

***A consultation on Extending Children's Rights- Guidance for education authorities and school staff on assessment of capacity and consideration of wellbeing of children aged 12 -15 years, in respect of additional support for learning in school education***

**Why we are consulting:**

The Education (Additional Support for Learning) (Scotland) Act 2004 has been amended to extend rights to children.

**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 a barrier, or barriers, to learning.

The Act aims to ensure that all children and young people are provided with the necessary support to help them work towards achieving their full potential. It also promotes collaborative working among all those supporting children and young people and sets out the rights of children, young people and parents within the system.

The Act has been amended by the Education (Scotland) Act 2016 ("the 2016 Act"). This extension provides that children will have the same rights as young people and parents under the Additional Support for Learning legislation, except in relation to placing requests and the use of mediation services. It is intended that these amendments to the Act will commence in January 2018.

In preparation for this, there is a need to update Regulations and statutory guidance.

We are already currently consulting on:

- Supporting Children's Learning Code of Practice (statutory guidance to the Act)
- the Additional Support for Learning (Collection of Data) (Scotland) Regulations 2017
- The Section 70 (Procedure) (Scotland) Regulations 2017
- The Additional Support for Learning Dispute Resolution (Scotland) Amendment Regulations 2017



The consultation on the Code of Practice and associated Regulations will close on 12 September 2017. The consultation can be accessed at:

<https://consult.scotland.gov.uk/supporting-learners/code-of-practice/>

### **This consultation**

Also in preparation for the amendments to the Act, non-statutory guidance has been developed on the provisions within the Act which require:

- Assessment of capacity for children in relation to the use of their rights and;
- Consideration of whether there may be adverse impact on the child's wellbeing as a result of using their rights.

This consultation seeks views in relation to this non-statutory guidance:

*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.*

This consultation seeks the views of those involved in supporting children and young people with additional support needs. This includes parents and carers, those working in schools, education authorities, health boards, social work services, voluntary sector services and those who are involved in providing dispute resolution services including mediation, independent adjudication and Tribunals. This consultation will be of interest to those organisations and individuals who have an interest in the promotion of children's rights in Scotland.

### **Consultation responses**

Overleaf, are a range of questions to guide responses to the consultation. Please provide specific comments wherever possible i.e. suggest alternative wording if you feel a sentence or paragraph requires amendment, state clearly any concerns that you have or issues that should be examined further.

**You must complete the Respondent Information Form to ensure that your consultation response is formally considered as part of the consultation process.**



## RESPONDENT INFORMATION FORM

**Please Note** this form **must** be completed and returned with your response.

Are you responding as an individual or an organisation?

- Individual  
X Organisation

Full name or organisation's name

CELCLIS (Centre for Excellence for Looked After Children in Scotland)

Phone number

Address

Level 6, Curran Building, University of Strathclyde, 94 Cathedral Street, Glasgow

Postcode

Email

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

- X Publish response with name  
 Publish response only (without name)  
 Do not publish response

### Information for organisations:

The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

- X Yes  
 No

## Questions: Non-Statutory Guidance on assessing capacity and adverse impact on wellbeing.

(If you are responding to this consultation electronically, to complete tick boxes, please double click on one of the boxes above and select the default value as 'checked').

### 1. Introduction

The introduction explains the purpose of the guidance – is this clear to you?

Is the information provided in the introduction appropriate? Please tick the box that applies.

Please tick the box that applies.

Yes  No  Don't know

- If you selected no, please provide details of additional information which should be included or removed and a brief reason for it.

The introduction is very clear, but given the particular responsibilities local authorities have as corporate parents of looked after children ([Part 9, Children and Young People \(Scotland\) Act 2014](#)), and the fact that the Act, as amended, makes specific reference to looked after children, we suggest adding a bullet under the heading, 'Who is this guidance for?', to include designated managers (or co-ordinators) for looked after children.

### 2. Children's Rights

Chapter 2 explains the rights extended to children aged 12 and over, with capacity.

Is the information provided in Chapter 2 appropriate? Please tick the box that applies.

Yes  No  Don't know

- If you selected no, please provide details of additional information which should be included or removed and a brief reason for it.

The information provided is appropriate, and we welcome the use of case studies to exemplify the information within the guidance. However we have concerns about a number of the case studies in Appendix A, and offer the following suggestions for improvement.

In the case of Gary, aged 12, it is stated that 'he was having some headaches and finding it hard to concentrate...' From the context and the response, it appears that is not meant that Gary is literally having headaches, but that this is a figure of speech. It would be clearer to use another word (e.g.

difficulties) because generally where a child was complaining of headaches and difficulty in concentration, there should be discussion with parents and carers and / or a referral via the school nurse.

In the case of Leanne, the words 'and accommodated' should be deleted because they are redundant. The Act, as amended, which makes additional provision for looked after children, does not distinguish between children accommodated 'away from home' and children looked after 'at home'. Despite this, some professionals believe incorrectly that certain provisions (e.g. requirement for a Child's Plan) apply only to children looked after away from home. It would be best not to appear to confirm this misconception. The case study would also benefit from a careful proof-read. For example, it is not always clear who 'she' refers to, and there are two instances of mis-spelling of 'principal' teacher.

We have concerns regarding the perception that readers may form regarding John and his circumstances. The case study currently appears to reinforce stereotypical descriptions of children in special school settings, and with social, emotional and behavioural needs; and risks conflating expressions of emotion with intellectual capacity. The guidance and case study examples are a valuable opportunity to challenge stereotypes, and highlight how children in John's circumstances do show capacity, and should be utilised as such. The inclusion of the Curriculum for Excellence levels that John is working at go some way towards demonstrating he has the 'sufficient understanding' to demonstrate capacity. It is unfortunate that a negative portrayal of John's needs detracts from the point that the guidance is trying to make; that complexity surrounds decisions where children have understanding to demonstrate capacity, but not maturity.

In the case study of Alana, reference to Alana having 'a degree of maturity beyond her years' is a value judgement that would be best omitted unless the guidance explains how Alana's teacher has reached this conclusion. Though the four considerations for assessing 'maturity and understanding' are set out on page 6 of the guidance, it is unhelpful for the user of the guidance to have to move back and forth within the document to reference how a decision about a child having sufficient maturity has been made. Reference to the assessment process within the case study would be a helpful aid for professionals making judgments about children's maturity and understanding. The heading of Alana's case study suggests that the learning point is the 'right to information and advice', and yet this aspect is not developed beyond passing on web links to Alana, which is a fairly passive example of giving information and advice. This case study could usefully be revised to have the guidance teacher explain to Alana that she supports Alana in her feeling that the maths teacher has not understood the circumstances, and that together they could approach the teacher. This would also demonstrate that information giving is not always from adult to child. A more active approach to the web links would be for the child and guidance teacher to look at them together and for the teacher to respond to the child's questions with advice.

The case study of Theresa is quite difficult to follow. It is not clear whether the central point is about whether Theresa has capacity to participate in a review, or the outcome of the review itself. This is further complicated by reference to an 'upcoming review' and a 'further review'. It is also unclear how Theresa is being supported to express her views. The role of the educational psychologist is also not clear. In the context of a child who has an eating disorder, the reference to 'improvements with

diet' is best avoided.

### 3. Assessment of Capacity

When a child requests to exercise a particular right, the Act also requires those who have responsibilities in respect of that right to assess the child's capacity and also any potential adverse impact on wellbeing that the use of the particular right may cause. Chapter 3 considers the assessment of capacity.

Is the information provided in Chapter 3 appropriate? Please tick the box that applies.

**Yes**  **No**  **Don't know**

- If you selected no, please provide details of additional information which should be included or removed and a brief reason for it.

What is written is sufficient, but the guidance would be strengthened by stating that the default position should be that a child of 12 will have capacity unless there is evidence that the child does not have capacity. In the context of consenting to a medical procedure, it is assumed that the child has capacity if medical staff are reasonably satisfied that the child understands ([Age of Legal Capacity \(Scotland\) Act 1991](#)). It would be unfortunate if in the context of education the tests required to prove capacity were more severe. Additionally, it should be clarified that the judgement about capacity should mostly be about the child's intellectual functioning, i.e. their capacity to understand the issues, the consequences of decisions, and to be able to communicate their wishes and process information. Sometimes 'maturity' is used in ways that emphasise social and behavioural aspects. Thus expressions of anger could be described as immature behaviour, whereas it is possible for a child to be angry, impolite, even anti-social, and simultaneously able to understand. It is very important that the process of assessing capacity does not become elevated to a kind of tribunal.

The case study of Eilidh in this chapter is welcomed. It demonstrates that from prior experience the adults around Eilidh know that she is able to weigh up different options and also to communicate her wishes.

### 4. Consideration of Adverse Impact on Wellbeing

When a child requests to exercise a particular right, the Act also requires those who have responsibilities in respect of that right to assess the child's capacity and also any potential adverse impact on wellbeing that the use of the particular right may cause. Chapter 4 considers the potential adverse impact on wellbeing in such situations.

Is the information provided in Chapter 4 appropriate? Please tick the box that applies.

Yes  No  Don't know

- If you selected no, please provide details of additional information which should be included or removed and a brief reason for it.

The way the information in this chapter is presented appears to foreground the hazards to wellbeing of exercising rights. Stating clearly that the experience of exercising rights, being listened to and taken seriously are potentially more beneficial to wellbeing than deleterious would strengthen this Chapter. It is a pity that the seven golden rules of participation are included only as a web-link - they would be usefully presented in full in this chapter. We consider the last bullet point ("personal support from an adult who knows the child well, page 9") to be the most important. Placing it first in the list would help to emphasise the human aspect of the process of assessing capacity.

The flow chart on assessing capacity and wellbeing (page 11) is very useful and would benefit from being placed at the beginning of the document, to show an overview of the process before guidance users read the text in subsequent sections.

## 5. Assessment of Change in Circumstances

Chapter 5 considers the assessment of capacity and adverse impact on wellbeing when similar matters have recently been considered.

Is the information provided in Chapter 5 appropriate? Please tick the box that applies.

Yes  No  Don't know

- If you selected no, please provide details of additional information which should be included or removed and a brief reason for it.

This chapter rightly sets out that changes to learning environment, health and disability, social and emotional factors and family circumstances should be considered in reassessment of capacity within a short timeframe.

Looked after children are often faced with multiple changes in both learning environment and family circumstances, due to both placement and school moves. This chapter would benefit from the acknowledgment that some children do not have stable home or learning environments, which may lead to unplanned changes in their circumstances, which should be taken into account in this regard.

Paragraph 29 states that a child and or their parents and carers may refer decisions they do not agree with to Tribunal for consideration. The Education (Additional Support for Learning) (Scotland) Act 2009 promotes the interests of looked after children by stating that they are presumed to have additional support needs unless assessed as otherwise. Unfortunately, as data released by local authorities via Freedom of Information requests shows, such duties towards looked after children

are being unevenly implemented across Scotland, with some councils only assessing a tiny proportion of eligible children. Through our own work in schools and education authorities, and wider consultation with individuals working with children (teachers, carers, social workers, advocates, etc.), we understand that it is very rare for cases relating to looked after children to be referred to the Additional Support Needs Tribunal. This is surprising, given the complexity of the individual circumstances of looked after children, and the fact that every looked after child is considered to have additional support needs (and must be assessed for a coordinated support plan). Indeed, it is reasonable to expect that, on this basis, looked after children would be significantly over-represented in Tribunal statistics (in relation to the proportion the 'looked after child' population represents of all children). We would welcome the inclusion of an assertion that practitioners, schools and local authorities have a duty to inform looked after children and their families of this rights in this regard.

## 6. Key Principles in Assessment

Chapter 6 gives further advice on the assessment of capacity and adverse impact on wellbeing.

Is the information provided in Chapter 6 appropriate? Please tick the box that applies.

Yes  No  Don't know

- If you selected no, please provide details of additional information which should be included or removed and a brief reason for it.

The additional value added by paragraph 30 is unclear as it seems to restate points already made. The second sentence is not entirely clear. The most important paragraphs in this chapter are 39 and 40, which helpfully establish the central role children and young people should hold in setting goals and plans for their education, with supportive adults. Other paragraphs in this chapter appear to be unnecessarily complicated, and could be expressed more simply, and using less technical 'jargon'.

The section on 'involving and informing parents' does not address the special circumstances of looked after children. This is a complicated aspect of practice where teachers would benefit from advice. It will not be sufficient simply to add 'and carers' on each reference to parents. The advice needs to address the local authority's responsibility to act as corporate parent, or to support birth parents and carers to ensure children exercise their rights in respect of additional support for learning. This is particularly important because local authorities have been criticised for allowing conflicts of interest to interfere with children's rights - i.e. where employees of a local authority assist a looked after child to exercise a right or complain about the same local authority. This chapter could usefully address advocacy and children's rights arrangements within local authorities, teachers may have less awareness about these than other professional groups, such as social workers.

We welcome the advice to avoid over-bureaucratic processes, and suggest it might be helpful to



state this earlier in the guidance.

## 7. Annexes/ Resources

There are 2 Annexes to the guidance, they are:

- Annex A Case Studies
- Annex B Resources

Is the information provided in the Annexes appropriate? Please tick the box that applies.

Yes  No  Don't know

- If you selected no, please provide details of additional information which should be included or removed and a brief reason for it.

Case studies are helpful, though we refer to our specific comments earlier in this response. It would be helpful to standardise the presentation of the case studies - use of headings etc. and to highlight the key learning points more clearly.

We suggest including details of our own website - [www.celcis.org](http://www.celcis.org) (and especially our Education Forum - <https://www.celcis.org/our-work/key-areas/education/celcis-education-forum/>), and that of Who Cares? Scotland - [www.whocaresscotland.org](http://www.whocaresscotland.org) in Annex B.

**Thank-you for responding to this consultation.**

**Please return a completed copy of respondent information form by email to or by post to [Capacityandwellbeing@gov.scot](mailto:Capacityandwellbeing@gov.scot) Support and Wellbeing Unit, Area 2C South, Victoria Quay, Edinburgh, EH6 6QQ.**