



Law Society
of Scotland

Written Evidence

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

Evidence to the Scottish Parliament's Education and Skills Committee

January 2021



Introduction

The Law Society of Scotland is the professional body for over 12,000 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 provide written evidence to the Scottish Parliament's Education and Skills Committee¹ on the Disabled Children and Young People (Transitions to Adulthood) (Scotland) Bill.² The sub-committee has the following comments to put forward for consideration.

General Comments

We welcome the aim of this Bill to improve opportunities of disabled children and young people as they grow up. We note the involvement of Camphill Scotland in preparing the Policy Memorandum accompanying the Bill. Camphill Blair Drummond, one of the member organisations of Camphill Scotland, is the Law Society of Scotland's current charity of the year.

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 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. Full account must be taken of this. Specific reference should also be made in the Bill to applications for Guardianship (where the "child" or "young person" over 16 lacks capacity to make decisions on or about their welfare and financial affairs), and to support for those with disabilities who have the appropriate capacity to grant a Power of Attorney.

¹ <https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/116502.aspx>

² <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/disabled-children-and-young-people-transitions-to-adulthood-scotland-bill/introduced/disabled-children-and-young-people-transitions-to-adulthood-scotland-bill-as-introduced.pdf>

1. Do you agree with the overall aims of the Bill? If so, do you think the Bill can meet these aims?

We agree with the aims of the Bill. We note that transition from child to adult services for children and young persons with disabilities is a complex and sensitive task. We note that a transition in the middle of treatment, or based primarily on chronological age, could be harmful to children and young persons with disabilities.³ 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 challenge of transition to adulthood has been widely recognised. The work of the Scottish Mental Health Law Review (the “Scott Review”),⁴ and the responses received by that Review, have highlighted that transition to adult mental health services is an area of particular concern.⁵ The Scott Review’s Communications and Engagement Advisory Group has recently focused on exploring “Improved communication between services and professionals to enable holistic, wrap around care, including a joined-up approach with welfare, including Department for Work and Pensions (DWP) to ensure delivery of economic and social rights. This includes transition between children and adult services”.⁶

2. Is changing the law the only way to do what the Bill is trying to do? Would the Bill (as it is currently written) have any unexpected or unforeseen effects?

Many of the shortcomings currently experienced by children and young people with disabilities are the result of poor planning, coordination, and delivery of services, rather than the law at an “operational” level. However, we would suggest that significant improvement is unlikely to be achieved without legislative measures.

The Scott Review is currently undertaking a significant inquiry in respect of reform, but a final report is not expected until September 2022. As noted above, responses to the Review’s call for evidence have highlighted the poor transition planning currently available. It may be that the Scottish Government takes the view that this topic falls under the remit of the Review. We believe, however, that it is important to ensure that the rights accorded children and young people by the UN Convention on the Rights of Persons with Disabilities⁷ (UNCPRD) are secured in a timely manner, and we therefore support the proposals for legislative change set out in this Bill.

³ Scottish Mental Health Law Review, Interim Report, December 2020, <https://cms.mentalhealthlawreview.scot/wp-content/uploads/2020/12/Scottish-Mental-Health-Law-Review-Interim-Report-Final-1-1.pdf> at page 29

⁴ <https://www.mentalhealthlawreview.scot/>

⁵ Scottish Mental Health Law Review, Interim Report, December 2020, <https://cms.mentalhealthlawreview.scot/wp-content/uploads/2020/12/Scottish-Mental-Health-Law-Review-Interim-Report-Final-1-1.pdf> at page 29.

⁶ Ibid, at page 44

⁷ www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html

3. The Bill would require the Scottish Government to introduce a National Transitions (sections 1 to 6 of the Bill). Do you agree with introducing a strategy, and a Scottish minister to be in charge of it?

Yes. 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. Obligations should be placed upon those who are required to produce and implement the transition plans, and they should be held to account if transition plans are not created or implemented. There should be a form of redress or remedy available. We are of the view that a specific forum should be identified to which issues of failure to implement statutory duties may be taken by persons disadvantaged or those entitled to represent them or claiming an interest in their welfare, and effective remedies must be available there.

We would stress the importance of full and effective consultation with all of those listed in section 2(3).

4. The Bill places a duty on local councils to prepare and implement transition plans for each disabled child and young person within their local authority area (sections 7 to 13 of the Bill). They would also have to explain:

- **how plans were going to be prepared and managed**
- **what would happen if there was a disagreement about what was in a plan or how it was working**

Do you agree with these proposals?

Section 7(2) provides that a transition plan must be 'agreed'. Where there are disputes about transition 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 should suggest that it is important that a clear and robust mechanism for dispute resolution is essential if the Bill is to achieve its aims.

We have noted that the Scottish system has scope for a specialist mediation service akin to the Court of Protection specialist mediation service widely used in the Court of Protection in England and Wales.⁸ We note that court action can be divisive, lengthy and expensive. We would recommend that the availability of a mediation service be facilitated and promoted in the context of developing transitions planning.

Section 7(4) confusingly refers to a "child" reaching a 26th 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 UNCPRD there is an obligation to consider past views, present views, and the rights, will and

⁸ Charlotte May LLB, *Court of Protection Mediation Research: Where are we in the UK?*, 2019

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 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.

5. What financial impact do you think the Bill may have, either on the Scottish Government, local councils, or other bodies?

We believe that the wider costs of inaction would be greater in comparison to the costs of implementation. Early intervention and appropriate planning have benefits not only to the child or young person with a disability but to the wider community.

Careful and supportive transition plans may lead to more young persons and adults with disabilities in employment, fewer young persons and adults with disabilities in hospitals under compulsion, fewer young persons and adults with disabilities in the criminal justice system and a better society as a whole.

6. Is there anything else you’d like the Committee to know about the Bill? Do you have any comments on how the Bill will affect (for better or worse) the rights and quality of life of the people covered by the Bill?

We believe that the Bill must be clearer in respect of the definition of “child” and “young person”. The Bill needs to ensure that the voice of the child or young person is at the centre of the transition planning.



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