

Govan Law Centre's Education Law Unit
Response to Call for Written Submissions
Education (Scotland) Bill

1. Govan Law Centre is a community controlled law centre and a Scottish Charity. Our education law unit is funded by the Scottish Government to provide advice, support, training and policy input across Scotland – particularly in the field of additional support needs. Together with Kindred, it operates the national advocacy service for the Additional Support Needs Tribunals for Scotland, on behalf of the Scottish Ministers.
2. Our principal interest in this legislation is in relation to the proposed amendments to the Education (Additional Support for Learning) (Scotland) Act 2004, and therefore we have restricted our response to those areas.

Additional Support for Learning

16. What will be the outcomes of extending rights under the Education (Additional Support for Learning) (Scotland) Act 2004 to children aged 12 and over with capacity? Please give practical examples.

3. Govan Law Centre considers that rights without accessible remedies can be rendered meaningless, and therefore supports the extension of rights to children aged 12 and over with capacity. As with the rights which currently apply to parents and young people, in most cases, the exercise or enforcement of those rights will not be necessary.
4. However, where the exercise of rights is necessary, placing those rights in the hands of those they were designed to benefit is in compliance with the UN Convention on the Rights of the Child. Further, where the child lacks an effective parental advocate, then the rights held by the child give them the opportunity to exercise those rights in circumstances where they would otherwise remain untouched. Specifically, this would lead to assessments being carried out where requested, provision being included with a CSP, or implementation of a CSP, or transition duties being complied with, where they may not have been otherwise.
5. Govan Law Centre opposes the introduction of a “best interests” test to be applied to the exercise of children’s rights. There is no equivalent for adults in exercising their own rights (or their children’s). If a child has legal capacity to exercise rights, then it is for them to determine whether it is in their best interests to do so. That is part of what it means to have rights – deciding whether and how best to use them. The “best interests” test is an obstacle to children exercising their rights, is overly complex and time consuming to challenge and effectively places a veto on the exercise of a child’s rights in the hands of the very body which the child would be seeking to challenge.
6. Govan Law Centre notes that the definition of “capacity” is one which excludes all children under the age of 12, and which does not provide for a

legal presumption that children aged 12 or over have sufficient maturity and understanding to exercise any of the rights in question. This is a departure from the approach taken in, for example, s4A of the Age of Legal Capacity (Scotland) Act 1991 and s.6 of the Children (Scotland) Act 1995. The approach taken in the Bill seems unduly restrictive in comparison to these established approaches.

17. Do you agree with the proposal that not all of the rights in the ASL legislation should be extended to children (see paragraphs 49 and 50 of the policy memorandum)?

7. Given the current legislative structure regarding attendance at school, which imposes duties on parents to ensure their children attend (on pain of criminal prosecution), and to provide transport to school in the case of placing requests, Govan Law Centre agrees that children should not be given the right to make a placing request.
8. Govan Law Centre recognises the concerns raised by mediation providers regarding children being able to access mediation directly, but considers that this should be made available to children alongside their other rights.

18. What are your views on the statutory children's support service proposed by the Scottish Government?

9. Govan Law Centre strongly supports the proposed service as essential to ensuring the rights to be conferred by the Bill can be understood and relied upon by the children affected.
10. Govan Law Centre notes that similar appeal / complaint rights exist in related jurisdictions, and it would make sense to extend the availability of the support service to those areas as well. It would be a peculiar position if a child making a reference to the Tribunal in terms of the Additional Support for Learning legislation had access to the support service, but the same child making a claim to the same Tribunal in terms of the Equality Act did not have that same access.
11. As a matter of equity and to ensure that all the areas of education law where children have been afforded these rights are supported, the areas covered by the service should be extended to include:
 - a. the child's rights to make a claim to the Additional Support Needs Tribunals for Scotland re: disability discrimination in school;
 - b. the child's rights to make a reference to the education appeal committee re: exclusion from school; and
 - c. the child's rights to access the complaint processes to be set out re: named persons and child's plans.
12. As the take up rates in all of these (known) jurisdictions is small, this additional remit for the support service could be easily incorporated without the need to extend the budget set out in the financial memorandum.

Other issues

Please provide any other information you think would be relevant to the Committee's scrutiny.

13. Govan Law Centre agrees with and supports the submissions made by Who Cares? Scotland. Their proposals that “More looked after young people should be subject to a Coordinated Support Plan which should be a central component of the Child’s Plan” is supported by our own experiences. Education authorities are failing to comply with their duties to assess looked after children for CSPs, and the numbers of CSPs for looked after children appears to be dropping.
14. The Children and Young People (Scotland) Act 2014 introduces a discrepancy in terms of older pupils, which could be addressed by a small amendment in this legislation. In terms of the right to a named person service, the 2014 Act uses the term “young person” to mean someone over the age of 18 who remains a pupil at school. Such “young people” remain entitled to the named person service, despite turning 18. By contrast, “young person” in the Education (Additional Support for Learning) (Scotland) Act 2004 means someone who is 16 or 17 years old. You stop being a young person on reaching your 18th birthday. This has the unfortunate (and surely unintended) effect of bringing a premature end to the right to additional support at school (including any CSP in place) on the pupil’s 18th birthday, rather than seeing them continue until the pupil actually leaves school. Our casework reveals some of the practical difficulties which can arise as a result.
15. A small amendment to the definition of “young person” for the purposes of the 2004 Act to incorporate those aged 18 or over, but who are still at school, would be easy to implement and would resolve the issue.
16. Similar issues arise as to the 2004 Act applying for children from birth until statutory nursery entitlement (usually 3). At present, the Act only applies to children of that age whose additional support needs arise from a disability. This is a wholly artificial distinction, which only serves to exclude some of the most vulnerable children. This anomaly would be easily remedied, and would bring the 2004 Act in line with the new GIRFEC and named person framework.

Iain Nisbet, Head of Education Law
Govan Law Centre, Glasgow G51 2BZ
iain@edlaw.org.uk