



Law Society
of Scotland

Consultation Response

Proposed Disabled Children and Young People (Transitions)(Scotland) Bill

January 2020



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.

Our Mental Health and Disability sub-committee welcomes the opportunity to consider and respond to Johann Lamont MSP's consultation: *Proposed Disabled Children and Young People (Transitions)(Scotland) Bill*.¹ The sub-committee has the following comments to put forward for consideration.

The sub-committee also notes the involvement of Camphill Scotland in developing the consultation. Camphill Blair Drummond, one of the member organisations of Camphill Scotland, is the Law Society of Scotland's charity partner of the year 2019-20.

Consultation questions

1. What challenges do you think children with a disability face in the transition to adulthood?

In addition to all of those narrated in the consultation document, with which we agree, we note:

(a) That arrangements put in place by a children's hearing terminate automatically at age 18. That was clearly demonstrated by the decision in *Scottish Borders Council v AB*.² Failure to plan adequately in advance for this can result in significant detriment.

¹ <https://www.parliament.scot/parliamentarybusiness/Bills/113161.aspx>

² [2019] SC Jed 85

- (b) That the need for a guardianship application to be lodged in court at the earliest permitted date (that is to say, three months before the "child" attains the age of 16) may be overlooked, and preparation not commenced in sufficient time.
- (c) That the possibility of the person, upon attaining the age of 16, granting a power of attorney, if necessary with appropriate support, may be overlooked.
- (d) That the needs of children and young persons with a record of offending may be overlooked.

2. Do you think that children and young people with a disability should have a statutory right to a transitions plan?

Yes. There should be robust provisions to enable the person in question, and anyone with a relevant interest, to ensure that the plan is prepared and thereafter to ensure that it is implemented.

3. Why do you think that a transitions plan would be helpful or unhelpful?

Helpful, in order to address all of the issues identified in the consultation and those noted at 1 above.

4. Will a National Transitions Strategy assist disabled young people to achieve independent living?

Yes, but it should more widely be couched to ensure that they all achieve all of the rights accorded by the UN Convention on the Rights of Persons with Disabilities.³

5. What do you think the advantages and disadvantages would be of a National Transitions Strategy?

A National Transitions Strategy would contribute to fulfilling the purpose identified in our answer to question 4, by ensuring that all relevant policies and planning- as well as individual planning- achieves that purpose.

³ <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>

6. Do you think it is necessary for there to be a Minister in the Scottish Government with special responsibility for ensuring that children and young people with a disability receive appropriate levels of care and support in the transition to adulthood?

Yes, as such an appointment is - on the basis of experience - likely to ensure that requirements are driven forward in a way unlikely to happen without such appointment. An example is the initiative resulting from the appointment of a Minister for Mental Health.

7. Do you have any other comments?

We are pleased to note that the consultation document takes into account the wider cost of inaction, in comparison to the costs of implementation.⁴ A narrow view of the costs of a proposal can be inappropriate where there would be overall benefit to the public purse.

We have a number of comments in relation to the proposed draft Bill.⁵ References to section numbers are references to the relevant sections of the proposed Bill:

Section 1(4): We would suggest that the list of persons consulted set out in sections 1(4)(a)- 1(4)(i) be extended to include guardians, attorneys, persons appointed to provide support, and persons providing advocacy services.

Section 6(3): We would suggest an option to state in a particular plan a higher age to which that plan would remain in force.

Section 10(1): Where a child/young person is subject to the jurisdiction of a Children's Hearing, we would suggest that the views of the Reporter to the Children's Hearing should be obtained. Where the child/young person has been subject to proceedings before the Mental Health Tribunal for Scotland or of the Additional Support Needs Tribunal, we would suggest that the views of those Tribunals should be sought. Where the child/young person has received mental health care, we would suggest that the views of the relevant medical practitioner and/or mental health officer should be sought. Where the child/young person is subject to any other healthcare on an ongoing basis, we would suggest that the views of the relevant consultant or other medical practitioner should be sought.

Section 10(1)(iii): Persons providing support to the child/young person should also be included.

⁴ <https://www.parliament.scot/parliamentarybusiness/Bills/113161.aspx>, page 11

⁵ <https://www.parliament.scot/parliamentarybusiness/Bills/113161.aspx>, page 35

Section 10(2): We would suggest that this proposed sub-section is contrary to human rights requirements and obligations and should be deleted. There should be attributable obligations to ascertain the views of the child/young person in every case, if necessary by any means of communication, and if necessary with all appropriate support. Where that is demonstrated to be impossible, there should be an attributable obligation to determine the best interpretation of the views of the child/young person. As the great majority of such "children" will be, or will shortly become, "adults" in terms of the Adults with Incapacity (Scotland) Act 2000 ("the 2000 Act"),⁶ obligations should be no less than those in terms of section 1 of that Act. We would also note the provision of the Children (Scotland) Act 1995⁷ that those over the age of 12 should be presumed to be of sufficient age and maturity to express a view.

Section 11(3): Our comments in relation to section 10(1) apply.

Section 11(4): We would suggest that this sub-section should be deleted for the same reason as we have given in relation to section 10(2).

Section 12: We would suggest that the rights to ensure that an appropriate plan is prepared, and that its requirements are delivered, should be assured by procedures provided for in statute.

Section 12(a): We would suggest amending this sub-section to "*(a) any child or young person*". We make this suggestion on the basis of the reasons given in relation to sections 10(2) and 11(4) above. We would also suggest that to allow a party to a dispute arbitrarily to deny the rights of another party by suggesting that it is not satisfied that that other party "has capacity" may violate Articles 6, 8 and 14 of the European Convention on Human Rights,⁸ and may also violate rights accorded by the UN Convention on the Rights of Persons with Disabilities in such manner as would justify triggering the procedure available to persons with disabilities under the First Protocol to that Convention.

Section 12(d): We would question the automatic relevance of "parents" given that young persons are all adults (see our comments in relation to section 16, below). The qualification about lacking capacity to express a view should in any event be deleted, for reasons already given. Included in this list should be the primary carer and nearest relative in terms of the Adults with Incapacity (Scotland) Act 2000; any guardian; any attorney; any persons whom a sheriff has determined should be consulted under relevant provisions of the 2000 Act; any duly appointed supporter; and any person providing advocacy services.

⁶ <https://www.legislation.gov.uk/asp/2000/4/contents>

⁷ <http://www.legislation.gov.uk/ukpga/1995/36/contents>

⁸ <https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c>

Section 16:

Definition of "child" and (to that extent) definition of "young person": It is inappropriate to include persons who are adults under both the Age of Legal Capacity (Scotland) Act 1991⁹ and the 2000 Act within the definition of "child". "Child" should mean a person under 16 years of age.

Definition of "Disability": we would suggest that the definition in section 6 of the Equality Act 2010¹⁰ is too narrow for this purpose. The definition in section 16 should extend to all persons within the definition of persons with a disability in terms of the UN Convention on the Rights of Persons with Disabilities, and any persons who are, or have been, subject to the jurisdiction of the Additional Support Needs Tribunal.

Definition of "young person" should include those whose transition plan provides that it shall continue in force until a later age than 26 (if our proposal in that regard is accepted).

Generally, we would suggest that the scope of the purposes of the Bill should be defined in the Bill in a manner according to the second paragraph on page 6 of the consultation document, with the amendment that "citizenship" should be adjusted to "full participation in society", and there should be express provision to ensure that all rights accorded by the UN Convention on the Rights of Persons with Disabilities are implemented in relation to each person who has a transition plan.

For further information, please contact:

Jennifer Paton
Policy Team
Law Society of Scotland
DD: 0131 476 8139
JenniferPaton@lawscot.org.uk

⁹ <http://www.legislation.gov.uk/ukpga/1991/50/contents>

¹⁰ <https://www.legislation.gov.uk/ukpga/2010/15/contents>