Introduction and Background

The Equality and Human Rights Commission is the National Equality Body (NEB)\(^1\) for Scotland, England and Wales, and works to eliminate discrimination and promote equality across the nine protected grounds set out in the Equality Act 2010: age, disability, gender, race, religion and belief, pregnancy and maternity, marriage and civil partnership, sexual orientation and gender reassignment (“the protected characteristics”). We are an “A Status”\(^2\) National Human Rights Institution (NHRI)\(^3\), and share our mandate to promote and protect human rights in Scotland with the Scottish Human Rights Commission (SHRC).

The Commission welcomes the Education (Scotland) Bill and this opportunity to comment on it. The Commission’s comments should be read with reference to the requirements on public authorities, such as education authorities, under the Public Sector Equality Duty to have due regard to the need to:

- Eliminate unlawful discrimination, harassment and victimisation and other prohibited conduct;
- Advance equality of opportunity between people who share a relevant protected characteristic and those who do not;
- Foster good relations between people who share a protected characteristic and those who do not.

The duty aims to ensure that public authorities and those carrying out a public function consider how they can positively contribute to a more equal society through advancing equality and good relations in their day-to-day business, to:

- Take effective action on equality;
- Make the right decisions, first time around;
- Develop better policies and practices, based on evidence;
- Be more transparent, accessible and accountable;
- Deliver improved outcomes for all.\(^4\)

\(^1\) [www.equinet.eu/equality-bodies](http://www.equinet.eu/equality-bodies)
\(^2\) [www.ohchr.org/Documents/Countries/NHRI/Chart_Status_NIs.pdf](http://www.ohchr.org/Documents/Countries/NHRI/Chart_Status_NIs.pdf)
Key public authorities including education authorities, are subject to the specific devolved equality duties which set out the steps they must take to meet the requirements of the general duty\textsuperscript{5}, which include the requirement to set equality outcomes (using evidence gathered from the involvement of groups who share one or more protected characteristic) and to assess the equality impact of any proposed new or revised policy.

**Education (Scotland) Bill**

**Clause 1 Inequalities of outcome**
The Bill imposes duties in relation to reducing inequalities of outcome experienced by pupils which result from socio-economic disadvantage (and experienced by other pupils of such description as may be specified).

Inequalities of outcome as experienced by pupils are not defined in the Bill.

In the accompanying Policy Memorandum, a variety of language appears; the term ‘equity of attainment’ is used and the Memorandum elsewhere describes the Bill as ‘aimed at promoting equity in education and raising attainment for all’. The terms ‘achievement’ and ‘attainment’ are both used.

If used, there should a clear definition of what is meant by the terms ‘achievement’ and by ‘attainment’ and any balance that is to be struck between the two. The Bill and accompanying Policy Memorandum should together be clear on what inequalities of outcome are to be addressed.

Educational outcomes can also be viewed more broadly, as the transitions or pathways that flow from education into the labour market or other destinations and we would suggest that the Bill and accompanying Policy Memorandum should include these in the inequalities of outcome to be addressed.

**A ‘whole child’ approach**
It is unlikely that education authorities alone will be able to address effectively such inequalities of outcome without being able to both take and contribute to a ‘person-centred’ or ‘whole child’ approach. Such an approach would need to be able to call on other local authority perspectives and services such as Social Work or Housing, or other

\textsuperscript{5} www.scotland.gov.uk/Topics/People/Equality/PublicEqualityDuties
public or voluntary agencies, to plan services including education around a child or family. We recommend that the Bill and accompanying Policy Memorandum support such an approach.

Equality of opportunity
Under Article 2 of the First Protocol of the Human Rights Act 1998 everyone has the right to an effective education, and advancing equality of opportunity through addressing the educational attainment of protected groups is already integral to the way an education authority operates in order to discharge its duties under the public sector equality duty provisions of the Equality Act 2010 and accompanying regulations.

Disadvantage
Neighbourhoods which are socio-economically disadvantaged are diverse. Some groups of people are more likely to live in these neighbourhoods than other groups. For example, disabled people, some ethnic minority and religious groups and people identifying as LGBT are likely to be overrepresented. However, not all people who experience disadvantage live in deprived neighbourhoods.

Socio-economic disadvantage has strong links to educational attainment, but so do other factors, such as ethnic background and disability status.

A nuanced approach is therefore needed, as not everyone with poor educational attainment will live in a deprived area and living in a deprived area does not automatically translate into poor attainment. Other factors are also likely to be at play. (See for example, Prejudice-based bullying in Scottish schools, which does also take into account a socio-economic perspective.)

Assessing the impact on equality
Many policies fall on just such an existing uneven landscape. Because of historical discrimination, people belonging to some groups protected by the Equality Act 2010, including ethnic and religious minorities, disabled people and others are less able to benefit from a policy initiative.

Unless this is adequately explored in an assessment of equality impact there may be insufficient checks and balances built into the implementation phase of a policy to take account of this landscape. One

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8 EHRC (2015) Prejudice-based bullying in Scottish schools
effect of an apparently neutral policy can then be to perpetuate or even reinforce existing inequalities; often without a way to check if the policy has actually achieved what was intended for all the people who have been affected.

Education authorities will need to ensure that the impact of any policy introduced in response to the Bill is assessed against the needs of the general equality duty as required by the Scottish specific equality duties.

Clause 2 Consultation
We welcome the provisions in the Bill for an education authority to seek and have regard to the views of pupils, parents and any other appropriate persons when considering decisions and the steps to take to implement such decisions.

In this and all other respects, guardians and kinship carers should be treated the same in all circumstances, legally, financially and practically.

Clause 17 and the Schedule

Extending right to make a reference to child
The Commission welcomes the proposals to extend to children over 12, the right to make a reference.

In terms of the Age of Legal Capacity (Scotland) Act 1991 section (4A) A person under the age of sixteen years shall have legal capacity to instruct a solicitor, in connection with any civil matter, where that person has a general understanding of what it means to do so; and without prejudice to the generality of this subsection a person twelve years of age or more shall be presumed to be of sufficient age and maturity to have such understanding. Under the Equality Act, a disabled pupil who has legal capacity can make a claim to the ASNTS that he or she has been discriminated against. A child aged 12 or over is presumed to have capacity. A child of a younger age may also have the capacity and can make their own claim if they wish to do so. We would call for that right to be extended to children of any age, who have capacity. The Policy Memorandum at paragraph 48 says that a disabled person, including a child over 12 can make a claim of disability discrimination to the ASNTS. The Memorandum does not make it clear that children aged 12 and under can also make a claim if they have capacity.

As it stands, the Bill proposes that a test of competency requires to be satisfied before a child is able to bring a reference. We would seek amendment so that children over 12 are presumed to be competent, unless prescribed grounds are met. Children under 12 should also have
an independent right to bring a case where they can show sufficient understanding of the process and its implications and the Bill should be reframed accordingly, bringing it in line with discrimination claims. Decisions about capacity should be taken by the Tribunal.

Providing children with the right to bring an ASL claim will particularly benefit looked after children in Scotland. There may be circumstances where a looked after child believes that the local authority is not meeting its legal obligations and the child does not otherwise have a ‘parent’ or a parent with the capacity to bring a case to the ASNTS on their behalf. Very few references are presently made to the ASNTS on behalf of looked after children.

**Introducing best interests test**
The Commission does not consider that the proposal in the Bill which requires the education authority to be satisfied not only that the child has capacity, but also to consider whether it is in the best interests of the child or young person is compliant with the Convention. The best interests test is also introduced for 16 and 17 year olds. Adding a “best interests” test for children and for 16 and 17 year olds in effect undermines the right to make a reference to the ASNTS. It adds an additional barrier and removes their autonomy.

There is also a concern as to the perception of independence of assessment by education authorities where, for example, a reference relates to the provision or failure to make provision by the same education authority in respect of that child's additional support needs.

**Assessing capacity provisions are hard to follow**
We feel that Schedule paragraph 2, of the Bill, which would add new Sections 3A and 3B to the Additional Support for Learning (Scotland) Act 2004 is not easy to follow. s3A(1)(a) for example states that "a child who has attained the age of 12 years may do something only if an education authority is satisfied that the child has capacity in relation to the thing". The use of the word "thing" here is incongruous and awkward. "Thing" is not defined and it is not clear what "the thing" is intended to mean.

The Bill's Schedule para 2 sets out in the amended Section 3 of the 2004 Act, principles that will apply to the assessment of capacity. Government Guidance on assessing capacity would be of great assistance. This should include guidance on the ways in which the duty under s3 (3) as regards facilitating communication, can be met, by "human, electronic or mechanical aid (whether of an interpretive nature or otherwise)".
Legal Aid and support services
The Commission would welcome clarification and reassurances from the Scottish Government that legal aid will be provided and the steps that are being taken to remove any arbitrary distinction for the provision of legal aid between ASL references and discrimination claims. Such support services should be extended to young people making references too.

Clause 20 Chief Education Officer
We welcome the proposal to legislate for the role of Chief Education Officer in education authorities in Scotland to provide advice to education authorities on the provision of their education functions.

We would expect that the definition of the role would explicitly specify a responsibility for oversight of the education authority meeting its obligations in respect of Equality and Human Rights.

Conclusion
The Commission welcomes the opportunity to comment on the Bill, and supports its policy intentions. However, we would like to see a clearer emphasis on the equality and human rights dimension to the legal and policy priorities for pupils, parents and other appropriate persons in Scotland, with clear reference to the domestic law against which the Bill should be read. In particular, we would welcome more information on how the Bill will meet the needs of pupils, parents and other appropriate persons who share one or more protected characteristic, and the importance of the devolved specific equality duties in framing public authorities’ approach.


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