

Education (Scotland) Bill - Schedule Stage 2 Committee Briefing

This is a joint briefing produced by the Children and Young People's Commissioner Scotland, the Equality and Human Rights Commission, Inclusion Scotland, the Scottish Human Rights Commission, Govan Law Centre, ENABLE Scotland and Together (Scottish Alliance for Children's Rights).

This briefing outlines our key concerns in relation to the Schedule accompanying the Education (Scotland) Bill.

The Schedule seeks to extend rights to children aged 12-15 years in relation to the Education (Additional Support for Learning) (Scotland) Act 2004. This would allow children with capacity for example to:

- ask a local authority to determine whether they have additional support needs or not
- ask that the authority determine whether they require a co-ordinated support plan or not
- make a request for an assessment (e.g. to assess whether they have dyslexia/whether they require speech and language therapy)
- request that an advocate or supporter accompany them to a meeting or
- refer a matter to dispute resolution

We fully support the extension of these rights.

However, we believe that the way in which the Scottish Government is seeking to extend these rights is flawed. Rather than freely extending rights to children, we believe that the Scottish Government has, via the Education (Scotland) Bill, put in place a number of barriers that may prevent children from exercising those rights.

The key barriers are:

- the introduction of a 'capacity assessment', carried out by the Local Education Authority or the Additional Support Needs Tribunal (depending on which right the child is seeking to exercise).
- the introduction of a 'best interests' assessment (which the Scottish Government is seeking to amend to an 'adverse effect on well-being' assessment).

In order to exercise their rights, a child must successfully negotiate both assessments (with a right of appeal to the Additional Support Needs Tribunal where the outcome of these assessments is disputed).

The Scottish Government has stated that these assessments are necessary in order to safeguard the well-being of a child.

However, we believe that these assessments are unnecessary. Rather than empowering children, they ensure that the balance of power remains firmly in the hands of adults.

Our specific concerns about the two types of assessment are outlined in more detail overleaf.

The Capacity Assessment

In very broad terms, where a child has legal capacity, this generally means that they have sufficient understanding to be able to think through the pros and cons of a situation and to recognise the likely outcomes of different courses of action.

The Age of Legal Capacity (Scotland) Act 1991 is routinely used in a wide range of settings to establish whether a child has capacity. For example, the Act sets out when a child is able to consent to their own medical or dental treatment and when they can instruct a solicitor in relation to a civil matter or consent to an adoption.

Where civil matters are concerned, the Act provides for a presumption of capacity at the age of 12 years. That means that a child aged 12 or older will be assumed to have legal capacity, unless proved otherwise. Where there is any doubt about a child's capacity, then it would be up to the person/body expressing doubt to demonstrate why this is the case. One example of where there is a presumption of capacity at 12 would be a child bringing forward a Disability Discrimination Claim under the Equality Act 2010. This would be heard by the Additional Support Needs Tribunal.

By contrast, the Education (Scotland) Bill introduces an assessment which all children seeking to exercise their rights would be required to undergo before they were able exercise their rights.

Effectively, this means that the presumption of capacity contained within the Age of Legal Capacity (Scotland) Act 1991 is turned on its head.

Rather than there being a presumption of capacity at 12, the presumption is that no child has capacity. The onus is then put on the child to prove their capacity via the 'capacity assessment'. This is a significant departure from current practice.

It also raises the possibility that a child would be able to pursue a Disability Discrimination Claim at 12 years of age, but that same child would be prevented from exercising their rights under the Education (Additional Support for Learning) (Scotland) Act where it was felt that they lacked the capacity to do so.

This inconsistency could be resolved by removing the 'capacity assessment' from the Bill and amending the Age of Legal Capacity (Scotland) Act 1991 to ensure that a presumption of capacity at 12 would apply to all children exercising rights extended by the Education (Scotland) Bill.

We therefore support Amendments 150, 151, 152, 153, 154 and 155 in the name of Liam McArthur, MSP.

Best Interests/Adverse Effect on Wellbeing Assessment

As currently drafted, the Education (Scotland) Bill will also require children to undergo a 'best interests' test before exercising their rights. The Scottish Government has stated that this test is designed to protect a child and ensure that they can 'cope' with the experience of exercising their rights. Where it is not in the child's 'best interests', then the child will not be allowed to exercise their rights and someone else will have to do so on their behalf (e.g. a parent).

We disagree. The key to extending children's rights in this area is to provide appropriate support and to ensure that processes are geared towards children's individual needs.

For some children, not being allowed to exercise their rights, where they feel capable of doing so, is arguably more damaging to them, than allowing them to exercise their rights and then subsequently finding the process too difficult for them.

The 'best interests assessment' also directly conflicts with the concept of legal capacity. That is, 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, and to take into account if and how their wellbeing may be affected. That is part of what it means to have rights – deciding whether and how best to use them.

We note that the Scottish Government proposes to amend this to a test of "adverse effect on wellbeing". We do not believe that this test is any more helpful than the 'best interests' one and our concerns in relation to the 'best interests assessment' apply equally to a test of 'adverse effect on wellbeing'.

We would point out that there is no equivalent test for adults in exercising their own rights (or their children's). There is also no equivalent for children exercising their rights in any other context.

We acknowledge that a child has the right to challenge the outcome of both the 'capacity' and 'best interests' assessments via the Additional Support Needs Tribunal. However, this could potentially mean in practice is that a decision a local education authority makes that a child making a simple written request would adversely affect their wellbeing could be to force that same child down the much more challenging route of Tribunal proceedings.

These assessments also effectively place 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. That is a clear conflict of interest.

The 'adverse effect on wellbeing' test is also applied by the Tribunal in respect of the child who wishes to bring Tribunal proceedings (although not if they wish to bring a disability discrimination claim to the same Tribunal).

By carrying out this assessment before proceedings have even begun, there is a very real risk that it serves to lengthen proceedings and to require a more involved, complex and trying procedure for children than it does for young people or for parents.

It also introduces a new and effective legal defence to any reference for the authority, where that reference is brought by a child.

We would also highlight that a Support Service has been created by this Bill to assist children in exercising their rights independently. It is therefore unclear why the Scottish Government should feel that an assessment of 'best interests' or 'adverse effect on wellbeing' should be necessary where this new service has been specifically created to support and safeguard the child's wellbeing.

Again, if the authority or Tribunal are of the view that certain statutory procedures would adversely affect the wellbeing of a child, then we would argue that the starting point should be to establish what steps could be taken to make these proceedings more child-friendly and

accessible – not to bar the child from making use of their rights. Clear information should also be provided to children in relation to the assistance the Support Service can offer to them.

With these measures in place, we believe that there is no place for a ‘best interests’ or an ‘adverse effect on wellbeing’ assessment in this Bill.

We therefore support Amendment 153 in the name of Liam McArthur, MSP which seeks to remove the ‘best interests’ assessment.

We also support Amendment 158, in the name of Liam McArthur, MSP which seeks to clarify by regulations how the support service will support children exercising their rights.

We do not support Amendments 61, 66, 70, 71, 73, 87 and 90 in the name of Dr Alasdair Allan, Minister for Learning, Science and Scotland’s Languages, which seek to change the ‘best interests assessment’ into an ‘assessment of adverse effect on wellbeing’.

Rights of Children to Instruct Parents to Act on their Behalf

We recognise that even where a child has capacity, they may prefer for a parent to progress an issue on their behalf. We believe that where this is the case, then the child should be fully involved and their role recognised in the decision-making process. This does not, however, substantively change any existing rights that parents may have under the Education (Additional Support for Learning) (Scotland) Act 2004.

We therefore support Amendments 154, 155, 156 and 157 in the name of Liam McArthur, MSP which seek to ensure that where a child with capacity does not want to exercise their rights, then they can authorise a parent to do so on their behalf.

Young Persons

We note that the Scottish Government has introduced a series of amendments to remove the requirement for young people (that is, those aged 16 and 17 years) to undergo the ‘capacity’ and ‘best interests’ assessments. We support these amendments, as they restore the status of 16 and 17 year olds with capacity who are currently able to exercise their rights independently without the need to undergo such assessments.

Amendment 97, seeks to remedy the definition of a young person currently used in the Education (Additional Support for Learning) (Scotland) Act 2004 to ‘ensure that young people in school continue to receive support regardless of their age’. Currently, a young person is defined as ‘a person over school age who has not attained the age of eighteen years’¹. This can have the unfortunate effect of bringing a premature end to the right to additional support at school on the pupil’s 18th birthday, rather than this support continuing until the pupil actually leaves school.

We therefore support Amendments 41-46, 48-49, 51-60, 62-65, 67-69, 75-76, 89 and 97 in the name of Dr Alasdair Allan, Minister for Learning, Science and Scotland’s Languages.

¹ <http://www.legislation.gov.uk/asp/2004/4/contents>

Conclusion

We believe that children should be supported to exercise their rights independently and that this Bill provides an important opportunity for them to do so. However, the approach taken in the Bill is unhelpful. It puts barriers in the way of children exercising their rights.

Removing the 'capacity' and 'best interests'/'adverse effect on wellbeing' assessments, however, and instead amending the Age of Legal Capacity (Scotland) Act 1991, provides a solution that would allow the extension of these rights in a way that is fair and consistent with those children's rights.

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