



John Swinney, MSP
Cabinet Secretary for Education & Skills
Scottish Government
St. Andrew's House,
Regent Road,
Edinburgh,
EH1 3DG

17 November 2017

Dear Mr Swinney,

Extending Children's Rights Consultation

The Government has made a commitment to putting human rights, including children's human rights, at the heart of policy making and the First Minister has made a commitment to explore the "[most effective and practical way to further embed the principles of the UN Convention on the Rights of the Child \(UNCRC\) into policy and legislation](#)"¹.

The UN Committee on the Rights of the Child's [General Comment 12](#), which elaborates on Article 12 of the convention, says that:

"States parties cannot begin with the assumption that a child is incapable of expressing her or his own views. On the contrary, States parties should presume that a child has the capacity to form her or his own views and recognize that she or he has the right to express them; it is not up to the child to first prove her or his capacity."²

Whilst any further realisation of children's rights is welcomed, the extension of rights relating to Additional Support Needs in the [Education \(Scotland\) Act 2016](#)³ is incompatible with Article 12 of the UNCRC, due to the introduction of "assessment of capacity" and a "consideration of wellbeing. These are intended as safeguards but are in fact barriers to exercising rights. This has the effect of an assumption that a child is incapable, until assessed otherwise. Our office and other rights-based organisations made this clear in our briefings at both [Stage 2](#)⁴ and [Stage 3](#)⁵ of the bill's passage through parliament.

¹ <http://www.gov.scot/Resource/0052/00524214.pdf>

² <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf>

³ <https://www.legislation.gov.uk/asp/2016/8/contents>

⁴ <https://www.cypcs.org.uk/ufiles/Education-Bill-Stage-2.pdf>

⁵ [https://www.cypcs.org.uk/ufiles/Education-\(Scotland\)-Bill-Stage-3-MSP-Briefing.pdf](https://www.cypcs.org.uk/ufiles/Education-(Scotland)-Bill-Stage-3-MSP-Briefing.pdf)

In our [response](#) to the Government's consultation on the Support Children's Learning Code of Practice⁶, we re-iterated our concern that these measures were not compatible with Article 12. We also expressed concerns at the proposed implementation of the assessment of capacity and consideration of wellbeing. In particular, we are concerned about the use of curricular achievement as the primary measure of both capacity and wellbeing.

Assessment of capacity

Notwithstanding our views regarding the appropriateness of the "safeguards" introduced in the Act, capacity should be assessed in the context of the particular situation, taking into account the development of the child and their ability to understand the issues and express a view. Achievement in specific areas of the curriculum, in this case literacy and numeracy, are in no way an appropriate way of assessing a child's capacity to form a view and express it in relation to their additional support needs. It should be considered using a broad range of factors, but key amongst these is discussion with the child to ascertain their understanding of the specific issues and ability to form and express a view. It is not appropriate to attempt to use objective measures such as curriculum achievement. Assessment of capacity in children aged 12 or under is not a new concept in Scots law or for Scottish professionals. The [Age of Legal Capacity \(Scotland\) Act 1991](#)⁷ introduced a presumption that children aged 12 or above have capacity to make legal and medical decisions and provided for children younger than that to be assessed as having capacity. It has been in force for over 25 years.

It is entirely possible that a child may achieve academically, but lack the capacity to engage with legal processes. More concerningly, some children with additional support needs, particularly if they are not receiving the support they need, may not be achieving in literacy or numeracy but, when assessed appropriately, clearly have capacity to bring forward a reference to the ASN Tribunal. There is a potential for the assessment of capacity, as currently laid out in both the Supporting Children's Learning Code of Practice and the present guidance, to indirectly discriminate against children with certain additional support needs, for example specific learning disabilities, such as dyslexia or dyscalculia. We also feel that the assessment of capacity, when it presents a barrier to children exercising their rights, may be open to legal challenge, through referral to the Additional Support Needs Tribunal Scotland under the [Equality Act 2010](#)⁸. In that case there is a presumption of capacity as per the Age of Legal Capacity (Scotland) Act 1991 rather than that contained within this guidance.

⁶ <https://www.cypcs.org.uk/ufiles/Supporting-Children-s-Learning-Code-of-Practice.pdf>

⁷ <https://www.legislation.gov.uk/ukpga/1991/50/contents>

⁸ <https://www.legislation.gov.uk/ukpga/2010/15/section/116>

Consideration of Wellbeing

The use of curricular achievement as a significant factor when considering of wellbeing is even more egregious from a children's rights perspective. Understanding the skills, attributes and capabilities relating to health and wellbeing is no way of assessing a child's actual wellbeing, let alone the specific impact exercising rights will have. Yet the guidance lists this as the first factor to be taken into account when assessing whether exercising rights will cause an adverse impact on wellbeing. The most important factors, the views of the child and an holistic assessment by adults who work with the child, are at the bottom of the list. Again, the consideration of wellbeing may indirectly discriminate against children and young people with specific types of additional support needs, for example mental health problems, as no consideration is given to the harm that being told they may not exercise their rights will do to them. We feel that the consideration of wellbeing may also be open to legal challenge, through an action under the Equality Act 2010.

Involve and inform parents.

We are concerned that the sections on involving and informing parents do not take sufficient account of the privacy rights of the children and young people to whom rights have been extended. These children have a right to privacy and this includes a right to withhold consent for information sharing with their parents. Yet on page 10 and in the section headed "Involve and Inform Parents" on page 15, there is no mention of consent from the child or young person being obtained prior to involving parents in discussions about their additional support needs. This would appear to be a breach of the child's right to privacy under Article 8 of the [European Convention of Human Rights](#)⁹ and Article 16 of the UNCRC. In terms of the section 66 of the Data Protection Act 1998, children in Scotland are presumed to have the capacity to make decisions about the information held about them from the age of 12. Not all information relevant to assessment of additional support needs will fall within the narrow definition of educational information which parents have a right to and the sharing of information with parents without consent may therefore be unlawful. It could also have an adverse impact on the child's wellbeing.

Case Studies

We have specific concerns about some of the case studies contained within the guidance. More generally the concepts of assessment of capacity and consideration of wellbeing seem to have been conflated in this. The consideration of the wellbeing impact of exercising right is also conflated with assessments of wellbeing as part of [Getting it Right for Every Child](#) and the provision of services¹⁰.

⁹ http://www.echr.coe.int/Documents/Convention_ENG.pdf

¹⁰ <http://www.gov.scot/Topics/People/Young-People/gettingitright/national-practice-model>

Notwithstanding our concerns regarding the barrier that the consideration of wellbeing presents to young people exercising their rights, we feel it must be made clear that this is not a consideration of a child's overall wellbeing, but a consideration of the impact exercising rights will have on their wellbeing. It may be that it has a positive impact. Finally, the issue of consent to share information, even with parents, is unclear.

We have already highlighted the risk that decisions made regarding capacity and wellbeing based on this guidance could result in indirect discrimination in terms of the Equality Act 2010. Gary's case study could have provided a good example of how to avoid this risk. In the case study Gary is attaining towards Third Level in literacy. We feel this may be unlikely for an undiagnosed dyslexic child. This case study should be altered so that a lack of achievement is taken into account, the child is still assessed as having capacity and is able to exercise their rights.

Likewise John's case study illustrates a situation where a child's disability may be used as a reason to deny their rights, in contravention of the Equality Act 2010. John's challenging behaviour is given as a reason why his is not able to exercise his rights, on both capacity and wellbeing grounds. This is inappropriate. In addition, it is not clear whether there is an advocate or a teacher, or even a key teacher acting as an advocate, at the meeting. It needs to be clear that it is not appropriate for a member of staff to act as an advocate and that John has a right to independent advocacy. We would recommend that this case study be further developed with input from professionals experienced in assessment capacity in people with mental health problems.

Omar's case study is particularly concerning, as his Peer Educator Buddy, Imran, is invited to attend review meetings. This is not an appropriate situation for either Omar or Imran as it is entirely outwith the role of a peer supporter. Omar should have been signposted to advice and advocacy services, with interpreting support if required. In addition, the impact on Omar's wellbeing of past events is not relevant to whether exercising his rights will adversely impact on him.

Theresa's case study does not clearly delineate between the use of wellbeing assessment to provide support to Theresa and the assessment of the impact of exercising rights on wellbeing. A child's wellbeing might be assessed as poor, but if exercising rights has no adverse impact they should still be able to exercise their rights. Likewise, a child's decisions may have an adverse impact on wellbeing but this is not the same as exercising the right itself having an adverse impact. Children have the right to make decisions adults do not agree with. This is another example of a case study where decisions could be subject to legal challenge as indirect discrimination on the basis of disability.

None of the case studies illustrate a situation where a young person exercises their right to refer their matter to the Additional Support Needs Tribunal Scotland. There

is only two mentions of the advice, support and advocacy services provided to support the extension of rights and one is a case study where a child decides not to use them. None of the examples include a child challenging the assessment of capacity or the consideration of wellbeing.

We believe that this guidance would be vastly improved if new case studies were co-produced with children and young people with additional support needs.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'B Adamson'. The signature is stylized with a large, looped 'B' and a cursive 'Adamson'.

Bruce Adamson

Children and Young People's Commissioner Scotland