



Law Society  
of Scotland

# Stage 1 Briefing

## Disabled Children and Young People (Transitions to Adulthood) (Scotland) Bill

23 November 2023



## Introduction

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The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

The Disabled Children and Young People (Transitions to Adulthood) (Scotland) Bill<sup>1</sup> (the Bill) was introduced by Pam Duncan-Clancy MSP, the Member in Charge of the Bill, on 20 April 2022. The Bill's introduction followed consideration of a previous Bill introduced by Johann Lamont MSP in Session 5.<sup>2</sup> We submitted written evidence on the Bill to the Education and Skills Committee of the Scottish Parliament<sup>3</sup> as part of the Committee's stage 1 consideration of the Bill. The Education and Skills Committee's Stage 1 Report on the Disabled Children and Young People (Transitions to Adulthood) (Scotland) Bill (the Stage 1 Report) was published on 5 October 2023.<sup>4</sup>

We welcome the opportunity to consider and provide comment on the Bill ahead of the Stage 1 debate scheduled for 23 November 2023.

## General Comments

We support the aim of the Bill, which is to improve outcomes for disabled children and young people in the transition to adulthood.

We note that transition from child to adult services for children and young persons with disabilities is a complex and sensitive task. The challenge of transition to adulthood has been widely recognised. In the mental health context, the Scottish Mental Health Law Review has recently considered inconsistencies in access to CAMHS by 16 and 17 year olds, and has recommended that:

<sup>1</sup> [Disabled Children and Young People \(Transitions to Adulthood\) \(Scotland\) Bill \(parliament.scot\)](https://www.parliament.scot/bills/2022-23/1)

<sup>2</sup> [Disabled Children and Young People \(Transitions to Adulthood\) \(Scotland\) Bill – Bills \(proposed laws\) – Scottish Parliament | Scottish Parliament Website](https://www.parliament.scot/bills/2022-23/1). Our written evidence on this earlier Bill is available at: [Disabled Children and Young People \(Transitions to Adulthood\) \(Scotland\) Bill | Law Society of Scotland \(lawsociety.org.uk\)](https://www.lawsociety.org.uk/evidence/22-10-27-mhd-disabled-children-and-young-people-transitions-to-adulthood-scotland-bill-written-evidence.pdf)

<sup>3</sup> [22-10-27-mhd-disabled-children-and-young-people-transitions-to-adulthood-scotland-bill-written-evidence.pdf \(lawsociety.org.uk\)](https://www.lawsociety.org.uk/evidence/22-10-27-mhd-disabled-children-and-young-people-transitions-to-adulthood-scotland-bill-written-evidence.pdf)

<sup>4</sup> [Stage 1 Report on the Disabled Children and Young People \(Transitions to Adulthood\) \(Scotland\) Bill | Scottish Parliament](https://www.parliament.scot/bills/2022-23/1)

*“There should be a programme of improvement to transitions between CAMHS and adult services, to ensure that transitions are well planned, maintain relationships which are important to the young person, and reflect the developing capacities and needs of the young person.”<sup>5</sup>*

The Bill should seek to ensure continuity and stability in the transition period, and that services or treatment are not disrupted because the child, young person or adult has reached a certain age.

The proposals set out in the Bill may interact with a number of other current legislative developments, specifically the proposals for a National Care Service, the Scottish Government’s plans for a Human Rights Bill, the UN CRC Bill, and any legislation arising following the recommendations of the Scottish Mental Health Law Review. Care must be taken to avoid any inconsistency or duplication in legislation.

We note the lead committee’s comments in the Stage 1 Report regarding the volume and complexity of existing legislation and policy already in place governing disabled children and young peoples and adults’ entitlement to education, health, social care and other types of support.<sup>6</sup> We support the suggestion in the Stage 1 Report that the Member in Charge and the Scottish Government carry out detailed analysis of how the provisions of the Bil would interact with these existing provisions.

<sup>5</sup> Scottish Mental Health Law Review, Final Report (September 2022), recommendation 12.12 at page 622. Available at: [Consulation \(mentalhealthlawreview.scot\)](https://www.mentalhealthlawreview.scot)

<sup>6</sup> Stage 1 report, page 24

## Comments on the Bill

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### **National Transitions Strategy (Part 1, Sections 1-6)**

Part 1 of the Bill makes provision for a National Transitions Strategy. We support the introduction of a National Transitions Strategy.

We welcome the consultation and publication and laying provisions in sections 2 and 3 of the Bill. We would stress the importance of full and effective consultation with all of those listed in section 2(3).

It is not clear how any failure to comply with a National Transitions Strategy by the persons listed in section 4(2) would be addressed. The dispute resolution provisions in section 13 would appear to apply to transitions plans only. Where statutory duties are created, there should be clear, effective and accessible mechanisms for disadvantaged persons to seek redress or remedy.

We note the concerns raised in the Stage 1 Report regarding the provisions of the Bill which would place duties on public bodies without the need for Parliament to consider secondary legislation, and the consequent concerns regarding the sufficiency of Parliamentary oversight.<sup>7</sup> We support the suggestion in the Stage 1 report that Scottish Government and the Member in Charge consider and respond to this point.

We support provision for a Scottish Minister to have special responsibility for exercise of functions under the Bill (section 6). Such an appointment is, on the basis of experience, likely to ensure that the requirements are driven forward in a way unlikely to happen without such an appointment. However, we note the concerns highlight in the Stage 1 Report regarding legislative competence<sup>8</sup> and would welcome further consideration on this point.

### **Transitions Plans (Part 2, Sections 7-15)**

Part 2 of the Bill makes provisions for transitions plans.

Section 7(2) provides that a transition plan must be 'agreed'. Where there are disputes about transitions plans, a form of redress and remedy should be available, alongside the ability to challenge the local authority in an identified forum as a last resort. Whilst Section 13 would allow Scottish Ministers to make arrangements for dispute resolution by regulations, we would suggest that a clear and robust mechanism for dispute resolution is essential if the Bill is to achieve its aims.

We would recommend that the availability of a mediation service be facilitated and promoted in the context of developing transitions planning.

<sup>7</sup> Stage 1 report, page 13

<sup>8</sup> Stage 1 Report, page 15

Section 7(4) confusingly refers to a “child” reaching a 26<sup>th</sup> birthday.

Section 7(5) refers to a child “lacking capacity to express a view”. There should be a presumption in favour of all children, young people and adults having the ability to express a view. This presumption should only be rebutted with evidence to the contrary. In terms of the Adults with Incapacity (Scotland) Act 2000 and the UNCRPD there is an obligation to consider past views, present views, and the rights, will and preference of the person with disability. We would suggest that this section should not state “capacity to express a view” but rather “be unable to express a view” and that this section should include the consideration of the past and present views, rights, will and preference of the child or young person. The obligation to form a best interpretation of the child, young person or adult’s will and preference should also be included in this section. There must also be an attributable obligation that any necessary technical or other supportive measures for the formulating and/or expressing of a view are made available.

Section 7(5) also places a duty on local authorities to ascertain and have regard to the views of the child’s or young person’s parents, legally appointed guardian or other carers. We suggest that the Bill generally should include references to attorneys as people who are required to be consulted. Guardians and Attorneys may have express powers to exercise the rights of the child or young person over 16 years of age on their behalf. The legal status of Guardians and Attorneys must be respected in the Bill. We would also suggest that the term “nearest relative” should replace parents in line with section 254 of the Mental Health (Care and Treatment) (Scotland) Act 2003.

Sections 11 and 12 should similarly refer to attorneys and nearest relatives (replacing the word parents) as persons who require to be consulted in preparing and reviewing a transitions plan.

Sections 11 and 12 should allow for an independent professional, such as a Safeguarder, to be appointed in order to ascertain views, in so far as ascertainable, and should be accompanied by an attributable duty to ascertain views.

Section 11 includes a duty to ascertain and have regard to the views of “any advocate or support agency instructed by the disabled child or young person, or instructed by the child’s or young person’s parents, legally appointed guardian or other carers to act on behalf of the child or young person”. Section 12 includes a duty to consult any such advocate or support agency. We would suggest that these duties are both unnecessary and inappropriate. The purpose of advocacy and other provisions of support is to facilitate formulation and expression of the person’s own views, and an essential part of the professionalism required of people in such roles is to set their own views entirely to one side. Sections 11 and 12 contain separate duties relating to both the disabled child or young person, and the parents, legally appointed guardian or other carers of the disabled child or young person, and we would suggest that the role of advocacy is to support these individuals in conveying their views to the local authority.

Section 12 makes provision for review of the transitions plan. Section 12(6) provides that the local authority may, in consequence of the review, amend the transition plan, transfer to the management of the plan to another relevant authority, or end the plan. We note that there is no requirement for such changes to the transition plan to be ‘agreed’, in contrast to the terms of sections 7(2) and 7(3). We would suggest that it is

equally important that changes to a transition plan proposed by a local authority are agreed by the child or young person.

We note the DPLR Committee's view that that guidance issued under section 14 of the Bill should be subject to the parliamentary scrutiny, and the recommendation that the Member in Charge lodge an amendment that would require the Scottish Ministers to issue guidance by regulations subject to the negative procedure in section 14(1) of the Bill. We consider that this is appropriate.

We note the concerns raised in the Stage 1 Report<sup>9</sup> regarding references within sections 7 and 10 of the Bill to 'diagnosis' of disability. Whilst we did not comment on this in our written evidence, we support concerns raised at stage 1 regarding the need for a diagnosis- in the current human rights climate, we consider the requirement for a diagnosis to be inappropriate. Reference to "assessment of relevant impairments of capabilities" may be more appropriate. See our further comments below regarding the definition of disability for the purposes of the Bill.

### **General (Part 3, Sections 16-21)**

Part 3 of the Bill makes general provisions.

Section 19 is an interpretation section which provides definitions for terms used within the Act.

The Bill must be clearer regarding the definitions of "child" and "young person". We note that section 19 defines a child as a person under 18 years of age, and a young person as a person aged 18 to 26 years. We would suggest that the Bill must take into account the fact that a person over 16 years of age is treated as an adult for many legal purposes, including the Adults with Incapacity (Scotland) Act 2000 ("the 2000 Act"). The Bill should address the fact that once a "child" turns 16, they are considered an adult for purposes including the 2000 Act and thus to specific extent subject to both the child and adult regimes.

We note that the Bill defines "disability" for the purposes of the Bill as having the meaning given by section 6 of the Equality Act 2010. We note the comments in the Stage 1 Report regarding the wider scope of this definition as compared to the existing legislative framework for Additional Support Needs.<sup>10</sup> There may be merit in adopting the UN CRPD definition of persons with disabilities, in order to achieve consistency with other legislation and with future moves towards incorporation of the UN CRPD into Scots Law. We have commented above regarding the references to diagnosis in the Bill, and have suggested alternative wording which we consider to be more consistent with the UN CRPD approach.

<sup>9</sup> Stage 1 Report, page 34

<sup>10</sup> Stage 1 report, para 21

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