



**THE LAW SOCIETY
of SCOTLAND**
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Written Evidence

Education (Scotland) Bill

**The Law Society of Scotland's response
July 2015**

Introduction

1. The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interest of solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision-making process.
2. The Mental Health and Disability sub-committee of the Law Society of Scotland (“the committee”) did not respond within the required time limit to the call for evidence during Stage 1 consideration of the Education (Scotland) Bill but nevertheless requests that these submissions be received and considered late, particularly as they identify:
 - a) an apparent non-compliance with Article 6 of the European Convention on Human Rights (“ECHR”) which would render the Bill ultra vires of the Parliament
 - b) an apparent non-compliance with the requirements of the UN Convention on the Rights of Persons with Disabilities (“UN CRPD”) which would render enactment of the Bill liable to be prevented by the Secretary of State as contravening the UK’s international obligations, and
 - c) the extent to which the Bill, if enacted in its present form, would seriously weaken the case for maintaining that Scotland’s adult incapacity regime is not such a regime as requires to be abolished, having regard to General Comment No 1 (2014) “Article 12: Equal recognition before the law” of the UN Committee on the Rights of Persons with Disabilities dated 19th May 2014 (“General Comment”)¹.
3. The committee’s comments are confined to the Schedule of the bill, which amends the Education (Additional Support for Learning) (Scotland) Act 2004.

¹ <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement>

4. The committee has had the advantage of considering the written submissions by (firstly) the Additional Support Needs Tribunals for Scotland dated 14th May 2015 (“ASN Tribunals”, “ASN Tribunals submissions”) and (secondly) the Centre for Mental Health and Incapacity Law, Rights and Policy, Edinburgh Napier University (“the Centre”, “the Centre’s submissions”).
5. This paper should be read as supplemental to both the ASN Tribunals’ and the Centre’s submissions. The committee agrees with those submissions, subject to the submissions made below.
6. Four members of the committee are members of the core research group of the Essex Autonomy Three Jurisdictions Project, which is addressing the compliance of the adult incapacity/mental capacity regimes of Scotland, Northern Ireland, and England & Wales with the UN CRPD, having regard to the terms of the General Comment. The work of that project is incomplete. The terms of these submissions have been informed by experience of that work, but should not be taken as any indication of what may be the concluded views of that project, as none have yet been arrived at.

Ultra Vires of the Parliament

7. The first sentence of Article 6 of ECHR (the Convention for the Protection of Human Rights and Fundamental Freedoms) provides that: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. A determination regarding the provision of educational support, and a determination in respect of disability discrimination relating to persons in school education, are each a determination of that person’s civil rights. In any such process of determination, one of the parties thereto will be the education authority in question.

8. The Bill as drafted confers upon that education authority, notwithstanding that it is a party to any such proceedings, (firstly) the role of determining whether a child or young person who seeks to be the other party to those proceedings lacks the capacity to do so or whether it is not in the best interests of the child or young person to do so, and (secondly) if determining that either of those conditions applies, to prevent the child or young person from proceeding. It is clearly a breach of Article 6 that a party to proceedings which a person wishes to bring should itself be able both to assess whether certain preconditions apply and also to prevent the person from proceeding further if it considers that such conditions do apply. Such a process is fundamentally unfair. It is a determination by a party to the proceedings rather than by “an independent and impartial tribunal established by law”.
9. Article 14 of ECHR prohibits discrimination, in the enjoyment of the rights and freedoms set forth in ECHR, on grounds such as those specified in Article 14 “or other status”. By providing provisions under which access to the procedures proposed by the Bill could be denied on grounds of disability in the form of deemed lack of capacity, the Bill would contravene Article 14 in relation to the rights of children and young persons with such deemed disabilities under Article 6.
10. The committee disagrees with the suggestion in paragraph 11 of the ASN Tribunals submissions that the lack of “impartiality and objectivity” in these provisions “may be assisted by allocating the assessment to a person or agency within the education authority who is not ordinarily engaged with the child or young person”. Whatever the safeguards, the performance of the functions of assessing and denying access to the procedure will breach Article 6 if carried out by any person or group of persons within or controlled by the education authority which is party to the proceedings.

11. Proposed legislation which is not compliant with ECHR is *ultra vires* of the Scottish Parliament. The Bill, insofar as it may continue to contain the provisions referred to above in their present form, would thus be *ultra vires* of the Parliament.
12. To render the Bill *intra vires* of the Parliament in relation to Article 6, the process of assessment, and of deciding whether the child or young person should be permitted to proceed with the reference or claim, must be made by an independent and impartial tribunal established by law. The Additional Support Needs Tribunals for Scotland would qualify. The committee suggests that they have the appropriate expertise and would be appropriate tribunals to determine such matters, and that such role would not be incompatible with their further role of proceeding to determine finally such references or claims as they might permit to proceed.
13. To comply with Article 14, a fully effective mechanism must be established to permit a reference or claim to be conducted on behalf of a child or young person deemed to lack sufficient capacity to do so.

UN CRPD and the General Comment

14. The Bill proposes that the provisions described in paragraph 7 above should apply not only to children, but to “young persons” aged 16 and 17. In Scots law, such “young persons” are adults: see section 1(6) of the Adults with Incapacity (Scotland) Act 2000 (“the 2000 Act”) and the relevant provisions of the Age of Legal Capacity (Scotland) Act 1991. Determination of matters by reference to best interests are appropriate in Scots law in relation to children, but in relation to persons over 16 they were rejected for the purposes of the 2000 Act and would contravene UN CRPD having regard to the terms of the General Comment.
15. As regards matters relevant to this submission, the 2000 Act followed the recommendations in, and draft Bill annexed to, Scottish Law Commission Report No

151 on Incapable Adults, September 1995. In paragraph 2.50 of that Report, the Commission proposed the general principles now contained in the 2000 Act and rejected “the concept of best interests of the incapable adult”. The Commission wrote: “We consider that ‘best interests’ by itself is too vague and would require to be supplemented by further factors which have to be taken into account. We also consider that ‘best interests’ does not give due weight to the views of the adult ...”. The Commission drew the distinction between adult and child law: “The concept of best interests was developed in the context of child law where a child’s level of understanding may not be high and will usually have been lower in the past”.

16. The General Comment draws a distinction between “supported decision-making regimes” and “substitute decision-making regimes”. In paragraph 7 it asserts that to achieve compliance with UN CRPD substitute decision-making regimes “must be abolished”. In paragraph 27, substitute decision-making regimes are those which, inter alia, provide for decisions being “based on what is believed to be in the objective ‘best interests’ of the person concerned, as opposed to being based on the person’s own will and preferences”.
17. To achieve compliance with UN CRPD, the provisions in the Bill which would permit access to procedures to determine references and claims to be blocked on the basis of what might be deemed to be in the best interests of that person should be deleted.
18. It would not be acceptable to argue that the definition “young person” applies only to persons aged over 16 for purposes such as those addressed in the Bill, and not for other purposes such as those addressed in the 2000 Act; and in particular that they only apply to them if they should be at school or in receipt of education. To discriminate against them in such manner on grounds of such a distinction (and in particular because circumstances give rise to a possible reference in relation to educational

support under additional support for learning provisions, or a claim of disability discrimination) is discriminatory in relation to Article 14 of ECHR as engaged by Article 6.

Impact on the process of engagement

19. Having regard to the terms of the 2000 Act, the terms of the Scottish Law Commission Report No 151, and the general developments of Scots law which preceded the 2000 Act and which informed the process of law reform leading to that Act, it can reasonably be asserted that by reference to the terminology adopted in the General Comment as referred to above, the guardianship and similar provisions of the 2000 Act represent a supported decision-making regime rather than a substitute decision-making regime. On a reasonable reading of the General Comment, all such regimes are either supported decision-making regimes or substitute decision-making regimes. It can reasonably be argued that the regime of the 2000 Act is not a substitute decision-making regime in accordance with the definition of that term in paragraph 27 of the General Comment; and that it is accordingly a supported decision-making regime.
20. However, as the ASN Tribunals point out in paragraph 8 of their submissions, proposed section 3(1)(b) of the Bill “largely mirrors” the definition of “incapable” in the 2000 Act. To link the provisions of the 2000 Act in this way with new legislation which would contravene UN CRPD and which would, in particular, import elements of a substitute decision-making “best interests” based regime, would substantially weaken the position of the UK Government in the process of engagement with the UN Committee on the Rights of Persons with Disabilities (now expected to take place during the course of 2016 and 17) upon the crucial question as to whether Scots law is compliant with UN CRPD.

For further information and alternative formats, please contact:

Katie Hay

Law Reform

DD: 0131 476 8123

E: katiehay@lawscot.org.uk

The Law Society of Scotland

26 Drumsheugh Gardens

Edinburgh

EH3 7YR

www.lawscot.org.uk