

Education (Scotland) Bill - Schedule Stage 3 MSP Briefing

This is a joint briefing produced by the Children and Young People's Commissioner Scotland, the Equality and Human Rights Commission, Inclusion Scotland, the Scottish Human Rights Commission, Govan Law Centre, ENABLE Scotland and Together (Scottish Alliance for Children's Rights).

This briefing outlines our key concerns in relation to the Schedule accompanying the Education (Scotland) Bill.

The Schedule seeks to extend rights to children aged 12-15 years in relation to the Education (Additional Support for Learning) (Scotland) Act 2004. This would allow children with capacity for example to:

- ask a local authority to determine whether they have additional support needs or not
- ask that the authority determine whether they require a co-ordinated support plan or not
- make a request for an assessment (e.g. to assess whether they have dyslexia/whether they require speech and language therapy)
- request that an advocate or supporter accompany them to a meeting or
- refer a matter to dispute resolution

Dependent on the right to be exercised, the child may address a matter to either the local education authority or the Additional Support Needs Tribunal.

We fully support the extension of these rights.

However, we believe that the way in which the Scottish Government is seeking to extend these rights is flawed. Rather than freely extending rights to children, we believe that the Scottish Government has, via the Education (Scotland) Bill, put in place a number of barriers that may prevent children from exercising those rights.

The key barriers are:

- the introduction of a 'capacity assessment', carried out by the Local Education Authority or the Additional Support Needs Tribunal (depending on which right the child is seeking to exercise).
- the introduction of an 'adverse effect on well-being' assessment as a preliminary assessment¹

In order to exercise their rights, a child must successfully negotiate both assessments (with a right of appeal to the Additional Support Needs Tribunal where the outcome of these assessments is disputed).

¹ That is, the 'adverse effect on well-being' assessment takes place before the child has begun to exercise their rights (i.e. it relates to whether the action of exercising the right is likely to cause harm). A broader consideration of a child's well-being will also take place later (i.e. when the substance of the child's request is considered).

Part 1 of the Children and Young People (Scotland) Act 2014 places duties on Ministers to 'keep under consideration whether there are any steps which they could take which would or might secure better or further effect in Scotland of the UNCRC requirements'²

The Scottish Government has stated that these assessments are necessary in order to safeguard the well-being of a child.

However, we believe that these assessments are unnecessary. Rather than empowering children and allowing them to fully enjoy their rights under the UN Convention on the Rights of the Child, they instead ensure that the balance of power remains firmly in the hands of adults.

Our specific concerns about the two types of assessment are outlined in more detail below.

The Capacity Assessment

In very broad terms, where a child has legal capacity, this means that they have sufficient understanding to be able to think through the pros and cons of a situation, weigh up risks and to recognise the likely outcomes of different courses of action.

The Age of Legal Capacity (Scotland) Act 1991 is routinely used in a wide range of settings to establish whether a child has capacity. For example, the Act sets out when a child is able to consent to their own medical or dental treatment and when they can instruct a solicitor in relation to a civil matter or consent to an adoption.

The Age of Legal Capacity (Scotland) Act 1991 acknowledges that children with capacity have the right to make what adults might perceive to be very difficult decisions about their lives.

Presumption of Capacity

Where civil matters are concerned, the 1991 Act provides for a presumption of capacity at the age of 12 years. That means that a child aged 12 or older will be assumed to have legal capacity, unless proven otherwise.

Where there is any doubt about a child's capacity, then it would be up to the person/body expressing doubt to demonstrate why this is the case.

One example of where there is a presumption of capacity at 12 would be a child bringing forward a Disability Discrimination Claim under the Equality Act 2010. This would be heard by the Additional Support Needs Tribunal.

However, the approach currently taken in this Bill raises the possibility that a child would be presumed able to take a Disability Discrimination Claim to the ASN Tribunal at 12 years of age, but that the same child could be prevented from exercising other additional support for learning rights under the Education (Additional Support for Learning) (Scotland) Act where it was felt that they lacked the capacity to do so.

² Section 1(1)(a), Children and Young People (Scotland) Act 2014, <http://www.legislation.gov.uk/asp/2014/8/section/1>

Presumption Against Capacity

By contrast, the Education (Scotland) Bill introduces an assessment which all children seeking to exercise their rights would be required to undergo **before** they were able exercise their rights.

Effectively, this means that the presumption of capacity contained within the Age of Legal Capacity (Scotland) Act 1991 is reversed.

Rather than there being a presumption of capacity at 12, the presumption is that no child has capacity. The onus is then put on the child to prove their capacity via the 'capacity assessment'. This is a significant departure from current practice.

This inconsistency could be resolved by removing the 'capacity assessment' from the Bill and amending the Age of Legal Capacity (Scotland) Act 1991 to ensure that a presumption of capacity at 12 would apply to all children exercising rights extended by the Education (Scotland) Bill.

We therefore support Amendments 53, 60, 61 and 63-75 in the name of Liam McArthur, MSP, which seek to remove the 'capacity assessment'.

'Adverse Effect on Wellbeing' Assessment

As currently drafted, the Education (Scotland) Bill also requires children to undergo an 'adverse effect on well-being' test **before** exercising their rights.

The Scottish Government has stated that this test is designed to protect a child and ensure that they can 'cope' with the experience of exercising their rights. Where it is assessed that exercising their rights would have an 'adverse effect on their well-being', then the child will not be allowed to exercise their rights and someone else will have to do so on their behalf (e.g. a parent).

We disagree with this approach. Whilst some children may want their parents to exercise their rights on their behalf, for others, it will be important for them to be able to exercise their rights independently.

We believe that the key to extending children's rights in this area is to provide appropriate support and to ensure that processes are geared towards children's individual needs.

For children wishing to exercise their rights, not being allowed to exercise their rights, where they feel capable of doing so, is arguably more damaging to them than any damage that might be caused by a child beginning to exercise their rights and then subsequently realising they will have to withdraw from that process.

Conflict with Legal Capacity

The 'adverse effect on well-being' assessment also directly conflicts with the concept of legal capacity. That is, if a child has legal capacity to exercise rights, then it is for them to determine whether it is in their best interests to do so, and to take into account if and how their wellbeing may be affected. That is part of what it means to have rights – deciding whether and how best to use them.

We would point out that there is no equivalent test for adults in exercising their own rights (or exercising rights on their children's behalf). There is also no equivalent for children exercising their rights in any other context.

Appealing Assessment Decisions

Whilst a child has the right to challenge the outcome of both the 'capacity' and 'adverse effect on well-being' assessments via the Additional Support Needs Tribunal, this could potentially mean that a child is forced down a much more taxing route, than would otherwise be the case.

For example, a child may want to exercise a right that would require them to make a simple written request. The local authority decides that to do so would adversely affect their well-being. If the child is adamant that they want to exercise the right, then they would be forced to appeal this to the Tribunal, a process which they might find much more challenging.

Potential Conflict of Interest

Where the matter is one which a child raises with the local authority, both the 'capacity' and 'adverse effect on well-being' assessments effectively place a veto on the exercise of a child's rights in the hands of the very body which the child would be seeking to challenge (e.g. where the assessments are carried out by a Local Authority and the request relates to the authority's service provision). That is a clear conflict of interest.

Where a child wishes to bring Tribunal proceedings, the 'adverse effect on wellbeing' test is also applied by the Tribunal (although not if they wish to bring a disability discrimination claim to the same Tribunal).

Timing of Assessments

By carrying out this assessment before proceedings have even begun, there is a very real risk that it serves to lengthen proceedings and to require a more involved, complex and trying procedure for children than it does for young people or for parents. If the presumption of capacity were to apply in line with the Age of Legal Capacity (Scotland) Act 1991, then capacity would only need to be considered where it was a matter of concern in a particular case.

When any decision is made about a request made by a child to a local authority or any reference to a Tribunal, the best interests – and indeed the well-being - of the child will be considered and taken into account at that stage.

It is not necessary or appropriate to require children to undergo an 'adverse effect on well-being' test **before** exercising their rights.

Support Service

We would also highlight that a Support Service has been created by this Bill to assist children in exercising their rights independently. It is therefore unclear why the Scottish Government should feel that an assessment of 'adverse effect on wellbeing' should be necessary given that this new service has been specifically created to support and safeguard the child's wellbeing.

Again, if the authority or Tribunal are of the view that certain statutory procedures would adversely affect the wellbeing of a child, then we would argue that the starting point should be to

establish what steps could be taken to make these proceedings more child-friendly and accessible – not to bar the child from making use of their rights.

Clear information should also be provided to children in relation to the assistance the Support Service can offer to them. This should be at an early stage, to allow the child to make an informed decision about whether they want to pursue a right independently, or ask a parent to do so on their behalf.

With these measures in place, we believe that there is no place for an 'adverse effect on wellbeing' assessment in this Bill.

We therefore support Amendments 63, 68, 69, 70 and 74 in the name of Liam McArthur, MSP which seek to remove the 'adverse effect on well-being' assessment.

Conclusion

We believe that children should be supported to exercise their rights independently and that this Bill provides an important opportunity for them to do so. However, the approach taken in the Bill is unhelpful. It puts barriers in the way of children exercising their rights.

Removing the 'capacity' and 'adverse effect on wellbeing' assessments, however, and instead amending the Age of Legal Capacity (Scotland) Act 1991, provides a solution that would allow the extension of these rights in a way that is fair and consistent with those children's rights.

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