2001). The emphasis is on keeping children at home and even when children are taken into care, rehabilitation to their home will usually be planned and cases are reviewed in the courts every year. Multi-disciplinary teams provide a wide range of services to families in difficulties and financial payments can be made as well as other support. In 2000 1.5% of the French population under the age of 20 years received this kind of help, or a short-term placement, while remaining in the care of their parents. Approximately 1000 children are adopted from care each year, the majority of these being young infants for whom the aim is an early placement within a year. Only children who are wards of court (*pupilles de l'état*) can be adopted and there are five different circumstances, by which children become wards of court:

- 1) if a child/baby has been abandoned or has no known family or is not recognised by their family;
- 2) if the parents have consented to the adoption at the time of the child's birth;
- 3) if the courts make an order on the grounds that the birth parents have relinquished their responsibilities for a year or more;
- 4) if the child is an orphan with no family guardian and
- 5) if the courts have removed parental rights.

There are many children who do not become wards of the state because they do not meet the above five criteria and are therefore, in need of long-term out-of-home placements. The majority of these are placed with foster families. All foster carers in France have professional status and since 1992 are obliged to undergo professional training, and are paid a wage in addition to childcare expenses. They are also seen as part of the family placement team and have a role to play in rehabilitation plans for the children. Children in long-term care cannot be adopted as long as their birth parents retain parental responsibility (Warman & Roberts 2003).

For children with special needs who are adoptable there is collaboration between *departements* (administrative regions) to find a family to accept them for adoption, but it is two private associations (one called *Enfants en Recherche de Famille* and the other called *Emanuelle*) which take children with severe handicaps. For the children who are not wards of the state, if their parents maintain family obligations/ties there is no possibility of adoption, although an article of law requires the *Aide Sociale a l'Enfance* to ask for legal renunciation if the family does not show adequate maintenance of such obligations (Gueant 2004). Young children are often placed in residential homes for assessment to avoid intense bonding which could jeopardise later family placements.

France has 'full' (*pleniere*) adoptions which completely severs legal ties with the birth family but also has 'simple' adoptions where the adoptive parents are given parental rights but the child keeps the birth family name and retains heritage rights. There have been major problems over access to birth records due to the practice of allowing birth mothers to remain anonymous. A new law in January 2002 encourages mothers to leave their identity in a sealed envelope and many are now doing so.

### 5.3 Spain<sup>1</sup>

In 2002 there were 31,368 children in public care (about 40 per 10,000 children under 18). 45 per cent of these were in residential care - a much higher proportion than in the other countries we have been discussing. This is in part a legacy of the Franco years when residential care was the only form of provision - Spain has only been a free democratic State since 1978 (Colton & Heelinckx 1993). The main form of provision in 2002 was kinship foster care (*acogimiento en familia extensa*) which accounted for 46.8% of children - with only 7.9% fostered by non-relatives. However, there are difficulties in obtaining a clear picture of Spain, as provision for looked after children lies with the 17 constituent autonomous communities.

Foster care can be arranged by *administrative decision* - which implies agreement between the administration, birth parents and foster parents and the child if older than 12 or by *judicial decision* - where the separation of the child from the birth parents was contested and the case taken to court. The former account for nearly twice as many foster placements each year. There are about 1,000 domestic adoptions a year, an increasing proportion being judicial decisions after the birth parents have contested the plans of social workers, but these remain a minority of total adoptions with the majority now being intercountry adoptions, the number of which increased from under 1500 in 1998 to over 5,000 in 2004. Social workers have the power to remove children and adoption is possible without parental consent.

In Spain *Kinship care* refers to children who have moved to live with relatives (usually grandparents). There are many kinship care instances that are informal

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<sup>1</sup> Information on adoption in Spain was provided by Jesus Palacios of the Dept of Psychology, University of Seville.

and are not part of any statistics. But those in the statistics are cases where (e.g.) the grandparents are the foster carers, usually in what the law calls “permanent foster care”, that is to say a foster care situation where reunification is not considered to be feasible. In some cases, the mother of the child might be living in the same household, although the grandparents are the ones with custodial responsibilities, but grandparents cannot adopt a grandchild.

## 6: CANADA

There are few publications about adoption in Canada and for many years there was little discussion about adoption other than press comments on babies from China and long waiting lists for domestic adoption. Adoption was rarely mentioned as part of the solution to 20,000 children growing up in permanent government care where parental rights have been terminated and many are in small institutional placements due to the shortage of foster homes for such children. Selwyn and Sturgess (2001) excluded Canada from their analysis “as the quality and reliability of the data was poor” (p vi).

According to the May 2002 “Report Card on Adoption” by the Adoption Council of Canada, there are over 66,000 Canadian children in foster care (93 per 10,000 aged 0-18). About 22,000 are permanent wards, and less than 1,700 of them are adopted annually across the country - 2.5% less than in UK and US ( Ross, 2000). In 1997 a new programme - Canada’s Waiting Children - was announced by the Adoption Council of Canada. ([www.canadaswaitingkids.ca](http://www.canadaswaitingkids.ca)). On March 19, 2002, the New Brunswick Adoption Foundation was launched. It is the first adoption foundation in Canada. It champions the cause of over 600 children in the care of the N.B. Ministry of Family and Community Services who need permanent families. Since the

Foundation’s inception, 164 children have been placed in adoptive homes. The Foundation was created to raise funds to support the New Brunswick Adoption Initiative, through education and public awareness. The Foundation is a charitable non-profit organization, independent of government. A conference on building lifelong connections was held in New Brunswick in October 2004. The slogan of New Brunswick’s adoption recruitment campaign is “Kids can’t wait to have a family” or “Une famille ... le rêve d’un enfant”.

Despite the evidence of growing interest in adoption of looked after children in Canada - and the indication of a growing rate of adoption from care (see Table 1) - we must agree with Selwyn & Sturgess (2001) that the limitations of available data make it impossible to use the country as a source for ideas about alternatives or indeed in relation to improving practice.

## 7. KINSHIP CARE

One alternative to fostering and adoption by approved non-relatives is formalised **kinship care**. This has been favoured in Australia and New Zealand where particular doubts about “stranger” adoption or fostering of children of indigenous ethnic origin has influenced overall policy for both countries.

Kinship care is rare in the UK where informal arrangements are more likely (Thoburn, 2000), but in the US there has been a major growth in the number of children in state custody who are living with their relatives. In 1997 approximately 150,000 foster care children, about one-third of all children in foster care, were living with relatives and in California a majority of foster children are with relatives.

This shift has been so significant that its importance is fully national in scope.

Some attributing factors for these increases are:

- increased reporting of abuse and neglect;
- a change in drug usage related to the spread of crack cocaine addiction and other drugs;
- increased levels of poverty;
- more children are affected by HIV/AIDS;
- parents struggle with physical and mental health problems;
- family violence and parental incarceration; and
- decline in the availability of traditional foster homes

Kinship care is also used in Sweden, where recent studies indicate less risk of placement breakdown for children fostered by relatives, who are also more likely to stay with family after 18. Kinship care is also common in Norway, but not in Denmark. In Spain this is the main method of foster care and accounts for nearly one half of looked after children (see section 5.3 above). The children in such placements tend to remain longer and are likely to continue with their new families after the age of 18, when risks for “looked after children” have been shown to be particularly acute.

## 8. OVER-RIDING PARENTAL RIGHTS

In England in March 2003 a majority of looked after children (65%) were subject to care orders and a further 1,900 were “freed for adoption” - a higher figure than in most of the other countries we have reviewed, but similar to the situation in the United States, where the Adoption & Safe Families Act 1997 requires termination of parental rights and a move to adoption, if a child has been looked after for more than 15 of the previous 22 months, unless it can be shown that the State has not made reasonable efforts to return the child to its family or the child is being cared for by a relative or there is a “compelling

reason” for believing it would not be in the child’s best interests. In Canada about a third of all looked after children are “permanent wards”.

In Denmark and Sweden only 3% of care orders are made without parental agreement, compared to 30% in the UK (Selwyn & Sturgess 2001 p 43). The biggest difference, however, is the reluctance of the Nordic countries to place children for adoption, which would involve a *permanent* termination of parental rights. It is this final step that has been a cause of major concern in other countries, especially New Zealand and Australia, leading to much debate about the possibility of a permanent order which does not involve such exclusion of the birth family.

While the concept of “open” adoption has moved adoption away from the traditional “fresh start” and “secrecy”, the extent and implications of long-term contact remains uncertain. The use of open adoption and “adoption with contact” has encouraged more interest in the Scandinavian countries in a possible role for adoption in respect of looked after children.

The 2002 Adoption & Children Act makes the child’s welfare the paramount consideration in any decision relating to adoption. This will make it easier to place children for adoption against the wishes of their birth parents, even if there is no specific fault, an approach unacceptable to many of the other countries reviewed and which raises concern over the lack of support for birth mothers who lose their children in this way (Mason & Selman 1997).

## 9. OUTCOMES:

This review has provided a limited secondary account of provision for looked after children in nine countries and it is unlikely that any of the models will be appropriate for Scotland. However, the

fact that most of the countries have not seen adoption as the preferred solution and the reluctance of most to remove children against parental wishes should act as a reminder of the importance of having a wide range of options in offering permanence for looked after children.

Ideally we would be able to point to one or other approach as more successful, but the data presented suggest that other factors must also be considered. Despite a higher proportion of looked after children being placed for adoption in the UK and USA, the number in need of a permanent family remains higher than many other countries because more children are in public care - preventive measures remain the priority alongside attacks on the social inequalities and poverty that lead to children being unable to live with their birth family.

Variations in the proportion of children who are “looked after” also make it difficult to carry out comparative studies of outcomes, as in those countries with low proportions of children in public care the looked after children may have a higher concentration of problems - as in Norway where the children admitted to care tend to stay for longer periods. Likewise comparisons over time are made more difficult by the changing characteristics of looked after children and particularly the suggestion that the population today includes more children with severe problems.

Nevertheless it is important to consider the outcomes of different modes of care: e.g.

- Residential Care
- Long-term Foster Care
- Kinship care
- Adoption by foster parents
- Other non-relative adoptions

This section of the report will look briefly at national studies which have attempted

this and also review the more extensive British and American studies on the outcome of special needs adoptions.

### 9.1 Studies of Foster Care Outcomes and Comparisons with Adoption

Barth & Berry (1987) compared the long-term outcomes for four groups of looked after children: those reunited with their parents; those who were adopted; children in long-term foster-care; and those with a guardianship order. Findings suggested that children placed for adoption had the best outcomes and those reunited with their birth parents the worst, findings similar to those of Tizard (1977) in an earlier British study. They conclude that “long-term foster care is not a preferred option”, a belief that remains at the heart of current American policy (Sargent 2003).

More recently, Triseliotis (2002) has looked at the research literature on outcomes of adoption and long-term foster care for children who cannot return to live with their birth families. He notes that studies carried out before 1990 show significantly higher breakdown rates for long-term fostering compared with adoption (2002 p 26) and that, although many later studies show a narrowing gap, the recent study by Sinclair (2000) for the Department of Health concluded that foster care rarely offers permanence and that the chance of long-term placements lasting is “very low”. Caution must be taken in drawing conclusions from these studies as an increasing number of very problematic children are now being placed - e.g. adolescents (Rushton 1988; 2000, 2004) and children exposed to parental substance misuse (Phillips 2004). In respect of the former Mulligan S. (2003) has argued that long-term foster care may be more appropriate for older children given the high breakdown rates associated with older age adoption placements.

Triseliotis argues that “the main defining difference between these two forms of substitute parenting appears to be the higher levels of emotional security, sense of belonging and general well-being expressed by those growing up as adopted compared with those fostered long term” and also the different expectations placed on foster carers and adopters, with the latter more likely to persevere “against the odds” (Quinton et al 1998).

However, he suggests four situations where long-term fostering may be the preferred option:

1. Where children do not want to be adopted;
2. When children attached to their current carers so a move would not be appropriate;
3. Where there are high levels of birth family involvement.
4. Where children, especially older ones, and their carers want time to get to know each other before making a final commitment.

This last point raises important issues about progress from foster care to adoption. Research suggests that the most successful type of adoption for older and special needs children is where foster carers decide to adopt. The dilemma is where foster carers are not prepared to adopt but are willing to offer long-term care. There are clear risks in moving a child from a family where (s)he has made attachments to a new family willing to offer an adoptive home, but leaving a child in the foster home can lead to rejection at a later stage when it will be more difficult to find adopters and where any placement has less chance of success - the result is often a succession of temporary placements and the risk of the child eventually growing up without a family (Triseliotis 2002 p31). This suggests a need for more attention to the support offered in long-term foster care,

as well as an exploration of factors which encourage foster carers to offer an adoptive home, including the availability of post adoption support and adoption allowances.

What is clear is that “long term fostering has a firm place in planning” for some children and that there is a need for more research into successful placements and whether these can maintain a family relationship for children into early adulthood (see also Schofield, 2003). There is also a need to explore how both foster carers and the children placed can be given a greater sense of security and it is in this context that the proposals for “special guardianship” in the Adoption & Children Act 2002 are important.

In the next section we look at the more extensive research literature on outcomes of special needs adoption.

## **9.2. The outcome of special needs adoption<sup>2</sup>**

Most of the evidence on the “success” of adoption for older and special needs adoption has come from studies in the US and Britain, although there is also a growing body of research on the outcomes of intercountry adoptions, most of which are seen as involving “special needs” (Selman 2003; Verhulst 2000). Some of the findings are discussed below. Appendix 1 contains some definitions of special needs and summaries of factors affecting success drawn from the American literature.

The literature on domestic special needs adoption in US is now vast, especially if we include earlier literature on “permanency planning” or the adoption of older children. Much of this has been loosely labelled “outcome” research and it is this that

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<sup>2</sup> This section is based on a more extensive discussion of outcomes of adoptions of older and special needs children in Selman (2003).

has generated most concern about the risks of placing older children. In studies of “permanency planning” outcomes have often been defined in terms of “**disruption**” - usually defined as breakdown of placement plans before adoption order - but sometimes equated with or also embracing “**dissolution**” - breakdown of adoption placement (McRoy 1999).

Older age at adoptive placement has been linked with increased risk of adoption breakdown or later maladjustment in numerous studies and is seen as a powerful factor within various categories of “special needs” leading to calls for more rapid placement when a family situation is seen as irretrievable. The most widely quoted of such studies is probably Barth & Berry (1988), who show the proportion of disruptions rising from 5% for 3-5 year olds to 24% for those aged over 12 years at placement, a finding replicated in many other studies (Boyne et al, 1984; Festinger, 1986; Thoburn, 1990).

Rosenthal & Groze (1992) studied 800 “intact” special-needs families and claim that their survey “provides empirical justification for what many professionals already know - that adoption of older children and children with handicaps is rewarding and satisfying for a substantial majority of families. In a later study Groze (1996) reports on a four-year follow up of 199 families. After one year 51.5 per cent of parents considered that the overall impact of the adoption on the family had been very positive, but this had fallen to 39% after 4 years and the number reporting the impact as “mostly negative” had risen from 3.1 to 13.6 per cent after 4 years. Despite this, 78 per cent of the parents said they never thought of ending the placement and 84 per cent said they would adopt again. However, caution must be exercised about the findings as only 71 of the families (35%) were left in the study after 4 years.

In the UK Rushton et al (1988) report on a small study of 18 placements of older boys (aged 5-9). A total of 31 children were placed - multiple placements being largely sibling groups. The authors conclude that success seemed to reflect the child’s sense of security and parental attitude rather than the severity of problems at placement. In a later study Rushton et al (2000) carried out research into 61 children with very negative early experiences who had been adopted from care and found a disruption rate of 20 per cent, with rates rising with age of child at placement. Most recently Rushton & Dance (2004) report findings from a study of 133 late placed children. The continuation rate was 91% after one year and 71% after six, but the authors note that a third of the continuing placements were considered highly problematic.

There are many other studies of special needs adoption. Excellent reviews of studies from the 1970s and 1980s can be found in Rosenthal (1993) and Thoburn (1990) and the Adoption Quarterly has provided reviews of more recent research on a number of relevant groups: adolescent and older-child adoptions (Haugaard et al 1999a); children with developmental disabilities (Haugaard et al 199b); children affected by HIV and AIDS (Haugaard et al 1998); and those exposed to illegal drugs in utero (Haugaard et al 2001). Other useful sources of research into special needs and of practice implications are Anderson (1997), Avery (1997), Glidden (1990). McRoy (1999) and Parker (1999) pay special attention to practice implications of such research. However, there has been very little research on the outcomes for different forms of care so that these studies cannot answer the question of whether there are alternative forms of provision which could achieve similar (or better) outcomes.

The most recent published study on children adopted from care in the United States comes from the Evan B Donaldson

Adoption Institute (2004). The study finds that “the vast majority of adoptions from foster care remain intact over time, notwithstanding concerns by many professionals that the failure rate of such adoptions would rise as a result of huge increases in their numbers during the last decade”

### 9.3. Factors affecting success

There is now a growing consensus about those factors that are predictors of positive outcomes (McRoy 1999; Rosenthal 1993; Rosenthal and Groze 1992) and these are listed in Appendix 1. There is also agreement about some factors which are consistently associated with negative outcomes. Older children are at greater risk but most placements succeed so that we must be careful not to react to the association of age with less satisfactory development by any suggestion that older children should never be placed for adoption. The message should rather be that, once it has been established that a child can no longer live with his/her birth parents, placements should be made as soon as possible. Similar dilemmas arise over the interpretation of research showing poor outcomes for children experiencing multiple moves before placement.

It is, therefore, important to consider the “value added” by adoption - for many older and special needs children this will be great even if many problems remain, as long as they are able to remain in a family with the prospect of a lifetime relationship. We need, therefore to ask questions about outcomes that look at costs and benefits, for both children and parents e.g.

- Do the costs for the minority of children whose placements fail outweigh the benefits for those that succeed? Is there a “necessary risk”? (Festinger 1986)
- Do the costs for some adoptive parents threaten the whole pattern of special needs adoption?

- What can society do to minimise these costs e.g. by post-adoption support and subsidies?

Many of the studies cited also indicate that post-adoption experience (including some characteristics of adoptive parents) is probably more important than pre-adoptive factors, suggesting that more care is needed in assessing and preparing parents and in matching. McRoy (1999) found that in her study 87% of the disrupted adoptions and 76% of the dissolved adoptions were considered to be poor matches between parent and child.

Finally, we must never forget that the search for permanence is not only about adoption, but about finding where adoption can play a crucial role alongside other forms of long-term care and renewed efforts at prevention and rehabilitation. This brings us back to the need for more studies looking at the effectiveness of a wider range of “permanent” solutions (Selman 2003).

## 10: SUMMARY AND DISCUSSION

This report has aimed to provide a brief introduction to policy and practice in respect of looked after children in nine developed countries, based on a review of recent literature. We have relied heavily on three previous reviews (Selwyn, J. and Sturgess, W. 2001, Thoburn, J. 2000 and Warman, A. and Roberts, C. 2001; 2003), the most useful of which has been Selwyn, J. and Sturgess, W. *International Overview Of Adoption: Policy and Practice*, (University of Bristol 2001). The authors looked at all of the countries we reviewed with the exception of Spain, but excluded Canada from its analysis due to the poor quality of data.

Of the countries discussed in this report only Canada currently promotes adoption strongly, although adoption is emerging as a part of policy for looked after children in France and Norway. In the

other countries foster care is the preferred solution with special needs children likely to be looked after by highly paid specialist foster carers and a wider use of kinship care. Parental rights are only removed in extreme cases. There is, however, growing concern over those children without families and their lack of continuity of care as they grow into young adulthood. Institutional care is widely used in cases of foster home breakdown.

British policy is, therefore, in many ways in advance of most of the countries reviewed in respect of seeking permanence for these children and there are no easy alternatives to recommend. The proposals for a “continuum of care” in the New Zealand Law Commission reports are attractive but have not yet been translated into law. In the mean time the Scottish Adoption Law review is rightly addressing those issues of permanence raised in the review of English Law.

Reviewing policies in other countries shows that there are many different approaches to supporting children and their families. Warman and Roberts (2003:1 p46) suggest this wide range of options has a lot to do with ‘deep-rooted attitudes and beliefs’ but warn that it is difficult to comment whether any system is ‘better’ than another without a full evaluation of research findings about each method/system. A central concern must be the evidence that looked after children do poorly in later life and that intervention by the State has been shown to be ineffective. A key issue is the vulnerability of such children when they leave care, especially if they lose contact with their temporary carers - whether in a foster or residential home: - hence the importance in the UK and US of the concept of permanence in the original sense of the term, including rehabilitation. Adoption is just one possible route but one that has proved relatively successful. The danger is that the “costs” of adoption - in terms of loss

of links to the birth family - have been neglected and adoption pursued at the expense of a parallel emphasis on improved services for prevention and rehabilitation and on strengthening alternatives such as long-term fostering (Schofield 2000; 2003).

### 10.1. Improving Support for Families

The level of support for families seems to be a major factor in determining whether children come in to - and remain in - care. Some of the countries reviewed have demonstrated a greater capacity to provide such support to families and two areas seem important:

- Universal, affordable childcare that enables parents to work and be economically self-supporting is especially important for single parents and a major influencing factor when they begin to think about future parenting options. The childcare system in Sweden is often cited as an exemplar.
- The degree to which professionals work with birth families when difficulties arise and the emphasis given to keeping children at home or to rehabilitation in cases where children have been removed.

There are also a number of more specific examples of support which have proved successful in other countries and which merit consideration as Scotland moves towards new provisions for adoption and permanence:

- a) **Payments to families** - are more generous in Denmark, Portugal and Greece - but are usually made only if there is proof that the child would otherwise have to be placed outside the family home.
- b) **Provision of Day Centres** - open to children and parents who are

encouraged to discuss their problems and look for solutions. These can vary in type including ones that are open after school hours for families with older children.

- c) **Home-based support** - this can be an expensive alternative because the support can be on a daily basis and continue for several weeks. It works by the professionals visiting the family in their own home on a regular basis. The professionals can be social workers with a role of educators visiting on a daily basis or therapists who may only visit once or twice a week. A novel scheme in the Netherlands is where families volunteer to have certain parts of their daily life filmed. The family and professionals then view the video together to discuss issues that have arisen.
- d) **Networking** - gather relative, friend, professionals and anybody else available to support the family. The Netherlands have a neighbourhood youth care network scheme which involves professionals from the community (nurses, teachers, doctors, social workers) working on a daily basis with under-12s and their parents. Denmark has a scheme where the children spend time away from home with relatives every other day or at weekends.
- e) **Kinship Care** - which has been most widely documented in New Zealand where it is linked to the development of family group conferences discussed earlier, but is now seen as a vital resource in the USA, especially in relation to black ethnic minority children who are over-represented in the care system: Black/African American children represent 15% of the population but account for 41% of looked after children.

## 10.2. The need for a lifelong home

One of the most compelling arguments for making adoption the preferred option for children unable to return on a permanent basis to their birth families is that it is the only form of substitute care which can provide a home for life. A big problem of children being brought up in residential or foster care is that of 'leaving care' (Ruxton 1996). Children are often expected to become independent at an earlier age than the average and the transition to independence is likely to be more abrupt. As a consequence there are higher levels of unemployment, prostitution and begging amongst those brought up by the care system. This is in direct contrast with outcome studies of children who have been adopted. The Swedish study cited above (Hjern et al 2003) suggests that this is a very real problem, manifested in extreme negative outcomes for a minority of children, especially those in non-relative foster placements.

As foster care is likely to continue as an option for many children in the foreseeable future, it is important to consider how we can provide security into early adulthood and beyond for those children who are not -or cannot - placed for adoption. The proposals for "enduring" guardianship have a clear appeal.

## 10.3. Improving provision for looked after children

Selwyn and Sturgess (2001) point out that even if adoption is to be a preferred option, there is much to be done to improve current practice and a parallel need to address the issue of those children who cannot be considered for adoption. Some of their key points are listed overleaf:

- A need for better data and research on adoption from care enabling "evidence-based practice"
- A need for more understanding in respect of children affected by

parental substance misuse, which is a growing problem and often involves irreparable damage

- Urgent action to minimising delays in permanent placement
- Treatment Foster care - for children with major long-term problems
- Specialist teams to recruit suitable adopters - links to Adoption Register
- Post adoption support - from extension of adoption allowances to the wider availability of counselling services.

#### 10.4. A continuum of care options

While a review of the alternatives to adoption has not indicated any model which can be shown to be clearly superior to that currently pursued by Britain, it does suggest the value of seeking a wide range of measures to provide permanence and of the danger of neglecting the equal importance of improving support for families and preventing children coming into care (Warman & Roberts 2001). In many other countries more resources are devoted to long-term fostering and it is important that adoption does not deflect attention from the current crisis in foster care in the UK. There is growing evidence that adoption by foster parents is more successful than adoption by new parents so that any decision to move a child from a long-term foster home simply to ensure an adoptive placement must be questioned. Likewise the role of kinship care seems to be neglected. What is clearly needed is a wider range of options than adoption and traditional long-term fostering which ends at 18. The examples discussed above - enduring guardianship in New Zealand; permanency orders in Australia; special guardianship in England - show that alternative legal routes to permanence are possible, although few of these have been systematically evaluated in comparison with adoption. What is less clear is how we ensure that such options are fully resourced and that research is undertaken which will show which options work best for which children.

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## Useful websites:

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[www.nsw.gov.au](http://www.nsw.gov.au)

**Evan B. Donaldson** report *What works for children* available at  
[www.adoptioninstitute.org/publications/2004\\_disruption\\_report.html](http://www.adoptioninstitute.org/publications/2004_disruption_report.html)

**New Zealand Law Commission**  
[www.lawcom.govt.nz](http://www.lawcom.govt.nz)

**Performance and Innovation Unit;**  
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## APPENDIX 1: Special Needs Adoption

### Definitions:

Rosenthal (1993) identified 6 key defining characteristics of "special needs":

- Older than 4 years
- Emotional or behavioural problems
- Disability - including developmental problems
- Serious medical condition - e.g. AIDS, cancer
- Sibling Groups

And often - as prime examples of "hard-to-place" children:

- Black & Minority ethnic children.

The issue of alcohol and drug misuse in parents has been of great concern in the US and more recently also in the UK (Phillips 2004)

### Factors Affecting Success

A number of factors emerge from reviews of outcomes of special needs adoption (McRoy 1999; Rosenthal 1993; Rosenthal and Groze 1992) as associated with positive outcomes:

- Younger age of child at placement
- Absence of behavioural problems
- No prior sexual abuse
- Provision of complete background information
- Careful Matching of parents and child
- Parents who are flexible and realistic in their expectations.

Children involved in disrupted and dissolved adoptions were more likely to:

- have been placed at older ages
- have been severely traumatised before placement
- have experienced numerous moves
- exhibit more aggressive and sexual acting-out behaviours.

# Annex D:

## Proposed changes to the Sheriff Court Rules

### Chapter 2 of the Act of Sederunt (Child Care and Maintenance Rules) 1997

#### ABBREVIATIONS USED

- Adoption (Scotland) Act 1978 1978 Act
- Human Fertilisation and Embryology Act 1990 1990 Act
- Children (Scotland) Act 1995 1995 Act
- Ordinary Cause Rules 1993 OCR 1993  
*(This is the name commonly given to the sheriff court rules for Ordinary Causes, contained in Schedule 1 of the Sheriff Courts (Scotland) Act 1907, the current version being substituted by S.I. 1993/1956.)*
- Rules of the Court of Session 1994 RCS 1994
- Act of Sederunt (Child Care and Maintenance Rules) 1997 AS 1997
- Parental responsibilities order under s.86 of the 1995 Act PRO

## INTRODUCTION

1. These are detailed proposals for changes to the rules in Chapter 2 of the AS 1997, "Adoption of Children". They expand the comments and recommendations in Chapters 7 and 8 of the main Report, and suggest specific drafting additions and amendments to the rules. In suggesting changes and new rules, it has been easier to prepare new draft rules with notes attached, rather than just describe possible changes.

2. Chapter 2 of the AS 1997 has seven Parts and deals with seven types of cases:

- Part I. General;
- Part II. Freeing applications;
- Part III. Revocation of freeing applications;
- Part IV. Adoption applications;
- Part IVA. Convention Adoption applications (inserted by S.S.I. 2003/44);
- Part V. PRO applications **and** Variation or Discharge of PROs; and
- Part VI. Applications under the 1990 Act.

3. This Annex is in eight sections, based on the recommendations for changes to the court rules in Chapter 7 and about curators, reporting officers and safeguarders in Chapter 8:

1. General rule to allow relief from failure to comply with rules.
2. Proposals for applications to contain reasons.
3. Rules providing for earlier formal intimation of applications.
4. Rules providing for Notices of Intention to Defend, Statements of Disputed Issues and Written Answers.
5. Rule allowing a general power of intimation of freeing hearing.
6. Rules to ensure that proof hearings are heard on consecutive working days.
7. Rule allowing extempore judgements.
8. Rules for Reporting Officers and Curators.

4. Some of the proposed rules are general ones for inclusion in Part I, while others are spread throughout the rest of the Chapter. There are new general rules for Citation; Service where an address is unknown; Duties of reporting officers; Duties of curators; Agreements and consents; Proofs to be taken continuously; and Decision of sheriff after hearing evidence. Rules for intimation of application, notices of intention to defend, statements of disputed issues and written answers are proposed for the different Parts of Chapter 2.

5. Some of the proposals for new rules mean that existing ones should be repealed. These rules are: **2.6, 2.8, 2.23, 2.26, 2.38(2), 2.40, 2.48 and 2.53**, which relate to executions of agreements etc and to duties of reporting officers and curators. They are replaced by general rules about these matters in Part I of Chapter 2. In addition, some of the proposals will require either changes to existing Forms or the preparation of new ones, for matters such as intimation of applications and Notices of Intention to Defend.

### **1. GENERAL RULE TO ALLOW RELIEF FROM FAILURE TO COMPLY WITH RULES AND CHANGE TO INTERPRETATION RULE**

6. This is not a specific recommendation of the Group but its introduction into the AS 1997 is needed along with the proposals for earlier notifications, notices of intention to defend, statements of disputed issues and written answers, to allow for mistakes. At present, there is no rule in Chapter 2 of the AS 1997 allowing relief to parties to proceedings when there has been a failure to comply with any of the rules, including timescales. If changes are to be made to the AS 1997 as suggested, there is a need for such a general provision. There are equivalent general provisions in the RCS 1984, r.2.1,

which covers adoption proceedings in the Court of Session under Chapter 67; and in the OCR 1993, r.2.1, which covers family actions in the sheriff court.

### **Proposal for a rule about relief from failure: Insert a new rule 2.1A**

#### **Relief from failure to comply with rules**

**2.1A.** (1) The sheriff may relieve a party from the consequences of failure to comply with a provision in the rules in this Chapter which is shown to be due to mistake, oversight or other excusable cause, on such conditions as he thinks fit.

(2) Where the sheriff relieves a party from the consequences of a failure to comply with a provision in the rules in this Chapter under paragraph (1), he may make such order as he thinks fit to enable the cause to proceed as if the failure to comply with the provision had not occurred.

7. It would also be helpful to have another general amendment to Chapter 2 in the Interpretation rule, r.2.1.

#### **Proposal for amendment to r.2.1**

After ““the Act” means the Adoption (Scotland) Act 1978;” insert a new line:

““the 1990 Act” means the Human Fertilisation and Embryology Act 1990;”.

## **2. PROPOSALS FOR APPLICATIONS TO CONTAIN REASONS**

8. An application should contain a short note of the reasons why the order sought is in the best interests of the child.

9. At present, applications under Chapter 2 do not require to give reasons as to why the orders sought are in the children’s best interests, with the

exception of those for PROs, where the Form 16 provides a section for Grounds for the application. Form 16, in its section 2, says:

*“The Applicant asks the Court to make a Parental Responsibilities Order for the following reasons:- [applicant to provide details of grounds for making the application]”*

The Group considers that it would be helpful if all the applications listed included short reasons why the order is in the best interests of the child. We propose that the rules about applications and the relevant Forms are amended to include this.

### **Proposals for amendment of rules and Forms**

#### **I. Amendments to rules about applications**

**(a) In rule 2.5(1)** (freeing), **rule 2.15(1)** (revocation of freeing), **rule 2.21(1)** (adoption), **rule 2.38(1)** (PRO) and **r.2.46(1)** (application under the 1990 Act), at the end of each paragraph, **insert the words:**

*“and shall include a note of reasons why the order sought is in the best interests of the child.”*

**(b) In rule 2.44(2)** (variation and discharge of PRO) at the end of sub-paragraph (d) delete the word “and”, and after sub-paragraph (e) delete “.” and **insert:**

*“; and*

*(f) a note of reasons why the order sought is in the best interests of the child.”*

## **II. Amendments to Forms 1, 8, 10, 11, 12, and 16**

**Insert** the following section in all the Forms:

### **Reasons for the Petition/Application**

The Petitioner/Applicant asks the Court to make [insert the type of order sought] on the basis that it is in the best interests of the child throughout his life/childhood because [petitioner/applicant to insert brief reasons why the order is in the child's best interests].

### **3. EARLIER FORMAL INTIMATION OF APPLICATIONS**

11. Formal intimation of applications to birth families should be made as soon as applications are lodged in court.

12. As explained in Chapter 7, formal notice to birth parents in permanence cases is currently not given until after reports from the reporting officer and curator have been lodged in court. This means that birth parents, while they should know about plans for their children, do not know when court proceedings will be starting and which court will deal with them. This leads to delays in taking legal advice, applying for legal aid and other aspects of cases.

13. The proposed intimations would help families receive prompt notification, and allow earlier indication of which cases are being disputed. Such earlier notifications would help to encourage birth parents to consult solicitors more promptly.

14. To introduce earlier notifications, Chapter 2 needs to be amended to ensure that all petitions, minutes and applications trigger orders for intimation to those with an interest. At present, the first thing the court does under the rules is to appoint a reporting officer and

curator, or a curator only, or to consider appointing a curator, depending on the type of case. The rules about these appointments could be amended to add in to a duty and a power to order intimation at the same time.

15. The proposals contain duties to order intimation to those who must have it; and powers to intimate to other people who might have an interest. The list of those to whom intimation may be made is based on the one in r.2.28(4) of the AS 1997, which allows sheriffs to intimate adoption hearings to others as they see fit. The proposals also correct the existing statutory references in r.2.28(4)(a) as the current ones are not accurate; and amends r.2.25(2), to remove the words "save for the purpose specified in rule 2.26(1)(a)" which are otiose.

16. The proposals for notification of applications when they are lodged include a general rule for periods of citation, r.2.4A, to cover all applications in Chapter 2. A further new rule, r.2.4B, is also suggested, to allow for service where the address of someone who should be notified is not known. There is no existing rule about this in Chapter 2 or in the RCS, although there is such a rule in the OCR. The current rules about intimation of hearings all refer to giving notice to persons "who can be found" or "whose whereabouts are known". As the suggested new rules are about notification at the start of an application, it seems fairer to allow for some form of service where an address is not known, rather than restrict intimation to people whose addresses are known.

### **Proposals for new rules and amendments about earlier notification**

**I. General provisions for periods of citation:-insert new rules 2.4A and 2.4B.** These are based on similar provisions in the OCR 1993.

## Period of notice after citation

**2.4A.** (1) Subject to rule 2.4B (service where address of person is not known) and to paragraph (2) of this rule, a petition, minute or application under this Chapter shall proceed after one of the following periods of notice has been given to the respondent:

- (a) where the respondent is resident or has a place of business within Europe, 21 days after the date of execution of service; or
- (b) where the respondent is resident or has a place of business outside Europe, 42 days after the date of execution of service.

(2) Subject to paragraph (3), the sheriff may, on cause shown, shorten or extend the period of notice on such conditions as to the method or manner of service as he thinks fit.

(3) A period of notice may not be reduced to a period of less than 2 days.

(4) Where a period of notice expires on a Saturday, Sunday, or public or court holiday, the period of notice shall be deemed to expire on the next day on which the sheriff clerk's office is open for civil court business.

## Service where address of person is not known

**2.4B.** (1) Where the address of a person to be cited or served with a petition, minute or application under this Chapter is not known and cannot reasonably be ascertained, the sheriff shall direct the petitioner, minuter or applicant to intimate to that person by:

- (a) the publication of an advertisement in Form 7C in a specified newspaper circulating

- in the area of the last known address of that person; or
- (b) by displaying on the walls of court a copy of the petition, minute or application and a notice in Form 7D;

and the period of notice fixed by the sheriff shall run from the date of publication of the advertisement or display on the walls of court, as the case may be.

(2) Where service requires to be executed under paragraph (1), the petitioner, minuter or applicant shall lodge a service copy of the petition, minute or application and a copy of any intimation with the sheriff clerk from whom they may be uplifted by the person for whom they are intended.

(3) Where advertisement in a newspaper is required for the purpose of citation or service under this rule, a copy of the newspaper containing the advertisement shall be lodged with the sheriff clerk by the petitioner, minuter or applicant.

(4) Where display on the walls of court is required under paragraph (1)(b), the petitioner, minuter or applicant shall supply to the sheriff clerk for that purpose a certified copy of the petition, minute or application and any intimation.

## ***II. Amendments to allow intimation of petitions, minutes and applications at the time of lodging.***

These are needed in Part II, Freeing; Part IV, Adoption; Part V, PROs; and Part VI, Applications under the 1990 Act. No amendment is needed in Part III, Revocation, because r.2.15(2) already provides for a minute for revocation to be intimated on lodging. Amendment is not needed in Part IVA,

Convention Adoption Orders, as the provisions for appointment of curators etc for these cases are the same as those for adoption in Part IV, with minor substitutions - see r.2.36E.

The proposed rules contain the words “(whose whereabouts are known to the petitioner/applicant/petitioners and)” in brackets and in italics if it is decided to use the wording in the rules about notifications of hearings. However, if the new rule 2.4B proposed above is inserted into Chapter 2, these words can be omitted.

**(a) Freeing insert new rule 2.6.**

*Intimation of application*

**2.6** (1) The sheriff shall, at the same time as he makes the appointments referred to in rule 2.7(1), direct the petitioner to intimate the petition and the appointments using Form 7A to:

- (a) every person (*whose whereabouts are known to the petitioner and*) whose agreement or consent in terms of section 18 of the Act is required or must be dispensed with; and
- (b) in the case of a child whose father is not married to the mother, any person whose whereabouts are known to the petitioner and who claims to be the father of the child but who is not his guardian and in respect of whom no order relating to parental responsibilities or rights has been made.

(2) The sheriff may, if he considers it appropriate, ordain the petitioner to intimate the petition and the appointments using Form 7A to:

- (a) any person or body having the parental responsibilities and rights of a parent of the child or having the custody or care of

the child or a local authority looking after the child in terms of section 17(6) of the 1995 Act, section 22(1) of the Children Act 1989 or section 18(3) of the Adoption and Children Act 2002;

- (b) any person liable by virtue of any order or agreement to contribute to the maintenance of the child;
- (c) any other person or body who in the opinion of the sheriff ought to be served with notice of the petition.

**(b) Adoption insert new rule 2.24A.**

*Intimation of application*

**2.24A** (1) The sheriff shall, at the same time as he makes the appointments referred to in rule 2.25(1), direct the petitioner to intimate the petition and the appointments using Form 7A to:

- (a) in a petition for an adoption order, every person (*whose whereabouts are known to the petitioner and*) whose agreement or consent to the making of such an order is required to be given or dispensed with; or
- (b) in a petition for an order under section 49(1) of the Act, every person (*whose whereabouts are known to the petitioner and*) whose agreement to the making of such an order would be required if the application were for an adoption order.

(2) The sheriff may, if he considers it appropriate, ordain the petitioner to intimate in Form 7A the petition and the appointments to:

- (a) any person or body having the parental responsibilities and rights of a parent of the child or having the custody or care of the child or a local authority looking after the child in terms

- of section 17(6) of the 1995 Act, section 22(1) of the Children Act 1989 or section 18(3) of the Adoption and Children Act 2002;
- (b) any person liable by virtue of any order or agreement to contribute to the maintenance of the child;
- (c) the local authority to whom the petitioner has given notice of his intention to apply for an adoption order;
- (d) any other person or body who in the opinion of the sheriff ought to be served with notice of the petition.

**(c) PROs insert new rule 2.38A.**

*Intimation of application*

2.38A(1) The sheriff shall, at the same time as he makes the appointments referred to in rule 2.39(1), direct the applicant to intimate the application and the appointments using Form 18A to:

- (a) any relevant person (*whose whereabouts are known to the applicant and*) whose agreement in terms of section 86(2) of the 1995 Act is required or may be dispensed with; and
- (b) in the case of a child whose father is not married to the mother, to any person whose whereabouts are known to the applicant and who claims to be the father of the child but who is not his guardian and in respect of whom no order relating to parental responsibilities or rights has been made.

(2) The sheriff may, if he considers it appropriate, ordain the applicant to intimate the application and the appointments using Form 18A to:

- (a) any person or body having the parental responsibilities and rights of a parent of the child or having the custody or care of

- the child or a local authority looking after the child in terms of section 17(6) of the 1995 Act, section 22(1) of the Children Act 1989 or section 18(3) of the Adoption and Children Act 2002;
- (b) any person liable by virtue of any order or agreement to contribute to the maintenance of the child;
- (c) any other person or body who in the opinion of the sheriff ought to be served with notice of the application.

**(d) Minutes for variation or discharge of PROs amendment to r.2.44: insert new paragraph (2A)**

*Variation and discharge of order*

2.44 (1) and (2)...Existing paragraphs.

(2A) The sheriff shall, on the lodging of a minute under paragraph (1), direct the applicant to intimate the application using Form 18A to:

- (a) the child who is the subject of the minute unless he is the applicant or the sheriff considers that it is not in his best interests to receive such intimation;
- (b) any relevant person who is not the applicant, (*whose whereabouts are known to the applicant and*) whose agreement in terms of section 86(2) of the 1995 Act was required in the original application;
- (c) the local authority which made the original application;
- (d) any other person who was a party to the original application; and
- (e) any other person or body who in the opinion of the sheriff ought to be served with notice of the application.

**(e) Applications under the 1990 Act  
insert new rule 2.50A**

2.50A(1) The sheriff shall, at the same time as he makes the appointments referred to in rule 2.51(1), direct the petitioners to intimate the petition and the appointments using Form 24A to:

- (a) every person (*whose whereabouts are known to the petitioners and*) whose agreement to the petition is required to be given; and
- (b) any other person or body who in the opinion of the sheriff ought to be served with notice of the petition.

**4. NOTICES OF INTENTION TO DEFEND,  
STATEMENTS OF DISPUTED  
ISSUES AND WRITTEN ANSWERS**

17. Where birth families want to oppose applications, they should be required to respond giving notice of their intention to defend if that is their wish. In addition, they and/or their solicitors should be required to state which of the facts are disputed and which are agreed. These statements should not be restrictive and sheriffs should be able to admit a line of evidence of which notice has not been given. Further, sheriffs should have discretion to order written answers as well as statements when they think these will be beneficial.

18. In the current court rules for permanence cases, there is no requirement on respondents to give any early indication to applicants whether they are going to oppose cases or not. Further, there are no rules obliging birth families to outline the basis on which applications are disputed, except in the provisions for revocation of freeing, where answers may be lodged, r.2.15(3). These recommendations seek to address these matters by proposing that

respondents, if they wish to oppose applications, must:

- give written notice of an intention to defend; and
- produce written notes of the issues in the application which are disputed.

19. After intimation, birth parents would have a period to lodge a notice of intention to defend. Failure to do so at this stage cannot and would not prejudice birth parents' rights to enter the process later on, but these notices would be akin to Notices of Intention to Defend (NID) which operate in Ordinary Causes under the OCR 1993.

20. In addition to rules about statements of disputed issues, courts would benefit from the power to order written answers where sheriffs feel these will help the progress of cases. They would be fuller than Statements of Disputed Issues and be similar to the written defences required under the OCR. Rules for these are also included.

21. These are needed in: Part II, Freeing; Part III, Revocation of freeing; Part IV, Adoption; Part IVA, Convention Adoption - minor amendment only; Part V, PROs; and Part VI Applications under the 1990 Act.

22. The proposed amendment of r.2.15 in Part III, Revocation of freeing, will have the effect of extending the time allowed to respondents, when taken along with the proposed rules for notices of intention to defend. The reason being this is the only Part of Chapter 2 where the rules already order intimation at the start of the process and allow for answers to be lodged. However, it seems preferable to have similar rules for all the processes in Chapter 2, even if the time for lodging notices and statements would be longer in revocation applications.

23. Taken as a whole, these rules should not mean that a respondent cannot raise other issues later in the process. The proceedings in Chapter 2 involve important issues of children's status and parental responsibilities and rights and it is important that parties are not prevented from putting forward appropriate arguments. However, by obliging respondents to state the basis of disputes, it is hoped that cases can go ahead with fewer delays than sometimes occur. And the general rule proposed in section 1 of this Paper allows sheriffs some discretion to accept Statements of Disputed Issues or Written Answers late.

24. The proposals suggest new rules to incorporate mandatory Notices of Intention to Defend and Statements of Disputed Issues; and discretionary Answers. Rules are needed in Part II, Freeing; Part III, Revocation; Part IV, Adoption; Part IVA, Convention adoption; and Part V, PROs; and Part VI, Applications under the 1990 Act.

### Proposals for new rules

#### (a) Freeing insert new rule 2.8

*Notice of intention to defend and statements of disputed issues*

- 2.8** (1) This rule applies where a respondent seeks to oppose a petition for an order declaring a child free for adoption.
- (2) In a petition to which this rule applies, a respondent who seeks to oppose the petition shall lodge a notice of intention to defend in Form 7B before the expiry of the period of notice.
- (3) When a respondent has lodged a notice of intention to defend in terms of paragraph (2), he shall within one month of the date of said notice prepare and lodge a statement of disputed issues.

(4) For the purposes of paragraph (3) a statement of disputed issues is a written statement in numbered paragraphs setting out in general terms the grounds of the respondent's opposition to the petition and is without prejudice to the right of the respondent to state further or different grounds later.

(5) In addition to a statement of disputed issues, the sheriff may require the respondent to lodge written answers to the petition within such period of time as he thinks fit.

(6) The written answers referred to in paragraph (5) shall be written detailed averments set out in numbered paragraphs and shall include detailed averments answering the reasons given for the petition and explaining the basis on which the respondent considers that the order sought is not in the best interests of the child throughout his or her life.

#### (b) Revocation of Freeing amendment to r.2.15: omit existing paragraph (3) and substitute new paragraphs (3) - (7).

- 2.15** (1) and (2)...Existing paragraphs.
- (3) Any person to whom intimation has been made under paragraph (2) and who seeks to oppose the minute shall lodge a notice of intention to defend before the expiry of the period of notice.
- (4) When a respondent has lodged a notice of intention to defend in terms of paragraph (3), he shall within one month of the date of said notice prepare and lodge a statement of disputed issues.
- (5) For the purposes of paragraph (4) a statement of disputed issues is

a written statement in numbered paragraphs setting out in general terms the grounds of the respondent's opposition to the petition and is without prejudice to the right of the respondent to state further or different grounds later.

(6) In addition to a statement of disputed issues, the sheriff may require the respondent to lodge written answers to the application within such period of time as he thinks fit.

(7) The written answers referred to in paragraph (6) shall be written detailed averments set out in numbered paragraphs and shall include detailed averments answering the reasons given for the application and explaining the basis on which the respondent considers that the order sought is not in the best interests of the child throughout his childhood.

**(c) Adoption insert new rule 2.26**

*Notice of intention to defend and statements of disputed issues*

**2.26** (1) This rule applies where a respondent seeks to oppose a petition for an adoption order or an order under section 49(1) of the Act.

(2) In a petition to which this rule applies, a respondent who seeks to oppose the petition shall lodge a notice of intention to defend in Form 7B before the expiry of the period of notice.

(3) When a respondent has lodged a notice of intention to defend in terms of paragraph (2), he shall within one month of the date of said notice prepare and lodge a statement of disputed issues.

(4) For the purposes of paragraph (3) a statement of disputed issues is a written statement in numbered paragraphs setting out in general terms the grounds of the respondent's opposition to the petition and is without prejudice to the right of the respondent to state further or different grounds later.

(5) In addition to a statement of disputed issues, the sheriff may require the respondent to lodge written answers to the petition within such period of time as he thinks fit.

(6) The written answers referred to in paragraph (5) shall be written detailed averments set out in numbered paragraphs and shall include detailed averments answering the reasons given for the petition and explaining the basis on which the respondent considers that the order sought is not in the best interests of the child throughout his life.

**(d) Convention Adoption Orders amendment to r.2.36D**

**2.36D** Rule 2.4D of Part I of Chapter 2 and rules 2.25, 2.26, 2.27, 2.28, 2.29, 2.30, 2.31, 2.32, 2.33, 2.34 and 2.36 of Part IV of Chapter 2 shall apply to an application under this Part, so far as they are not inconsistent with this Part, and subject to the modifications in rules 2.36E to 2.36G.

**(e) PROs insert new rule 2.40**

*Notice of intention to defend and statement of disputed issues*

**2.40** (1) This rule applies where a respondent seeks to oppose an application under this Part.

(2) In an application to which this rule applies, a respondent who seeks to oppose the application shall lodge a notice of intention to defend in Form 18B before the expiry of the period of notice.

(3) When a respondent has lodged a notice of intention to defend in terms of paragraph (2), he shall within one month of the date of said notice prepare and lodge a statement of disputed issues.

(4) For the purposes of paragraph (3) a statement of disputed issues is a written statement in numbered paragraphs setting out in general terms the grounds of the respondent's opposition to the petition and is without prejudice to the right of the respondent to state further or different grounds later.

(5) In addition to a statement of disputed issues, the sheriff may require the respondent to lodge written answers to the application within such period of time as he thinks fit.

(6) The written answers referred to in paragraph (5) shall be written detailed averments set out in numbered paragraphs and shall include detailed averments answering the reasons given for the application and explaining the basis on which the respondent considers that the order sought is not in the best interests of the child throughout his childhood.

**(f) Variation or discharge of PRO amendment to r.2.44: insert new paragraphs 2.44(2B) - (2F)**

**2.44** (2B) In an application to which this rule applies and in which a respondent seeks to oppose the application for variation or discharge

of the order, such a respondent shall lodge a notice of intention to defend in Form 18C before the expiry of the period of notice.

(2C) When a respondent has lodged a notice of intention to defend in terms of paragraph (2B), he shall within one month of the date of said notice prepare and lodge a statement of disputed issues.

(2D) For the purposes of paragraph (2C) a statement of disputed issues is a written statement in numbered paragraphs setting out in general terms the grounds of the respondent's opposition to the petition and is without prejudice to the right of the respondent to state further or different grounds later.

(2E) In addition to a statement of disputed issues, the sheriff may require the respondent to lodge written answers to the application within such period of time as he thinks fit.

(2F) The written answers referred to in paragraph (2E) shall be written detailed averments set out in numbered paragraphs and shall include detailed averments answering the reasons given for the application and explaining the basis on which the respondent considers that the order sought is not in the best interests of the child throughout his childhood.

**(g) Applications under the 1990 Act insert new rule 2.53**

*Notice of intention to defend and statement of disputed issues*

**2.53** (1) This rule applies where a respondent seeks to oppose an application for a parental order under section 30 of the 1990 Act.

(2) In an application to which this rule applies, a respondent who seeks to oppose the application shall lodge a notice of intention to defend in Form 24B before the expiry of the period of notice.

(3) When a respondent has lodged a notice of intention to defend in terms of paragraph (2), he shall within one month of the date of said notice prepare and lodge a statement of disputed issues.

(4) For the purposes of paragraph (3) a statement of disputed issues is a written statement in numbered paragraphs setting out in general terms the grounds of the respondent's opposition to the petition and is without prejudice to the right of the respondent to state further or different grounds later.

(5) In addition to a statement of disputed issues, the sheriff may require the respondent to lodge written answers to the application within such period of time as he thinks fit.

(6) The written answers referred to in paragraph (5) shall be written detailed averments set out in numbered paragraphs and shall include detailed averments answering the reasons given for the application and explaining the basis on which the respondent considers that the order sought is not in the best interests of the child throughout his childhood.

## 5. INTIMATION OF FREEING PROCEEDINGS

25. Sheriffs should have discretion to intimate freeing proceedings to any person, similar to the discretion currently allowed in adoption applications, in r.2.28(4).

26. In the AS 1997, a sheriff can order intimation of the date of an adoption hearing to people other than the parties, at his/her discretion. There is no equivalent provision in the rule about freeing hearings, r.2.11, so the sheriff has no discretion to allow intimation to other interested persons. This proposal allows discretion to the sheriff. The proposal above under Section 2, to insert a duty to intimate the petition in a freeing, amended **r.2.7(1B)**, gives the sheriff discretion to intimate the petition to the same list of people.

### Amendment to r.2.11 insert a new paragraph, r.2.11(2A)

(2A) The sheriff may, if he considers it appropriate, ordain the petitioner to serve notice of the date of the hearing intimate in Form 7 to:

- (a) any person or body having the parental responsibilities and rights of a parent of the child or having the custody or care of the child or a local authority looking after the child in terms of section 17(6) of the 1995 Act, section 22(1) of the Children Act 1989 or section 18(3) of the Adoption and Children Act 2002;
- (b) any person liable by virtue of any order or agreement to contribute to the maintenance of the child;
- (c) the local authority to whom the petitioner has given notice of his intention to apply for an adoption order;
- (d) any other person or body who in the opinion of the sheriff ought to be served with notice of the petition.

## 6. PROOF HEARINGS ON CONSECUTIVE WORKING DAYS

27. When evidential proofs have started, they should continue from day to day and not be postponed unnecessarily save in exceptional circumstances.

28. This recommendation is designed to insert a rule in Chapter 2 to provide for continuous proof hearings if at all possible. One of the factors which causes delay is the postponement of hearings for weeks or months and such a rule would make it clear that this should be avoided. There is an equivalent rule in the OCR 1993, r.29.17. The rule would not be necessary and should not apply when a case is undisputed and no evidence led.

29. It is proposed that there is one general rule for all proceedings covered by Chapter 2.

#### **Proposal for new rule insert rule 2.4F**

##### ***Proof to be taken continuously***

**2.4F** When a hearing has been fixed under rule 2.11(1) (freeing), rule 2.18(1) (revocation of freeing), rule 2.28(1) (adoption), rule 2.42(1) (application for an order under section 86 of the 1995 Act or variation or discharge) or rule 2.54(1) (application under section 30 of the 1990 Act) and it is necessary for the sheriff to hear evidence, the proof shall be taken continuously as far as possible, but the sheriff may adjourn the diet from time to time.

#### **7. EXTEMPORE JUDGEMENTS**

30. Sheriffs in all the types of permanence cases should be able to give extempore judgements at the conclusion of the hearing on evidence, to be followed by a written judgement within a set timescale.

31. In proceedings under Chapter 2, the sheriff having heard evidence but not immediately able to issue an interlocutor making or refusing an order, makes Avizandum. This allows time for considering the decision and writing a detailed judgement. However, there are

cases when a sheriff feels able to make a decision about the order at the end of the full hearing of evidence, but needs time properly to write this up.

32. This proposal would give the sheriff a discretion to give an extempore oral judgement, and issue the written judgement later. This is akin to a practice that is used on occasions in the Court of Session.

#### **Proposal for new rule insert rule 2.4G**

##### ***Decision of sheriff after hearing evidence***

**2.4G** (1) At the conclusion of any hearing fixed under rule 2.11(1) (freeing), rule 2.18(1) (revocation of freeing), rule 2.28(1) (adoption), rule 2.42(1) (application for an order under section 86 of the 1995 Act or variation or discharge) or rule 2.54(1) (application under section 30 of the 1990 Act) the sheriff may give his decision orally.

(2) The sheriff shall, whether or not he has given his decision in terms of paragraph (1), thereafter issue his judgement in writing and the sheriff clerk shall send a copy thereof to the parties or their agents.

#### **8. PROPOSALS REGARDING THE RULES FOR REPORTING OFFICERS AND CURATORS.**

33. If duties of curators and reporting officers are amended in line with the Group's detailed proposals (see Chapter 8 of the report), the court rules relating to their appointment and duties should be amended to provide uniformity of wording, where appropriate, and better clarity.

34. These proposals are concerned with all the proceedings covered by Chapter 2, with a view to as much harmonisation as possible of the rules about reporting

officers and curators in all types of applications. The suggested rules cover:

- I. Duties of reporting officers;
- II. Duties of curators ad litem
- III. Provisions for appointment of more than one reporting officer; and
- IV. Provisions for execution of documents in other parts of the U.K.

35. The rules in Chapter 2 of the AS 1997 cover appointments and duties of reporting officers and curators in all the proceedings in the Chapter: freeing; revocation of freeing; adoption; Convention adoption; PRO applications; applications for variation and discharge of PROs; and applications under the 1990 Act. Generally speaking, the rules would benefit from:

- re-wording and re-ordering of duties, including moving some from the curator's lists to the reporting officer's lists and vice versa;
- uniformity of wording for duties as between the various applications, where possible;
- some harmonisation with the RCS, including the addition of other duties from them;
- rules clearly allowing more than one reporting officer to be appointed; and
- the addition of rules for Parts II-V about execution etc when those whose consent is sought do not live in Scotland, but are not outwith the U.K.

36. The rules about the duties of reporting officers and curators are scattered throughout Chapter 2 in Parts II - VI. The duties imposed are inconsistent, even allowing for necessary differences in the various proceedings. Even when the same duties are imposed in different proceedings, the wording is not always consistent. In particular, the Group felt that the rules about reporting officers' duties could be listed more logically, taking appointees through the tasks more coherently.

37. The proposals attempt to streamline these duties, with one set of rules for reporting officers and one set for curators for all proceedings in Chapter 2, including provisions for variations arising from the different types of cases. It is hoped that the tasks will be more clearly set out by listing the general duties for both appointments, and then the specific duties for each type of case, all in Part I of the AS 1997: see proposed new rules below, **rr.2.4C and 2.4D**.

38. In re-ordering the duties, it seems appropriate to give reporting officers the procedural tasks involved in the consent or non-consent of birth parents etc, and to give curators the welfare based ones, including ascertaining the facts of the petition or application, or as some of the rules say "investigate the facts". This reflects the position that curators will meet children and petitioners/minuters/applicants, whereas reporting officers who are not also curators need not do so. The current rules already require curators to "ascertain" or "investigate" or "enquire" into some or all of the facts, although the wording is inconsistent between the different Parts.

39. Reference is made to the RCS 1994, Chapter 67 for freeing and adoption and, for comparison purposes and with a view to some harmonisation where this seems helpful. PRO applications can only be made in the sheriff court, and are not therefore referred to in the RCS 1994. The rules in Chapter 2 Part VI for applications under the 1990 Act are already very similar to those in Chapter 81 of the RCS 1994 though they are somewhat different from the rest of the provisions in Chapter 2. However, these proposals do not attempt a complete harmonisation of the AS 1997 with the RCS 1994. In particular, the duty in the AS 1997 to ask a young person of 12 or over whether he or she consents to freeing and/or adoption should remain on the curator and not be given to the reporting officer as it is in the RCS 1994.

40. There are anecdotal accounts of problems about whom to appoint as reporting officers in cases where the parties whose consents are being sought live in different parts of Scotland, often away from the area where the petitioners live, and sometimes outwith Scotland but not outwith the U.K. The proposals therefore include clear provision for the appointment of more than one reporting officer where necessary because of the geography dispersal of the various parties.

41. There are also proposals for rules about execution of documents outside Scotland, but still within the U.K. There is already provision for this in Part VI of the Chapter, and in the RCS 1994, but not in the rest of Chapter 2.

### ***1. Duties of reporting officers***

42. Reporting officers are appointed by courts in permanence cases for specific purposes, usually consents to proceedings. Reporting officers are currently concerned with confirming facts in applications, finding out if birth parents consent or not, and witnessing any agreements. Their tasks are generally more procedural than those of curators, and not focused on children. Where consent is sought from children of 12 or over, this is done by curators in the sheriff court, unlike in the RCS 1994, where it is the task of reporting officers.

43. Courts must appoint reporting officers in the following types of cases in Chapter 2:

- freeing applications;
- adoption applications;
- PRO applications; and
- applications under the 1990 Act.

44. Reporting officers are not mentioned in the rules relating to applications for:

- revocation of freeing;
- Convention adoptions; or
- variation or discharge of PROs.

They are not necessary in these cases because they do not require the consent of birth parents.

45. They are also not actually necessary in post-freeing adoptions, and it would be helpful if this was stated clearly in Chapter 2.

### **An amendment to r.2.25(2) is proposed:**

**2.25** (2) Where an order freeing the child for adoption has been made, the sheriff shall not appoint a reporting officer. (Delete the words “save for the purpose specified in rule 2.26(1)(a)”.)

As indicated above, one set of rules is proposed for all reporting officers in Chapter 2, with variations as needed for the different types of cases.

### **Proposals for new rule Insert new rule 2.4C**

#### ***Duties of reporting officer***

**2.4C** (1) A reporting officer appointed under rule 2.7(1) (freeing), rule 2.25(1) (adoption), rule 2.39(1) (application for parental responsibilities order) or rule 2.51(1) (application under the 1990 Act) shall:

(a) ascertain the whereabouts of all persons (*instead of “parents and guardians and any other person”*) whose agreement to the petition or application is required and who can be found;

(b) consider whether the petitioner or applicant has made every reasonable effort to find the whereabouts of every person (*instead of “parent and guardian and any other person”*) whose agreement to the petition or application is required; (*compare RCS 67.11(1)(h)*);

- (c) investigate whether there are any other persons with a relevant interest and whether the petition or application should be intimated to them; *(compare RCS 67.11(1)(i))*
- (d) where a person whose agreement to the petition or application is required resides in Scotland, meet with him, if practicable, and discuss and explain the following matters:
  - (i) the effect of a freeing order followed by an adoption order; or of an adoption order; or of a parental responsibilities order under section 86 of the 1995 Act; or of an order under section 30 of the 1990 Act, whichever is appropriate to the petition or application, including particularly the effect that such an order would have on his parental responsibilities and rights in relation to the child;
  - (ii) alternatives to adoption or to a parental responsibilities order under section 86 of the 1995 Act or to an order under section 30 of the 1990 Act, whichever is appropriate to the petition or application;
  - (iii) whether or not he is willing to agree to the petition or application;
  - (iv) that he may renounce his agreement at any time prior to the granting of the relevant order;
  - (v) in a freeing petition, that he may make a declaration under section 18(6) of the Act, that he prefers not to be involved in future questions regarding the adoption of the child after the freeing order is granted;
  - (vi) in a freeing petition, that he may withdraw any declaration made under section 18(6) of the Act at any time prior to the granting of the order;
  - (vii) in a freeing petition, that, if the order is granted, he may thereafter be able to apply under

section 20 of the Act for revocation of the order, and explain the law and procedure to him; and  
 (viii) in an application for a parental responsibilities order under section 86 of the 1995 Act, that, if the order is granted, he may apply to the sheriff for variation or discharge of the order under section 86(5) of the 1995 Act, and explain the law and procedure to him; and

- (e) where satisfied that a person whose agreement to the order is required is able and prepared fully and unconditionally to agree to the petition or application, arrange to have such agreement executed in terms of rule 2.4E(1);

and, subject to paragraph (2), shall report in writing on these matters and any other information which may be of assistance to the court within 4 weeks from the date of the interlocutor appointing him, or within such other period as the sheriff in his discretion may allow.

(2) A reporting officer appointed under rule 2.7(1) (freeing petition), in addition to the duties laid out in paragraph (1), shall:

- (a) inquire whether there is anyone claiming to be the father of the child and who has not been and is not married to the mother and does not have parental responsibilities and rights;
- (b) where there is such a person as is mentioned in paragraph (a), ascertain:
  - (i) the likelihood of him applying for an order relating to the child under section 11 of the 1995 Act;
  - (ii) factors which might lead to such an order being granted or refused; and
  - (iii) the likelihood of him entering into an agreement with the mother under section 4(1) of the 1995 Act;

and shall include these matters in the report referred to in paragraph (1).

## **II. Duties of curators ad litem**

46. Curators *ad litem* may be appointed in all proceedings under Chapter 2, but are not mandatory in every case. They investigate cases and report to courts with children's welfare as their paramount concern. If children's formal agreement to adoption or freeing is sought, it is the curator who discusses this with children, and witnesses any consent, not reporting officers. Curators are also expected to give the court the views of children if they have been able to ascertain them, although they are not the only medium for obtaining these. Views are distinguished from the overall duty to put forward children's best interests. Views of children and their welfare do not always coincide.

47. Curators must be appointed in:

- freeing applications;
- adoption applications;
- Convention adoptions;
- PRO applications; and
- applications under the 1990 Act.

48. In addition, they may be appointed in:

- revocations of freeing;
- variation or discharge of PROs.

49. As with reporting officers, the proposal is to have one set of rules for all curators, with variations as needed for the different types of cases.

### **Proposal for new rule insert rule 2.4D**

#### **Duties of curator**

**2.4D** (1) A curator ad litem appointed under rule 2.7(1) (freeing), rule 2.16(1) (revocation of freeing), rule 2.25(1) (adoption) or rule 2.51(1) (application under s.30 of the 1990

Act) shall have regard to the welfare of the child who is the subject of the petition, minute or application as his paramount duty, and ensure that proper consideration has been given to the interests of the child throughout his life and shall generally safeguard the interests of the child.

(2) A curator ad litem appointed under rule 2.39(1) (application for parental responsibilities order) or rule 2.44(3) (variation or discharge of parental responsibilities order) shall have as his paramount duty regard to the welfare of the child who is the subject of the application or minute, and shall generally ensure that proper consideration has been given to safeguarding the interests of the child throughout his childhood.

(3) A curator *ad litem* appointed in any proceedings under this Chapter (*not really necessary to list all the rules here*) shall:

- (a) inquire into the facts and circumstances averred in the petition, minute or application, ascertain whether they are correct and if they are not establish the true facts and circumstances;
- (b) ascertain whether the child who is the subject of the petition, minute or application is subject to a supervision requirement under section 70 of the 1995 Act;
- (c) ascertain from the child, whether he is over the age of 12 or not, whether he has a view on the petition, minute or application and, if so, whether he wishes to express it;
- (d) where the child has indicated that he wishes to express a view, ascertain it or otherwise assist the child to put his views before the sheriff;
- (f) ascertain whether it would be

better for the child that the court should make the order sought than it should not make the order; and

- (g) ascertain the current circumstances and care of the child;

and, subject to paragraphs (4) to (9) of this rule, shall prepare a report in writing on these matters and any other information which may be of assistance to the court within 4 weeks from the date of the interlocutor appointing him, or within such other period as the sheriff in his discretion may allow.

(4) A curator *ad litem* appointed under rule 2.7(1) (freeing), in addition to the duties laid out in paragraphs (1) and (3), shall

- (a) where the child who is the subject of the petition is of or over the age of 12 years, ascertain whether he understands the effect of the petition and whether he wishes to consent to it or not; and
- (b) witness any such consent given by the child; and
- (c) ascertain whether any payment or reward prohibited by section 51 of the Act (prohibition on certain payments) has been given, received or agreed upon; *(see RCS 67.11(1)(r) although the duty there is on the reporting officer, not the curator.)*

and shall include these matters in the report referred to in paragraph (3).

(5) A curator *ad litem* appointed under rule 2.16(1) (revocation of freeing), in addition to the duties laid out in paragraphs (1) and (3), shall: *(based on RCS 67.14(4)(b) and (c))*

- (a) ascertain whether 12 months have elapsed between the making of the freeing for

adoption order and the date of presentation of the minute;

- (b) ascertain whether the child has been placed for adoption or not; and
- (c) ascertain whether there have been any previous applications for revocation which were refused and whether there has been any change of circumstances or any other reason for the current application about which the court should be aware in determining the minute;

and shall include these matters in the report referred to in paragraph (3).

(6) A curator *ad litem* appointed under rule 2.25(1) (adoption), in addition to the duties laid out in paragraphs (1) and (3), shall

- (a) where the child who is the subject of the petition is of or over the age of 12 years, ascertain whether he understands the effect of the petition and whether he wishes to consent to it or not;
- (b) witness any such consent given by the child;
- (c) obtain particulars of accommodation in the home of the petitioner and the condition of the home;
- (d) obtain particulars of all members of the household of the petitioner and their relationship to the petitioner;
- (e) in the case of a petition by only one of two spouses, ascertain the reason or reason for the other spouse not joining in the application;
- (f) ascertain whether the means and status of the petitioner are sufficient to enable him to maintain and bring up the child suitably;
- (g) ascertain what rights or interests in property the child has;

- (h) establish that the petitioner understands the nature and effect of an adoption order and in particular that the making of the order will render him responsible for the maintenance and upbringing of the child;
- (i) where appropriate, ascertain when the mother of the child ceased to have the care and possession of the child and to whom care and possession was then transferred;
- (j) ascertain whether any payment or reward prohibited by section 51 of the Act (prohibition on certain payments) has been given, received or agreed upon; (*see RCS 67.24(h) where the duty is on the curator.*)
- (k) ascertain whether the life of the child has been insured and if so for what sum;
- (l) ascertain whether it may be in the interests of the welfare of the child that the sheriff should make any interim order or make the adoption order subject to particular terms and conditions or require the petitioner to make special provision for the child and if so what provision;
- (m) where the petitioner is not ordinarily resident in the United Kingdom, establish whether a report has been obtained on the home and living conditions of the petitioner from a suitable agency in the country in which he is ordinarily resident;
- (n) establish the reasons of the petitioner for wishing to adopt the child;
- (o) establish the religious persuasion, racial origin and cultural and linguistic background of the child and of the petitioner;
- (p) assess the considerations which might arise where the difference in ages as between the petitioner and the child is

greater or less than the normal difference in age as between parents and their children; and

- (q) consider such other matters, including the personality of the petitioner and, where appropriate, that of the child, which might affect the suitability of the petitioner and the child for the relationship created by adoption and affect the ability of the petitioner to bring up the child;

and shall include these matters in the report referred to in paragraph (3).

(7) A curator ad litem appointed under rule 2.51(1) (application under section 30 of the 1990 Act), in addition to the duties laid out in paragraphs (1) and (3), shall

- (a) ascertain whether the conditions in subsections (2) to (7) of section 30 of the 1990 Act have been satisfied, including ascertaining whether any money or other benefit which is prohibited by section 30(7) of the 1990 Act (prohibition on gift or receipt of money or other benefit) has been given, received or agreed upon;
- (b) establish that the petitioners understand that the nature and effect of a parental order is to transfer the parental rights and responsibilities in relation to the child to the petitioners and make them responsible for the maintenance and upbringing of the child; and
- (c) ascertain whether it may be in the interests of the child that the court should make a parental order subject to particular conditions, including the making of special provision for the child;

and shall include these matters in the report referred to in paragraph (3).

### ***III Appointment of more than one reporting officer***

50. The court may appoint the same person as curator and reporting officer and often does this, but not always. For example, if a birth parent whose consent is sought lives in another part of the country, the court may appoint a reporting officer who works in that other area. In some circumstances, as indicated above, it would be helpful if the court could appoint more than one reporting officer, when consents need to be sought from people living in different parts of the country, including furth of Scotland, but still in the UK.

51. The rules dealing with appointments of reporting officers are: r.2.7, r.2.25, r.2.39 and r.2.51. These could all be amended by the insertion of an additional paragraph allowing more than one reporting officer.

#### **Proposals for amendments to r. 2.7 insert into rules 2.7, 2.25, 2.39 and 2.51:**

(1A) The sheriff may, when making the appointments mentioned in paragraph (1) appoint more than one reporting officer if he considers it appropriate to do so for the purposes of the duties in rule 2.4C(1)(d) and (e) only; and where a person whose agreement to the petition or application is required resides furth of Scotland but within the U.K., the sheriff may appoint such an additional reporting officer for that person from the list of reporting officers held by the County Court or equivalent court for the area where that person resides, for the purposes of the duties in rule 2.4C(1)(d) and (e) only.

# Annex E: Sheriffdom of Lothian and Borders:

## Practice Note No.2, 2004

Adoption of Children, etc:  
Guidance for Sheriffs and  
Practitioners.

### A. PRELIMINARY

#### 1. Introduction

##### **Purpose**

1.1 The purpose of this Practice Note is to secure the efficient management of contested proceedings in applications for orders declaring children free for adoption, applications for the revocation of such orders, applications for adoption orders, applications for parental responsibilities orders and applications for the variation and discharge of such orders. It is intended to provide Sheriffs and practitioners with practical guidance about the operation of the Adoption (Scotland) Act 1978 ('the 1978 Act'), the Children (Scotland) Act 1995 ('the 1995 Act') and the Act of Sederunt (Child Care and Maintenance Rules) 1997 ('the Rules') relative to such proceedings. It will be revised in the light of experience and any new primary or secondary legislation.

##### **Commencement**

1.2 This Practice Note applies to all applications lodged after 26 March 2004.

##### **Minimum of delay**

1.3 It is the duty of the court to secure that applications for freeing orders are dealt with 'as expeditiously as possible with the minimum of delay' (*Lothian Regional Council v A* 1992 SLT 858 at 861). Such applications require the co-operation of all concerned and firm case management by the Sheriff (*Strathclyde Regional Council v MF* 1997 SCLR 142 at 143). The same considerations apply to the other applications dealt with in this Practice Note. This Practice Note indicates how Sheriffs and practitioners may best fulfil those responsibilities.

## **Identity of Sheriff**

1.4 In the interests of continuity and consistency in management, every stage of each case must, whenever possible, call before the same Sheriff on dates and at times assigned by him or her. If a diet of proof has to be fixed, it will normally be assigned to the sheriff who has conducted the previous hearings unless, exceptionally, an early diet can be made available at which another sheriff is free to preside. This paragraph does not apply to the Borders courts.

## **Representatives**

1.5 At every calling of each case any representative of any party must be familiar with the case and must have sufficient authority to deal with any issues that are likely to arise.

## **Record of discussion to be kept**

1.6 At every hearing prior to any proof it is the responsibility of the Sheriff not only to pronounce an interlocutor regulating further procedure but also to prepare and keep with the process a brief written record of the main points of the discussion at that hearing.

## **B. APPLICATION FOR AN ORDER DECLARING A CHILD FREE FOR ADOPTION**

### **2. Timetable**

2.1 Section 25A of the 1978 Act provides that in proceedings in which the question arises as to whether the court is satisfied that the agreement of a parent or guardian should be dispensed with, the court must do the following 'with a view to determining the question without delay'. First, it must draw up a timetable specifying periods within which certain steps must be taken. Secondly, it must give such directions as it considers appropriate for the purpose of ensuring,

so far as reasonably practicable, that the timetable is adhered to.

2.2 This Practice Note emphasises the duty of the Sheriff to draw up timetables and the importance of adherence to these timetables. However, the programming of all classes of business in the courts remains exclusively the responsibility of the Sheriff Principal. In this respect he generally acts through the Sheriff Clerk (or, in Edinburgh, the Administration Unit). It is therefore essential that the drawing up of timetables and the assigning of diets by the Sheriff should be undertaken only after consultation with, and with the agreement of, the Sheriff Clerk. Any timetable that is drawn up must be adhered to, unless in exceptional circumstances.

2.3 Rule 2.4 of the Rules requires the court to draw up the timetable 'forthwith' in three situations: (1) where the petition craves the agreement of a parent or guardian to be dispensed with; or (2) where it appears from a report by an adoption agency, local authority or reporting officer that a question as to dispensing with such agreement arises; or (3) such agreement previously given is withdrawn. Where the parent or guardian agrees to the making of an adoption order in terms of section 18(1)(a) of the Act, no timetable is necessary. A timetable is necessary, however, where the agreement of the parent or guardian has not been secured, even if he or she takes no part in the proceedings (*as in T, Petitioner* 1997 SLT 724).

2.4 In many freeing cases situation (1) will apply. In such a case, in order to comply with rule 2.4 the timetable should be drawn up at the same time as the interlocutor appointing the curator *ad litem* and the reporting officer in terms of rule 2.7(1) which must be pronounced after the petition is lodged. It will usually be too early, however, to draw up a

detailed timetable at this stage because the areas of dispute, the availability of legal aid, documents and witnesses, and other matters with a bearing on the progress of the case will not yet be known. The timetable at this stage should therefore only specify the date by which the reports of the curator *ad litem* and the reporting officer should be lodged. The curator *ad litem* and the reporting officer must generally report within four weeks of the date of the interlocutor appointing them (rule 2.8(1), (2)).

2.5 The Sheriff may select a period other than four weeks since he or she has a discretion to select a period other than four weeks for the lodging of the reports. Before selecting any other period the Sheriff may wish to consult the curator *ad litem* and the reporting officer. If selecting any other period it is necessary to keep in view the court's duty to determine 'without delay' the question whether consent should be dispensed with.

2.6 When the reports of the curator *ad litem* and the reporting officer have been received, the Sheriff must order a diet of hearing to be fixed (rule 2.11(1)). This is the hearing referred to below (see paragraph 3.1) as 'the first hearing'. It should be fixed after consultation with, and with the agreement of, the Sheriff Clerk (see paragraph 2.2), for a date some two weeks ahead. The Sheriff should consider the advisability of ordering intimation by sheriff officer in order to avoid any possible delay due to ineffective postal service.

2.7 The Sheriff Clerk should advise the petitioners' solicitors forthwith of the terms of the interlocutor appointing the date of the first hearing in order that they may intimate it as soon as possible.

### 3. First hearing

3.1 The first hearing provides the first opportunity for all interested parties to be present or represented and for the court to fix a further timetable. The drawing up of a further firm and realistic timetable or timetables and the need for adherence to them will be of central importance to the efficient management of the later stages of the case, as will appear from later paragraphs.

3.1.1 The object of the first hearing is to enable the Sheriff to make preliminary inquiries with a view to ascertaining the likely scope of the dispute, encouraging early preparation for the proof and drawing up a timetable and giving such directions as he or she considers appropriate for the purpose of ensuring, so far as reasonably practicable, that the timetable is adhered to (see paragraphs 2.1 and 2.2 above).

#### ***Before the first hearing***

3.2 Before the first hearing, and throughout the proceedings, the Sheriff should be prepared to engage in active management of the case. He or she should maintain control over the proceedings while exercising flexibility in doing so.

3.2.1 He or she should have read the report lodged by the local authority which accompanies the petition, and checked that it contains the information required by rule 2.5(2)(b).

3.2.2 The Sheriff should also have read the reports of the curator *ad litem* and the reporting officer and checked that they similarly comply with rule 2.8(1) and (2).

3.2.3 The Sheriff should also have read any other documents lodged by the petitioners in terms of rule 2.5(2)(c). These may include a report by a children's hearing received in terms of section 73(14) of the 1995 Act.

3.2.4 The Sheriff should have checked that intimation of the hearing has been made as required by rule 2.11(2).

3.2.5 Where the child has indicated a wish to express a view, the Sheriff should consider ordering appropriate procedural steps in terms of rule 2.9(1)(a). Such steps may include interviewing the child.

3.2.6 The solicitor for a party who has received intimation of the first hearing may apply to the court for access before the first hearing to any document which has been lodged. (See also paragraph 3.3.4 below.)

### ***At the first hearing***

3.3 At the first hearing the attention of the Sheriff and all parties should be devoted to securing that the issues at the proof will be as sharply focused as possible. The parties should therefore have considered in general terms how they intend to prove their respective cases.

3.3.1 The Sheriff should ask the respondent or his or her solicitor to indicate in general terms the grounds of his or her opposition to the petition, without prejudice to the right of the respondent to state further or different grounds later.

3.3.2 The Sheriff should ask the respondent or his or her solicitor whether the respondent has applied, or proposes to apply, for legal aid. If so, the respondent should be able to give the Sheriff at least as much information about the grounds of opposition as has been or will be given to the Scottish Legal Aid Board.

3.3.3 The Sheriff should ask the respondent or his or her solicitor whether it is intended to instruct counsel or any expert witness and, if so, whether legal aid for that purpose has been or is to be applied for.

3.3.4 The Sheriff should ensure that the parties have sufficient access to all the documents lodged in process (see also paragraph 3.2.6 above). A party's solicitor is entitled to copies of such documents so long as he or she complies with rule 2.12 by treating the documents and any copies as confidential.

3.3.5 The Sheriff should ask the respondent or his or her solicitor whether they will be seeking to recover other documents and, if so, which documents. The Sheriff should ask the petitioners' solicitor if the petitioners will make these available to the respondent informally without the need for a commission and diligence, and if so, should fix a date by which those documents should be lodged with the court.

3.3.6 It is now for the Sheriff to draw up the timetable and determine further procedure after consultation with, and with the agreement of, the Sheriff Clerk (see paragraph 2.2 above). In many cases it will be advantageous to appoint a second hearing and thereafter a pre-proof hearing, as recommended in the following paragraphs. In other cases, however, the Sheriff may in the exercise of his or her discretion dispense with either or both of those hearings. For example, in a very simple case the Sheriff may instead continue the first hearing for a short period in order that any outstanding matters may be addressed and then, if satisfied that the issues in dispute have been clearly identified and the preparations for proof will be simple and straightforward, obtain the parties' estimates of the duration of the proof and assign a diet of proof (as in paragraphs 4.3.4 to 4.3.6 below).

3.3.7 If the Sheriff decides that a second hearing is appropriate, he or she should advise the parties that he or she is now going to fix a second hearing; and that before the second hearing they must have lodged the minute of disputed

issues and joint minute referred to in paragraphs 4.2.1 and 4.2.2, and must be prepared to give the Sheriff the information referred to below.

3.3.8 The date fixed for the second hearing should normally be no more than six weeks after the date of the first hearing. If it has not been possible for the Sheriff to identify with the Sheriff Clerk, before the first hearing, a suitable date and time for the second hearing, the Sheriff should now adjourn briefly for that purpose (see paragraphs 2.2 and 3.3.6 above).

#### 4. Second hearing

4.1 The object of the second hearing is to make further preparations for the proof, to identify clearly the issues in dispute and to avoid having a lengthy and poorly focused proof. 'The principal duty of representatives in adoption proceedings is to identify the issues in dispute, and to lead evidence in relation to those issues.' (Macphail, *Sheriff Court Practice* (2nd edn), vol 1, page 931, paragraph 28.111.) The following guidance assists the parties' representatives to carry out that duty.

##### ***Before the second hearing***

#### THE STATEMENT OF DISPUTED ISSUES

4.2.1 Before the hearing the respondent's solicitor should have prepared a statement of disputed issues. It should be signed and lodged at least seven working days before the hearing. It should specify the matters in the local authority's report which the respondent disputes, and should refer to the numbered paragraphs of the report in which these matters are stated. It should also specify any other issues which are not mentioned in the report but which the respondent intends to raise at the proof.

#### THE JOINT MINUTE

4.2.2 Before the hearing the parties should have entered into a joint minute. It is the responsibility of the petitioners' solicitor to draft the joint minute and send it to the respondent's solicitor for revision. The petitioners' solicitor may use as a basis of the joint minute the material facts in the local authority's report which are considered not to be controversial. The parties' solicitors are expected to co-operate in the framing of the joint minute. It should be signed and lodged at least two working days before the hearing.

#### CONSIDERATION OF LEGAL ISSUES, EVIDENCE AND PROOF DATES

4.2.3 Before the hearing the parties' solicitors should consider the matters mentioned in paragraphs 4.3.1 to 4.3.5 below in order that they may provide the Sheriff with sufficient information to enable him or her to conduct the second hearing as provided for in these paragraphs. A solicitor who intends to raise a legal issue at the second hearing should intimate it to the other parties' solicitors beforehand.

##### ***At the second hearing***

#### CONSIDERATION OF JOINT MINUTE AND STATEMENT

4.3.1 At the hearing the Sheriff should consider with the parties the contents of the joint minute and the statement of disputed issues. If necessary, the Sheriff will ask whether further facts can be agreed by joint minute. He or she may also seek clarification of any matter in the statement of disputed issues. If it appears to the Sheriff that a matter identified in the statement is not a relevant issue, although it is disputed, he or she may indicate that evidence on that matter will not be admitted at the proof.

## LEGAL ISSUES

4.3.2 The Sheriff should ask the parties if there are any questions of admissibility of evidence or any other legal issues, including any questions under the European Convention on Human Rights, that are likely to arise at the proof. If so, the Sheriff should consider whether they could with advantage be determined at this hearing rather than at the proof. Alternatively, the Sheriff may continue the second hearing to another date in order to enable any such issue to be argued and determined. If a legal issue is not raised at the second hearing, the Sheriff may refuse to allow it to be raised at the proof except on cause shown.

## EVIDENCE

4.3.3 It should be noted that evidence may be presented in the form of affidavits or other written documents (Civil Evidence (Scotland) Act 1988, section 2; *McVinnie v McVinnie* 1995 SLT (Sh Ct) 81; *Glaser v Glaser* 1997 SLT 456). The Sheriff is bound to consider reports placed before him or her even if the authors are not called to speak to them, and the strict rules of evidence do not apply (*T, Petitioner* 1997 SLT 724 at 730L). Such considerations may render the attendance of certain witnesses unnecessary, although for other reasons it may be preferable to call the author of a document. The parties should therefore apply their minds to the question whether any evidence might be appropriately presented in the form of an affidavit or other document and encourage them to decide that question at this hearing. The Sheriff should encourage the use of affidavits to cover contentious issues where that would save the time of witnesses and the court.

4.3.3.1 Where the author of a report or the maker of a statement which has been or is to be lodged is to be called as a witness, the Sheriff should order that the

report is to be held to be equivalent to the witness's examination-in-chief, unless for special reasons he or she otherwise directs.

4.3.3.2 The Sheriff should discourage the unnecessary use of expert witnesses. If expert evidence is essential, the Sheriff should encourage the joint instruction of a single expert by all parties. If one party instructs an expert report, it should be disclosed to the other parties with a view to the agreement of as much of its contents as possible.

4.3.3.3 The Sheriff should ask the parties what further productions, if any, they intend to lodge. Any difficulties over the obtaining or lodging of documents should be raised and if possible resolved.

## ESTIMATE OF DURATION OF PROOF

4.3.4 'It is essential ... that the Sheriff should be given at the outset a carefully considered forecast of the time which the proof is expected to take.' (*Lothian Regional Council v A* at 861L.) It is therefore very important that the parties should pay close attention to this matter. The Sheriff should ask each party to specify in detail how long he expects to take in the presentation of his own evidence and in the cross-examination of the other side's witnesses. On the basis of that information the Sheriff will assess how many days should be set aside for the proof (including closing submissions). At the proof, parties may expect to be held to the estimates given at this hearing, unless in exceptional circumstances.

## ASSIGNING THE DIET OF PROOF

4.3.5 Having assessed how many days are needed for the proof, the Sheriff will assign the diet. He or she should do so at the hearing after consultation with, and with the agreement of, the Sheriff Clerk (see paragraph 2.2 above). The Sheriff may adjourn briefly for that purpose.

The dates assigned should be consecutive working days. The Sheriff should consider whether he or she is likely to require any writing days in order to produce the judgment. If so, the dates assigned should include writing time. The reason for such arrangements is that the Sheriff should 'be released from other duties so that he can give priority to the case without interruption and until it has been completed by the issuing of his interlocutor. Special arrangements of that kind are clearly necessary if the sheriff is to maintain the continuity of thought throughout the proceedings which is so necessary to a proper disposal of the case.' (*Lothian Regional Council v A* at 862A-B).

4.3.6 The parties should have come to the hearing with a list of dates when their witnesses, including any expert witnesses, and counsel, if any, will be available. It is not generally a valid ground for postponing a proof that a party wishes to instruct particular counsel. The Sheriff should not, unless in highly exceptional circumstances, pronounce an interlocutor allowing a proof on dates to be afterwards fixed. If the dates cannot be fixed at the hearing, it will usually be preferable to continue the hearing for a few days and fix the dates at the continued hearing.

#### ASSIGNING THE PRE-PROOF HEARING

4.3.7 The Sheriff should also assign a pre-proof hearing on a date some two weeks before the proof. The date and time of the hearing should be selected after consultation with, and with the agreement of, the Sheriff Clerk (see paragraph 2.2 above).

4.3.8 In addition to assigning the pre-proof hearing the Sheriff should assign a date two weeks prior to the pre-proof hearing by which the parties must have lodged their productions and exchanged list of the witnesses who are to give oral evidence.

#### 5. Pre-proof hearing

5.1 The purpose of the pre-proof hearing is to ascertain whether the parties are still in dispute and, if so, whether they are fully prepared for proof. The timetable must, however, be respected and a proof will be discharged only in highly exceptional circumstances.

#### 6. The proof

6.1 If the guidance above is followed, the proof should not be unduly long. In any event, 'there is a heavy responsibility on the parties' representatives to exercise all reasonable economy and restraint in their presentation of the evidence and in their submissions to the court.' (*Lothian Regional Council v A* at 862B).

6.2 Parties may expect to be held to their estimates of time taken for examination and cross-examination which they gave at the second hearing.

6.3 The Sheriff may exercise his or her existing common law power to intervene to discourage prolixity, repetition, the leading of evidence of unnecessary witnesses and the leading of evidence on matters which are unlikely to assist the court to reach a decision.

6.4 If the proof is not completed on the last day assigned, it is very desirable that it should continue on the following day.

6.5 Before the hearing on evidence, the Sheriff may require the parties to submit, in electronic form or otherwise, draft findings in fact, or skeleton arguments, or both.

#### 7. The judgment

7.1 The judgment should be issued within four weeks of the date of the making of avizandum. See paragraph 4.3.5 above.

## C. REVOCATION OF FREEING ORDERS

8.1 Part A of this Practice Note applies to contested applications for the revocation of freeing orders.

8.2 Paragraphs 3.1 to 7.1 of this Practice Note, with the exception of paragraph 3.2.1, apply to contested applications for the revocation of freeing orders *mutatis mutandis*, subject to paragraphs 8.3 to 8.5.

8.3 In paragraph 3.1 there shall be inserted at the beginning:

‘Rule 2.18(1) requires the Sheriff to order a diet of hearing to be fixed when answers have been lodged under rule 2.15(3).’

8.4 For paragraph 3.2.2 there shall be substituted:

‘The Sheriff should have read the report by any curator *ad litem* appointed in terms of rule 2.16(1) and checked that it complies with that rule.’

8.5 In paragraph 3.2.4, for the reference to rule 2.11(2) there shall be substituted a reference to rule 2.15(2).

## D. ADOPTION ORDERS

9.1 Part A of this Practice Note applies to contested applications for adoption orders.

9.2 Part B of this Practice Note applies to contested applications for adoption orders, *mutatis mutandis*, subject to paragraphs 9.3 to 9.7.

9.3 In paragraph 2.2 there shall be added at the end:

‘If no report by an adoption agency or local authority has been lodged with the petition, the Sheriff must

pronounce an interlocutor requiring such a report to be lodged within four weeks or such other period as the Sheriff may allow: rule 2.21(5).’

9.4 In paragraph 2.3, for the reference to rule 2.7(1) there shall be substituted a reference to rule 2.25(1), and for the reference to rule 2.8(1),(2) a reference to rule 2.26(1),(2).

9.5 In paragraph 3.1 there shall be inserted at the beginning:

‘Rule 2.28(1) requires the Sheriff to fix ‘a diet of hearing’ on receipt of the reports of the reporting officer and curator *ad litem* in respect of a child who is not free for adoption. Rule 2.28(2) provides that the Sheriff may fix ‘a diet of hearing’ on receipt of the report of the curator *ad litem* in respect of a child who is free for adoption. The hearing referred to above as ‘the first hearing’ is any diet of hearing fixed in terms of either of these rules.’

9.6 For paragraph 3.2.1 there shall be substituted:

‘3.2.1 He or she should have read all the reports and other papers lodged with the petition and will have checked that a report by the local authority or adoption agency contains the information required by rule 2.21(3). The other papers may include a report by a children’s hearing received in terms of section 73(14) of the 1995 Act and, where the child has not been placed for adoption with the applicant by an adoption agency, a medical report (rule 2.21(2)(c)).’

9.7 In paragraph 3.2.2, for the reference to rule 2.8(1) and (2) there shall be substituted a reference to rule 2.26(1) and (2).

9.8 In paragraph 3.2.4, for the reference to rule 2.11(2) there shall be substituted a reference to rule 2.28(3).

9.9 In paragraph 3.3.4, for the reference to rule 2.12 there shall be substituted a reference to rule 2.30.

#### **E. PARENTAL RESPONSIBILITIES ORDERS**

10.1 Part A of this Practice Note applies to contested applications for parental responsibilities orders.

10.2 Part B of this Practice Note applies to contested applications for parental responsibilities orders, *mutatis mutandis*, subject to paragraphs 10.3 to 10.7.

10.3 In paragraph 2.3, for the reference to rule 2.7(1) there shall be substituted a reference to rule 2.39(1), and for the reference to rule 2.8(1),(2) a reference to rule 2.40(1),(2).

10.4 In paragraph 3.1 there shall be inserted at the beginning:

‘Rule 2.42(1) requires the Sheriff to fix a ‘diet of hearing’ on receipt of the reports of the reporting officer and curator *ad litem*.’

10.5 For paragraph 3.2.1 there shall be substituted:

‘3.2.1 He or she should have read any report by a children’s hearing received in terms of section 73(14) of the 1995 Act and any reports and other papers lodged by the local authority with the application.’

10.6 In paragraph 3.2.2, for the reference to rule 2.8(1),(2) there shall be substituted a reference to rule 2.40(1),(2).

10.7 In paragraph 3.2.4, for the reference to rule 2.11(2) there shall be substituted a reference to rule 2.42(2).

#### **F. VARIATION AND DISCHARGE OF PARENTAL RESPONSIBILITIES ORDERS**

11.1 Part A of this Practice Note applies to contested applications for the variation and discharge of parental responsibilities orders.

11.2 Paragraphs 3.1 to 7.1 of this Practice Note, with the exception of paragraph 3.2.1, applies to contested applications for the variation and discharge of parental responsibilities orders *mutatis mutandis*, subject to paragraphs 11.3 to 11.5.

11.3 In paragraph 3.1 there shall be inserted at the beginning:

‘Rule 2.42(1), as applied by rule 2.44(5), requires the Sheriff to order a diet of hearing to be fixed when the report of any curator *ad litem* appointed under rule 2.44(3) has been received.’

11.4 For paragraph 3.2.2 there shall be substituted:

‘The Sheriff should have read the report of any curator *ad litem* appointed in terms of rule 2.44(3) and checked that it complies with that rule.’

11.5 In paragraph 3.2.4, for the reference to rule 2.11(2) there shall be substituted a reference to rule 2.44(6).

**Iain Macphail**  
Sheriff Pricipal of Lothian and Borders  
1 March 2004

# Annex F: Forms for Children's Hearings

## THE ADOPTION AGENCIES (SCOTLAND) REGULATIONS 1996 REGULATION 12(5)

### Addendum to Schedule 3 (Form of Reference by Adoption Agency to Principle Reporter)

#### ***Information to the Children's Hearing***

Recommendation of the Adoption Panel for \_\_\_\_\_  
to the Adoption Agency *(name of agency)*

Date of Adoption Panel: \_\_\_\_\_

Name of child: \_\_\_\_\_ DOB \_\_\_\_\_

#### Members of the Adoption Panel:

<i>Name</i>	<i>Status</i>
1. _____	_____
2. _____	_____
3. _____	_____
4. _____	_____
5. _____	_____
6. _____	_____
7. _____	_____
8. _____	_____
9. _____	_____
10. _____	_____
11. _____	_____
12. _____	_____

Attending Adoption Panel:

	<i>Name</i>	<i>Status</i>	<i>Agency</i>
1.	_____	_____	_____
2.	_____	_____	_____
3.	_____	_____	_____
4.	_____	_____	_____

Legal Advice Given:                      Yes                       No

Medical Advice Given:                      Yes                       No

Recommendations to the Adoption Agency relating to the plan for the child:

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_

Decisions of Officer of Adoption Agency:

Recommendation/s Agreed:    Yes                       No

If not agreed indicate reasons:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Date of Decision/s: \_\_\_\_\_

\_\_\_\_\_  
*Officer of Adoption Agency*  
*(place and date)*



Summary of relevant person's views provided to the Hearing:

**Advice to Court:**

To Support Permanency Planning:            Yes                             No

*Reasons for Advice (including any dissenting view):*

Is termination of SR appropriate?            Yes                             No

*Reasons:*

Contact with Birth Parents/Relevant Persons/siblings/others *(specify briefly level of contact at date of Hearing).*

Chairman's Signature: \_\_\_\_\_ Date: \_\_\_\_\_

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