



Law Society
of Scotland

Consultation Response

Extending Children's Rights - Guidance for education authorities and school staff on assessment of capacity and consideration of wellbeing of children who have attained 12 years of age in respect of additional support for learning in school education

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Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Mental Health and Disability Sub-committee welcomes the opportunity to consider and respond to the Scottish Government's consultation: Extending Children's Rights - Guidance for education authorities and school staff on assessment of capacity and consideration of wellbeing of children who have attained 12 years of age in respect of additional support for learning in school education. The Sub-committee has the following comments to put forward for consideration.

Assessment of Capacity

Assessment of capacity requires relevant psychiatric or psychological professional expertise. Determinations of capacity have, for obvious reasons, fundamental significance in relation to human rights. Normally such determinations will be made by a court, upon psychiatric and/or psychological professional evidence. The assertion that "education authority staff including teachers" might be able "to decide on a child's capacity" is concerning. Because of the significance of such a decision, it should only be made by someone who not only has the necessary professional skills, but who holds an appropriate qualification to vouch those skills. It may be necessary to institute training and certification arrangements. Paragraph 12 is at present, in any event, contradictory in that the first sentence refers to such staff being the decision-makers, and the second sentence refers to them being able to provide evidence.

Required Training

The provision of required training is an obligation undertaken by the United Kingdom by ratifying the United Nations Convention on the Rights of Persons with Disabilities (the UNCRPD), and in particular Article 13.2 under which States Parties are obliged to "promote appropriate training for those working in the field of administration of justice, including police and prison staff". Any decision-making process in relation to exercise of the rights listed in paragraph 8 of the guidance is a matter of administration of justice, engaging the requirement for appropriate training.

Maturity and Sufficient Understanding

Paragraph 13 appears to indicate confusion as to the status and meaning of “maturity” in the relevant context. The reference to “health and wellbeing” would seem to point towards physical maturity. That, we suggest, is irrelevant. We would suggest that in this context “maturity” refers to the development of relevant cognitive skills.

The references to “sufficient understanding” in paragraph 13 also appear to be based upon misunderstanding. It is well established in incapacity law that capacity is task-specific and time-specific. In relation to a particular act or decision, the relevant understanding is only that directly related to the act or decision in question, at the time when that act is to be taken or that decision is to be made.

UNCRPD

The guidance does not appear to take account of the United Kingdom’s obligations, in the case of children with disabilities, under the UNCRPD.

Not all children over the age of 12 to whom these procedures relate will fall within the definition of persons with disabilities for the purposes of the UNCRPD, but it would appear likely that many will have a cognitive disability, and fall within the scope of the UNCRPD.

Article 7 UNCRPD requires provision of age-appropriate assistance to realise the rights conferred by that article. Article 7.3 requires that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realise that right. Exercise of all of the rights listed in paragraph 8 of the draft guidance constitute the expression of views on matters affecting them in the sense of article 7.3 UNCRPD. Paragraph 20 of the draft guidance refers only to assistance with communication. The guidance should stress the obligation to provide all necessary support to the child in order to express its views in relevant matters. The fourth bullet-point in paragraph 13 appears to confuse provision of support with assessment of capacity.

To the extent that the guidance is intended to apply to those aged 16 and above and given the Age of Legal Capacity (Scotland) Act 1991, the guidance should also take account of the obligations under Article 12.3 UNCRPD, which applies to persons with disabilities (as defined in Article 1 of the Convention), and which, in the context of a system which grants legal capacity upon reaching age 16, must logically apply to all persons thereafter. Article 12.3 UNCRPD requires States Parties to “take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity”. Exercise of all of the rights listed in paragraph 8 of the draft guidance constitutes exercises of legal capacity, in the sense of Article 12.3. As discussed above, paragraph 20 refers only to assistance with communication, but should stress the obligation to provide all necessary support to the child in order to exercise their capacity in relevant matters. The apparent confusion in the fourth bullet-point in paragraph 13 between provision of support and assessment of capacity is also relevant in this context.

Such provision of support might in any event be practice that should be recommended in relation to all children, whether or not disabled.

Flowchart

The flowchart which follows paragraph 27 of the draft appears to require that the risk of adverse effect on wellbeing should be considered in relation to the assessment of capacity process, as well as (later in the chart) on exercise of a particular right. This seems to be at odds with paragraph 24 of the draft, and requires better explanation.

The same flowchart should refer to the obligations to provide support and to make a best interpretation of the child's will and preferences, in addition to the existing text about support for communication.

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