



John Swinney MSP  
Deputy First Minister  
Cabinet Secretary for Skills and Education  
The Scottish Government  
St. Andrew's House  
Regent Road  
Edinburgh  
EH1 3DG

14<sup>th</sup> September 2017

Dear Mr Swinney,

### **Supporting Children's Learning Code of Practice**

This Code of Practice plays an important part in ensuring children and young people with additional support needs' rights are realised. The [United Nations Convention on the Rights of the Child](#) (UNCRC)<sup>1</sup> outlines all children's right to an education in article 28. Article 29 specifies that this education should be directed to "the development of the child's personality, talents and mental and physical abilities to their fullest potential, a concept which is further detailed in [General Comment 1](#)<sup>2</sup>. The right of all children to an education is also emphasised in the [International Covenant on Economic, Social and Cultural Rights](#) (ICESCR)<sup>3</sup>. The [United Nations Convention on the Rights of People with Disabilities](#) (UNCRPD)<sup>4</sup> outlines the rights of children with disabilities to an education which is inclusive at all levels. Given the [Scottish Government's commitment](#) to a human rights based approach to policy making, including possible incorporation of international human rights instruments such as the UNCRC<sup>5</sup>, this code of practice will play an important part in ensuring that decisions made by education authorities and schools are lawful.

We feel that the current Code of Practice is too lengthy and complex to be of practical use in decision making. It does not take a human rights based approach. Although this is the second review of the code, parts are now 12 years old. The language used is inconsistent and in places contradictory. We appreciate that the current version has had to be prepared to comply with recent changes to legislation but feel that it is important that the Code of Practice as a whole be reviewed as soon as possible.

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<sup>1</sup> <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>

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[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fGC%2f2001%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fGC%2f2001%2f1&Lang=en)

<sup>3</sup> <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>

<sup>4</sup> <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx>

<sup>5</sup> <http://www.gov.scot/Resource/0052/00524214.pdf>

## **Extension of rights to children with capacity**

As stated in our response to previous consultations on the extension of the right to refer to the [Additional Support Needs Tribunals for Scotland](#) (ASNTS) to children over the age of 12 with capacity, we remain concerned that this is a restricted right. In particular, we are concerned that the responsibility to assess capacity rests with the local authority which is likely to be the subject of the complaint. This creates a clear risk of conflict of interest.

The right for children to be heard, contained within Article 12 of the UNCRC and further articulated within [General Comment 12](#), issued by the UN Committee on the Rights of the Child, apply to all children. In relation to any presumption, the General Comment makes it clear that:

“States parties cannot begin with the assumption that a child is incapable of expressing her or his own views. On the contrary, States parties should presume that a child has the capacity to form her or his own views and recognize that she or he has the right to express them; it is not up to the child to first prove her or his capacity.”<sup>6</sup>

We believe that the right for children with capacity to refer their case to ASNTS, introduced by the Education (Scotland) Act 2016 is not compliant, with article 12 of the UNCRC and we will continue to call for government to review this process.

### **Specific concerns with new content of the guidance.**

We are also concerned about some of the language used in those sections dealing with the extension of rights to children with capacity and in particular relating to the two tests, for capacity and wellbeing, which are required before children can exercise these rights. We feel that the use of the term “safeguard” in relation to these tests, for example on page 111, is inappropriate as the effect is not to safeguard but to restrict access to these rights.

We are concerned that there is a lack of clarity in some sections of the code of practice between the two discrete tests – of capacity and of wellbeing. This is not clear in some sections of the code of practice and in some sections, the two are conflated or possibly transposed. It needs to be made clear that capacity and wellbeing are separate tests and that the tests are context and time specific, reflecting children’s evolving capacity over time. The wellbeing test must take into account the potential adverse impact on wellbeing of not being permitted to make a referral, as well as any concerns about making a referral. Both tests should be undertaken by someone not connected with the matter being referred and who has a good knowledge of the current ASNTS system.

We are particularly concerned that both tests are linked to educational progress, on page 117. This is inappropriate. Children’s capacity and educational attainment are not necessarily linked and indeed attainment may be affected by the very issues the child is seeking to refer to ASNTS. For example, a child with dyslexia may not be achieving at level 2 in literacy but may have the knowledge and maturity needed to

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<sup>6</sup> <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf>

make a referral. There is potential for this attempt to use inappropriate measures to result in direct discrimination against children.

On page 113 our office's resource, the [7 Golden Rules of Participation](#), is referenced as part of a test of wellbeing. This is not appropriate. This resource is intended be used by adults to develop their ability to take account of the views of children of all ages, abilities and capacity<sup>7</sup>.

Regarding the provision of information, advice and support regarding the right to refer to ASNTS, the Code of Practice wrongly, in places, restricts this to children over 12 who have capacity, for example on page 118 where outlining support and advocacy services. In fact, information on these rights should be available to all children, including those who have not yet reached the age of 12 and those who may have previously been assessed as lacking capacity, as capacity evolves over time.

Whilst we appreciate the need for the Code of Practice to be updated to reflect these new provisions, we very strongly feel that it requires to be more comprehensively reviewed, with a clean slate approach to enable it to grounded in a human rights approach and to be simplified and significantly reduced in length, in the very near future.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'B Adamson'.

**Bruce Adamson**

Children and Young People's Commissioner Scotland

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<sup>7</sup> <https://www.cypcs.org.uk/education/golden-rules>