



FACULTY OF ADVOCATES

Written Evidence from the Faculty of Advocates

In relation to the

Education (Scotland) Bill

General

The Faculty of Advocates is the independent bar in Scotland. It exists, not for its own benefit, nor the benefit of its members, but to serve the public interest by securing to the people of Scotland the benefits of an independent referral bar. The Faculty has unrivalled general experience in litigation in the civil courts of Scotland and also includes members with particular experience and expertise in the law relating to children and young people in general and education in particular. It is on the basis of that experience and expertise that the Faculty of Advocates offers written evidence to the Scottish Parliament in relation to the proposed Education (Scotland) Bill.

The Faculty does not comment on matters of policy, as these are for the Parliament. The focus of the Faculty's evidence is on the legal effects of the proposed Bill and its coherence with other aspects of the law. This written evidence focuses on three parts of the Bill which have previously been the subject of comment by the Faculty, namely extension of rights under the Education (Additional Support for Learning) (Scotland) Act 2004 to children aged 12 and over with capacity, complaints under section 70 of the Education (Scotland) Act 1980 and the issue of children who have guardians but do not benefit from the early learning and child care provisions of the Children and Young People (Scotland) Act 2014.

Additional Support for Learning

While the extension of rights to children with capacity in this area is consistent with the United Nations Convention on the Rights of the Child and as such welcome, the Bill is not consistent with Scots law generally and risks causing confusion. The general principle, found in the Age of Legal Capacity (Scotland) Act 1991, section 2, is that a child of any age has legal capacity to instruct a solicitor in connection with any civil matter where the child has a general understanding of what it means to do so. A child with the legal capacity to instruct a solicitor may sue or defend in any civil proceedings, including proceedings under the Equality Act 2010. There is a presumption that a child of twelve years of age or more is of sufficient age and maturity to have this understanding. The capacity of many of the children to whom the Education (Additional Support for Learning) (Scotland) Act 2004 applies will be unaffected by their additional support needs, particularly where the needs arise from a physical disability. The Bill as framed would prevent children under twelve with capacity from making an application to the Additional Support Needs Tribunal under the 2004 Act, while the same children may make an application to the Tribunal based on disability discrimination and to the sheriff in connection with any other unlawful discrimination. The child excluded from the Tribunal could seek other remedies, such as judicial review, but could not as the Bill stands, complain to the Scottish Ministers. The Faculty considers that the approach in the 1991 Act should be universally applied, ie a child of any age who understands the issues may access legal remedies, with a rebuttable presumption that a child aged twelve understands (ie it is assumed the child is capable unless shown not to be) and the possibility of showing that a child under twelve has capacity.

The actual provisions of the Bill are unduly complex. They will be difficult for parents and children to understand. Consideration should be given to a simpler statement of the test of capacity. There are models in, for example, section 2 of the 1991 Act and section 11 of the Children (Scotland) Act 1995 (in respect of children's views) which have been operating for many years without obvious difficulty.

The Faculty also considers that capacity in a child should not exclude a parent from legal remedies under the 2004 Act. A parent has an obligation to provide the child with efficient education for a child of school age (Education (Scotland) Act 1980, section 30). The parent may be prosecuted for failure (section 35). The child may be referred to the children's hearing in connection with failures over education. A parent also has responsibilities and

rights in respect of a child under the Children (Scotland) Act 1995. Either or both of a child and the parent(s) should be able to exercise remedies under the 2004 Act. If there is a conflict then the Tribunal will have to determine whose view should prevail.

Question 16

The Faculty understands that the Bill is proposed because the Scottish Government considers this is consistent with obligations under the United Nations Convention on the Rights of the Child. Further the Government's emphasis in terms of GIRFEC is on each individual child, so the number and variety of uses is less important than the potential utility for even small numbers of children. Predicting the use to be made of the provision is an exercise in speculation, but the Faculty can see potential for a child to act unilaterally when separated from parents. Looked after children in particular may wish to exercise their own remedies. In cases of parental conflict a child may cut through parental disputes and seek a remedy for him or herself.

Question 17

The Faculty does not agree that children should be excluded from rights that they have the capacity to exercise. If the test of capacity is based on the child's understanding with respect to the issue and remedy in question (as suggested above) then there is no reason for children to be excluded from the exercise of particular rights.

Children do not generally have the right to make placing requests. Giving children with additional support needs this right would be inconsistent with the general position, but that does not mean that the general position is defensible. Children with capacity may contest exclusion from school and have other rights, consistent with the United Nations Convention on the Rights of the Child. The Tribunal (or a court) may refuse a placing request if to grant it would cause practical difficulties. In principle the issues raised in the policy memorandum can therefore be addressed in the current legislation relating to placing requests.

The exclusion of children from mediation is based on what may be an unwarranted assumption that the adults in a particular case are better able to participate in mediation than a child. There may be no difference between the adult and a child in capacity to resolve issues at mediation, particularly if legal representation or a support worker is available to the child.

Question 18

A child support service is in principle welcome. Consideration should be given to how this service fits with more generally available services such as legal advice and representation by solicitors and counsel, which may be available to the child, or may be appropriate if legal remedies are to be sought.

The Faculty does not consider that the named person with responsibility under the Children and Young People (Scotland) Act 2014 should take a lead role in the provision of the child support service. This person will be an employee of the education authority working at the child's school. The service will require to provide support in relation to issues where there is a conflict between the child and the education authority. There will then be a conflict of interest. The named person will be in a difficult position. The child may be reluctant to seek help and may not trust the advice and assistance provided. To be effective the service must be independent of the school and education authority.

Complaints

The Faculty opposed the repeal of section 70 of the Education (Scotland) Act 1980 and is pleased to note that the section is to remain and that there is now a proposal designed to make the section more effective by including prescribing timescales. It is also noted that Education Scotland will make the investigation and will then, presumably advise the Scottish Ministers on whether an order under section 70 is required. It is noted that the proposed process will be specified in regulations and that there will be consultation on the precise terms of the regulations.

The benefit of section 70 is that it has applied universally to any breach of duty relating to education. It is not always easy to anticipate what kind of problems may arise, but it is important that a breach relating to education can be addressed, given that it is likely to affect children's learning. The Faculty is content that any issues that may be dealt with by the Additional Support Needs Tribunal should be referred to that Tribunal and excluded from section 70, but would not wish to see a remedy under section 70 further limited.

There is a further difficulty if a child with capacity under section 2 of the Age of Legal Capacity (Scotland) Act 1991 cannot make a reference to the Tribunal about a breach of duty

under the 2004 Act, but cannot claim the protection of section 70 because the exclusionary provisions are drafted by reference to the subject matter, not the power to complain.

Question 23

The Policy Memorandum with the Bill proposes that an initial decision on whether to investigate will be taken within 40 days and that in the event of full investigation the complaint will take up to 112 days to determine. These deadlines appear reasonable.

Question 24

The Faculty agrees that when there is a remedy available by referring a matter to the Additional Support Needs Tribunal there is, in principle, no need for section 70 to apply. There is however a danger that it will not always be clear whether a particular matter falls within the jurisdiction of the Tribunal. For example provision of transport may be a matter for the Tribunal if specified in a co-ordinated support plan, but might also be subject to section 70 if there was a duty to provide the transport under section 50 of the Education (Scotland) Act 1980.

There is also a difficulty arising from the drafting of the exclusion by reference to the subject matter, as opposed to the right to complain, as children with legal capacity who are excluded from the Tribunal may wish to pursue a claim under section 70.

From the perspective of pupils and parents it will be important to ensure that there are no gaps or practical impediments to an issue being dealt with under one provision or the other. Part of the solution may be procedural, for example requiring the Tribunal to reach a rapid decision as to whether any issue falls within its jurisdiction under section 18(3), (5A) or (5B) of the Education (Additional Support for Learning) (Scotland) Act 2003 and then, if the Tribunal held that the matter could not be dealt with under one of these subsections, to allow a section 70 complaint to proceed.

Question 25

The Scottish Government's proposals have the potential to clarify the procedure for complaints and, importantly, to ensure that matters are dealt with speedily in the interests of children, whose education may be affected by the matters that are the subject of the complaint. It is not possible to comment further on whether the system will be effective until draft regulations are provided. Section 70 remains available to deal with all

breaches of duty, save those which may be dealt with by the Additional Support Needs Tribunal and in that respect we refer to our response to Question 24.

Learning and child care

The intentions of the Children and Young People (Scotland) Act 2014 have suffered from convoluted drafting. The intention of the Scottish Parliament was to make early learning and childcare available to looked after children and children who were living with kinship carers, including guardians, from the age of two. The Faculty in its written evidence on the Children and Young People (Scotland) Bill pointed out that children whose parents had died, but who had a guardian appointed by the parents to act after their death (under the Children (Scotland) Act 1995, section 7) logically fell within the class of children the Parliament intended to benefit. This class included all children subject to “kinship care orders”. Such orders are defined in section 72 to include orders made under section 11 of the Children (Scotland) Act 1995, which would result in children living with, or being the responsibility of persons other than their parents. An appointment under section 7 has a similar result, but without going to court. The children concerned will have suffered the death of parents.

The Parliament accepted in principle that such children should benefit from the early learning and childcare provisions of Part 6, but by attempting to include these children by referring to section 73(3)(f) the provision was limited to such children who were at risk of becoming looked after or were otherwise in a group that were specified by Scottish Ministers by order. The proposed change has the effect of removing the limitation. It also makes the provision much more comprehensible. All children with a guardian appointed by their parents to exercise parental responsibilities and parental rights after the parent has died are now included.

Question 26

The proposed amendment clarifies the law to ensure a group of children in an equivalent position to those in a kinship care arrangement are included in the measures relating to early learning and childcare. The Faculty sees no reason to distinguish these children from others who have guardians or are cared for by relatives, friends or acquaintances by virtue of a court order.