New Year, New Rights: Upcoming Changes to Additional Support for Learning Legislation and the impact on Children’s Rights

The Background

The Education (Additional Support for Learning) (Scotland) Act 2004 ("the Act") provides the legal framework for identifying and addressing the additional support needs of children and young people who face barriers to learning. There are a wide range of factors that may lead to additional support needs, such as family circumstances, disability, health needs or social factors. The definition of additional support contained within the Act is wide and includes, for example, deployment of a support teacher, provision of particular learning and teaching materials or use of resources, such as special IT facilities. The Act also promotes collaboration among those supporting children and young people, including social work services, health professionals and voluntary sector services.

The Act has been amended on a number of occasions since its introduction, most recently by the Education (Scotland) Act 2016 (“the 2016 Act”). Amongst other things, the 2016 Act extends certain rights to children aged 12-15. These are intended to mirror the rights already held by young people (aged 16 and over), parents and carers under current ASL legislation, subject to some limited exceptions.
The Education (Scotland) Bill was introduced to Parliament in response to recommendations made by the UN Committee on the Rights of the Child in 2008. One such recommendation was that the UK had to do more to “ensure that children who are able to express their views have the right to appeal against their exclusion as well as the right, in particular for those in alternative care, to appeal to special educational need tribunals.” As a result, Scottish Ministers took steps to extend the rights of children under ASL legislation, culminating in the 2016 Act.

Whilst the Commission welcomes overall the aim of extending these rights to children, there are concerns about whether the 2016 Act actually achieves that aim and, in a broader sense, whether the provisions do so in a way which is human rights compliant. These issues were raised by the Commission, and other stakeholders, at consultation stage and although the Bill was amended to take account of some of these concerns, the 2016 Act in its final form remains problematic. In particular, there are concerns about the approach to be taken to assessing capacity, the consideration of “wellbeing”, the potential for conflict of interest and overall compatibility with convention rights.

Extension of Children’s Rights under the Education (Scotland) Act 2016

One of the stated aims of the amendments introduced by the 2016 Act is to extend certain rights already held by young people, parents and carers under the Education (Additional Support for Learning) (Scotland) Act 2004 to certain children aged 12-15.

Under the 2004 Act, parents, carers and young people aged 16-18 (and still in school) are afforded a number of rights, including the right to ask the education authority to establish whether a child or young person has additional support needs, to request an assessment or examination to determine this, to make placing requests to special schools and request or review a Coordinated Support Plan (CSP). It also provides for young people, parents and carers to use mediation services or request independent adjudication or, where attempts at dispute resolution fail, to apply to the Additional Support Needs Tribunal for Scotland (ASNTS)\(^1\) for decisions about CSPs and other issues. The 2016 Act aims to extend these rights to certain children aged 12-15, with the exception of the right to make placing requests and the right to use mediation services.

---

\(^1\) It should be noted that another consequence of the 2016 Act amendments is that the Additional Support Needs Tribunal for Scotland will transfer into the Health and Education Chamber of the First-tier Tribunal for Scotland.
Instead of using mediation services themselves, children will have their views considered as part of the mediation process.

**How does a child exercise a right under the 2016 Act?**

The process begins with the child advising the education authority that they wish to exercise a right. The education authority then notifies the child’s parents that they intend to assess the child’s capacity and the impact on the child’s wellbeing (these assessments are discussed in more detail below). If the education authority decides the child does not have capacity or feels their wellbeing may be adversely affected by exercising that right then they will refuse the request. If the child (or their parents) do not agree with the education authority in relation to the assessment of capacity or the wellbeing assessment (or both), they may refer this to the ASNTS. The ASNTS will then carry out the same preliminary assessments and either uphold or overturn the authority’s decision.

Importantly, the 2016 Act makes provision for a free support service offering advice, information and assistance to children aged 12-15, who wish to exercise their rights. This type of service is already offered by the Enquire service to young people aged 16 and over, parents and carers. The new support service will provide advocacy (if the child wants it) to support them in any meetings with the local authority and legal representation at any resulting ASNTS. The service can also assist with seeking the views of children where it has not been possible to obtain their views through the usual channels.

**The “Capacity Assessment” and consideration of “wellbeing”**

The concept of legal capacity is one many will be familiar with. The Age of Legal Capacity (Scotland) 1991 (“the 1991 Act”) sets out a test of capacity, which applies in a wide range of settings, for example when a child is able to consent to their own medical or dental treatment, when they can instruct a solicitor or whether they can consent to their adoption. In very broad terms, a child is considered to have legal capacity when they have sufficient understanding to be able to think through the pros and cons of a situation, weigh up risks and recognise the likely outcomes of different courses of action. A child is presumed to have capacity to instruct their own solicitor from the age of 12. Where someone doubts a child’s capacity, they must show why this is the case.
By contrast, the 2016 Act introduces a capacity assessment, which all children are required to undergo as a starting point to exercising a right. This effectively removes the presumption of capacity. Such an assessment is not imposed on children exercising legal rights in any other context. This assessment could mean that a 12 year old child, presumed able to take a disability discrimination claim to the ASNTS, is prevented from exercising rights under ASL legislation. Taken further, a finding of non-capacity in relation to ASL issues could inappropriately impact on the presumption that the child has capacity in relation to their discrimination claim.

Once the education authority has satisfied itself that the child has the requisite “capacity” to exercise a right, they must then consider whether the child’s wellbeing will be adversely impacted by doing so: in other words, whether the child would be able to “cope” with the potential consequences of exercising a right (pressure, stress, anxiety, the impact of “losing”). This assessment is not about whether the decision or action the child wishes to take is itself in the child’s best interests. Section 3B of the 2016 Act defines wellbeing by reference to the “Getting it Right for Every Child” indicators and focuses on the extent to which the child is or would be: Safe, Healthy, Achieving, Nurtured, Active, Respected, Responsible and Included.

The requirement on education authority to consider the child’s “wellbeing” as a precursor to allowing them to exercise a right disregards the fact that, by definition, if a child is considered to have capacity, then they are able to understand and make decisions about their interests and wellbeing. It cannot be right to say that a child has capacity to make decisions and then impose a requirement which takes that child’s decision-making power away. A person with capacity has the right to do something others feel may not be good for them. Again, this restriction is one which is not imposed on children exercising legal rights in any other context.

Concerns have been voiced regarding how comfortably the “consideration of wellbeing” sits within wider convention rights. Article 6 of the European Convention on Human Rights protects an individual’s right to a fair trial and access to justice. The wellbeing assessment could potentially limit a child’s ability to enforce their rights if the education authority decides that it is not in their interests to do so. Ultimately, whether or not the assessment is incompatible with the EHRC will depend on how it operates in practice. The definition of wellbeing within the 2016 Act involves consideration of whether a child would be respected, responsible and included. It could be considered contrary to these indicators if a child who wants to exercise a right is prevented from doing so.
Separately, there are concerns that these assessments may lead to perceived conflicts of interest. As previously mentioned, it is, in the main, for the education authority to determine whether a child has the requisite “capacity” to exercise a right and whether it would be in their interests to do so. This is particularly the case in relation to Looked After Children where a local authority is also the corporate parent.

**Conclusion**

While efforts to allow children to exercise their rights independently are commendable (and in line with the broader aim of promoting and increasing children’s rights in Scotland), the Commission is concerned that the 2016 Act could actually place barriers in children’s way. In addition, the Commission does not consider that the 2016 Act actually addresses the recommendations made by the United Nations Committee on the Rights of the Child in 2008, which was, after all, its raison d’etre.

At consultation stage, the preliminary assessments were, by far, the most contentious feature of the proposed amendments. The Scottish Government has very recently issued non-statutory Guidance on this very issue (“Guidance on the Assessment of Capacity and Consideration of Wellbeing”). Unfortunately this is not particularly useful and does little to address the concerns raised at consultation stage and outlined within this article. It can only be hoped that these assessments will be managed carefully and that education authorities, and professionals working for them, will be live to human rights considerations and the potential for perceived conflict of interest when taking discretionary decisions.

Finally, it is imperative that appropriate support is provided to those wishing to exercise a right and that processes are geared towards children’s individual needs. We welcome the new support service as leading the way in that regard.