

**Centre for Mental Health and Incapacity Law, Rights and Policy
Edinburgh Napier University**

Education (Scotland) Bill – Response to Call for Written Evidence

1. The Centre for Mental Health and Incapacity Law, Rights and Policy welcomes the opportunity to comment on the Scottish Government's Education Bill proposals to amend the Education (Additional Support for Learning) (Scotland) Act 2004 subject to the comments made below. The Centre works to promote excellence in mental health and incapacity law, rights and policy and considers that the proposed amendments will have implications for children and young persons with mental disorder and/or incapacity and the protection of their human rights.

International Human Rights Law

2. The UK has ratified both the United Nations Convention on the Rights of the Child (CRC) and the United Nations Convention on the Rights of Persons with Disabilities (CRPD) which set out specific rights in relation to children and young persons' education and capacity. Although the CRC and CRPD are not given effect in domestic law they still create binding obligations for the UK under international law. Moreover, the enactment of devolved legislation in Scotland and actions of the Scottish Ministers can be prevented by the Secretary of State if they contravene the UK's international obligations, including those under international human rights treaties.¹
3. The Children and Young People (Scotland) Act 2014 should also be noted in this regard. Section 1, which comes into effect on 15 June 2015, obliges the Scottish 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'. It is therefore imperative that the Bill takes account of international human rights standards and endeavours to give effect to these where possible.

Observations

Capacity

4. The proposed section 3(1) sets out that a child or young person has capacity in relation to certain actions 'if the child or young person has sufficient maturity and understanding'. 'Sufficient maturity and understanding' is not defined in the Bill and the making of such an assessment is the responsibility of the education authority.
5. While the age of legal capacity is stipulated as 16 years under the Age of Legal Capacity (Scotland) Act 1991, children over the age of 12 have capacity in certain

¹ ss35 and 58 Scotland Act 1998.

areas (i.e. making a will, consenting to an adoption). Extending rights to children over 12 with capacity therefore reflects the current position in Scots law. However, the United Nations Committee on the Rights of the Child has stated that ‘age cannot determine the significance of a child’s views.’² In terms of expressing views, section 12 of the Bill sets out that the child’s right to express their views is dependent on their age and capacity and thus potentially excludes children below the age of 12 who have sufficient maturity and understanding. Children have evolving capacities which cannot be determined according to a specific age. It has also been stated that children are able to form views from an early age and need not have a comprehensive understanding of every aspect of a matter to be able to hold a view.³ The Committee has therefore stated that assessment of ‘maturity’ should take account of the ‘physical, emotional, cognitive and social development of the child’.⁴ A child’s view should not be excluded on account of their age if they are able to demonstrate sufficient maturity and understanding.

Best Interests

6. Section 3A of the Bill provides that in addition to carrying out the capacity assessment the education authority must also ‘consider whether it is in the best interests of the child or young person to do the thing or have the thing done in relation to the child or young person.’ The introduction of the ‘best interests’ test provides a mechanism for the oversight of the child’s proposed action(s) and does not form part of the capacity assessment.
7. The introduction of the best interests test in the current Bill appears to reflect the requirements of international human rights instruments, namely the CRC and CRPD. Both treaties provide that, ‘In all actions concerning children... the best interests of the child shall be a primary consideration’.⁵ The Committee on the Rights of the Child has also stated that it is beneficial to set out a ‘non-exhaustive and non-hierarchical list of elements that could be included in a best-interests assessment by any decision-maker having to determine a child’s best interests.’⁶ It is suggested that such a list could be set out in the Code of Practice to the resultant legislation and that specific reference should be made to elements which impact upon a child’s education.
8. As the Bill sets out that the education authority is responsible for carrying out both the assessment of capacity and applying the best interests test, it is important that the Code of Practice instructs the education authority to avoid a finding of incapacity or to declare something contrary to best interests because

² United Nations Committee on the Rights of the Child, General Comment No. 12 (2009) The right of the child to be heard para.29 <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf>

³ General Comment No.12 (n2) para.21

⁴ United Nations Committee on the Rights of the Child, General Comment No.14 (2013) on the right of the child to have his or her best interests taken as a primary consideration para.83 http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf

⁵ Article 3 CRC and Article 7(2) CRPD

⁶ General Comment No.14 para.50

the proposed action is unconventional. Nor should best interests considerations form part of the actual assessment of capacity. This should be considered only in the context of the proposed action. It is also noted that a conflict of interest could arise due to the education authority also having responsibility for assessing the capacity of the child to potentially raise an appeal against the authority's actions. Further consideration should be given to conferring this responsibility on an independent body.

Capacity and Disability

9. Section 3(2) of the Bill provides that 'For the purposes of subsection (1), a child or young person lacks capacity if the child or young person does not have sufficient maturity or understanding as mentioned in that subsection by reason of mental illness; developmental disorder; learning disability; an inability to communicate because of a physical disability; or a matter... related to having additional support needs.' Given the requirement for a presumption of capacity⁷, even in the case of mental disorder⁸, a disability neutral provision should be inserted which refers only to 'sufficient maturity or understanding' and which requires the assessment of capacity to be based purely on the child's maturity and ability to understand, whether or not this is affected by the presence of a mental disorder etc.

10. It is also important to note the provisions of the CRPD in this regard. In particular, Article 7(3) sets out that 'States parties shall ensure that children with disabilities have the right to express their views on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children...' Like the Bill, this provision also makes reference to the child's 'maturity'. However, while 'maturity' may be an acceptable basis on which to assess the child's capacity, the CRPD requires that this be done 'on an equal basis with other children'. It is suggested that this interpretation provides further support for the removal of section 3(2) from the Bill or its amendment to reflect a disability neutral approach.

Extending Rights

11. The capacity provisions in the Bill largely correlate to the new rights which the Bill confers on children who are aged 12 or over and who have capacity. Significantly, in relation to the Additional Support Needs Tribunal, the Bill introduces a right for children aged 12 and over to make a reference to the Tribunal if the Tribunal is satisfied that the child has capacity to make the reference and the making of the reference is in the child's best interest.

⁷ See *Kedzior v Poland* (45026/07) (2012) ECHR 1809 para.85; *Shtukaturov v Russia* (44009/05) (2008) ECHR 223 para.94

⁸ See *Shtukaturov v Russia* (44009/05) (2008) ECHR 223, paras 87-89 (Article 8 ECHR); Article 12 CRPD.

12. These provisions are to be welcomed for attempting to increase the participation of children and young people in processes which concern their education. In 2008 the UN Committee on the Rights of the Child recommended that the UK ensure children are able to express their views and appeal to special educational needs tribunals.⁹ The UN Committee's requirement for children's views to be heard, and for rights of appeal to be conferred, are clearly connected. A right of appeal to the ASNT provides the child with the most effective way of having their views heard and acted upon.
13. As previously stated however, access to these rights is dependent on the child's age and capacity. It should be considered whether the right of appeal can be conferred upon children without employing an age limit. It is also important that children with disabilities are not disproportionately excluded from exercising their rights under the Bill. The CRPD provides that children with disabilities should receive the support required to facilitate their effective education.¹⁰ Therefore, specific provision should be made, either in the legislation or in the Code of Practice, regarding the need to provide children with disabilities with the necessary support and assistance required to express their views and exercise their rights.
14. While increasing the participation of children and young persons is a welcome policy objective, under Scottish law parents have legal rights and responsibilities in relation to their child. It is important that any extension of rights to children are balanced with corresponding parental rights.

Children's Support Service

15. The Centre welcomes the proposal for the establishment of a children's support service. The service will enable the realisation of the rights contained within the Bill by supporting children to exercise their rights and communicate their views. It is suggested that the support service could play a role in assisting in situations where the capacity of the child or young person is disputed. As previously mentioned, there may be a conflict of interest in granting the education authority and the Additional Support Needs Tribunal the role of assessing the capacity and best interests of the child. Oversight of this role by an independent body such as the support service would act as a safeguard. It is also suggested that the service should have a specific responsibility for providing support to children with disabilities to enable them to express their views and exercise their rights.

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⁹ UN Committee on the Rights of the Child, 'Concluding observations: United Kingdom of Great Britain and Northern Ireland' (20 October 2008) para.67

¹⁰ Article 24 CRPD

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